

WCB 04-424

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
SBC Communications Inc.)
)
Petition for Declaratory Ruling)
Concerning Terminating Switched)
Access Charges for Wireless-)
Originated Calls)
)

WCB Docket No. _____

NOV 12 2004

SBC's PETITION FOR
DECLARATORY RULING

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INTRODUCTION AND SUMMARY

By this Petition for Declaratory Ruling, SBC Communications Inc. ("SBC") requests that the Commission affirm that, in the absence of accurate and reliable information included in the call detail provided by long distance carriers as to the actual geographic location of wireless subscribers at the time they initiate wireless calls, Southwestern Bell Telephone Company's ("SWBT") interstate tariffs permit it to use the telephone numbers of the calling and called parties to determine whether to bill long distance carriers interstate or intrastate terminating switched access rates for wireless originated long distance calls. Such a ruling would be consistent with the terms of SWBT's tariffs, which are similar to those of other ILECs, and with longstanding industry practice. Commission action on this issue is necessary in order to respond to the referral from the United States District Court for the Eastern District of Missouri of a complaint filed by Global Crossing Telecommunications, Inc. ("Global Crossing") against SWBT.

When a long distance carrier hands off a call to a local carrier for termination, the long distance carrier also hands off certain "call detail" associated with that call, which usually includes the originating telephone number (which is sometimes referred to as automatic number identification ("ANI")), the number being called, the time of the call, the elapsed time of the call, and various information indicating the routing of the call.¹ For more than a decade, SWBT's interstate terminating switched access charge tariffs have provided that, where the originating and terminating telephone numbers are included in such call detail, SWBT will use those

¹ See, e.g., MCI Telecommunications Corporation; Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, *Memorandum Opinion and Order*, FCC 85-145, 57 Rad. Reg.2d (P&F) 1573 ¶ 5 n. 10 ("Call detail consists of information about particular calls such as the terminating addresses (*i.e.*, dialed numbers), originating numbers (where ANI permits such information to be recorded), elapsed time of calls and the access lines or trunk groups via which calls are routed.")

Commission need only clarify “the meaning and application of two provisions” of SWBT’s interstate access tariffs,⁹ and it requests that the Commission bar the industry from commenting on the issue.¹⁰ Global Crossing’s petition should be rejected, for two fundamental reasons.

First, Global Crossing misrepresents and misconstrues the two tariffs provisions it claims are dispositive. SWBT’s tariff provisions, in fact, confirm that the telephone numbers of the calling and called parties are to be used to determine whether SWBT should charge interstate or intrastate rates for terminating switched access. Second, the use of telephone numbers is consistent with and wholly supported by not only the language of SWBT’s tariffs, but also longstanding and predominant industry practice—supported by Commission policy and precedent—of using telephone numbers to determine applicable intercarrier compensation rates for wireless originated calls. If Global Crossing seeks to change that policy, it should do so as part of the Commission’s intercarrier compensation rulemaking proceeding. Finally, precisely because telephone numbers are used throughout the industry to assess applicable terminating switched access charges for wireless originated calls, any Commission pronouncements on this issue will impact the entire industry. Accordingly, the Commission should not bar the industry from participating and submitting comments in this proceeding.

⁹ *Global Crossing Petition* at ii.

¹⁰ Letter from Tamara E. Conner, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 27, 2004)(“[W]e ask that this Petition not be put on public notice or subject to comment, as that will only serve to delay the judicial process.”)

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PETITION FOR DECLARATORY RULING

SWBT's interstate tariffs specifically contemplate and provide that SWBT shall jurisdictionalize Feature Group D terminating switched access traffic with reference to call detail information, when such information is provided by the interexchange carrier. At all relevant times, Global Crossing has provided call detail information to SWBT for wireless originated calls it delivers to SWBT for termination. The Commission, therefore, should issue a declaratory ruling that SWBT's tariffs permit SWBT to determine the jurisdiction of such calls for access charge purposes with reference to the call detail information provided by Global Crossing – in particular, the telephone numbers included in such information.

Such a ruling would not only be consistent with SWBT's interstate tariffs, but with longstanding industry practice. The tariff language at issue has been in effect for more than a decade. Throughout that entire period, SWBT has jurisdictionalized Feature Group D access traffic, including wireless originated traffic, based on the called and calling party telephone numbers when that information was provided. Moreover, SWBT is by no means alone in this practice. Numerous LEC tariffs contain substantially similar language concerning the use of call

detail for jurisdictionalizing terminating switched access traffic. A contrary ruling would thus not only be inconsistent with the industry's own view of the language at issue, but would unleash a torrent of litigation.

