

Attachment 7

Ionex's Motion to Stay

BEFORE THE STATE CORPORATION COMMISSION STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

OCT 24 2000

**IN THE MATTER OF SOUTHWESTERN BELL)
TELEPHONE COMPANY – KANSAS')
COMPLIANCE WITH SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS ACT)
OF 1996)**

Jeffrey S. Maseman Doc
No. 97-SWBT-411-GIT --
Rb

**IONEX COMMUNICATIONS, INC'S MOTION TO STAY FURTHER
PROCEEDINGS WITH RESPECT TO
SWBT'S SECTION 271 APPLICATION**

COMES NOW, Ionex Communications, Inc. ("Ionex") and hereby moves the Commission for an order staying further proceedings with respect to Southwestern Bell Telephone Company's ("SWBT") Section 271 Application. In support of this Motion to Stay, Ionex states as follows:

1. On October 23, 2000, Ionex filed a Complaint with this Commission to enforce the Commission's orders issued *In the Matter of Joint Application of Sprint United Telephone Company, United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas and United Telephone Company of Southeastern Kansas for the Commission to Open A Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination and Resale*, Docket No. 97-SCCC-149-GIT (hereinafter the "Generic UNE Docket"). A copy of the Complaint is attached as Exhibit A. In the Complaint, Ionex alleges that SWBT has illegally failed and refused to apply the Commission's permanent UNE rates to Ionex's interconnection agreement with SWBT.

2. SWBT's failure to comply with the Commission's orders from the Generic UNE Docket goes to the core of the Commission's recommendation in this docket. One of the essential aspects of a Section 271 Application is the Commission's determination that SWBT's UNE rates

are cost based and nondiscriminatory, as required by 47 U.S.C. §§ 251(c)(2) and 252(d)(1). In the absence of cost-based, nondiscriminatory rates, this Commission may not recommend approval of SWBT's Section 271 Application. See 47 U.S.C. § 271(c)(2)(B)(i). Indeed, in making its recommendation on the Section 271 Application, Staff repeatedly relied on its belief that SWBT was in fact making the Commission determine UNE rates available to all CLECs. *See Staff's Recommendation*, Executive Summary at page 2, and Section 1, page 11. ("SWBT provides UNEs at TELRIC based UNE-rates as established by this Commission in Docket No. 97-SCCC-149-GIT") As reflected in the attached Complaint, ***this is not true.*** SWBT has refused to apply the February and September, 1999 orders setting permanent cost-based UNE rates to existing interconnection agreements, even though the existing agreements specifically incorporate the Commission determined cost-based rates from the Generic UNE Docket. SWBT's conduct completely undermines any Staff recommendation and should prevent the Commission from issuing a written recommendation in favor of SWBT's Application.

3. Due to the egregious nature of SWBT's refusal to abide by the Commission's orders and the devastating impact on competition, Ionex seeks a motion to stay this proceeding until SWBT can prove to this Commission that the basis of Staff's recommendation -- that SWBT is offering cost-based UNE rates in compliance with the Commission's orders to all CLECs -- is in fact valid. Accordingly, further proceedings with respect to SWBT's Section 271 Application should be stayed.

WHEREFORE, for the above and foregoing reasons, Ionex Communications, Inc. respectfully requests an order from the Commission staying further proceedings with respect to Southwestern Bell Telephone Company's Section 271 Application.

Respectfully submitted,



Mark P. Johnson

Lisa C. Creighton

KS #14847

Sonnenschein Nath & Rosenthal

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Kansas City, Missouri 64111

Telephone: (816) 460-2400

Facsimile: (816) 531-7545

ATTORNEYS FOR IONEX COMMUNICATIONS, INC.

VERIFICATION

STATE OF MISSOURI)
) s s :
COUNTY OF JACKSON)

COMES NOW Lisa C. Creighton, being of lawful age and duly sworn, who swears and affirms as follows:

1. My name is Lisa C. Creighton, and I am an attorney for Ionex Communications Company. In that capacity, I am authorized to verify this Motion to Stay Further Proceedings with Respect to SWBT's Section 271 Application and the information contained therein.

2. The information contained in the Motion to Stay Further Proceedings with Respect to SWBT's Section 271 Application is true and accurate to the best of my knowledge and belief.



Lisa C. Creighton

Subscribed and sworn to before me this 24th day of October 2000.



