

FCC MAIL SECTION

Federal Communications Commission

DA 97-1472

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

DISPATCHED BY

In the Matter of)	
)	CC Docket No. 97-158
Southwestern Bell Telephone Company)	
)	Transmittal No. 2633
Tariff F.C.C. No. 73)	
)	
)	

**ORDER DESIGNATING ISSUES
 FOR INVESTIGATION**

Adopted: July 14, 1997; Released: July 14, 1997

Filing Schedule:

Direct Case: August 13, 1997
 Oppositions/Comments: August 28, 1997
 Rebuttal: September 12, 1997

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 5, 1997, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2633, which was scheduled to become effective on June 16, 1997. This transmittal proposes to add to SWBT's interstate access tariff a new Section 29, "Request for Proposal (RFP)," in which SWBT would include its "response[s] to customer requests for proposal submitted to SWBT in competitive bid situations."¹ SWBT files this Transmittal to permit it to respond to two specific RFPs that it received from customers AT&T Corp. (AT&T) and Coastal Telephone Company (Coastal). SWBT seeks permission to offer access services to those customers at rates below its otherwise tariffed rates for those services.² SWBT would provide service to these customers using facilities that "are the same type as that used by [SWBT] in furnishing its other tariffed services."³ The Transmittal would make the rates offered in response to the RFPs available to "any similarly situated customer that submits a RFP requesting

¹ Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Proposed Section 29.1.

² Transmittal No. 2633, Description and Justification (D&J) at 5.

³ Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Proposed Section 29.1.

the same service" in the same quantities and at the same location.⁴

2. On May 16, 1997, AT&T, MCI Communications Corporation (MCI), and Sprint Communications Company L.P. (Sprint) filed oppositions urging the Commission to reject or, alternatively, to suspend and investigate SWBT's Transmittal No. 2633.⁵ On June 13, 1997, the Common Carrier Bureau's Competitive Pricing Division (Division) released the *SWBT Tariff Suspension Order*, in which it concluded SWBT's transmittal raised significant issues of lawfulness.⁶ The Division suspended SWBT's Transmittal No. 2633 for five months and noted that an order designating issues for investigation would be forthcoming. In this Order, we designate issues for investigation regarding SWBT's Transmittal No. 2633.

II. BACKGROUND

3. Section 202(a) of the Communications Act of 1934, as amended, (Act), prohibits unjust or unreasonable discrimination in charges, practices, classifications and services by common carriers in connection with any "like" communications service.⁷ In addition, the Commission's rules require dominant local exchange carriers (LECs), *i.e.*, those that possess market power, to offer averaged rates throughout their individual study areas.⁸ Moreover, in its *DS-3 ICB Order* the Commission prohibited dominant LECs from filing individual case basis (ICB) tariffs, that is, offering individualized contract rates to certain customers and not others.⁹ A potential exception to these requirements is the "competitive necessity" doctrine. Under the competitive necessity test as applied by the Commission in the case of interexchange carriers (IXCs), a dominant carrier may offer what would otherwise be considered a discriminatory tariff under Section 202(a) of the Act by demonstrating that: (1) the customers of the discounted offering have a competitive alternative from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to

⁴ *Id.* at Section 29.2.

⁵ Petition of AT&T Corp. to Suspend and Investigate SWBT Transmittal No. 2633 (AT&T petition); MCI Petition to Reject, or, Alternatively Suspend and Investigate SWBT Transmittal No. 2633 (MCI petition); Sprint Communications Company L.P.'s Petition to Reject, or Alternatively Suspend and Investigate SWBT Transmittal No. 2633 (Sprint petition).

⁶ *Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2633, Suspension Order*, DA 97-1251 (Comp. Pricing Div. rel. June 13, 1997) (*SWBT Tariff Suspension Order*).

⁷ 47 U.S.C. § 202(a).

⁸ *See, e.g.*, 47 C.F.R. § 69.3(e)(7).

⁹ *Local Exchange Carriers Individual Case Basis DS-3 Service Offerings, Memorandum Opinion and Order*, 4 FCC Rcd 8634 (1989) (*DS-3 ICB Order*). The Commission recognized certain exceptions to this rule for LECs offering new services. *See infra* Section IV(B).

reasonable rates and efficient services for all users.¹⁰ The Commission has never specifically held that this defense applies to dominant LECs.¹¹ The Commission also never has held that the competitive necessity defense applies to anything other than generally available tariffed offerings.

4. In a prior tariff investigation involving a proposed SWBT RFP tariff,¹² the Commission concluded that it need not determine whether dominant LECs should be able to invoke the competitive necessity doctrine.¹³ Instead, the Commission concluded that SWBT could not satisfy the doctrine in any event, under the circumstances presented.¹⁴ The United States Court of Appeals for the District of Columbia Circuit remanded this order to the Commission stating the Commission had inadequately explained its decision.¹⁵ That matter is currently pending before the Commission. The Commission also is currently considering the issue of competitive response tariffs, including RFP tariffs, in its *Access Reform* docket, CC Docket No. 96-262.¹⁶ In addition, in a recent order designating issues for investigation regarding SWBT tariff Transmittal No. 2622, the Bureau stated that the competitive necessity doctrine may not be applicable to dominant LECs.¹⁷ SWBT later withdrew Transmittal No. 2622, and the Bureau

¹⁰ See *Private Line Rate Structure and Volume Discount Practices Guidelines*, Report and Order, 97 FCC 2d 923, 948 (1984) (*Private Line Rate Structure Guidelines*).

¹¹ The Commission has recognized certain limited exceptions to its rules and policies regarding geographically averaged access rates. For instance, the Commission has held that dominant LECs able to show a measure of competition in their markets may divide their service areas into three zones based on the density of customer locations, and may charge a different price in each zone for certain switched transport elements. See *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992). Dominant LECs still must provide averaged rates within each density zone. 47 C.F.R. § 69.123(c).

