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FEDERAL COMMUNICATIONS COMMISSION
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**REPLY OF
SOUTHWESTERN BELL TELEPHONE COMPANY**

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September 12, 1997

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SUMMARY*

The parties opposing SWBT's Transmittal provide no sound basis upon which to delay the effectiveness of it. All of the parties contesting SWBT's use of "competitive necessity" are, strangely enough, competitors to SWBT in various markets.

These competitors are trying to tempt the Commission into rejecting SWBT's filing through the charades of "contract" tariff and ICB rules that SWBT has not relied upon, and does not rely upon, to obtain effectiveness for its offerings. The Commission should not be misled into reading these rules to reject SWBT's filing because the competitive necessity test, when read together with the Commission's other rules and policies, requires allowing SWBT's filing to take effect.

Key to evidencing competition is the letter that AT&T has now provided SWBT. AT&T has now informed SWBT that it will use "other supply options" for the business that SWBT had bid upon and for which it had filed some of the rates in this Transmittal. No better evidence of competition could exist.

The Commission must not delay effectiveness of SWBT's Transmittal any longer. Such delays have undoubtedly caused SWBT to unreasonably lose business during the course of this proceeding. Future delays will injure customers by preventing them from receiving the choices that they should have.

* All abbreviations used herein are referenced within the text.

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Transmittal No. 2633

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REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT), pursuant to the Designation Order¹ in the above-captioned docket, hereby submits its Reply to the Oppositions filed by various parties² against SWBT's Direct Case. None of the Oppositions provide any basis upon which to deny immediate effectiveness of SWBT's Transmittal No. 2633.

I. **SWBT HAS NOT ATTEMPTED TO USE THE CONTRACT TARIFF RULES TO JUSTIFY ITS OFFERING.**

A number of parties claim that SWBT's Transmittal No. 2633 violates the Commission's contract tariff rules. As SWBT explained in its Direct Case, however, SWBT has not filed the transmittal as a contract tariff. The transmittal cannot be a contract tariff since, as some commentators admit, the definition of a contract tariff is as follows:

¹ Southwestern Bell Telephone Company Tariff F.C.C. No. 73, CC Docket No. 97-158, Transmittal No. 2633, Order Designating Issues for Investigation, (DA 97-1472) (released, Common Carrier Bureau, July 14, 1997). (Designation Order).

² Oppositions were filed by MCI Telecommunications Corporation (MCI); AT&T Corp. (AT&T); Sprint Communications Company L.P. (Sprint); Time Warner Communications Holdings Inc. (Time Warner); KMC Telecom, Inc. (KMC); GST Telecom, Inc. (GST); and Teleport Communications Group Inc. (Teleport). Comments were filed by U S WEST Communications, Inc. (U S WEST).

Contract-based tariff. A tariff based on a service contract entered into between an interexchange carrier subject to §61.42 (a) through (c) or a nondominant carrier and a customer.³

Thus, since SWBT is not an interexchange carrier, it has not, by definition offered a Section 61.3(m) "contract tariff." The attempts by the commentators to paint SWBT's filing as a Section 61.3(m) "contract tariff" must be rejected.

As SWBT previously stated in its Direct Case the Designation Order cites no order that supports the claim that RFP tariffs are prohibited under the Commission's current policy: "The passages cited by the Order only stand for the proposition that interexchange carriers or nondominant carriers may offer contract tariffs. There is no explicit prohibition in these cited rules that prohibits the filing of contract or RFP tariffs by other carriers, including dominant LECs."⁴

Analysis of SWBT's Transmittal No. 2633 must be undertaken on its own merits. Either the transmittal is allowed under the Commission's policies, taken as a whole, or it is not. Adherence to particular rules or orders, without analysis of how the Commission's policies, as a whole, relate to each other is meaningless. Since the Commission's competitive necessity doctrine applies to SWBT's filing, all of the Commission's other rules and policies must be read in light of that fact. Attempts to have the Commission reject SWBT's Transmittal No. 2633 on the narrow ground that it does not fit within the rules for a "contract tariff" without considering the Commission's competitive necessity doctrine, only encourages the Commission to make an arbitrary and capricious decision which would be subject to reversal by a Court on review.

³ 47 C.F.R. § 61.3 (m).

⁴ Direct Case at p. 3.

