

DISPATCH
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
)
)
)

MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION

Adopted: March 13, 1998; Released: March 13, 1998

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a Petition for Reconsideration (petition) filed by Southwestern Bell Telephone Company (SWBT) of our decision in the *SWBT RFP Tariff Rejection Order*¹ rejecting as unreasonably discriminatory SWBT Transmittal No. 2633, in which SWBT sought approval to respond to interstate access service customer requests for proposal (RFPs) with individualized contract offerings.²

II. BACKGROUND

2. In its Transmittal No. 2633, SWBT sought to offer access services to individual customers in response to RFPs submitted by those customers at rates below SWBT's other

¹ *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2633, Order Concluding Investigation and Denying Application for Review, CC Docket No. 97-158 (rel. Nov. 14, 1997) (SWBT RFP Tariff Rejection Order)*. We found Transmittal No. 2633 to be unreasonably discriminatory in violation of section 202 of the Communications Act (the Act), 47 U.S.C. section 202(a).

² SWBT filed its Petition for Reconsideration (petition) on December 15, 1997. Petition for Reconsideration of Southwestern Bell Telephone Company, (filed Dec. 15, 1997). SWBT and seven other parties filed comments. Two parties filed in support of SWBT's petition: U S WEST, Inc. (U S WEST), and United States Telephone Association (USTA). Five parties filed in opposition: AT&T Corp., GST Telecom, Inc. and KMC Telecom, Inc., who filed jointly, MCI Telecommunications Corp. and Time Warner Communications Holdings Inc. On January 22, 1998, SWBT and U S WEST filed Reply Comments.

customers from obtaining the same rates as the customers that submitted the original RFPs.¹⁰ We also found that charging different rates to individual customers violated our requirement that incumbent LECs charge averaged rates throughout a study area.¹¹

5. In the *SWBT RFP Tariff Rejection Order*, we also considered SWBT's argument that the discriminatory features of Transmittal No. 2633 were justified by the competitive necessity doctrine. We reviewed prior Commission decisions in which we had considered application of the competitive necessity doctrine to justify a tariff that was otherwise unlawful under section 202(a),¹² and found that we had never approved a customer-specific tariff, *i.e.*, a tariff that is not generally available to similarly situated customers, under the competitive necessity doctrine.¹³ We held that our precedent did not compel us to apply the competitive necessity doctrine to SWBT's transmittal under circumstances such as those of Transmittal No. 2633, where the rates would not be generally available to similarly situated customers.¹⁴ In addition, we found, based on the record, significant potential that SWBT, by offering customer-specific discounts under Transmittal 2633, may be able unreasonably to foreclose or deter entry into its markets.¹⁵ We concluded that, at least until we revisit these issues in the broader context of the rulemaking proceeding, we would not apply the competitive necessity doctrine to dominant local exchange carriers who are proposing customer-specific tariffs because such an application would thwart the public interest of promoting competition in the local exchange and exchange access markets.¹⁶ We therefore rejected the transmittal as unreasonably discriminatory under section 202(a) and as violating our rules requiring averaged rates within a study area.¹⁷

III. DISCUSSION

6. SWBT makes three arguments in support of its petition: first, that applicable precedent supports and does not bar application of the competitive necessity defense to

¹⁰ *SWBT RFP Tariff Rejection Order* at para. 44.

¹¹ *SWBT RFP Tariff Rejection Order* at para. 18.

¹² *SWBT RFP Tariff Rejection Order* at paras. 32-40.

¹³ *SWBT RFP Tariff Rejection Order* at para. 15.

¹⁴ *SWBT RFP Tariff Rejection Order* at para. 40.

¹⁵ *SWBT RFP Tariff Rejection Order* at para. 49.

¹⁶ *See SWBT RFP Tariff Rejection Order* at para. 54.

¹⁷ *SWBT RFP Tariff Rejection Order* at para. 54.

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SWBT's transmittal;¹⁸ second, that the weight of economic evidence in the record suggests that market foreclosure will not occur;¹⁹ and third, that by preventing SWBT from responding to RFPs, the Commission is seeking to protect SWBT's competitors, and that this is confiscatory and denies SWBT equal protection of the law.²⁰ Because SWBT's petition raises neither significant new facts nor new arguments, we deny its petition for reconsideration of the *SWBT RFP Tariff Rejection Order*.

A. Commission Precedent

7. In the *SWBT RFP Tariff Rejection Order*, we reviewed prior decisions in which we had considered the competitive necessity doctrine and found that none of those decisions relied on the competitive necessity doctrine to justify a customer-specific tariff that was otherwise unlawfully discriminatory and in violation of our rules.²¹ Although these cases do not bar application of the competitive necessity doctrine to SWBT's Transmittal No. 2633, we declined to apply competitive necessity in this instance because the proposed tariff potentially enabled SWBT to prevent competitive entry.²² On reconsideration, SWBT has failed to raise any significant issues concerning our review of Commission precedent that we did not fully consider in our prior decision. Accordingly, we find SWBT's arguments concerning our discussion of prior Commission precedent do not warrant reconsideration.