¹² *Southwestern Bell Telephone Company, Tariff FCC No. 73, Transmittals Nos. 2433 and 2449*, Order Terminating Investigation, 11 FCC Rcd 1215 (1995) (*Transmittals Nos. 2433 and 2449*), remanded, *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004 (D.C. Cir. 1996).

¹³ *Transmittals Nos. 2433 and 2449*, 11 FCC Rcd at 1220.

¹⁴ *Id.*

¹⁵ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1008 (D.C. Cir. 1996).

¹⁶ *Access Charge Reform*, First Report and Order, FCC 97-158, CC Docket No. 96-262 (rel. May 16, 1997) (*Access Reform First Report and Order*).

¹⁷ *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal 2622*, Order Designating Issues for Investigation (Com. Car. Bur. rel. May 23, 1997) at para. 11 (*SWBT Transmittal No. 2622 Designation Order*).

issued an order terminating that investigation.¹⁸

III. PLEADINGS SUMMARY

A. SWBT's Description and Justification

5. In Transmittal No. 2633, SWBT proposes to respond to RFPs received from two customers seeking competitive bids for the provision of access service by providing those customers with individualized rates instead of offering SWBT's tariffed rates. SWBT states it received the first RFP letter on February 11, 1997 from AT&T, who requested that SWBT respond to an RFP for multiple DS-3 circuits in the Dallas, Texas area between various SWBT central offices and two of AT&T's points of presence (POPs).¹⁹ AT&T's letter notes that SWBT's tariffed rates are "significantly higher than those of other access providers in the area."²⁰ SWBT states that it received a second RFP letter on February 13, 1997, from Coastal, requesting a competitive bid to provide multiple 45 "Mbps" interfaces configured in a "self-healing" network architecture in the Houston, Texas area.²¹ In the letter, Coastal indicates that it has contacted other vendors to obtain additional bids.²² SWBT assumes that Coastal has access to its tariffed rates for access service, which are publicly available, and thus that Coastal seeks a competitive bid from SWBT that will be less than SWBT's tariffed rates.²³

6. SWBT recognizes that a tariff that would respond to individual RFPs with rates below those offered in SWBT's general tariff would require an exception to the Commission's rules requiring incumbent LECs to offer geographically averaged access rates and prohibiting "customer-specific" or contract tariffs. SWBT contends, however, that Commission orders recognize the "competitive necessity" doctrine as a justification for differential pricing of LEC access services that renders lawful Transmittal No. 2633's differential treatment of customers.²⁴ SWBT argues that, because it satisfies the Commission's competitive necessity test,

¹⁸ *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal 2622, Order Terminating Investigation (Com. Car. Bur. rel. June 5, 1997).*

¹⁹ D&J at 4-5. SWBT provides a copy of AT&T's letter as Attachment 3 to its D&J.

²⁰ *Id.* Although this statement by AT&T appears to invite SWBT to deviate from its tariffed rates, AT&T contends in its petition that SWBT has no authority to do so.

²¹ *Id.*

²² *Id.* SWBT provides a copy of Coastal's letter as Attachment 4 to its D&J.

²³ *Id.*

²⁴ *Id.* at 2-3 (arguing that Commission has recognized competitive necessity as a justification for ICB pricing, citing *DS-3 ICB Order*, 4 FCC Rcd at 8634).

it may offer this transmittal without seeking a waiver of the *DS-3 ICB Order*'s requirement that LECs file averaged rates for their DS-3 offerings.²⁵ SWBT further argues that, in the interexchange context, dominant carriers were permitted to offer contract carriage upon a showing that "substantial competition" existed in a market, and that a similar result must apply here.²⁶ SWBT also notes that the Commission recently proposed in its *Access Reform NPRM*²⁷ to permit the filing of RFP tariffs.²⁸

7. According to SWBT, the existence of RFPs submitted by two customers, the tariffed rates of other special access providers in SWBT's markets, and the use of ICB rates by other access providers in SWBT's market, demonstrate that competition exists. Therefore, SWBT argues, Transmittal No. 2633 satisfies the "competitive alternative" prong of the competitive necessity test.²⁹ SWBT states that its competitors' tariffs are often vague, making it difficult for SWBT to determine if the rates offered are for comparable services.³⁰ SWBT also believes that these competitive access providers (CAPs) "apparently choose to sell to select customers at rates below" their published rates, making determination of these carriers' rates that much more difficult.³¹ In addition, SWBT asserts that the CAPs' tariffs do not list service quantities, rendering it impossible for SWBT to determine these access providers' per unit prices.³² SWBT states it nonetheless has ascertained that its competitors' generally available rates are lower than SWBT's generally available rates.³³

8. SWBT argues that the transmittal satisfies the second prong of the competitive necessity test because its response to an RFP will be available to all "similarly situated" customers

²⁵ *DS-3 ICB Order*, 4 FCC Rcd at 8644.

²⁶ D&J at 3-4.

²⁷ *Access Charge Reform*, Notice of Proposed Rulemaking and Third Report and Order, 11 FCC Rcd 21354 (1996) (*Access Reform NPRM*).

²⁸ D&J at 4.

²⁹ *Id.* at 10.

³⁰ *Id.* at 6-7.

³¹ *Id.* at 6.

³² *Id.* at 7.

