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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	CC Docket No. 97-158
Southwestern Bell Telephone Company	)	Transmittal No. 970
	)	
Tariff F.C.C. No. 73	)	

**REBUTTAL COMMENTS OF BELL ATLANTIC<sup>1</sup>**

In this proceeding, Southwestern Bell seeks approval of a tariff that will allow it to respond to customer requests for proposals, or "RFPs". The parties opposing this tariff argue that the Commission should forbid any type of responsive bid by a local exchange carrier. Doing so, however, would inhibit competition and harm both carriers and customers.

Instead, the Commission should move quickly to adopt rules that provide all local exchange carriers the type of flexibility sought here as part of its upcoming order on pricing flexibility. In the meantime, the Commission should act favorably on individual petitions like the present.

<sup>1</sup> The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

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**I. The Commission Should Promptly Modify Its Rules To Allow The Pricing Flexibility Necessary To Accommodate Market Needs**

The fundamental dispute in the proceeding here is what the rules are, and should be, governing local exchange carrier (“LEC”) pricing in response to specific competition. This exact issue was raised by the Commission in its notice of rulemaking two years ago,<sup>2</sup> and the Commission most recently proposed to address it in a pricing flexibility proceeding it plans to initiate as a follow-up to its access reform order.

As the Commission itself recognized, the market based approach it adopted to access reform requires it to “progressively ... deregulate the access charge regime as competition develops.”<sup>3</sup> In order to avoid a flood of repetitive and wasteful regulatory proceedings to address requests for individual relief, the Commission should act quickly to adopt rules providing all LECs with the flexibility they need to respond to competitive situations -- in particular, by responding to a bona fide RFP with a proposal that offers a customized service package that may deviate from generic tariff terms and prices. Bell Atlantic, for example, recently submitted a detailed proposal that would establish three different phases of pricing flexibility (each of which would apply under specific market conditions), the first stage of which includes the right to respond to RFPs.<sup>4</sup>

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<sup>2</sup> **Price Cap Performance Review**, Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, 11 FCC Rcd 858 (1995).

<sup>3</sup> **Access Charge Reform**, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, ¶ 49 (rel. May 16, 1997) (“Access Reform Order”).

<sup>4</sup> **See Access Charge Reform**, CC Docket Nos. 96-262, 94-1, 91-213, NYNEX Ex Parte Letter from Susanne Guyer to William F. Caton (filed July 31, 1997).

## II. LECs Should Have The Flexibility To Respond To Requests For Proposals

A number of parties seek to deny any pricing flexibility to incumbent LECs, or at a minimum, have the Commission use pricing flexibility as “leverage” to extract other action from the LECs.<sup>5</sup> This is misguided. The Commission has struggled to create a rate structure that will “facilitat[e] the movement to a competitive market.”<sup>6</sup> One natural outgrowth of that movement is that customers will begin to seek specific competitive responses to their particular commercial needs -- in other words, issue RFPs. Competing carriers that are not classified as dominant are free to respond to the customer’s requirements. In order to offer the competition sought by the Commission, LECs that are still regulated as dominant carriers must be able to respond in kind.

In a market with growing competition, prices do not move uniformly, but rather price levels decrease over time as a growing number of customers have competitive alternatives and seek lower rates. Part of this natural process will flow from customers seeking individual price quotes for a package of services that meets their specific needs. To block LECs from responding to such requests only limits competition and denies consumers a choice.<sup>7</sup> As one customer has

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<sup>5</sup> *See, e.g.*, Time Warner Opposition to the Direct Case at 12 (filed Aug. 28, 1997) (Time Warner would have the Commission require competition tests for all services, including tests that admittedly are not “applicable” to the service for which pricing flexibility is sought).

<sup>6</sup> Access Reform Order at ¶ 13.

<sup>7</sup> “Regulations that impede the use of discounts or similar mechanisms for sharing cost savings under contracts impede competition and prevent customers from obtaining the lowest possible price for the services they purchase.” Affidavit of Robert G. Harris at ¶ 12 (attached to Comments of U S West, Inc. on SWBT’s Direct Case (filed Aug. 28, 1997) (“Harris ¶Affidavit”). In the context of “competitive bidding opportunities” for services to schools and libraries, the Commission has already recognized that LECs may need “further freedom to participate in competitive bidding situations.” *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Report and Order at ¶ 483 (rel. May 8, 1997).

explained to the Commission, absent pricing flexibility for the LECs, competitors will set prices a standard percentage below the incumbent LEC's tariffed rate and feel completely insulated from further competitive pressure.<sup>8</sup> This is completely inconsistent with the Commission's goal of market pressure on both incumbents' and competitors' access rates.