MCI claims in this regard are the same as those it made when it petitioned to reject the Transmittal. SWBT responded as follows:

In essence, MCI argues that since the Commission has not formally yet allowed SWBT to offer the services at issue under contract-type pricing, it must also be rejected here. Again, MCI appears to be attempting to "bait" the Commission into making the same mistake it has been admonished for making in its previous order. SWBT has shown competition for the services in question. The fact that the Commission's current rules may not address this situation for LEC access services is of no issue. Competitive necessity, as an exception to the generally stated rules, permits the filing at issue.⁵

II. SWBT DID NOT FILE TRANSMITTAL NO 2633 AS AN ICB TARIFF.

Likewise, SWBT's Transmittal No. 2633 should not be rejected on the arguments made by some parties that it is an illegal ICB tariff.⁶ SWBT did not file its Transmittal No. 2633 as an ICB offering. As noted above, the Commission should not be tempted by the Oppositions to improperly classify SWBT's Transmittal No. 2633 as an ICB offering and then deny it. Instead, Transmittal No. 2633 should be considered in light of all of the Commission's policies and rules, not just a few of them.

While SWBT did not claim that its Transmittal No. 2633 was an ICB offering, the language in the DS3 ICB Order is instructive. As SWBT noted:

The policies set forth in the DS-3 ICB Order serve to illustrate the applicability of competitive pricing under certain situations. In the DS-3 ICB Order, the Commission directed certain LECs to file averaged rates for their DS-3 offerings. Nevertheless, the Commission recognized:

⁵ Reply Comments of SWBT at pp. 6-7.

⁶ GST at p. 4; KMC at p. 5; MCI at p. 4; Teleport at p. 7; and Sprint at p. 4.

the LECs have demonstrated that competitive conditions may justify some departures from a single general offering of DS-3 facilities. We do not intend to determine the precise limits of future DS-3 pricing flexibility in this proceeding. . . .

The DS-3 ICB Order also recognized the validity of 'competitive necessity' as a justification for ICB pricing. The DS-3 ICB Order quoted the Private Line Guidelines Order as follows:

[a] carrier's proof [of competitive necessity] should include a showing that (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- 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 volume discount contributes to reasonable rates and efficient services for all users. We will assess the adequacy of the competitive-necessity justification on a case-by-case basis until we are able to develop additional standards in this area.

Since SWBT's offerings will satisfy competitive necessity . . . a waiver of the DS-3 ICB Order is not necessary.⁷

Thus, the DS3 ICB Order supports SWBT's Transmittal No. 2633.

III. SWBT's TRANSMITTAL NO. 2633 DOES NOT OFFEND SECTION 69.3(e)(7) OF THE COMMISSION'S RULES.

A number of parties state that Section 69.3(e)(7) prohibits SWBT's Transmittal No. 2633.⁸ None of these parties, however, successfully reconcile the Commission's competitive necessity doctrine with the rule. Most apparently feel there is no reason to reconcile the two,

⁷ SWBT Transmittal No. 2633, D&J at pp. 2-3 (footnotes omitted).

⁸ AT&T at pp. 5-6; Sprint at p. 4; Teleport at p. 8; MCI at p. 4; KMC at p. 5; and GST at p. 6.

inviting the Commission to leave this conflict unanswered and ripe for reversal by a reviewing court.

In any event, a close reading of Section 69.3(e)(7) reveals that it does not apply as a mandatory obligation for all LEC tariffs. Section 69.3(e) states that " a telephone company or group of telephone companies may file a tariff that is not an association tariff . . . Any such tariff must comply with the requirements hereinafter provided." (emphasis added) Notably, this passage does not state that a telephone company must file (or is limited to filing) a tariff under the specific rules, but only states that a telephone company "may" do so. In comparison, other subsections of Section 69.3 use the mandatory word, "shall." Competitive LECs would also appear to fall under this language if it was treated as mandatory. Since the Commission has apparently never enforced this provision against competitive LECs, it would appear that a LEC need not comply.⁹ Thus, a waiver of 69.3(e)(7) is not required.