8. We reject SWBT's assertion that our treatment of AT&T's Tariff 15 compels that we find Transmittal No. 2633 lawful.²³ As the *SWBT RFP Tariff Rejection Order* states, Tariff 15 took effect by operation of law when the Commission failed to conclude its investigation within the statutory time limit.²⁴ We never found those tariffs lawful based on competitive necessity or any other ground. In addition, Transmittal No. 2633's geographic restrictions make it distinguishable from Tariff 15 offerings generally. We have consistently rejected tariffs that contain geographic limitations on availability of service,²⁵ including

¹⁸ Petition at 2-5.

¹⁹ Petition at 5-6.

²⁰ Petition at 6-7.

²¹ See *SWBT RFP Tariff Rejection Order* at para. 40.

²² *SWBT RFP Tariff Rejection Order* at paras. 49-54.

²³ See Petition at 4-5.

²⁴ *SWBT RFP Tariff Rejection Order* at para. 38 n. 105.

²⁵ See, e.g., *AT&T Communications Revisions to Tariff F.C.C. No. 12*, CC Docket No. 87-568, 4 F.C.C. Rcd 4932, 4938, rev'd on other grounds, *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990).

specific Tariff 15 offerings with such restrictions.²⁶ For this reason, Transmittal No. 2633's geographic limitations on availability would nonetheless render it unlawful, even if we had found Tariff 15 to be a lawful, single-customer offering justified by the competitive necessity doctrine.

9. SWBT argues that we must allow it to establish customer-specific tariffs in Transmittal No. 2633 because, it asserts, the May 8, 1997 *Universal Service Order*²⁷ permits carriers to respond with below tariff rates to customer RFPs from schools, libraries, and rural health care providers.²⁸ We reject this argument. The *Universal Service Order* does not permit customer-specific rates similar to those in Transmittal No. 2633. Rather, the Commission invoked its explicit authority under section 201(b) of the Communications Act to identify a special class of communications for which different charges may be made.²⁹ Thus, the Commission stated that "we hereby designate communications to organizations, such as schools and libraries and eligible health care providers, eligible for preferential rates under section 254 as a class of communications eligible for different rates, notwithstanding the nondiscrimination provisions of section 202(a)."³⁰ Such preferential rates are not to be offered on a customer-specific basis, but rather "will be generally available to all members of these classes under tariffs filed with this Commission."³¹ Therefore, the *Universal Service Order* provides no support for SWBT's argument.

B. The Economic Evidence in the Record

²⁶ See, e.g., *In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan 22, Transmittal No. 3921*, 7 F.C.C. Rcd 4636 (Com. Car. Bur. 1992).

²⁷ *In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, 12 F.C.C. Rcd 8776 (1997) (*Universal Service Order*).

²⁸ Petition at 5 n. 6.

²⁹ See 47 U.S.C. section 201(b):

. . . communications by wire . . . subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications . . .

47 U.S.C. section 201(b).

³⁰ *Universal Service Order*, 12 F.C.C. Rcd 9031.

³¹ *Universal Service Order*, 12 F.C.C. Rcd 9031.

10. SWBT also contends that we should grant reconsideration because, contrary to our finding that Transmittal No. 2633 could permit it to foreclose market entry, the weight of economic evidence in the record suggests that market foreclosure will not occur.³² In support of its view, SWBT points to the following: (1) a 1989 law review article by Alexander C. Larson, *et al.*,³³ discussing the application of the competitive necessity doctrine in the interexchange market, appended to SWBT's Direct Case; (2) the Affidavit of Robert G. Harris (Harris Affidavit) advocating use of contract tariffs generally, submitted as part of U S WEST's initial comments; and (3) the Affidavit of Douglas R. Mudd (Mudd Affidavit) arguing that SWBT cannot deter market entry, which SWBT submits with its petition.

11. We are not persuaded that the weight of the evidence in the record at the time of our decision, or as supplemented by SWBT on reconsideration,³⁴ shows that we should grant reconsideration. The Larson law review article is unpersuasive as grounds for application of the competitive necessity doctrine here because it analyzes the interexchange market, and relies on that market's low entry barriers to police anti-competitive behavior by firms.³⁵ As we recognized in the *SWBT RFP Tariff Rejection Order*, the access services market is characterized by high entry barriers,³⁶ and entrants seeking to compete with SWBT through unbundled network elements must obtain key inputs from SWBT.³⁷ Thus, the Larson article does not persuade us to grant reconsideration.

12. The Harris Affidavit is also unpersuasive. Although Dr. Harris contends that contract tariffs serve the public interest, he also urges that requiring that contract tariffs be available to similarly situated customers will prevent unreasonable discrimination and anti-

³² Petition at 5.

³³ SWBT Direct Case at Appendix 1 (Alexander C. Larson, Calvin S. Monson, Patricia J. Nobles, "Competitive Necessity and Pricing in Telecommunications Regulation," 42 Fed. Comm. L. J. 1 (1989) (the Larson article)).

³⁴ As supplemented, this evidence includes maps of competitors' networks in Dallas and Houston submitted by SWBT during an *ex parte* meeting.