³³ *Id.* at 8.

that put out RFPs, and therefore the transmittal is not unduly discriminatory.³⁴ According to SWBT's Description and Justification, a customer is similarly situated if it requests "technically equivalent" service in "a similar market area" as that of the original offering.³⁵ For instance, a customer that requested the same service as that requested by Coastal, namely a self-healing network for 25 digital transmission links and 2 multiplexers with four nodes consisting of one customer premises and three SWBT central offices, would be eligible for the same rate.³⁶ In contrast to the Description and Justification, however, proposed Section 29.2 of the tariff provides that service would be available only to customers who submitted RFPs requesting "the same service in the same quantities and at the same Central Office(s)" as AT&T or Coastal.³⁷ SWBT argues it should not be required to lower prices to all of its customers merely to win the business of AT&T and Coastal. According to SWBT, customers that have not "presented the same competitive situation" would not be considered similarly situated, and would therefore be ineligible for the discounted rates.³⁸ SWBT does not define "competitive situation."

9. Lastly, SWBT argues that the transmittal satisfies the third prong of the competitive necessity test because the promotion will attempt to "keep this business" on SWBT's network, resulting in additional revenue that will contribute to overall reasonable rates and efficient services for all users.³⁹ SWBT argues its pricing is reasonable and in the public interest because Transmittal No. 2633 will provide revenue contribution that will help promote reasonable rates and efficient services for all users,⁴⁰ and that having more vendors from which to choose will benefit customers. SWBT has filed cost support, albeit under seal, that it believes demonstrates its rates are not below its costs.⁴¹ In the alternative, SWBT states in a footnote that "to the extent that the Commission believes that a waiver of the [DS-3 ICB] order or of any of

³⁴ *Id.* SWBT defines RFP as "a written request from a customer for a competitive bid on a service to be provided by [SWBT]." Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Proposed Section 2.7.

³⁵ D&J at 12-13. SWBT lists "Dallas, Tx., Houston, Tx., etc." as examples of "similar market areas." The Description & Justification is unclear whether SWBT intends that a customer seeking the RFP rate may do so only in the same city as the original customer, or whether SWBT considers Dallas, Houston, and other large cities within its region to be "similar market areas."

³⁶ *Id.* at 13.

³⁷ Transmittal No. 2633, Proposed Section 29.2. "Central office" refers to the local telephone company location containing the switching computer that serves a particular customer.

³⁸ D&J at 12.

³⁹ *Id.* at 10.

⁴⁰ *Id.*

⁴¹ *Id.* at 17-18.

its rules are necessary for SWBT's filing to take effect, SWBT respectfully requests a waiver of such orders or rules.⁴²

B. Opposition Petitions of AT&T, MCI and Sprint

10. AT&T, MCI, and Sprint argue multiple grounds exist for the Commission to suspend or reject this Transmittal. Sprint argues that SWBT has failed to satisfy the competitive necessity defense.⁴³ MCI and AT&T contend that the transmittal will enable SWBT to engage in anti-competitive behavior, such as cross-subsidizing prices where competition exists with revenues from customers where competition does not exist,⁴⁴ which MCI argues violates Section 202(a) of the Act.⁴⁵ Sprint estimates that the rates offered under Transmittal No. 2633 to AT&T represent a 64 percent discount off SWBT's tariffed rates, while the rates offered to Coastal are 31 percent below tariffed rates.⁴⁶ AT&T and MCI assert Transmittal No. 2633 will enable SWBT to quash competition before any competitors have gained a foothold in the market.⁴⁷ AT&T further argues that the transmittal violates section 69.3(e)(7) of the Commission's rules, which prohibits geographic deaveraging and disaggregation.⁴⁸ MCI also asserts the transmittal should be rejected because it would predetermine pricing flexibility issues that the Commission has proposed to consider in its *Access Reform* docket.⁴⁹ MCI further argues that the streamlined tariff process under which SWBT has filed Transmittal No. 2633 is the incorrect forum for resolving these issues because it offers less opportunity to build an adequate record than would be available to parties in the *Access Reform* rulemaking.⁵⁰

⁴² *Id.* at 3 n.5.

⁴³ Sprint petition at 4-6.

⁴⁴ AT&T petition at 4; MCI petition at 11-12.

⁴⁵ MCI petition at 12; *see* 47 U.S.C. § 202(a).

⁴⁶ Sprint petition at 2.

⁴⁷ AT&T petition at 4; MCI petition at 5.

⁴⁸ AT&T petition at 3; *see* 47 C.F.R. § 69.3(e)(7).

⁴⁹ MCI petition at 2 (*citing Access Reform NPRM* at 21439). In the *Access Reform NPRM*, we proposed that LECs should be permitted to offer competitive response tariffs upon a showing that a certain level of competition exists in the access market. *See Access Reform NPRM* at 21439. The Commission did not resolve this issue in the *Access Reform First Report and Order*, but stated it would consider these issues in a forthcoming rulemaking. *Access Reform First Report and Order* at para. 14.

⁵⁰ MCI petition at 2.

11. Sprint and MCI argue the tariff is unreasonably discriminatory in violation of Section 202(a) of the Act.⁵¹ Specifically, Sprint argues that Transmittal 2633, in practical effect, would be available only to a specific customer that instituted an RFP, and that to offer both individual case basis tariffs and averaged rates for the same service violates the conditions set out in the *DS-3 ICB Order*.⁵² MCI argues that Transmittal 2633 is a contract tariff, and that Commission policy prohibits contract tariffs for dominant carriers in the absence of "substantial competition," which MCI contends does not exist here.⁵³ According to MCI, Section 204 of the Act places the burden on SWBT to justify its filing by demonstrating that substantial competition exists, and asserts that SWBT has failed to do so here.⁵⁴ Additionally, MCI argues SWBT has violated Commission policies by filing cost information for its tariff under seal.⁵⁵ MCI also contends that SWBT's access revenues are growing, and that the loss of the business represented by the AT&T and Coastal RFPs would have no effect on SWBT's ability to secure new business or increase its revenues.⁵⁶

IV. DISCUSSION

12. In the *SWBT Tariff Suspension Order*, the Division concluded Transmittal 2633 raised significant questions of lawfulness, including whether it: 1) offers rates that are unreasonably discriminatory in violation of Section 202(a) of the Communications Act; 2) violates Section 69.3(e)(7) of the Commission's rules requiring dominant LECs to offer averaged rates throughout their individual study areas; 3) violates the Commission's policy prohibiting dominant LECs from offering contract tariffs; and 4) complies with the *DS-3 ICB Order*'s restrictions on individual case basis tariff offerings by dominant LECs.⁵⁷ As set forth below, we now designate in greater detail issues regarding SWBT's rate structure and terms and conditions for access service outlined in Transmittal No. 2633.

