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September 10, 2001

RECEIVED

Magalie Roman Salas, Secretary
Federal Communications Commission
CY-B402
445 12th Street, S.W.
Washington D.C. 20554.

SEP 10 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

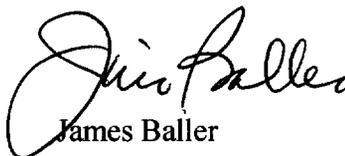
Re: *Application By Southwestern Bell Communications Inc. For Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the States of Arkansas and Missouri, CC Docket No. 01-194*

Dear Ms Salas:

Please accept for filing the enclosed original and one copy of the comments of City Utilities of Springfield, MO, in the above-styled matter. In addition, we are delivering twelve copies to Janice Myles, Common Carrier Bureau, 445 12th Street S.W., Room 5-B145, Washington, D.C., 20554 and one copy to Qualex International (Qualexint), Portals II, 445 12th Street S.W., Room CY-B402, Washington D.C., 20554.

Please return the additional date-stamped copy to the messenger.

Sincerely,


James Baller

Enclosures

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Application by SBC Communications Inc.,
Southwestern Bell Telephone Company, and
Southwestern Bell Communications Services,
Inc. d/b/a Southwestern Bell Long Distance for
Provision of In-Region, InterLATA Services in
Missouri

CC Docket No. 01-194

To: The Commission

**COMMENTS OF CITY UTILITIES OF SPRINGFIELD, MISSOURI
CONDITIONALLY OPPOSING SOUTHWESTERN BELL'S APPLICATION
FOR LEAVE TO PROVIDE IN-REGION, INTERLATA SERVICES IN MISSOURI**

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September 10, 2001

SUMMARY OF CITY UTILITIES' COMMENTS

In 1997, Southwestern Bell persuaded the Missouri legislature to adopt a statute, HB 620, that prohibits Missouri's municipalities and municipal electric utilities from providing or facilitating the provision of competitive telecommunications services in their communities. When the municipalities of Missouri petitioned the Federal Communications Commission to preempt that law, Southwestern Bell vigorously defended it, and it continues to do so in the appeal of the Commission's decision that is currently before the United States Court of Appeals for the Eighth Circuit. Southwestern Bell's advocacy and ongoing defense of the Missouri law is especially pernicious because, as shown below, Southwestern Bell has essentially conceded in its original and amended submissions that meaningful competition is virtually non-existent in Missouri outside St. Louis and Kansas City.

In its Missouri preemption decision, the Commission found that the Missouri barrier to municipal entry is unwise, unnecessary to meet any legitimate state interest, and contrary to the purposes and policies of the Telecommunications Act of 1996. Three commissioners filed separate statements to underscore these points. Nevertheless, the Commission found that it could not give weight to these public-interest considerations in construing the term "any entity" in Section 253(a) of the Act, because "the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition." In this proceeding, Section 271 of the Act not only imposes on the Commission the authority, but also the duty, to take into account the public-interest considerations that the Commission said it could not reach in the *Missouri Order*.

For the reasons discussed below, Southwestern Bell cannot demonstrate that its entry into the long distance market in Missouri would be in the public interest. So long as there is a state statute prohibiting or significantly impeding the ability of "any entity" to provide telecommunications services, including a municipality or a municipal utility, the Commission

should conclude that markets in the state are *per se* not competitive. Under such circumstances, the Commission may not permit a Bell Operating Company to provide in-region interlata services. Because such a statute exists in Missouri, the Commission should reject Southwestern Bell's application in its entirety.

