



MCI Telecommunications Corporation
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Washington, D.C. 20006

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

November 6, 1995

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Southwestern Bell Telephone Company, Transmittal No. 2489, Tariff F.C.C. No. 73, CC Docket No. 95-158, Request for Confidential Treatment

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of MCI Telecommunications Opposition to Application for Review regarding the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Opposition to Application for Review, furnished for such purpose and remit same to the bearer.

Sincerely yours,

Don Sussman
Regulatory Analyst

Enclosure
DHS

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)

Southwestern Bell Telephone Company)

Tariff F.C.C. No. 73)

Request for Confidential Treatment)

Transmittal No. 2489

CC Docket No. 95-158

DOCKET FILE COPY ORIGINAL

OPPOSITION TO
APPLICATION FOR REVIEW

I. Introduction

MCI Telecommunications Corporation ("MCI"), pursuant to section 1.115 of the Commission's rules, hereby files its opposition to Southwestern Bell Telephone Company's ("SWBT's") Application for Review, which was filed October 20, 1995. On August 14, 1995, SWBT filed Transmittal No. 2489 to defer the effective date of Transmittal No. 2470 and to revise the cost information submitted to support the rates proposed in Transmittal No. 2470.¹ SWBT requested in Transmittal No. 2489 that its revised cost support be treated as confidential. Upon review of the cost information submitted with SWBT Transmittal No. 2489, the Common Carrier Bureau ("Bureau")

¹ SWBT Transmittal No. 2470 proposes to provide 155 Mbps of protected bandwidth between 15201 W. 99 and 600 N. Industrial Parkway, Lenexa, Kansas, utilizing three Optical Carrier Level-3 ("OC-3") transport, for one of its customers.

denied SWBT's request for confidential treatment of its cost information.²

The Commission should dismiss SWBT's Application for Review of the Bureau's Investigation Order because the Bureau correctly determined that SWBT has failed to satisfy the threshold requirements for confidential treatment. SWBT's request for confidential treatment of its Transmittal No. 2470 cost information should be rejected because SWBT based its arguments solely on a generalized concern over the disclosure of its cost support, and because SWBT has offered no support for its assertion that disclosure would likely cause substantial competitive injury.

II. SWBT's Request for Confidential Treatment Does Not Meet Commission Requirements

In the Investigation Order, the Bureau correctly states the standard used to determine whether to treat data, which is routinely filed on the public record, as confidential.³ As the Bureau pointed out, commercial or financial information filed pursuant to mandatory requirements may be deemed confidential under Exemption 4 of the Freedom of Information Act only if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information

² In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2470, 2489, CC Docket No. 95-158 (Com. Car. Bur., released October 13, 1995) (DA 95-2156) ("Investigation Order").

³ 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.

was obtained.⁴ Parties requesting such confidentiality are required to show, “by a preponderance of evidence,”⁵ actual competition and a likelihood of substantial competitive injury.⁶ SWBT’s vague references and generalized concerns fail to meet the threshold requirements for withholding the cost data filed in support of Transmittal No. 2470 from public inspection.⁷

In its Application for Review, SWBT attempts to reverse the burden of proof, arguing that it is the Bureau that must prove the absence of competition in denying a request for confidentiality. For example, SWBT argues that the Investigation Order should be reversed because the Bureau failed to explain why injury to SWBT’s competitive position would not occur in the manner described by SWBT. SWBT is

⁴ Investigation Order at ¶16. 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).

⁵ *Id.*, 47 C.F.R. §0.459(d).

⁶ *Id.*, 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).

⁷ SWBT routinely requests that its cost support be treated confidentially. SWBT has requested that its cost support be treated confidentially in over 46 percent of the tariff transmittals that it has filed in the last year, for which the Commission required cost data to support the proposed rates (*e.g.*, for new services). SWBT requested confidential treatment of cost support in Transmittal Nos. 2397 (Nov. 11, 1994), 2407 (Dec. 6, 1994), 2422 (Jan. 26, 1995), 2433 (Feb. 27, 1995), 2438 (Mar. 10, 1995), 2448 (Apr. 17, 1995), 2453 (Apr. 28, 1995), 2480 (July 19, 1995), 2489 (Aug. 14, 1995), 2498 (Sept. 12, 1995), 2501 (Sept. 14, 1995), 2508 (Oct. 20, 1995). In addition, SWBT requested confidential treatment of cost data filed to support its virtual collocation tariffs, filed Sept. 1, 1994, and its Direct Case in support of its virtual collocation tariffs, filed March 21, 1995. SWBT routinely requests confidential treatment of cost data, which is typically filed on the public record by all other LECs, without any explanation or justification.

attempting to turn the Commission's rules on its head. Section 0.459(d) of the Commission's rules clearly states that requests for confidential treatment must be supported "by a preponderance of evidence." The burden of justifying that data should be withheld from public scrutiny is that of the carrier seeking confidential treatment. It is not the burden of the Commission to demonstrate that such competitive harm is not likely. SWBT's attempt to shift the burden to the Bureau for demonstrating whether data is confidential should not be tolerated.

SWBT also argues that the Investigation Order does not deny that substantial actual competition for the service in question exists.⁸ SWBT states that because the Bureau did not specifically state that competition does not exist, and because the affidavit filed with SWBT's transmittal was "uncontested," that SWBT's cost support materials must be afforded confidential treatment because "actual competition and the likelihood of substantial competitive injury" exist.⁹ SWBT's argument is void of logic and is completely without merit.