Some parties assert that the New York Telephone Company case, where the Common Carrier Bureau rejected a tariff for its failure to comply with 69.3(e)(7) compels rejection here. As previously stated in SWBT's Direct Case, however, the New York decision is only a Bureau Order and was not issued by (or apparently appealed to) the full Commission. Nor was the New York case appealed to the courts. In light of the SWBT v. FCC¹⁰ decision on

⁹ Neither the recent Time Warner or Hyperion petitions for forbearance from tariff filing requirements list Section 69.3(e) as a rule from which they seek relief, nor does the recent order granting those petitions list or discuss that section. Hyperion Telecommunications, Inc. Petition Requesting Forbearance CCB/CPD No. 96-3, Memorandum Opinion and Order and Notice of Proposed Rulemaking, (FCC 97-219) (rel. June 19, 1997). If the competitive LECs requesting relief had felt that compliance with 69.3(e) was necessary, one would expect that they would have requested relief from it and that the order would have specifically covered it.

¹⁰ 100 F.3d 1004 (D.C. Cir. 1996).

SWBT's prior RFP tariff, it is clear that the New York case would not withstand judicial scrutiny. Thus, it should not be cited as precedent in this matter.

IV. THE COMPETITIVE NECESSITY DOCTRINE APPLIES TO SWBT'S TRANSMITTAL AND REQUIRES ITS EFFECTIVENESS.

Some parties have claimed that the competitive necessity doctrine does not apply to SWBT's RFP filing.¹¹ As SWBT has previously noted, this would be a reversal of Commission precedent and would require an explanation for the Commission's changed position on this issue. The Commission has applied competitive necessity analysis to SWBT's prior RFP tariff. The Commission has not previously distinguished between LECs and IXCs in the use of the competitive necessity doctrine.¹²

In SWBT v. FCC, the Court recognized that the Commission made a conscious effort to apply the competitive necessity doctrine to SWBT's RFP tariff.¹³ For the Commission to now hold that the competitive necessity doctrine does not apply would be a change of position which would have to be reasonably explained on the record.

As SWBT stated in its Direct Case:

the case cited by the Commission and most parties in discussion of the competitive necessity doctrine is the Private Line Structure Decision. That matter does not distinguish between dominant and nondominant carriers, or between long distance and local exchange

¹¹ MCI claims that instead of "competitive necessity," a "substantial competition" standard should apply and SWBT has not demonstrated substantial competition.

¹² As a practical matter, competitive necessity can only provide relief to dominant carriers since nondominant carriers are subject to substantially relaxed regulation.

¹³ 100 F. 3d, 1004, 1007.

carriers, or between the telecommunications industry and the industry as a whole. The Commission cites a 1983 Supreme Court decision on application of the Robinson-Patman Act in a different industry in support of the Commission's use of the competitive necessity test.

The Direct Case also attached a copy of a Federal Communications Law Journal article discussing competitive necessity. This article explains how permitting customers specific offerings throughout the telecommunications industry serves the public interest, and contribute to reasonable rates for all customers.

The comments filed by U S WEST in this proceeding are also extremely instructive. Those comments give a history of the competitive necessity doctrine and how it has been used in many wide ranging proceedings. In particular, the comments explain how current special access markets are, in many instances, if not everywhere, more competitive than AT&T's markets when it was granted relief under competitive necessity.¹⁴

A. SWBT Satisfies the First Prong of the Competitive Necessity Test

MCI admits that the first part of the competitive necessity test is satisfied by "the presence of a single, equal or lower priced alternative, without regard for the new entrants' capacity to serve the incumbent's customers."¹⁵ While other parties claim that the competitive necessity test requires a more extensive showing of competition,¹⁶ all of these parties fail to answer the dilemma posed by the Court to the Commission: the Commission apparently requires SWBT to either obtain competitor's rates in violation of antitrust laws, or lose competitive bids.

¹⁴ U S WEST at pp. 8-13.

¹⁵ MCI at p. 9.

¹⁶ Time Warner at p. 16, Sprint at p. 7, GST at p. 8, KMC at p. 8, AT&T at p. 11, and Teleport at p. 13.

None of the oppositions explain how any other reasonably obtainable evidence would be satisfactory, apparently wanting to tempt the Commission into raising the same dilemma before the Court. Instead, SWBT must be allowed to satisfy the first prong of the competitive necessity test as it has done, merely by presenting the evidence of RFPs that it has been given by the customers. As SWBT stated in its D&J:

The RFPs from AT&T and Coastal Telephone ask for a price from SWBT which will be used in a competitive situation. These customers also clearly state that they intend to evaluate the submitted prices against those of "other access providers in the area" or "other vendors". Thus, on their face, AT&T and Coastal acknowledge the existence of competition for the services in question.