Furthermore, even if Southwestern Bell could show that it has met the 14-point checklist, its past and ongoing support for the anti-competitive HB 620 cannot be reconciled with the separate and additional public-interest standard under Section 271(d)(3)(C) that Southwestern Bell must meet in order to be entitled to provide long distance service in Missouri. Thus, as an alternative remedy, City Utilities submits that the Commission should require Southwestern Bell to agree to satisfy the following additional conditions as a prerequisite to any Commission approval of its application:

1. Cease and desist from promoting or supporting, before any state or local governmental entity in Missouri, any measure that may explicitly or effectively prohibit any entity, including any public entity, from providing directly or indirectly any telecommunications service.
2. Furnish the governor, the leaders of both parties in each chamber of the Missouri legislature, the chairmen and ranking minority members of the legislative committees with jurisdiction over telecommunications matters, the chair of the public service commission, and the chief elected official of each city, county and town that Southwestern Bell serves in Missouri, a written statement that Southwestern Bell opposes adoption or extension of any legislative or regulatory measure, and supports repeal of any existing measure, that may explicitly or effectively prohibit any entity, including any public entity, from providing any telecommunications service directly or indirectly.

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

In the Matter of

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Southwestern Bell Telephone Company, and
Southwestern Bell Communications Services,
Inc. d/b/a Southwestern Bell Long Distance for
Provision of In-Region, InterLATA Services in
Missouri

CC Docket No. 01-88

To: The Commission

**COMMENTS OF CITY UTILITIES OF SPRINGFIELD, MISSOURI
CONDITIONALLY OPPOSING SOUTHWESTERN BELL'S APPLICATION
FOR LEAVE TO PROVIDE IN-REGION, INTERLATA SERVICES IN MISSOURI**

In 1997, Southwestern Bell persuaded the Missouri legislature to adopt a statute, HB 620, that prohibits Missouri's municipalities and municipal electric utilities from providing or facilitating the provision of competitive telecommunications services in their communities. When the municipalities of Missouri petitioned the Federal Communications Commission to preempt that law, Southwestern Bell vigorously defended it, and it continues to do so in the appeal of the Commission's decision that is currently before the United States Court of Appeals for the Eighth Circuit.

In its Missouri preemption decision, the Commission found that the Missouri barrier to municipal entry is unwise, unnecessary to meet any legitimate state interest, and contrary to the purposes and policies of the Telecommunications Act of 1996.¹ Three commissioners filed separate statements to underscore these points. Nevertheless, the Commission found that it could

¹ *In re Missouri Municipal League, et al.*, FCC 00-443, 2001 WL 28068, at ¶ 10-11 (rel. January 12, 2001) ("*Missouri Order*"); appeal pending, *Missouri Municipal League v. FCC*, No. 01-1379 (8th Cir., filed Jan. 13, 2001).

not give weight to these public-interest considerations in construing the term “any entity” in Section 253(a) of the Act, because “the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition.”²

In this proceeding, Section 271 of the Act not only imposes on the Commission the authority, but also the duty, to take into account the public-interest considerations that the Commission said it could not reach in the *Missouri Order*. City Utilities submits that these considerations, coupled with Southwestern Bell’s admission that competition is virtually non-existent in all but the major metropolitan areas in Missouri, requires the Commission either to reject Southwestern Bell’s application outright or to require Southwestern Bell to take the actions recommended below, as a condition to the Commission’s approval.

INTEREST OF CITY UTILITIES OF SPRINGFIELD, MISSOURI

City Utilities provides municipal electric, gas, water and transportation utilities in Springfield, Missouri. City Utilities was a party to the Missouri preemption proceeding before the Commission and is currently a party to the petition for review of the *Missouri Order* filed with the Eighth Circuit. As the record of the Missouri case demonstrates, City Utilities has constructed a sophisticated communications network primarily for its own core utility needs, and it now stands ready, able and eager to use that network to provide or facilitate the provision of advanced communications services in Springfield. City Utilities is owned by the people of Springfield, Missouri, who want to take maximum advantage of City Utilities’ assets and

² Relying upon *Gregory v. Ashcroft*, 501 U.S. 252 (1991), and *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), the Commission held that Congress had not made a sufficiently “plain statement” in Section 253(a) that it intended to protect public entities from state barriers to entry. *Missouri Order* ¶¶ 5, 14.

expertise to promote economic development, educational and occupational opportunity, and quality of life in Springfield.