A. SWBT's Waiver Request

⁵¹ Sprint petition at 2-3; MCI petition at 11-12; see 47 U.S.C. § 202(a).

⁵² Sprint petition at 3-4.

⁵³ MCI petition at 4-5.

⁵⁴ *Id.* at 8; see 47 U.S.C. § 202(4).

⁵⁵ *Id.* at 12-13.

⁵⁶ *Id.* at 18-19.

⁵⁷ *SWBT Tariff Suspension Order* at para. 9.

13. In footnote 5 of its Description and Justification, SWBT seeks a waiver of the *DS-3 ICB Order*, or "any of [the Commission's] rules . . . necessary for SWBT's filing to take effect."⁵⁸ Under Section 1.3 of our rules, the Commission may waive any provision of its rules or orders if "good cause" is shown.⁵⁹ The standard of good cause requires the petitioner to demonstrate that special circumstances warrant deviation from the rules or orders and that such a deviation would better serve the public interest than the general rule.⁶⁰ Moreover, grant of a waiver presumes the validity of the general rule, must not undermine the policy served by the rule, and must not be so broad as to eviscerate the rule. Rather, the request must be tailored to the specific contours of the exceptional circumstances.⁶¹ Parties must obtain a waiver before filing any tariff that would conflict with the Commission's rules. Failure to observe this procedure is grounds for rejecting the tariff.⁶²

14. SWBT's one-line waiver request, contained in a footnote to its Description and Justification, fails to comply with the foregoing requirements. SWBT fails to identify each of the particular rules from which it seeks relief and makes no specific showing in its request as to how it meets the legal standards described above for grant of a waiver. For example, the waiver request does not even attempt to show special circumstances justifying a waiver or to specify how the waiver would be limited to meet such circumstances. Given SWBT's failure to support its broad waiver request, that request is denied.

B. Issues Designated for Investigation

15. Section 202(a) of the Act prohibits unjust or unreasonable discrimination in charges, practices, classifications and services by common carriers in connection with any "like" communications service.⁶³ In examining whether Transmittal No. 2633 is unreasonably discriminatory, we must determine: (1) whether the services at issue are "like" communications services offered to third parties, which is based on whether the services are the "functional equivalent" of each other; (2) whether there is a difference in charges or treatment; and (3)

⁵⁸ D&J at 3 n.5.

⁵⁹ See 47 C.F.R. § 1.3.

⁶⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); See also *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁶¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); See also *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁶² *U S West Communications, Inc., Revisions to Tariff F.C.C. No. 5, Transmittal No. 525*, 9 FCC Red 5228 (Com. Car. Bur. 1994).

⁶³ 47 U.S.C. § 202(a).

whether the difference is reasonable.⁶⁴ SWBT does not deny that the services to be provided under Transmittal No. 2633 are "like" its other access services. Accordingly, we find that the services at issue are "like." In addition, because SWBT seeks to offer a discounted price for this service to some customers and not others, we find that a difference exists in charges or treatment for these "like" services. Although SWBT recognizes that its tariff would permit discriminatory pricing,⁶⁵ it argues that the presence of competitors and, specifically, the competitive necessity defense render this discrimination reasonable under the third prong of the test we apply under Section 202(a). SWBT also claims that the competitive necessity doctrine should be sufficient to enable Transmittal No. 2633 to take effect.⁶⁶ We construe SWBT's contention to be that competitive necessity operates as a complete defense to any claimed violation of Section 202(a) and the Commission's rules that might stem from Transmittal No. 2633, including potential violation of the *DS-3 ICB Order*,⁶⁷ our prohibition against contract and RFP tariffs for dominant LECs, and our rules prohibiting de-averaging of access rates. We seek comment on these issues below.

Issue 1: Whether Transmittal No. 2633 Violates the Commission's Policy Prohibiting Dominant LECs From Offering Contract Tariffs

16. MCI asserts that Transmittal No. 2633's individualized pricing renders the transmittal a "contract-type tariff," that only IXCs and non-dominant carriers may offer under Section 61.3(m) of the Commission's rules.⁶⁸ MCI further contends that the Commission did not permit AT&T, when it was classified as a dominant carrier, to offer contract tariffs until its services were subject to "substantial competition."⁶⁹ MCI asserts that substantial competition for access service does not exist in SWBT's market.⁷⁰

17. Section 61.3(m) of the Commission's rules defines contract tariff as a "tariff based on a service contract entered into between an interexchange carrier . . . or a non-dominant

⁶⁴ See, e.g., *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

⁶⁵ D&J at 15.

⁶⁶ *Id.* at 3 n.5.

⁶⁷ *Id.*

⁶⁸ MCI petition at 5.

⁶⁹ *Id.* at 3-6.

⁷⁰ *Id.* at 5.

carrier and a customer."⁷¹ Thus, by definition, a dominant LEC may not offer a contract tariff. A competitive response or RFP tariff is a contract tariff that a LEC initiates when it responds to a competitor's offer to an end user, or in response to a request for proposal.⁷² An RFP tariff is therefore a type of contract tariff.