Notary Public

My Commission Expires:

| |
|---|
| <p>CARMEN M. WESSON Notary Public - Notary Seal STATE OF MISSOURI Clay County My Commission Expires: March 23, 2004</p> |
|---|

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, this 24th day of October, 2000, to:

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Michael Jewell
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Vice President of Regulatory Policy
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ATTORNEY FOR IONEX COMMUNICATIONS, INC.

EXHIBIT A

Ionex's Complaint was attached to this Motion to Stay as Exhibit A.
The entire Complaint is attached to this Report as Attachment 10.

Attachment 8

SWBT's Response to Ionex's Motion to Stay

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of Southwestern Bell)
Telephone Company – Kansas' Compliance)
with Section 271 of the Federal)
Telecommunications Act of 1996)

STATE CORPORATION COMMISSION

) Docket No. 97-SWBT-41 I-GIT

) **NOV 03 2000**

Abby L. Wagoner Docket
Room

**RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY TO
IONEX COMMUNICATIONS, INC.'S MOTION TO STAY FURTHER PROCEEDINGS**

Southwestern Bell Telephone Company ("SWBT") hereby files its response to Ionex Communications, Inc.'s ("Ionex's") Motion to Stay Further Proceedings.

INTRODUCTION

1. Ionex's Motion should be denied. The Kansas Corporation Commission ("Commission" or "KCC") has completed this proceeding and there is no further action to be stayed. SWBT received the official copy of the Complaint from the Commission on November 1st, and pursuant to the rules of procedure, has ten days thereafter to file SWBT's written answer. See Attachment A to this response, which is the letter from the Commission, date-stamped as received by the President's office on November 1, 2000. Although SWBT is not required to include its answer to the complaint in this response, SWBT does state herein that the allegations in the complaint are without merit. SWBT is in full compliance with all of the KCC's orders in Docket No. 97-SCCC-149-GIT. Ionex's complaint is nothing more than a billing and contract interpretation dispute, and in no way relates to SWBT's Section 271 application presently pending' before the Federal Communications Commission ("FCC").

2. Ionex's complaint must be handled pursuant to the KCC's rules of procedure, specifically Kansas Administrative Regulations, 82-I-220, and is not a part of this Docket. As the Commission noted at the Administrative Meetings in this Docket, if the Commission were to reserve its opinion on the larger issues of SWBT's compliance with the fourteen point checklist until each and every CLEC-specific complaint were resolved, this matter would never be closed. As a point of fact, it is closed, the Commission has stated its support for SWBT's application, has approved the K2A, and has no further action to take in this Docket. The KCC should move forward on its consultative report to the FCC on the, Commission's conclusions regarding SWBT's compliance with the fourteen point checklist, and handle the Ionex complaint pursuant to the Kansas Administrative Regulations.'

3. SWBT has a right to procedural due process, to respond in writing to the complaint under the timeframes of the rules, to discovery and to a hearing on the issues raised. The complaint is on one track, the KCC's report to the FCC on SWBT's compliance with the checklist is on another one. Ionex should not be allowed to use the

¹ The FCC's Public Notice issued concurrent with SWBT's filing of its Application for in-region interLATA relief in the States of Kansas and Oklahoma, on October 26, 2000, states:

State Commission and Department of Justice Written Consultations. The Kansas and Oklahoma Corporation Commissions must file any written consultation on or before November 20, 2000. *(footnote omitted)* . . . Because the Kansas and Oklahoma Commissions and the Department of Justice are given roles by statute in a section 271 proceeding, copies of all pleadings, including comments, should be filed with those parties.

pending report to the FCC as a cudgel to beat SWBT into giving up its procedural rights in the complaint process or into foregoing its right to develop the facts in dispute.

**SWBT HAS NOT FAILED TO COMPLY WITH THE
COMMISSION'S ORDERS IN THE COST DOCKET**

4. Ionex's statements in its Motion are untrue. SWBT has fully complied with the Commission's orders in the UNE cost docket, Docket No. 97-SCCC-149-GIT. SWBT has filed the UNE Master List, as ordered by the Commission, and made those rates that are effective available to CLECs. However, as stated in Section 252(a)(l):

"Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 ."