THE “PUBLIC INTEREST” STANDARD OF SECTION 271

As Southwestern Bell acknowledges in its *Brief in Support of Joint Application By Southwestern Bell For Provision Of In-Region, InterLata Services in Arkansas and Missouri* at 144 (filed August 20, 2001) (“*Southwestern Revised Bell’s Brief*”), “[u]nder section 271, this Commission is required to determine whether InterLATA entry ‘is consistent with the public interest, convenience, and necessity.’ 47 U.S.C. § 271(d)(3)(C).” Specifically, that provision states, in relevant part, as follows:

SEC. 271. [47 U.S.C. 271] BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.

(d) ADMINISTRATIVE PROVISIONS.--

(3) DETERMINATION.--Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission *shall not approve* the authorization requested in an application submitted under paragraph (1) *unless* it finds that--

...

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission *shall* state the basis for its approval or denial of the application.

Id. (emphasis added).

In its decision approving Verizon’s entry into long distance services in Massachusetts, the Commission observed that

Separate from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity. . . .

We view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors

exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that this market is open to competition.

...

. . . [S]everal commenters suggest that the state of competition for residential services in Massachusetts indicates that this market is not yet truly open. Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that showing. *Factors beyond a BOC's control, such as individual competitive LEC entry strategies, might explain a low residential customer base.* We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here.

In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket 01-9, Memorandum Opinion and Order, ¶¶ 232, 233, 235 (rel. April 16, 2001) (emphasis added) (footnotes omitted).

As the Commission summarized the “public interest” standard above, it has several features that are relevant here: (1) the Commission is obligated to apply it even if a Bell Operating Company (BOC) otherwise establishes that it has met the fourteen-point competitive checklist in Section 271; (2) the Commission must “ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open,” including whether there are “unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [a particular] application;” (3) the Commission’s “overriding goal” must be to ensure that there is nothing present that “undermines our conclusion, based on our analysis of

checklist compliance, that this market is open to competition;” and (4) that while “low customer volumes in and of themselves do not undermine” the conclusion that the public interest requires approval of leave to provide long distance service, evidence of low customer volumes *in combination with evidence of actions within a BOC’s control to stifle competition*, do undermine the conclusion that approval of a BOC’s entry into long distance service is in the public interest.

THE COMMISSION’S MISSOURI ORDER

In the Missouri preemption proceeding, acting pursuant to Section 253 of the Telecommunications Act, the Commission examined the legality of Section 392.410(7) of the Missouri Statutes (HB 620). That provision states, in relevant part, that “[n]o political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service.” The Commission *unanimously* found that HB 620 is unwise and contrary to the purposes of the Telecommunications Act:

[M]unicipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. . . . Our case study is consistent with APPA’s statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.

Missouri Order, ¶ 10.

The Commission also found HB 620 to be unnecessary to achieve any legitimate state purpose:

We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

Missouri Order, ¶ 10.

Nevertheless, the Commission upheld the Missouri law, finding that “the legal authorities that we must look to in this case compel us to deny the Missouri Municipals’ petition.” *Missouri Order*, ¶ 10. Chairman William Kennard and Commissioner Gloria Tristani jointly filed a separate statement to emphasize that this result, “while legally required, is not the right result for consumers in Missouri.” “Unfortunately,” they continued, “the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit’s *City of Abilene* decision and the U.S. Supreme Court’s decision in *Gregory v. Ashcroft*.”

Similarly, Commissioner Susan Ness observed in her own separate statement that

I write separately to underscore that today’s decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.

In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions. [Citing *Abilene*].

Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

In the appeal of the *Missouri Order*, the Eighth Circuit will eventually determine whether *Gregory* and *Abilene* did indeed preclude the Commission from taking its public-interest findings into account in interpreting Section 253(a), or whether, as the petitioners argue, the Commission was affirmatively *required* to take these findings into account in interpreting the term “any entity.” However the Court may decide the *legal effect* of the Commission’s public-interest findings for the purposes of Section 253(a), the findings themselves are fully supported in the Missouri record and are highly relevant to the Commission’s duties in this proceeding under Section 271.