18. In the *Interexchange Order*, the Commission adopted rules permitting IXC's to offer common carrier services pursuant to individually negotiated contract tariffs.⁷³ The Commission permitted AT&T, then deemed a dominant interexchange carrier, to offer services under contract tariff rates only for services the Commission had found subject to substantial competition.⁷⁴ We commenced our pending access reform proceeding, in part, to determine whether, and under what circumstances, dominant LECs would be permitted to offer contract tariffs, including RFP tariffs.⁷⁵ The Commission proposed in the *Access Reform NPRM* to permit dominant LECs to offer RFP and other contract tariffs upon a showing that a certain level of competition exists in the market.⁷⁶ The Commission has sought comment on the level of competition that must be shown to exist prior to permitting incumbent LECs to offer contract and RFP tariffs. While the Commission ultimately may decide that LECs may offer contract and RFP tariffs, current Commission policy prohibits both types of tariffs.⁷⁷ Transmittal No. 2633, as a tariff initiated by a LEC to respond to a competitor's offer to an end user, would appear to meet the Commission's definition of an RFP tariff that is prohibited under the Commission's current policy. We seek comment on this issue. A finding that Transmittal No. 2633 is an RFP tariff would compel us to reject this transmittal, assuming we find against SWBT on the issue of competitive necessity.⁷⁸

⁷¹ 47 C.F.R. § 61.3(m). The elements of a contract tariff include: 1) the term of the contract, including any renewal options; 2) a brief description of each of the services provided; 3) minimum volume commitments for each service; 4) the contract price for each service or services at the volume levels committed to by the customers; 5) a general description of any volume discounts built into the contract rate structure; 6) a general description of other classifications, practices and regulations affecting the contract rate. 47 C.F.R. § 61.55.

⁷² *Access Reform NPRM*, 11 FCC Rcd at 21439.

⁷³ *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5897 (1991) (*Interexchange Order*).

⁷⁴ *Id.* at 5897.

⁷⁵ *Access Reform NPRM*, 11 FCC Rcd at 21439-21440.

⁷⁶ *Id.*

⁷⁷ *See Id.* at 21428, 21439-21440.

⁷⁸ SWBT argues that the competitive necessity doctrine forms a defense to this requirement. *See Section IV(B)*, Issue 4, *infra*.

Issue 2: Whether Transmittal No. 2633 Violates the DS-3 ICB Order's Restrictions on Tariff Offerings on an Individual Case Basis by Dominant LECs

19. Sprint argues that, under Transmittal No. 2633, no other carriers are likely to order the same quantity of service at the same central switching office as the original customer that submits the RFP, and thus, in practical effect, no customer other than that submitting the original RFP will be able to obtain service on the terms set forth in this tariff.⁷⁹ Sprint argues this renders Transmittal No. 2633 an ICB tariff, and that the Commission, in the *DS-3 ICB Order*, found the practice of offering the same access service at both ICB and averaged prices to be unreasonably discriminatory.⁸⁰

20. ICB offerings refer to the carrier practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions.⁸¹ While they share certain characteristics of contract tariffs, ICB offerings are generally intended to be precursors to new service offerings.⁸² And, unlike contract tariffs, although the tariffs containing the specific service offerings and ICB rates are filed with the Commission, ICB offerings are not immediately available to other prospective customers.⁸³ ICB offerings are therefore an exception to the standard carrier practice of making a service generally available to prospective customers under uniform rates, terms, and conditions stated in the applicable tariff.⁸⁴

21. To prevent anti-competitive behavior or unreasonable price discrimination, we impose conditions that a LEC must satisfy before offering ICB pricing, including: 1) the service involved must be one with which the carrier is not experienced, and must not be "like" any other current offering;⁸⁵ 2) the ICB rate must be used only as an interim transitional

⁷⁹ Sprint petition at 2.

⁸⁰ *Id.* at 3.

⁸¹ "Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings," Public Notice, 11 FCC Rcd 4001 (Com. Car. Bur. 1995) (*ICB Public Notice*).

⁸² *Price Cap Performance Review for Local Exchange Carriers*, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 888 (1995).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *ICB Public Notice (citing Investigation of Access and Divestiture Related Tariffs, Memorandum Opinion and Order, 97 F.C.C. 2d 1082, 1143 (1984))*.

measure;⁸⁶ 3) the carrier must develop averaged rates for the service within a reasonable period of time and make the service generally available at such averaged rates as soon as they are developed;⁸⁷ and 4) the carrier must provide cost support information in accordance with the standards set forth in Section 61.38 of the Commission's rules.⁸⁸

22. SWBT has made no attempt to comply with the Commission's conditions, governing the offering of ICB rates. Moreover, SWBT cannot argue that provision of special access is a service that is unlike SWBT's other services and with which SWBT is inexperienced. Accordingly, we tentatively conclude that a finding that Transmittal No. 2633 would permit SWBT to offer ICB tariffs will compel us to reject Transmittal No. 2633, assuming we find against SWBT on the issue of competitive necessity.⁸⁹ We seek comment on whether Transmittal 2633 is an ICB tariff and on this analysis more generally.

Issue 3: Whether Transmittal No. 2633 Violates Section 69.3(e)(7) of the Commissions Rules Requiring Dominant LECs to Offer Averaged Rates Throughout Their Individual Study Areas

23. Section 69.3(e)(7) of the Commission's rules requires dominant LECs to offer averaged rates throughout their individual study areas.⁹⁰ Section 69.123(c) of the Commission's rules provides that dominant LECs that offer density zone pricing must provide averaged rates within each density zone.⁹¹ We seek comment on whether Transmittal No. 2633 violates Sections 69.3(e)(7) or 69.123(c) of the rules.