Ionex appears to be making a claim pursuant to the ACG agreement, which was assigned to Feist Long Distance. (SWBT is still trying to sort out the relationships of these companies, and may need to engage in discovery on this issue.) In any event, ACG voluntarily opted into the Sprint-Kansas agreement in December of 1998. Thereafter, including in August of 1999, ACG voluntarily filed amendments to its Agreement, including an amendment to its Schedule of Pricing - UNE. This action took place 6 **months after the Commission's non-final February Order**. If Feist/ACG/Ionex believed that it was entitled to rates from the February, 1999 Order of the KCC, it had every opportunity to request those rates, negotiate on that basis, and arbitrate if it was not able to reach resolution with SWBT. (SWBT notes that ACG states affirmatively in its complaint that it participated in the UNE Cost Docket prior to the issuance of the February, 1999 order.) It was not then, and it is not now, SWBT's

responsibility to do the legal, regulatory and negotiating work for another business entity.

5. SWBT also notes that the rates in the February 1999 order were not permanent, as stated in Ionex's Motion. Further, the order setting permanent recurring rates did not issue until September 1999, and there has still not been an order from the Commission setting permanent nonrecurring rates. Also, as the Commission stated in its Order On Petition For Stay And/Or Motion For Extension Of Time in Docket No. 97-SCCC-149-GIT, dated October 15, 1999, the nonrecurring prices in the February Order were applicable only "[t]o the extent that interconnection agreements do not establish prices for nonrecurring costs" The ACG Interconnection Agreement, voluntarily entered into by the CLEC, had nonrecurring rates contained therein. ACG voluntarily opted into the Sprint Agreement, took the rates contained in that Agreement, participated in the UNE Cost Docket, was obviously capable of requesting and negotiating changes to rates when it so chose, but never requested the rates in the February Order or in the September Order. It is SWBT's position that the contractual language in these various interconnection agreements did not require any other action on its part, and SWBT will lay out those facts in its answer to the complaint.

6. In any event, none of this has any impact on the Section 271 proceeding. There is no "absence of cost-based, nondiscriminatory rates" in the State of Kansas. This Commission has set rates for unbundled network elements following the FCC's guidelines, and those rates are available in the Kansas 271 Agreement, as well as in other approved, voluntarily negotiated interconnection agreements. There is no "devastating impact on competition", nor has SWBT refused to abide by Commission

orders. There is nothing more here than lonex's refusal to accept the obligations of its voluntarily negotiated agreements, and a blatant attempt to blackmail SWBT by threatening the 271 application. The Commission should deny the Motion to Stay and allow the parties to fully develop the facts of this dispute through the complaint process.

WHEREFORE, SWBT respectfully requests that the Commission deny lonex's Motion to Stay Further Proceedings With Respect To SWBT's Section 271 Application.



APRIL J. RODEWALD (KS #99007) ✓

BRUCE A. NEY (KS #15554)

MICHELLE B. O'NEAL (KS #18701)

220 E. Sixth Street, Room 515

Topeka, Kansas 66603-3596

(785-276-8411)

Attorneys for
Southwestern Bell Telephone Company

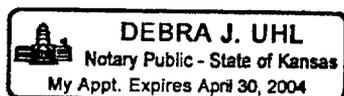
VERIFICATION

I, Charles H. Cleek, of lawful age, and being first duly sworn, now state: I am Executive Director-Regulatory Matters, and have read the above Response on behalf of Southwestern Bell Telephone Company and verify the statements contained herein to be true and correct to the best of my knowledge and belief.

Charles H. Cleek

Charles H. Cleek

Subscribed and sworn to before me this 3rd day of November, 2000.



Debra J. Uhl
Notary Public

My Appointment Expires: April 30, 2004

ATTACHMENT A



Kansas Corporation Commission

REPLY DUE

| | PLEASE HANDLE | PLEASE DISCUSS | FYI |
|-----------------|---------------|----------------|-----|
| MR. MCKENZIE | | | |
| MR. CLEEK | | | |
| MR. GARTNER | | | |
| MS. RODEWALD | | | |
| <i>McKenzie</i> | | | |
| MS. YOUNG | | | |

Bill Graves, Governor *John Wine, Chair Cynthia L. Claus, Commissioner Brian]. Moline, Commissioner*

Utilities Division
October 30, 2000

CERTIFIED MAIL

Return Receipt Requested

Shawn M. McKenzie
Southwestern Bell Telephone Company
220 East sixth Street
Topeka, KS 66603

RE: Docket No. 01-SWBT-344-COM

Dear Mr. McKenzie:

Enclosed herewith, please find one (1) copy of a formal complaint which is served upon you as the President of Southwestern Bell Telephone Company.