**UNCONDITIONAL APPROVAL OF SOUTHWESTERN BELL’S
ENTRY INTO IN REGION, INTERLATA SERVICES
IN MISSOURI WOULD BE CONTRARY TO THE PUBLIC INTEREST**

In its lengthy brief, Southwestern Bell deals only once with the status of competition in small communities or rural areas of Missouri. In its Executive Summary, Southwestern Bell concedes that competition in Missouri is concentrated in St. Louis and Kansas City, but it suggests that competition is also beginning to take hold elsewhere:

In Missouri, CLECs have captured at least 231,000 (and probably closer to 385,000) lines in the business market, and they serve at least 64,000 (and probably closer to 82,000) residential lines in Southwestern Bell territory in the State. Southwestern Bell has 112 approved interconnection and/or resale agreements with CLECs in Missouri, and more than 20 CLECs are currently providing facilities-based local voice service. *Although CLECs have concentrated their efforts on serving businesses in the St. Louis and Kansas City*

markets, they are winning customers in smaller towns as well. CLECs now serve between 10.2 and 15.3 percent of Missouri access lines.

Id. at v (emphasis added). Southwestern Bell offers no evidentiary support for its suggestion that competition is growing in Missouri's smaller towns. To the contrary, the sentence following the italicized statement is simply a *non sequitor* that lumps together access lines of all kinds throughout the State, and Southwestern Bell never returns to its suggestion that competition is thriving outside of St. Louis and Kansas City. Southwestern Bell does not even use the terms "small," "smaller," "towns" or "rural" elsewhere in its brief.

In fact, in the portion of its brief in which Southwestern Bell elaborates on the passage in the Executive Summary quoted above, Southwestern Bell conspicuously avoids any mention of competition in smaller communities or rural areas:

Local competition is thriving in Missouri. CLECs now serve between 10.2 and 15.3 percent of the access lines in the state. See Tebeau MO Aff. ¶ 5 & Table 2 (App. A – MO, Tab 24) ; see also Final Missouri PSC Order at 20 (finding "that CLECs serve approximately 12 percent of access lines in SWBT territory").^[16] Spurred on by SWBT's application for 271 relief, moreover, CLECs are substantially increasing their competitive activity. Between June 2000 and June 2001, for example, CLECs' E911 listings grew almost 111 percent, UNE loop/port combinations grew 146 percent while stand-alone loops grew 184 percent, and operational physical collocation arrangements were up more than 70 percent. See Tebeau MO Aff. ¶ 8 & Attach. D. These numbers make clear that CLECs are taking full advantage of the meaningful opportunity to compete that SWBT provides in Missouri.

[16] This finding was based on information that the CLECs themselves provided to the Missouri PSC Staff. See Staff's Response Comments to October Question and Answer Session, and to Interim Consultant Report at 7 & App. A ¶ 17, *Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Case No. TO-99-227 (Mo. Pub. Serv. Comm'n Oct. 26, 2000) (App. C – MO, Tab 67).

Southwestern Bell's Brief at 14. This statement completely ignores competition outside St. Louis and Kansas City, and so do the Tabeau Affidavit and the other sources that Southwestern Bell cites.³

Southwestern Bell's failure to present data to support its claim of growing competition outside of St. Louis and Kansas City is all the more telling when compared to its treatment of this issue in the brief accompanying its original submission. There, Southwestern Bell had said:

. . . [A]lthough most CLECs in Missouri, like elsewhere, concentrate on major metropolitan areas, local competition is arriving in Missouri's rural areas as well. CLECs are currently serving customers in Cedar Hill (population 234), Neosho (population 9,531), and Joplin (population 44,612).

Brief in Support of Application By Southwestern Bell For Provision Of In-Region, InterLata Services in Missouri at 8 (filed April 4, 2001). Southwestern Bell's deletion of its reference to Cedar Hill, Neosho and Joplin this time around indicates that Southwestern Bell has come to realize that, far from proving that "competition is arriving in Missouri's rural areas," its paltry evidence constitutes eloquent proof that exactly the *opposite* is true.⁴

³ Even as to the limited services that Southwestern Bell does discuss, the percentage increases are misleading, as they are based on very low initial levels of service.

⁴ Of course, given the recent difficulties that CLECs have experienced, competition in Missouri's rural areas may no longer exist even in Cedar Hill, Neosho and Joplin.