### **III. Allowing LECs To Respond to RFPs is Consistent With The Competitive Necessity Doctrine**

As explained in Southwestern Bell's Direct Case, the Commission's existing rate averaging rules<sup>9</sup> are subject to exceptions, including the "competitive necessity doctrine."<sup>10</sup> This doctrine, which has been applied to dominant carriers in the past,<sup>11</sup> "permits a discounted offering for a service where (1) an equal or lower priced alternative is generally available to customers of the discounted offering, (2) the terms of the discounted offering are reasonably designated to meet competition without undue discrimination, and (3) the discount contributes to reasonable rates and efficient services for all users."<sup>12</sup> Allowing LECs to deviate from averaged rates to respond to RFPs is consistent with all three requirements.

The first prong is met by the very existence of an RFP. By calling for bidders, a customer's issuance of an RFP recognizes that the customer has a choice. Indeed, the expense

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<sup>8</sup> *Ex Parte* Letter from Kelsey W. Hill, Marriot International Inc. Vice President Telecommunications and Technology Advancement to William F. Caton, Acting Secretary, CC Dkt. No. 94-1 (filed Jan. 19, 1996).

<sup>9</sup> 47 C.F.R. § 69.3(e)(7).

<sup>10</sup> See Direct Case at 4.

<sup>11</sup> See Direct Case at 5.

<sup>12</sup> *Southwestern Bell Telephone Co. v. FCC*, 100 F.3d. 1004, 1006 (D.C. Cir. 1996).

and formality of the normal RFP process would discourage customers that did not have a reasonable belief that they could attract multiple bidders. Moreover, the fact that the LEC responds with a deaveraged rate indicates the LEC's market judgment that its averaged rate is equal or higher to other competitive alternatives. The Commission cannot reasonably require more. As the D.C. Circuit recognized, a requirement that a LEC substantiate what others have bid is "arbitrary and capricious" because it puts the regulated LEC in a "classic Catch-22 situation -- it must either obtain competitors' rates, which may violate the antitrust laws, or lose competitive bids."<sup>13</sup>

The second prong is easily satisfied by a requirement that any package of services provided in response to an RFP be made available to other similarly situated parties on the same terms and conditions as offered to the customer that purchased the original proposal.<sup>14</sup> Moreover, as explained in the comments of U S West, "the availability of resale allays any concerns that might otherwise arise" from allowing LECs to deviate from their averaged access rates.<sup>15</sup>

As set forth above, the third prong is directly met by the fact that the proposed rate is in response to an RFP. By meeting the specific needs of a customer, the LEC benefits that customer and encourages other customers to seek out the best competitive alternative.<sup>16</sup> Moreover, allowing customized packages that deviate from averaged rates encourages carriers to

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<sup>13</sup> *Id.* at 1007.

<sup>14</sup> Southwestern offers an alternative proposal to meet this requirement. *See* Direct Case at 12-15.

<sup>15</sup> Harris Affidavit at ¶ 35.

<sup>16</sup> Customers that continue on tariffed rates continue to pay reasonable rates that are limited by price cap regulation.

offer prices that reflect their actual efficiencies rather than allowing inefficient carriers to avoid competition by pricing just below a LEC's average rates. This encourages efficient use of all carriers' networks.

### **Conclusion**

The Commission should quickly complete its Access Reform rulemaking and allow LECs to offer competitive alternatives that deviate from averaged rates. In the interim, the Commission should look favorably on LEC tariffs that offer lower rates in response to RFPs.

Respectfully submitted,

  
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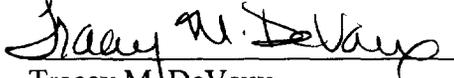
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September 12, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 1997 a copy of the foregoing "Bell Atlantic Rebuttal Comments" was served by the hand on the parties on the attached list.

  
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