There is no reason for the Commission to go down that route. Global Crossing's claims regarding SWBT's tariffs are not only wrong, they blatantly misrepresent the terms of those tariffs – attributing to them language that they do not, in fact, include. Moreover, Global Crossing's proposed alternative method of determining jurisdiction would open the door to access avoidance schemes that this Commission should not sanction. Accordingly, SBC requests that the Commission affirm that, in the absence of accurate and reliable information included in the call detail provided by long distance carriers as to the actual geographic location of wireless originated calls, SWBT's interstate tariffs permit SWBT to use the telephone numbers of the calling and called parties to determine whether to assess interstate or intrastate terminating switched access rates for wireless originated calls.

I. THE USE OF THE TELEPHONE NUMBERS OF THE CALLING AND CALLED PARTIES TO DETERMINE WHETHER TO ASSESS INTERSTATE OR INTRASTATE TERMINATING ACCESS RATES FOR WIRELESS ORIGINATED CALLS IS FULLY CONSISTENT WITH SWBT'S INTERSTATE TARIFFS, COMMISSION PRECEDENT, AND LONGSTANDING INDUSTRY PRACTICE

Global Crossing's claim that SWBT's tariffs preclude the use of telephone numbers to determine the jurisdiction of wireless originated calls is flatly incorrect. With respect to determining whether interstate or intrastate rates apply to terminating access, § 2.4 of SWBT's interstate terminating access tariffs generally provides:

When Access Services . . . are provided for both interstate and intrastate use, monthly rates, usage rates, and nonrecurring charges are prorated between interstate and intrastate on the basis of the projected interstate percentage of use (PIU) as set forth in 2.4.1.¹¹

¹¹ Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 2.4.

With respect to who calculates the PIU, § 2.4 also generally provides:

Where the jurisdiction can be determined from the call detail, the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage. Where call detail is insufficient to determine jurisdiction, the customer will provide a projected percentage of interstate use (PIU).¹²

More specifically, for terminating Feature Group D service, which is what Global Crossing purchases from SWBT, § 2.4.1(A)(2)(b) of SWBT's interstate tariffs for Arkansas, Kansas, Missouri, and Oklahoma identifies when SWBT will develop the PIU:

*... where jurisdiction can be determined from the call detail, the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage.*¹³

Conversely, SWBT's tariffs provide that the customer will provide the PIU only "where call details are insufficient to determine jurisdiction."¹⁴

Most importantly, however, the tariffs make clear what is meant by the phrase, "where jurisdiction can be determined from the call detail." Specifically, the tariffs state, in no uncertain terms, that "interstate terminating access minutes" are "access minutes where *the calling number* is in one state and *the called number* is in another state."¹⁵ In other words, under SWBT's

¹² *Id.*

¹³ *Id.* § 2.4.1(A)(2)(b). (Emphasis added.) Section 2.4.2(A)(1)(a) contains similar language for Texas.

¹⁴ *Id.*

¹⁵ *Id.* (Emphasis added.) SWBT's state tariffs contain similar provisions. *See, e.g., Southwestern Bell Telephone Company Missouri Access Services Tariff*, § 2.3.13(A)(1) ("For . . . FGD . . . where jurisdiction can be determined from the call detail, the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage. The projected interstate percentage will be developed . . . when the Switched Access Service Minutes . . . are measured by dividing the measured interstate terminating access minutes (the access minutes where the calling number is in one state and the called number is in another state) by the total terminating access minutes."); *Southwestern Bell Telephone Company Texas Access Service Tariff*, § 2.4.1(B) ("A call is an interstate communication if the call originates from a telephone number within the boundaries of one state or country and terminates outside the boundaries of the state of origin. . . . A call is an intrastate communication is the call both originates

tariffs, SWBT will determine the jurisdiction of terminating access traffic with reference to the called and calling party telephone numbers when that information is included in the call detail, as it is here. In those circumstances, SWBT calculates the PIU by dividing the interstate switched access minutes—as determined by the telephone numbers—by total switched minutes.

Nowhere do SWBT's tariffs say, as Global Crossing claims, that interstate access minutes are minutes where the "geographic point of origin or termination," "origination or termination points," "originating or terminating location," "location" or even the "calling and called parties" are in different states.¹⁶ Rather, the *sole* determinants in those tariffs as to whether the call detail identifies the jurisdiction of terminating switched access are the telephone numbers of the calling and called parties. Indeed, this is the only possible reading of SWBT's terminating switched access tariffs. Even for wireline calls, call detail has never included information as to the precise location of customers (*e.g.*, GPS or other geographic data). Thus, the only sensible interpretation of the phrase "where jurisdiction can be determined from call detail" is "where call detail includes the telephone numbers of the calling and called parties."