³⁵ Alexander C. Larson, 42 Fed. Comm. L. J. at 11-12. The authors state: "The success of [strategic pricing] revolves around the difficulty of entering this market. If entry is relatively easy (which is true of the long distance market), predation will not succeed because rivals would enter as soon as prices were raised to recoup the losses from eliminating the previous rivals." *Id.*

³⁶ *SWBT RFP Tariff Rejection Order* at para. 49.

³⁷ *SWBT RFP Tariff Rejection Order* at para. 51.

competitive behavior.³⁸ As we explained, however, Transmittal No. 2633's narrow definition of the term "similarly situated" effectively prevents potential customers from obtaining service under the same rates and terms as the original customer submitting the RFP. Thus, regardless of the merits of contract tariffs generally, the Harris affidavit does not support allowing SWBT's customer-specific tariff to take effect.

13. Mr. Mudd asserts that we should grant reconsideration because our determination that Transmittal No. 2633 could thwart market entry was incorrect. Mr. Mudd argues that, even if SWBT attempted to forestall entry by reducing prices below profit maximizing levels, competitive entry would nonetheless occur, as efficient competitors recognized that SWBT would not maintain prices below contribution maximizing levels in the long run.³⁹ Attempting to deter market entry by competitors in this way is known as "limit pricing." As we noted in the *SWBT RFP Tariff Rejection Order*, however, SWBT's ability to lower prices on a customer-specific basis anywhere in its territory could make this strategy much less costly for SWBT, and would weigh heavily in a new entrant's decision to establish a facilities-based presence in any SWBT geographic market.⁴⁰ Accordingly, the Mudd Affidavit does not persuade us that we should reconsider our decision and permit Transmittal No. 2633 to take effect.

C. Other Arguments

14. We reject SWBT's additional argument that any defects that may be present generally in Transmittal No. 2633 are cured because we will be able to review every individual RFP offering that SWBT files under Transmittal No. 2633.⁴¹ As explained above, Transmittal No. 2633 is unlawful because it discriminates against customers unable to receive discounts and because it violates our rules requiring averaging within study areas. Commission review of individual RFP offerings on a case-by-case basis would not address these concerns.

15. We also reject US WEST's argument that we should grant reconsideration because incumbent LECs lack market power in the access services market.⁴² The record in

³⁸ See Harris Affidavit at 32 (observing "[t]he law clearly stated that contracts had to be nondiscriminatory and available to all similarly situated customers" before an AT&T contract tariff could be found lawful).

³⁹ Mudd Affidavit at 6.

⁴⁰ *SWBT RFP Tariff Rejection Order* at para. 50.

⁴¹ SWBT Reply at 9.

⁴² U S West comments at 4-6.

this proceeding is insufficient to warrant a determination that incumbent LECs lack market power in provision of access services.

16. We further reject generalized contentions by SWBT and USTA that we rejected Transmittal No. 2633 to protect SWBT's competitors until they can improve their market position and provide more effective competition to SWBT.⁴³ As explained in our earlier decision, we rejected Transmittal No. 2633 as unlawful under Section 202(a) of the Act for the very specific reasons set forth in that order.

17. We further reject SWBT's contention that preventing it from offering RFP tariffs is confiscatory. SWBT has submitted no evidence showing that its rates, absent the reduced rates that would be permitted under Transmittal No. 2633, affect SWBT's financial integrity and prevent it from raising capital, or fail to compensate SWBT with returns on investment commensurate with other enterprises having corresponding risks.⁴⁴ For the reasons already set forth in the Order, we again reject SWBT's contention that our action deprives it of equal protection of the laws.⁴⁵

IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that the Petition for Reconsideration of Southwestern Bell Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁴³ SWBT reply at 1-5; USTA comments at 5.

⁴⁴ See *Illinois Bell Telephone Company v. FCC*, 988 F.2d 1254, 1260 (D.C. Cir. 1993) (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)).

⁴⁵ *SWBT RFP Tariff Rejection Order* at para. 52.

**CONCURRING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Southwestern Bell Telephone Company, Tariff F.C.C. No. 73.

I concur in the majority's decision to deny Southwestern Bell Telephone Company's Petition for Reconsideration of our earlier decision to reject the pricing flexibility sought by its tariff offering. I continue to believe that Southwestern Bell has failed to justify such an individual departure. I write separately, however, to continue to urge the Commission to consider the issue of pricing flexibility for dominant exchange carriers in the context of the Commission's pending Access Charge Reform proceeding. As I stated in the Commission's original denial, the issues raised by Southwestern Bell's tariff are only part of the larger issues relating to pricing flexibility of dominant LECs in general. I have serious reservations about the majority's initial conclusion that the public interest could be thwarted by allowing customer-specific tariffs. The accompanying economic theories relating to "limit pricing" and the incentives a LEC may have to lower prices to deter entry turn logic on its head; consumers benefit, and the public interest is served, when prices are lowered. Thus, I continue to await anxiously the opportunity to address more fully these issues and the circumstances under which dominant LECs should be accorded additional pricing flexibility.