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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
	)	CCB/CPD 97-67

REPLY OF
SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT), pursuant to the Public Notice released December 22, 1997[1], hereby replies to the oppositions filed against its petition for reconsideration in the above styled docket.[2] None of the oppositions provide any basis on which to sustain the Commission's decision. In particular, the oppositions fail to provide any logical support for the Commission's errant conclusion that competitors will be foreclosed from entering markets if SWBT is allowed to price its services as requested.

I. THE COMMISSION MUST PROTECT COMPETITION, NOT COMPETITORS

An often quoted phrase from the U.S. Supreme Court reads: "The antitrust laws... were enacted for 'the protection of competition, not competitors'."[3] While the quote is usually applied to antitrust analysis, the Commission has also applied it to its statutory

[1] Public Notice, Southwestern Bell Telephone Company Seeks Reconsideration of Order Rejecting Tariff F.C.C. No. 73, Transmittal No. 2633 Raising Issues of Competitive Necessity (DA 97-2668) Released December 22, 1997).

[2] Oppositions were filed by GST Telecom, Inc. and KMC Telecom, Inc. (GST/KMC), MCI Telecommunications Corporation (MCI), AT&T Corp. (AT&T), and Time Warner Communications Holdings Inc. (Time Warner).

[3] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))

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responsibilities. In 1995 the Commission held that:

> To the extent that Alaska Telecom complains about a company of AT&T's size entering the Alaska Market, and fears that it cannot compete against AT&T, n88 We respond that the Commission's statutory responsibility is to protect competition, not competitors. n89 As we have said before, the issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market.... Such advantages do not ... mean that these markets are not competitive ... [or] that it is appropriate for government regulators to deny [AT&T] the efficiencies its size confers in order to make it easier for others to compete.
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> n88 Alaska Telecom's Reply at 5-6.
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> n89 Hawaiian Telephone Co. v. FCC, 498 F. 2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of "competition not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors").[4]

And in a separate matter, the Commission held that:

> We agree with Nextel that our priority is to protect competition, not competitors, for the benefit of consumers. n58 In short, we find no evidence to support the view that competition will be reduced in the relevant markets we have defined above. Instead, we view increased mobile service options for consumers at lower prices to be the more likely outcome.
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> n58 Nextel Reply Comments at 11; see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) ("The question whether [the defendant's] conduct may be properly characterized as exclusionary cannot be answered by simply considering its effect on [its competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way."); Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of competition "not in terms primarily as to benefit the public but specifically with the objective

[4] Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of ALASCOM, Inc. from Pacific Telecom, Inc. to AT&T Corporation; and Application of Alascom, Inc. For Review of Authorization to Acquire and Operate a Fiber Optic Cable System between Alaska and Oregon for the Provision of Interstate-Switched and Private Line-Services, 11 FCC Rcd 732.

of equalizing competition among competitors").[5]

And in 1994 the Commission determined that:

> It is well established that the "public interest" means the interest as a whole; not the interest of any one individual. n52
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> n52 See Northeast Utilities Service Co. v. FERC, 933 F.2d 937, 951 (1st Cir. 1993); see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488(1977) (antitrust laws are designed to protect competition, not competitors) .[6]

The U.S. Court of Appeals for the DC Circuit has noted the Commission's goal as follows:

> The test of a competitive market is whether consumers are offered the lowest possible prices or more or better services. See Douglas H. Ginsburg, Nonprice Competition, 38 Antitrust Bulletin 83, 94 (1993). As the Commission itself once put it, the goal of the agency "is to promote competition in the interexchange marketplace, not to protect competitors." Report and Order, WATS-Related and Other Amendments of Part 69 of the Commission's Rules, 59 Rad. Reg. 2d (P&F) 1418, 1434-35 (1986).[7]

Notwithstanding this body of precedent, the RFP Tariff Rejection Order[8] contradicts these decisions as it chooses to protect individual competitors instead of competition generally. It is undisputed that in each of the RFP cases, SWBT's ability to bid at the rates it filed would benefit the customers. Since, as noted above in the Comptel decision, "The test of a competitive market is whether consumers are offered the lowest possible prices or more or better services," preventing SWBT from filing lower prices

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[5] Applications of MOTOROLA, INC. For Consent to Assign 800 MHZ Licenses to NEXTEL COMMUNICATIONS, INC., 10 FCC Rcd 7783; (1994.)