Reliance upon the assertions made by the customers is necessary to avoid problems with the antitrust laws. No party other than SWBT provides a proper response to this dilemma.

Further, the existence of competition is firmly proven by AT&T's own actions. On July 17, 1997, AT&T informed SWBT that it was going to "pursue other supply options in Dallas" for the services that were bid by SWBT. In light of this firm proof that competition exists in Dallas, Texas for the services that SWBT bid, the Commission must ignore AT&T's arguments that SWBT should be required to use affidavits to prove competition. The affidavits could, in this case, serve no purpose other than to reaffirm AT&T's admission that there are other "supply options in Dallas." The letter from AT&T is attached as Exhibit A.¹⁷

All of the protestations about the level of competition are moot when SWBT has lost at least some of the business in question to a competitor. While AT&T does not provide any

¹⁷ The letter, as attached, states that it is "subject to joint nondisclosure agreement." SWBT has been informed, however, by AT&T representatives that the letter does not contain proprietary material and thus is not subject to a nondisclosure agreement.

reason in its letter for giving the business to "other supply options" it is obvious that the delays occasioned by the current tariff process do not make SWBT an attractive "supply option."

Thus, the end result in the case of AT&T, as it was for SWBT's RFP proposal to MCI, is that the Commission's refusal to allow acceptance of the tariff on competitive necessity grounds has apparently caused SWBT to lose more business. AT&T cannot deny that options for the traffic in question exist. The Commission must not allow the same outcome for Coastal. By delaying the effectiveness of SWBT's tariffs, and insisting on more proof than SWBT has to offer (or that any party has reasonably suggested SWBT could provide), the Commission is placing SWBT in the same "catch-22" described by the Court in SWBT v. FCC.

A number of parties have complained that the tariffs of competitive providers submitted by SWBT are insufficient to show the existence of competition. Nevertheless, these parties cannot deny that the tariffs assist in demonstrating competition.

SWBT has not relied on these tariffs alone. The Court in SWBT v. FCC noted that the tariffs could not be counted upon for identification of the prices CAPs would bid:

it is rather doubtful, that [SWBT] would even be able to detect from a CAPs tariff filings which price it actually charged in a successful bid and CAPs can amend their tariffs with as little as one day's notice . . . so Southwestern Bell can never anticipate what prices CAPs may bid.¹⁸

Thus, the Court firmly recognized the ability of CAPs to change their tariffs on as little as one day's notice made it more difficult for SWBT to show competition. The Court, however, did not place the burden on SWBT to solve this dilemma, acknowledging that SWBT had done all it could. Thus, SWBT should not be required to show any further evidence of competition than it

¹⁸ 100 F.3d 1004, 1007.

has already placed on the record in satisfaction of the first prong of the competitive necessity doctrine.

Some parties complain that the MFS tariffs cited by SWBT's direct case are not comparable to the services in question. While the entire document SWBT attached includes non-comparable services, many of the services are precisely on point. Thus, the MFS tariff provides additional evidence of competition.

B. SWBT has Satisfied the Second Prong of the Competitive Necessity Test.

Some parties assert that SWBT cannot satisfy the second prong of the competitive necessity test because SWBT is only allowed under that prong to match competing offers.¹⁹ As stated above, however, the Court has recognized that SWBT "can never anticipate what prices CAPs may bid." It is thus illusory to claim that SWBT has not satisfied the competitive necessity test since SWBT has not shown the existence of competitive bids. As SWBT has stated, and as the SWBT v. FCC Court would likely agree, SWBT is "in a classic catch-22 situation." The Oppositions provide no solution to this dilemma, and must be rejected.

Teleport claims that SWBT makes no effort to avoid any undue discrimination.²⁰ Teleport argues that SWBT is required to "address the discrimination concerns of its existing customers" in the filing of rates under the competitive necessity test. Teleport ignores the fact that other customers' rates are not being increased by this filing. Other customers suffer no harm when SWBT acts to win business through an RFP filing. Teleport apparently argues that the rates for all customers must decrease when SWBT bids on an RFP. Such a result is ludicrous and

¹⁹ MCI at p. 17, AT&T at p. 13, Sprint at p. 8.

²⁰ Teleport at p. 15.

would result in elimination of the competitive necessity doctrine itself. AT&T's use of the doctrine never required bringing all rates down to the level of the competitive offering. No such requirement is warranted here.