There is a tremendous difference between not determining whether competition exists, and determining that SWBT's services face effective competition. Ostensibly, the Commission did not state whether or not effective competition actually existed because it was clear that SWBT's request for confidential treatment was deficient in many other respects (e.g., SWBT's arguments relied on unsupported, generalized

⁸ SWBT Application for Review at 3-4.

⁹ Id. at 4.

assertions). Moreover, SWBT claims that the affidavit that it filed with its transmittal was “uncontested.” MCI was not even aware that such an affidavit existed until SWBT filed its Application for Review, since SWBT either filed the affidavit under confidential cover or separately.¹⁰ It is not possible for interested parties, such as MCI, to question or contest such an affidavit when the existence of such a document is not even known.¹¹ SWBT’s argument is disingenuous, and should be dismissed.

SWBT also claims in its Application for Review that it filed its cost support voluntarily, and therefore, its cost support warrants “more lenient standards for confidential treatment.”¹² SWBT filed its cost support because it was mandated by Section 61.38 of the Commission’s rules to do so.¹³ The Bureau restated this

¹⁰ MCI has never been sent a copy of the affidavit referenced in SWBT’s Application for Review, and to date, has not seen the contents of this document.

¹¹ SWBT’s filing of confidential affidavits and “explanations” of why its cost support must be treated as confidential should not be permitted by the Commission. It is one thing for SWBT to have its cost support withheld from public scrutiny once the Commission has determined that SWBT has met the threshold requirements. It is quite another for SWBT to file its request for confidential treatment and its supporting affidavits as confidential, and then claim that no party contested such documents. The Commission should require all LECs to file their requests for confidential treatment, and any documents that support their request, on the public record. All interested parties should be permitted to comment or “contest” such filings, before the Commission determines whether to grant the LEC’s request for confidentiality.

¹² SWBT Application for Review at 5.

¹³ Section 61.38 of the Commission’s rules requires carriers filing ICB arrangements to provide a projection of costs for a representative 12 month period, and estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, and the carriers overall traffic revenues. Furthermore, the rules require the carriers filing ICB arrangements to include “complete explanations of the bases for the estimates.” 47 C.F.R. §61.38 (b)(1).

requirement in a Public Notice, released September 27, 1995.¹⁴ SWBT's argument that Section 61.38 of the Commission's rules does not apply to ICB filings is wrong.¹⁵ The cost filed by SWBT was not filed voluntarily and it certainly does not deserve more lenient standards for confidential treatment.

Finally, SWBT asserts that it faces "actual competition" because Kansas City FiberNet, Cox Fibernet, Teleport Communications Group Inc., and Metropolitan Fiber Systems all have the ability to offer OC3 services. SWBT argues that requiring SWBT to publish rate element-specific costs, while permitting every other supplier to keep this same information to itself, effectively undermines a key element of the current competitive process --suppliers bidding against each other for lucrative customer accounts.¹⁶ SWBT's argument that it should be treated like all other competitors, and potential competitors, is misplaced. First, SWBT's question regarding the appropriate degree of pricing and regulatory flexibility is one which should be addressed in a rulemaking, not in a tariff proceeding. The Commission has already initiated such a

¹⁴ The Bureau released, on its own initiative, a Public Notice restating that Commission policy requires carriers filing ICB arrangements to provide cost support information in accordance with the standards set forth in Section 61.38 of the Commission's rules. Public Notice, Common Carrier Bureau Restates Commission Policy On Individual Case Basis Tariff Offerings (DA 95-2053), released September 27, 1995 ("September 27 Public Notice").

¹⁵ In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2470, 2489, CC Docket No. 95-158 (Com. Car. Bur., released October 13, 1995) (DA 95-2156) ("Investigation Order"), Direct Case of Southwestern Bell Telephone Company, filed October 27, 1995, at 4.

¹⁶ SWBT Application for Review at 10.

proceeding which will look at these issues.¹⁷ In that docket, the Commission does not propose to go as far as SWBT proposes here. Second SWBT has failed to demonstrate that the specific service at question faces actual, effective competition. Just because the Commission has authorized expanded interconnection, and because some providers may provide a similar service in another part of the country, does not mean that SWBT faces competition for this service in Lenexa, Kansas. SWBT has failed to demonstrate that its ICB offering in Lenexa, Kansas faces competition; its request for confidential treatment of cost support should be rejected.

¹⁷ In the Matter of Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, CC Docket No. 94-1, FCC 95-393, released September 20, 1995.

III. Conclusion

The Bureau correctly determined that SWBT has not met the threshold requirements for confidential treatment of data in the case of Transmittals 2470 and 2489. SWBT's request failed to demonstrate the competitive significance of the particular data for which it seeks confidential treatment and it failed to link these data to specific examples of likely competitive harm. SWBT has also failed to demonstrate in its Application for Review that the Bureau erred in its decision. Thus for the above-mentioned reasons, the Commission should dismiss SWBT's Application for Review, filed October 20, 1995.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION

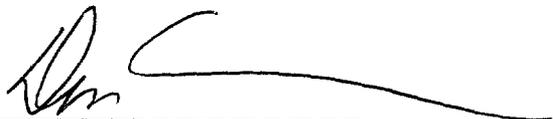


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(202) 887-2779

November 6, 1995

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on November 6, 1995.

A handwritten signature in black ink, appearing to read 'Don Sussman', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Stan Miller, do hereby certify that copies of the foregoing Opposition to Application for Review were sent via first class mail, postage paid, to the following on this 6th day of November.

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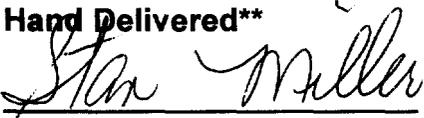
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