[6] Tele-Communications, Inc. and Liberty Media Corporation, Applications for Consent to Transfer Control of Radio Licenses, 9 FCC Rcd 4783; (1994.)

[7] Comptel v. FCC, 87 F.3d 522; (D.C. Cir. 1996)

[8] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, CC Docket No. 97-158, Transmittal No. 2633, Order Concluding Investigation and Denying Application For Review (FCC 97-394) (released November 14, 1997) (RFP Tariff Rejection Order).

explicitly prevents the establishment of a competitive market[9]. Thus, the RFP Tariff Rejection Order cannot be sustained.

II. PRECEDENT DOES NOT SUPPORT THE RFP TARIFF REJECTION ORDER'S CONCLUSIONS.

As SWBT explained in its petition for reconsideration, cases cited by the RFP Tariff Rejection Order support the use of the competitive necessity doctrine in this case to allow SWBT's Transmittal No. 2633 to take effect. Especially noteworthy are the discussions by MCI, GST/KMC, and Time Warner on AT&T's Tariff 15.[10] These three oppositions failed in their attempts to distinguish AT&T's Tariff 15 case from the instant matter. This failure is underscored by the fact that AT&T, the subject of the AT&T Tariff 15 case, makes absolutely no attempt to contradict SWBT's assertions as to the applicability of the Tariff 15 case, but merely argues that the Commission was free to disregard all of the cases cited by SWBT.

III. THE OPPOSITIONS SHOW THAT SWBT'S COMPETITORS DESIRE PROTECTION FROM TRUE COMPETITION.

Time Warner complains that if SWBT would have been allowed to place its tariff into effect, "SWBT would have received virtually complete discretion to determine when and where to drop its prices."[11] Time Warner claims that this would constitute "extraordinary pricing flexibility" and that it would "almost certainly be more harmful than beneficial to competition."

Clearly, Time Warner fears competition and cannot conceal its true desire for SWBT to be handicapped by the Commission. In real competition, all competitors have

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[9] In SWBT's state jurisdictions, pricing such as proposed by SWBT here would be allowed and is not considered to be contrary to a competitive market.

[10] MCI, p. 6-7; GST/KMC, p. 6-7; Time Warner, pp. 5-6.

[11] Time Warner, p. 9

"virtually complete discretion to determine when and where to drop their prices" and this pricing flexibility is not considered "extraordinary." Thus, what Time Warner fears is competition itself.

IV. NONE OF THE OPPOSITIONS OFFER ANY EXPERT ECONOMIC EVIDENCE

In this matter, the law review article attached to SWBT's Direct Case, the affidavit from Robert Harris, and the affidavit of Douglas Mudd, stand uncontradicted by any expert economic testimony.

Time Warner claims SWBT will have the ability to implement anticompetitive pricing practices (with the implication that such anticompetitive behavior is inevitable) if incumbent LECs are permitted to respond to requests for proposal issued by IXCs and other telecommunications suppliers. [12] Similarly, MCI contends that increasing LEC pricing flexibility "risks preempting the development of competition in the access market."[13] However, lacking evidence that SWBT's responses to RFPs include prices that are below the incremental cost of supplying the specified services and facilities, predatory pricing and cross-subsidization claims are, by definition, unfounded. Further, any scheme involving predatory pricing and cross-subsidization of services provided subsequent to RFPs must either be sanctioned by regulators or devised to elude detection by state and federal regulators and those firms injured by such anticompetitive pricing. Neither scenario is likely. Incumbent LECs' cost data are subject to regulatory scrutiny within both the state and federal jurisdictions. Regulators and LEC competitors intervening in regulatory proceedings have access to such information. Failure to identify

[12] Time Warner, pp. 11-13.
[13] MCI, p. 8.

below cost prices for the arrangements specified in RFPs removes predatory pricing claims. In addition, "to cross-subsidize its competitive access prices with monopoly service prices" thereby maintaining revenues at prevailing levels, SWBT must increase tariff prices that require explicit regulatory approval.[14] Having little confidence that regulators and LEC competitors intervening in the proceedings required to approve LEC requests for price increases will ignore attempts to cross-subsidize below cost prices in exchange access markets, incumbent LECs have few, if any, incentives to initiate such illegal pricing strategies.