Issue 4: Whether Competitive Necessity Applies, And If So, Whether SWBT Has Satisfied Its Requirements

24. SWBT relies on the competitive necessity doctrine to justify any potentially

⁸⁶ *ICB Public Notice (citing DS-3 ICB Order, 4 FCC Rcd at 8642).*

⁸⁷ *Id.*

⁸⁸ *Id. (citing Bell Atlantic Telephone Companies Transmittal Nos. 224 and 226, Revisions to Tariff 1, 3 FCC Rcd 1621, 1622-23 (Com.Car.Bur. 1988)); see 47 C.F.R. § 61.38.*

⁸⁹ SWBT argues that the competitive necessity doctrine forms a defense to this requirement. See Section IV(B), Issue 4, *infra*.

⁹⁰ 47 C.F.R. § 69.3(e)(7).

⁹¹ *Id.* at § 69.123(c).

unlawful charges contained in its tariff.⁹² Under the competitive necessity test, as the Commission previously has articulated it, a dominant carrier may offer what would otherwise be considered a discriminatory tariff under Section 202(a) of the Act by demonstrating that: (1) the customers of the discounted offering have a competitive alternative from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.⁹³ As we stated in the *SWBT Transmittal 2622 Designation Order*, however, although the Commission has recognized competitive necessity as a defense to a claim under Section 202(a) of the Act that a dominant IXC has engaged in unreasonable discrimination, the Commission has not determined whether competitive necessity is available as a defense to discrimination allegations against dominant LECs. We require SWBT to explain why competitive necessity should be available to dominant LECs as a defense to discrimination. We note that the competitive necessity defense was developed to permit AT&T to respond to competition in the interexchange market.⁹⁴ We require SWBT to explain how the interstate access market conditions are similar to the market conditions that existed in the interexchange market when competitive necessity was available to AT&T as a dominant carrier.

25. We also direct parties to address, in the event the Commission finds that the competitive necessity defense is available, whether the current form of the competitive necessity defense should be applied to SWBT in the circumstances at issue, or whether it should be modified in any way. SWBT argues that it is difficult to ascertain its competitors' prices for purposes of satisfying the first prong of the test because its competitors' tariffs are vague, making it difficult to determine whether the price offered is for a comparable access service. We note that the RFP process itself may interfere with a LEC's ability to determine the presence and extent of competitive alternatives, since the LEC will not have advance knowledge of its competitors' responses to the RFP. We ask parties, first, to address whether we are required to craft a competitive necessity defense that is available in all circumstances, or whether we could reasonably find that the competitive necessity defense is not always available. We seek comment on whether it is ever possible to satisfy the first prong of the test in an RFP situation. Commenters who believe it is not possible to satisfy this prong in an RFP context should discuss whether, and if so, how, the test should be changed to accommodate an RFP situation, or alternatively, whether we simply should hold that dominant LECs are precluded from invoking the competitive necessity test under these circumstances.

26. The RFP situation also could create difficulties for LECs seeking to satisfy

⁹² D&J at 3 n. 5.

⁹³ *Private Line Rate Structure Guidelines*, 97 FCC 2d at 948.

⁹⁴ See, e.g., *AT&T Communications Tariff F.C.C. No. 15 Competitive Pricing Plans*, Memorandum Opinion and Order, 4 FCC Rcd 7933 (1989) (*AT&T CPP Order*).

the second prong of the test, which considers whether the dominant carrier's offering responds to competition without "undue discrimination." As with the first prong, this prong would require the dominant carrier to determine the terms of other competitive offers in order to tailor a proportionate response that does not unreasonably discriminate against other customers. Parties should address whether the difficulty in ascertaining other competitors' bids for purposes of tailoring a competitive response requires us to conclude that the competitive necessity defense should not apply in the RFP context. Assuming, *arguendo*, that the competitive necessity defense does apply, we seek comment on whether we should define further the types of competitive responses that we would deem reasonable responses to RFPs.

27. In addition to seeking comment on possible modification of the test, we require SWBT to provide further explanation on how it has satisfied each prong of the current test for competitive necessity. The first prong of this test requires a carrier to prove that an equally or lower priced competitive alternative is generally available to customers of the discounted offering.⁹⁵ We ask parties to address what types of evidence would be sufficient to establish the first prong of the test in the circumstances presented by SWBT's transmittal.

28. SWBT seeks to prove that lower priced competitive alternatives exist by citing to tariff pages of other special access providers in its region. We have been unable, however, to validate SWBT's analysis of the competitive alternatives offered by these other carriers. SWBT has calculated the three-year term price a customer would pay to competitive access providers Teleport Communications Group, Inc. and GST Telecommunications for 164 DS-3s and 142 multiplexers requested by AT&T, based on these CAPs' published, generally available rates. SWBT has not described, however, how it calculated these prices, and we have been unable to arrive at SWBT's estimates using the tariff pages to which SWBT cites. Moreover, SWBT has made no attempt to estimate the price that a competitor might charge to fulfill Coastal's request for 25 digital transmission links and 2 multiplexers.

29. To the extent SWBT intends to rely on publicly available tariffs to show that equally or lower priced competitive alternatives exist, SWBT should re-submit the tariff pages that it believes support its claim. These tariff pages should cover CAP services that are comparable to the services SWBT seeks to offer in response to the RFPs issued by Coastal and AT&T.⁹⁶ Since tariff pages typically contain many rates for each rate element, we require SWBT to identify the specific rate that corresponds to each rate element that it uses in its price calculation. Using the published, generally available rate data that it decides to submit, SWBT should compute the total price for comparable CAP services, and then fully explain and document the methodology, assumptions, and data it uses to make its calculations. Failure to substantiate

⁹⁵ *Private Line Rate Structure Guidelines*, 97 FCC 2d at 948.