In short, in its original filing, Southwestern Bell unintentionally proved that, despite the passage of more five years since the enactment of the Telecommunications Act of 1996, the benefits of competition have not reached the vast majority of small and rural communities in Missouri. Southwestern Bell's current submission contains nothing but empty rhetoric to the contrary.

Furthermore, Southwestern Bell's admission that competition is all but non-existent in Missouri's rural areas must be read against the backdrop of Southwestern Bell's vigorous sponsorship and advocacy of HB 620. Not only did Southwestern Bell push that measure through the Missouri legislature, but it has subsequently worked diligently to uphold HB 620 before the Commission and now before the Eighth Circuit. These actions in Missouri mirror Southwestern Bell's aggressive legislative, administrative and judicial support for the Texas barrier to entry that was at issue in the *Abilene* case.

As the Commission unequivocally found in the Missouri Order, HB 620 is contrary to the public interest as well as inconsistent with the purposes of the Telecommunications Act. It follows that Southwestern Bell's promotion and continuing advocacy of that law is also contrary to the public interest and inconsistent with the purposes of the Telecommunications Act. In the terminology of the Commission's Verizon/Massachusetts order, these actions "frustrate the congressional intent that markets be open," and they undermine the Commission's "overriding goal" of ensuring "nothing undermines our conclusion . . . that this market is open to competition." Furthermore, Southwestern Bell's actions are not "beyond the BOC's control," and they can be tied directly to the miniscule amount of competition in rural areas of Missouri that, according to the Commission's own findings in the *Missouri Order*, would now have meaningful competition in the absence of HB 620.

CONCLUSIONS AND RECOMMENDATIONS

For the reasons discussed above, Southwestern Bell cannot demonstrate that its entry into the long distance market in Missouri would be in the public interest. Where there is a state statute that prohibits or significantly impedes the ability of "any entity" to provide telecommunications services, including a municipality or a municipal utility, the Commission should conclude that the state is *per se* not competitive. In these circumstances, the Commission may not permit a Bell Operating Company that has played a key role in the enactment of such a statute, as Southwestern Bell has in Missouri, to provide in-region InterLATA service. The Commission should reject in its entirety Southwestern Bell's application to provide such service in Missouri.

Furthermore, even if Southwestern Bell could show that it has met the 14-point checklist, its past and ongoing support for the anti-competitive HB 620 cannot be reconciled with the separate and additional public-interest standard under Section 271(d)(3)(C) that Southwestern Bell must meet in order to be entitled to provide long distance service in Missouri. Thus, as an alternative remedy, City Utilities submits that the Commission should require Southwestern Bell to agree to satisfy the following additional conditions as a prerequisite to any Commission approval of its application:

1. Cease and desist from promoting or supporting, before any state or local governmental entity in Missouri, any measure that may explicitly or effectively prohibit any entity, including any public entity, from providing directly or indirectly any telecommunications service.
2. Furnish the governor, the leaders of both parties in each chamber of the Missouri legislature, the chairmen and ranking minority members of the legislative committees with jurisdiction over telecommunications matters, the chair of the public service commission, and the chief elected official of each city, county and town that Southwestern Bell serves in Missouri, a written statement that Southwestern Bell opposes adoption or extension of any legislative or regulatory

measure, and supports repeal of any existing measure, that may explicitly or effectively prohibit any entity, including any public entity, from providing any telecommunications service directly or indirectly.

The latter recommendation is particularly important because the HB 620, by its terms, sunsets on August 28, 2002, and a commitment by Southwestern Bell to oppose its extension could have a significant impact on the Missouri legislature.

Southwestern Bell may object that City Utilities' proposed alternative remedy would violate Southwestern Bell's right to free speech under the First Amendment. Southwestern Bell is, of course, free to do and say what it wishes. But when coming to the Commission for leave to enter the long distance market, Southwestern Bell must prove under that this would be in the public interest. Like many other pro-competitive provisions of the Telecommunications Act, Section 271(d)(3)(C) requires Southwestern Bell to act pro-competitively in return for the right to reap the benefits of entry into a lucrative new market. The choice is Southwestern Bell's.

Respectfully submitted,



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