Time Warner also contends that "limit pricing can deter entry that will lead to increased competition and consumer welfare."[15] Time Warner claims SWBT's prices in response to RFPs likely will be designed to preclude entry (i.e., below entrants' initial costs, presumably including start up investment) by firms which presently are less efficient than incumbent LECs but eventually could become more efficient than SWBT. However, if entrants are convinced they eventually will be at least as efficient as incumbent LECs, the prospect of long term financial success will motivate entry and the additional guarantee that only entrants can respond to RFPs should not be necessary to induce efficient entry.

Finally, Time Warner asserts that "SWBT will be the supplier of essential facilities to its access competitors for the foreseeable future and therefore capable of several forms of anticompetitive behavior."[16] However, state regulators are being told

[14] Time Warner, p. 12.
[15] Time Warner, p. 11.
[16] Time Warner, p. 12.

by SWBT's competitors that the prices for access to SWBT's network elements are to be determined by calculating what hypothetical long run incremental costs might be in a hypothetical market where network elements are competitively supplied by numerous facilities based local exchange suppliers.[17] Such prices likely could be below prevailing LEC incremental costs. Providing competitors access to SWBT network elements at prices below prevailing incremental costs coupled with SWBT prices responding to RFPs which exceed the incremental costs of the services specified are not components of the illegal anticompetitive practices Time Warner implies SWBT will implement if permitted to respond to RFPs. Time Warner's unsubstantiated claims of future anticompetitive behavior should not be sufficient to preclude the Commission from reconsidering its decision regarding application of the competitive necessity doctrine to SWBT participation in the RFP process.

GST Telecom and KMC Telecom insist that SWBT be banned from responding to competitive bid situations until it is proven that "competition actually exists in the access market."[18] Alternative access service suppliers' tariffs, one of which includes posted prices below those developed by SWBT in response to RFPs, do not constitute evidence of competition in GST Telecom's and KMC Telecom's view. Additional data addressing the competitive status of the access service market could be produced by SWBT competitors such as AT&T (which recently purchased Teleport) and World Comm (owner of MFS). Demanding that SWBT produce information such as the scope

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[17] See, for example, Prefiled Direct Testimony of John W. Mayo, on behalf of AT&T Communications of the Southwest, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., before the Public Utility Commission of Texas, Docket Nos. 16226 and 16285, filed September 9, 1997.

[18] GST/KMC, p.11.

and capacity of alternative networks, number of customers subscribing to alternative access suppliers, information describing rivals' financial strength, or other data closely guarded by competitors seems an unreasonable precondition to allowing LEC participation in the RFP process. Compelling alternative suppliers of access services to produce such information will clearly depict the size and state of the entire access market and inferences based on data already publicly available will be unnecessary.

V. THE COMMISSION MUST REJECT TIME WARNER'S ACCUSATIONS

Time Warner claims, without any support whatsoever, that the recent decision from the U.S. District Court for the Northern District of Texas finding Sections 271-275 of the Telecommunications Act of 1996 unconstitutional, will make SWBT "far less likely to cooperate with competitive access providers in the provision of access to its network...."[19]

SWBT stands willing, ready and able to continue its practice of complete fulfillment of all of its obligations under the valid sections of the Act, including Sections 251 and 252, which describes SWBT's obligation to provide access to its network. Time Warner does not cite any instance of non-cooperation to support its charge. Thus, Time Warner's claim in this regard must be rejected.

VII. SWBT'S RFP TARIFF IS AVAILABLE TO SIMILARLY SITUATED CUSTOMERS

MCI claims that SWBT does not dispute four points listed on page 10 of its opposition. For the record, SWBT contests all of the issues listed there by MCI. In particular, the RFP Tariffs would be available to similarly situated customers. As SWBT has

[19] Time Warner, p.14.

previously noted, other customers may apply to SWBT for new rates under the RFP section, in addition to those instances where a customer may be able to take advantage of the rates already filed. Any new rates would be subject to further Commission review, satisfying another of MCI's contentions that SWBT's competitive evidence here, allegedly limited to special access, would not qualify it to offer RFP rates for switched access services. In a filing for new RFP rates, the Commission could engage in further inquiry about the competition shown for those services for which the new rates are filed.

VIII. CONCLUSION

For the foregoing reasons, SWBT respectfully requests that the Commission reverse its RFP Tariff Rejection Order, and allow SWBT's Transmittal No. 2633 to take effect immediately.

Respectfully Submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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January 22, 1998

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CERTIFICATE OF SERVICE

I, Mary Ann Morris, hereby certify that the foregoing, "COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY" in CC Docket No. 97-158 has been filed this 22nd day of January, 1998 to the Parties of Record.

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