⁹⁶ By "comparable," we mean CAP services that have the same term, the same capacities, and that employ the same technologies in the same geographic areas as SWBT proposes to offer under Transmittal No. 2633.

its claims, of course, could result in a failure to satisfy the first prong of the existing competitive necessity test. SWBT need not limit the basis for its showing to publicly available tariff pages. SWBT may also submit evidence other than tariff pages that it believes demonstrates that equal or lower priced competitive alternatives exist. We seek comment from the other parties on the accuracy of the price estimates that SWBT submits. Assuming SWBT provides sufficient information to enable us to reproduce their estimates, we seek comment on whether such evidence is sufficient to satisfy the first prong of the competitive necessity test.

30. SWBT also submits evidence of ICB pricing by competitive access providers, and evidence that two potential customers, AT&T and Coastal, issued RFPs.⁹⁷ MCI argues that customers often issue RFPs to determine whether competitors exist in the market, and sometimes learn by issuing an RFP that competitors willing to offer the precise service at issue do not exist in the market.⁹⁸ We seek comment as to the weight, if any, that should be given to the issuance of one or more RFPs in determining the extent of competition.

31. We also seek further information from all parties regarding whether SWBT's transmittal meets the second prong of the competitive necessity test, which requires that the discounted offering respond to competition without undue discrimination.⁹⁹ The Commission has held that this prong permits a dominant carrier only to offer to match its competitor's offer, and that any discrimination that extends beyond that contained in the competitor's original offer is undue.¹⁰⁰ SWBT does not explain whether and to what extent its transmittal seeks to match its competitors' offers, or whether Transmittal No. 2633 would permit SWBT to offer rates below those offered by other potential bidders. Moreover, as we explain above, we have been unable to validate SWBT's estimate of the prices other carriers currently offer for the service AT&T requested in its RFP, and SWBT has made no attempt to estimate the rates that are available to Coastal. Once SWBT has submitted information on the availability of lower priced competitive alternatives, parties should address whether SWBT has narrowly tailored its competitive response to meet competition without undue discrimination.

32. In attempting to meet the second prong of the test, SWBT argues Transmittal 2633 is not unreasonably discriminatory because the discount is available to all "similarly situated" customers. In its Description and Justification, SWBT defines "similarly situated" as customers who request the same type and quantity of service that SWBT intends to offer to

⁹⁷ D&J at 4-7.

⁹⁸ MCI petition at 9.

⁹⁹ *Private Line Rate Structure Guidelines*, 97 FCC 2d at 948.

¹⁰⁰ *AT&T CPP Order*, 4 FCC Rcd at 7934.

Coastal or AT&T through Transmittal No. 2633, in markets where competition exists.¹⁰¹ According to SWBT, customers in markets not subject to competition are not similarly situated, and therefore are ineligible for the discount.¹⁰² It is not clear from the Description & Justification whether a subsequent customer would need to request service in the same cities as AT&T and Coastal, or whether a customer would qualify by making a request for the same services in a city with a similar level of competition. However, proposed Section 29.2 of the tariff appears to clarify this issue by providing that the services SWBT offers in response to the AT&T and Coastal RFPs would be available only to customers who submitted RFPs requesting "the same service in the same quantities and at the same Central Office(s)" as AT&T or Coastal.¹⁰³ Further, under proposed Section 29.1-2, SWBT will offer other customers the same services as it offers to AT&T and Coastal only if a "competitive situation" exists with respect to those other customers.¹⁰⁴ We seek comment on the reasonableness of these restrictions in light of the second prong of the competitive necessity test.

33. Sprint argues that the effect of these restrictions will be to ensure that only AT&T and Coastal, and no other customers, will be able to obtain the rates listed in the transmittal.¹⁰⁵ The Commission has, in the past, invalidated as unreasonably discriminatory rates that are limited by geographic restrictions so specific as to make them available only to a single customer.¹⁰⁶ We tentatively conclude that Transmittal No. 2633's rates would not be available to customers other than AT&T and Coastal, because proposed Section 29.2 appears to require subsequent customers to have a network configuration that is identical to that of AT&T or Coastal, a circumstance we believe would be unlikely.¹⁰⁷ We seek comment on this tentative

¹⁰¹ D&J at 12-13.

¹⁰² *Id.* at 12.

¹⁰³ Transmittal No. 2633, Proposed Section 29.2.

¹⁰⁴ *Id.*

¹⁰⁵ Sprint petition at 2.

¹⁰⁶ *AT&T Communications, Revisions to Tariff F.C.C. No. 12*, Memorandum Opinion and Order, 4 FCC Rcd 7928, 7938-39 (1989), *rev'd on other grounds sub nom. MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C.Cir.1990).

¹⁰⁷ To obtain a discount under Transmittal No. 2633, the a subsequent carrier must request "the same service in the same quantities and at the same Central Office(s)" as AT&T or Coastal. Transmittal No. 2633, Proposed Section 29.2. Therefore, to obtain the rate offered to Coastal, the subsequent carrier would need to order the exact service quantities Coastal ordered, namely, a self-healing network for 25 digital transmission links and 2 multiplexers with four nodes consisting of one customer premises, at the same three SWBT central offices in Houston where Coastal requested its service. Similarly, to obtain the rate offered to AT&T, a subsequent carrier would need to request 164 DS-3 circuits and 142 multiplexers at the same twenty-five locations as had

conclusion. We also seek comment as to whether under the competitive necessity doctrine a carrier may, consistent with Section 202(a) of the Act, permissibly limit an offering to a single geographical area, or single, identified customer. Further, we seek comment on the reasonableness of proposed Section 29.1-2 of the tariff, to the extent it appears to give SWBT unchecked discretion to decide when a "competitive situation" exists and thus the unilateral authority to decide who receives the proposed discounts.