C. SWBT has Satisfied the Third Prong of the Competitive Necessity Test.

Sprint claims that SWBT cannot show that the discount contributes to reasonable rates for all users because Sprint believes that the proposed RFP rate could not be reasonably expected to cover direct costs and make some contribution to overhead costs.²¹ Sprint cites a claimed "overhead" of "177%." Sprint claims that SWBT's rates in the AT&T RFP are unreasonable by comparing SWBT's general tariffed price with the proposed RFP price.

The logic behind this accusation is flawed in two ways. First, by making the comparison between SWBT's existing tariffed rate and that of the RFP, Sprint is ignoring the fact that the existing tariffed rate is an *averaged* rate representing an average of all DS3 service facilities across SWBT's entire operating territory. Averaged costs are often much higher than particular individual cost situations. The RFP is calculated for a particular situation and is therefore not an averaged rate. Sprint's attempt to make an evaluation regarding SWBT's RFP overhead contribution by comparing the revenues of the RFP with that of the corresponding tariff is thereby invalid and should thus be discounted. Sprint appears, by this line of reasoning, to be calling into question the reasonability of SWBT's existing DS3 service overhead which is irrelevant and unwarranted in this particular proceeding.

Second, Sprint arbitrarily concludes that the result is "unreasonable" overhead. If, for argument's sake, Sprint's calculation was accepted, Sprint has failed to show on what basis it

²¹ Sprint at p. 9.

has determined that this overhead is unreasonable for a competitive access service. SWBT has provided the Commission with all necessary cost data to prove that the service has indeed covered direct costs and makes contribution to overhead costs as prescribed by the Commission rules.

AT&T asserts that SWBT must meet a "public policy" standard, even if SWBT's prices are above cost.²² This claim ignores the viability of the competitive necessity doctrine and attempts to add an additional prong that AT&T never agreed to satisfy when it used the competitive necessity doctrine. In any event, AT&T fails to address the strong policy arguments in favor of the competitive necessity test's application to LEC markets that was provided in the article attached to SWBT's Direct Case, as well as those that are listed in U S WEST's comments.²³

V. THE COMMISSION SHOULD NOT DELAY ITS DECISION IN THIS DOCKET.

Time Warner urges the Commission to deny relief in this docket because a similar question is being considered in the Access Reform docket.²⁴ The Commission must not succumb to this temptation.

As noted above, SWBT has lost additional business to competition during this proceeding. As SWBT stated in the tariff Reply Comments:

As is evident to all by now, the Commission did not allow any additional pricing flexibility for local exchange carriers (LECs) of the type described in SWBT's filing in the current access reform

²² AT&T at p.13.

²³ U S WEST at pp. 8-16.

²⁴ Time Warner at pp. 1-2.

docket. Instead, it postponed consideration of those issues until some future, unstated date. Since there is not set time in which the Commission has committed to address this matter, SWBT must be allowed to make its filing in the meantime. The Commission has not, nor could it, make competition stand still while it considers 'catching up' its regulation of Incumbent Local Exchange Carriers (ILECs) with that competition.

If the Commission delays the requested relief, customers like Coastal will certainly be injured in the meantime since those customers will have fewer meaningful choices.

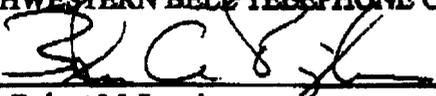
VI. CONCLUSION

For the foregoing reasons, SWBT respectfully requests that the Commission close the investigation and allow SWBT's Transmittal No. 2633 to take effect immediately.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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July 17, 1997

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Re: Dallas POP to LSO DS3 Proposal

Dear Dave,

I want to take this opportunity to thank you for submitting a proposal to serve AT&T's POP to LSO DS3 requirements in Dallas, Texas. Your team submitted an attractive proposal.

At this point however, we have decided to pursue other supply options in Dallas for these services. Should that situation change, we will advise you.

Again, thank you for your efforts.

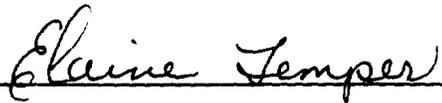
Sincerely,

Ron Base

for G. P. Terry

Certificate of Service

I, Elaine Temper, hereby certify that Transmittal #2633 to CC. Docket No. 97-158 for Southwestern Bell Telephone Company has been served this 12th day of September, 1997 to the Parties of Record.



Elaine Temper

September 12, 1997

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