Any questions and correspondence concerning this docket should be addressed to the following Commission staff:

Christine Aarnes
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604
(785) 271-3165

Eva Powers
Asst. General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604
(785) 271-3288

Please file your answer with the Commission within ten (10) days after receipt hereof and serve a copy of said answer on the Complainant.

Sincerely,

Jeffrey S. Wagonmaster
JEFFREY S. WAGONMASTER
Executive Director

JW:dktrm

cc : Lisa C. Creighton
Attorney for Ionex Communications, Inc.
Christine Aarnes, KCC
Eva Powers, KCC

RECEIVED
NOV 01 2000
President-Kansas

RECEIVED
NOV 01 2000
LEGAL DEPT.
TOPEKA, KANSAS

CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the above Response was sent on this 3rd day of November, 2000 as follows:

Via hand-delivery to:

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Assistant General Counsel
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Topeka, KS 66604-4027

Walker Hendrix
CURB
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Topeka, KS 66604-4027

Via electronic mail to:

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E-mail address: mbourian@lga.att.com

Via U.S. Mail to:

Mark P. Johnson
Sonnenschein Nath & Rosenthal
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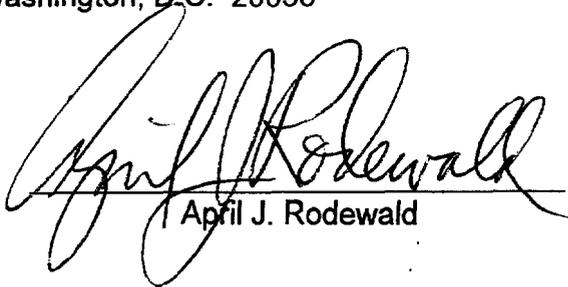
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April J. Rodewald

Attachment 9

Ionex's Reply to SWBT's Response to Motion to Stay

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

NOV 09 2000

**IN THE MATTER OF SOUTHWESTERN)
BELL TELEPHONE COMPANY – KANSAS’)
COMPLIANCE WITH SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS ACT)
OF 1996)**

Jeffrey S. Wassman Docket Room
Docket No. 97-SWBT-411-GIT

**IONEX COMMUNICATIONS, INC.’S REPLY TO SOUTHWESTERN BELL
TELEPHONE COMPANY’S RESPONSE TO MOTION TO STAY FURTHER
PROCEEDINGS WITH RESPECT TO
SWBT’S SECTION 271 APPLICATION**

COMES NOW, Ionex Communications, Inc. (“Ionex”) and hereby replies to Southwestern Bell Telephone Company’s (“SWBT”) response to Ionex’ motion to stay as follows:

1. In its response, SWBT now admits that it has failed to offer the Commission’s cost-based rates determined in *In the Matter of Joint Application of Sprint United Telephone Company, United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas and United Telephone Company of Southeastern Kansas for the Commission to Open A Generic Proceeding on Southwestern Bell Telephone Company’s Rates for Interconnection, Unbundled Elements, Transport and Termination and Resale*, Docket No. 97-SCCC-149-GIT (hereinafter the “Generic UNE Docket”). This admission negates the very premise upon which this Commission and its staff relied to find that SWBT complied with 47 U.S.C. § 271(c)(2)(B)(i). In absence of compliance with this section, this Commission cannot support SWBT’s application.

2. On October 23, 2000, Ionex filed a Complaint with this Commission to enforce the Commission’s Orders issued in the Generic UNE Docket, setting cost-based rates for CLECs interconnecting in Kansas. On October 24, 2000, Ionex filed its motion to say this proceeding,

arguing that SWBT's refusal to abide by the Commission Orders suggested that Ionex was not the only CLEC who was not receiving cost-based, non-discriminatory rates. SWBT has now confirmed Ionex' suggestion. By SWBT's own admission, it is now clear that numerous CLECs have not received the Commission-ordered rates in their interconnection agreements. The implications of this admission for SWBT's application are potentially staggering, as are the implications for competition and consumer benefits.