34. The third element of the competitive necessity defense considers whether the discount contributes to reasonable rates and efficient services for all users.¹⁰⁸ SWBT contends that allowing it to respond to the RFPs submitted by AT&T and Coastal will enable SWBT to win these customers' business, thus contributing to the recovery of SWBT's overhead costs and satisfying this prong of the test.¹⁰⁹ In contrast, AT&T and MCI contend that the transmittal will enable SWBT to engage in cross-subsidization by raising prices on customers in areas where competition does not exist, thus decreasing customer welfare overall.¹¹⁰ Based on our review of the cost information SWBT has submitted under seal, we tentatively conclude that the prices SWBT proposed to offer AT&T and Coastal through Transmittal No. 2633 would recover SWBT's direct costs of providing the services, plus a reasonable contribution to its overhead costs.¹¹¹ We agree with MCI's argument, however, that cost information in support of tariff filings should be available to third parties for their review subject to protective order. Accordingly, we intend shortly to impose a protective order that will enable interested parties to review SWBT's cost information by signing a non-disclosure agreement. AT&T, MCI, Sprint, and others will then have the opportunity to comment, should they wish to do so, on our tentative conclusion that SWBT has satisfied prong three of the test. To protect SWBT's confidential information, however, parties commenting on material subject to the protective order shall observe the procedures designed to safeguard such information as set forth in the standard

been requested by AT&T. See D&J at 9. This would appear to require the subsequent carrier to choose a network design that is very similar, if not identical, to that of Coastal's in Houston or AT&T's in Dallas, at least for the portion of the network included in the RFP.

¹⁰⁸ *Private Line Rate Structure Guidelines*, 97 FCC 2d at 948.

¹⁰⁹ D&J at 10.

¹¹⁰ AT&T petition at 4; MCI petition at 11-12.

¹¹¹ Regulated rates recover two types of costs: (1) direct costs; and (2) overhead costs. Direct costs of providing a service include capital costs (*i.e.*, depreciation, cost of money, and income taxes) and operating costs (*i.e.*, maintenance costs, administrative costs, and property and other taxes that are not income taxes) that are attributable to a particular service. Overhead costs are joint and common costs that are not directly attributable to any particular service. Most LECs, including SWBT, develop direct costs using long run incremental unit cost methodologies. See SWBT Direct Case filed in *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access*, CC Docket No. 93-162, Appendix 2 at 2. These direct costs are based on the principle of direct cost causation and are prospective.

protective order attached to the *Streamlined Tariff Order*,¹¹² or as contained in any subsequent protective order we shall issue in connection with Transmittal 2633.

35. We also seek comment on the scope of the competitive necessity test. SWBT claims that competitive necessity should be sufficient to enable Transmittal No. 2633 to take effect.¹¹³ As stated above, we construe SWBT's statement as arguing that competitive necessity operates as a complete defense not only to any violation of Section 202(a), but also to any other violation of the statute, Commission rules or policies, including the DS-3 ICB Order,¹¹⁴ our prohibition against contract and RFP tariffs for dominant LECs, and our rules prohibiting de-averaging of access rates. Does and should competitive necessity operate as a defense to these Commission requirements? We seek comment on this issue. We note that, in the past, we have held that competitive necessity does not excuse a failure to observe the Commission's rate averaging rules.¹¹⁵

V. PROCEDURAL MATTERS

A. Filing Schedules

36. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth below shall apply. SWBT shall file a direct case addressing each issue designated above no later than 30 days after the release of this Order.

37. Pleadings responding to SWBT's direct case may be filed no later than 15 days after filing the direct case and must be captioned "Opposition to Direct Case" or "Comments on SWBT's Direct Case." SWBT may file a "Rebuttal" to oppositions or comments no later than 15 days after the filing of comments on or oppositions to the direct cases.

38. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy must be delivered to the Competitive Pricing Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to

¹¹² *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 (1997), at 2242-2243.

¹¹³ D&J at 3 n.5.

¹¹⁴ *Id.*

¹¹⁵ *New York Telephone Company Tariff F.C.C. No. 41, Transmittal 1077*, 5 FCC Rcd 6745 (Com. Car. Bur. 1990).

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 should specify the docket number of this investigation.

B. Ex Parte Requirements

39. We will treat this proceeding as permit-but-disclose for purposes of the Commission's *ex parte* rules. See generally, 47 C.F.R. §§ 1.1200-1.1206.

VI. ORDERING CLAUSES

40. **IT IS ORDERED** that, pursuant to Sections 4(i), 202(a), 204, and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 202(a), 204, and 205, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the issues set forth in this Order **ARE DESIGNATED FOR INVESTIGATION**.

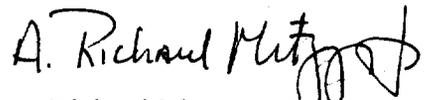
41. **IT IS FURTHER ORDERED** that SWBT's request for waiver of the Commission's rules is **DENIED**.

42. **IT IS FURTHER ORDERED** that SWBT **SHALL FILE** a direct case addressing each issue designated above no later than 30 days after the release of this Order.

43. **IT IS FURTHER ORDERED** that Pleadings responding to SWBT's direct case **SHALL BE FILED** no later than 15 days after filing the direct case and must be captioned "Opposition to Direct Case" or "Comments on SWBT's Direct Case."

44. **IT IS FURTHER ORDERED** that SWBT may file a "Rebuttal" to oppositions or comments no later than 15 days after the filing of comments on or oppositions to the direct cases.

FEDERAL COMMUNICATIONS COMMISSION



A. Richard Metzger, Jr.
Deputy Chief,
Common Carrier Bureau