3. In no uncertain terms, this Commission has ordered SWBT to make the Generic UNE rates available to all CLECs. Furthermore, this Commission and its staff have made it very clear that any approval of SWBT's application in this docket is premised on SWBT making the Generic UNE rates available to all CLECs. (See Order Regarding Non-Recurring Charges for Unbundled Network Elements, at Para. 4, Docket. No. 97-SCCC-149-GIT) (any KCC approval is premised on the expectation that permanent UNE rates set in the Generic UNE docket are available to all CLECs). SWBT now admits that it has not voluntarily offered the Commission-determined rates, certainly to Ionex and probably to many other CLECs. SWBT has refused to apply those rates to existing interconnection agreements, even those agreements, such as Ionex's, which explicitly reference the Generic UNE docket. Further, based on SWBT's admission, the Generic UNE rates are not to be voluntarily made available to CLECs negotiating amendments or new agreements. It is SWBT's position that despite the Commission's repeated orders to make the Generic UNE rates available, SWBT was free to offer any rates (even those three times higher) since it is not "SWBT's responsibility to do the legal, regulatory and negotiating work" for another entity. (See SWBT's Reply at pp.3-4). What SWBT fails to appreciate is that it was and remains legally obligated by this Commission to make the Generic UNE ordered rates available to all CLECs. It is this legal obligation that the Commission assumed was being met when it stated that it would support SWBT's

application. Clearly, such a blatant violation of the words and intent of the Generic UNE orders merits action by this Commission to withdraw its support of the application for 271 authority. At a minimum, this Commission must take the time necessary to determine the extent to which SWBT is not making its network available pursuant to cost based, non-discriminatory prices.

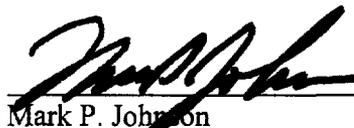
4. SWBT also argues that it is too late for this Commission to entertain Ionex' Motion to Stay. This is not the case. This Commission will have to make written Comments to the Federal Communications Commission ("FCC"). If SWBT has been caught in an attempt to mislead this Commission, this Commission is free to not issue any Comments or to withdraw its support of SWBT's 271 application.

5. This issue is not a private dispute between Ionex and SWBT -- it goes to the core of SWBT's 271 application and of SWBT's truthfulness in pursuing the application before this Commission. Competition cannot take hold in Kansas if SWBT is allowed to ignore Commission determined rates and trap CLECs into paying rates 300% higher than the Commission determined cost-based rates. In just three short months, the difference between the Commission-ordered rates and the rates in Ionex' agreement that were to be replaced by the Commission ordered rates has meant millions of dollars to Ionex. There are not many CLECs that can afford to continue to overpay SWBT by such amounts, including Ionex. As a start up company attempting to get the improved margins resulting from cost-based rates, this situation is devastating to Ionex.

6. Due to the egregious nature of SWBT's refusal to abide by the Commission's orders and the devastating impact on competition, Ionex seeks a motion to stay this proceeding, including any written Comments by this Commission, until the Commission determines the extent to which SWBT has violated the Commission's Orders in the Generic UNE docket.

WHEREFORE, for the above and foregoing reasons, Ionex Communications, Inc. respectfully renews its requests for an order from the Commission staying further proceedings with respect to Southwestern Bell Telephone Company's Section 27 1 Application, including the filing of any comments by the KCC at the FCC.

Respectfully submitted,



Mark P. Johnson

Lisa C. Creighton KS #14847

Sonnenschein Nath & Rosenthal

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Telephone: (816) 460-2400

Facsimile: (816) 531-7545

ATTORNEYS FOR IONEX COMMUNICATIONS, INC.

VERIFICATION

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

COMES NOW Mark P. Johnson, being of lawful age and duly sworn, who swears and affirms as follows:

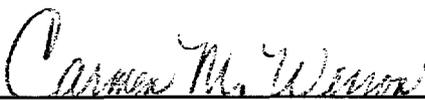
1. My name is Mark P. Johnson, and I am an attorney for Ionex Communications Company. In that capacity, I am authorized to verify this Reply to Southwestern Bell Telephone Company's Response to Motion to Stay Further Proceedings with Respect to SWBT's Section 271 Application and the information contained therein.

2. The information contained in the Reply to Southwestern Bell Telephone Company's Response to Motion to Stay Further Proceedings with Respect to SWBT's Section 271 Application is true and accurate to the best of my knowledge and belief.



Mark P. Johnson

Subscribed and sworn to before me this 9th day of November, 2000.



Notary Public

My Commission Expires:

CARMEN M. WESSON
Notary Public – Notary Seal
STATE OF MISSOURI
Clay County
My Commission Expires: March 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, this 9th day of November, 2000, to:

Mark Witcher
Michael Jewell
Michelle S. Bourianoff
AT&T Communications of the
Southwest, Inc.
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Bret Lawson
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