Nor do SWBT's tariffs say that SWBT will provide the PIU only "where the geographic point of origin is 'known,'" or that the customer will provide the PIU "where the origination point is 'unknown,'" or "where the originating geographic location is unknown."¹⁷ Again, Global Crossing has simply fabricated that language out of whole cloth. Global Crossing's fabricated language notwithstanding, the plain fact is that the language of SWBT's terminating switched access tariffs clearly delineates the telephone numbers of the calling and called parties

from a telephone number and terminates to another telephone number within the boundaries of the same state.")

¹⁶ *Global Crossing Petition* at ii, 2, 6, 9.

¹⁷ *Id.*

as the basis for determining jurisdiction and provides in terms that could not be plainer (but which Global Crossing wholly ignores) that “interstate terminating access minutes” are “access minutes where the calling number is in one state and the called number is in another state.”

Global Crossing is, moreover, incorrect when it repeatedly asserts that “the parties agree that the jurisdictional nature of the calls in question is ‘unknown,’”¹⁸ and that the parties agree that wireless originated traffic falls under the “unknown” section of SWBT’s terminating switched access tariffs.¹⁹ What the parties agree upon is that the call detail that Global Crossing provides to SWBT is insufficient to identify the *precise geographic location* of the originating wireless customer. SWBT has never agreed, however, that the parties do not have sufficient information for purposes of determining whether to charge interstate or intrastate switched access charges. As discussed above, SWBT’s tariffs provide that access charges will be assessed based on information “from call detail,” when that information includes the telephone numbers of the calling and called parties.

This conclusion, moreover, is fully supported by Commission precedent. First, in the 1989 *Joint Board Recommended Decision and Order* discussed by Global Crossing in its petition, the Joint Board addressed the question of how to assign Feature Group A and Feature Group B access services to interstate and intrastate jurisdictions. The Joint Board noted that the need to do so arose because Feature Group A and Feature Group B access services “typically do not provide ANI capability.”²⁰ Significantly, the Joint Board specifically contrasted Feature Group D—the service purchased by Global Crossing—noting that because “automatic number

¹⁸ *Id.* at 6; see also *id.* at 8 (it is “undisputed that the jurisdiction of mobile-originated traffic is ‘unknown.’”)

¹⁹ See, e.g., *id.* at ii.

²⁰ Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, *Recommended Decision and Order*, CC Docket No. 85-124, FCC 88J-5, 4 FCC Rcd. 1966 ¶ 3.

identification (ANI) capability” is available over Feature Group D, “jurisdictional usage is readily segregable for [determining whether intrastate or interstate tariffs apply].”²¹ More generally, the Joint Board made clear: “ANI capability enables the carrier to identify the originating number of a call which when combined with the called number *reveals the jurisdictional nature of the call.*”²² The Joint Board’s pronouncements—ignored entirely by Global Crossing—confirm that jurisdiction is determined under SWBT’s tariffs for terminating access for Feature Group D by comparing the telephone numbers of the calling and called parties.

This is how SWBT has interpreted and applied its terminating switched access tariffs since the PIU language was first added in 1992. In fact, in 1992, when the tariff revision was filed, MCI and Sprint objected, arguing that it was unreasonable, and the Commission rejected their challenges, in another decision ignored entirely by Global Crossing.²³ In defending the jurisdictional language in the tariffs, SWBT asserted that

... when the [calling party number] is passed on a call terminating to SWBT, *the jurisdiction of the call can be determined from the actual call detail of the usage record (i.e. originating number and terminating number are present on the record), and thus there is no reason to apply any other PIU factor.*²⁴

Similarly, SWBT argued against applying a customer-estimated PIU to all terminating usage, because “it is more accurate to use the PIU from actual usage, when available, on terminating

²¹ *Id.*

²² *Id.* n. 7. (Emphasis added.)

²³ See Southwestern Bell Telephone Company Revisions to Tariff F.C.C. Nos. 68 and 73, Transmittal 2182, Order, DA 92-611, 7 FCC Rcd. 3456 (May 15, 1992).

²⁴ *Id.* ¶ 7. (Emphasis added.)

traffic.”²⁵ In rejecting the challenges to the tariff language, the Commission concluded that “. . . no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.”²⁶

Most recently, the Commission addressed the issue of jurisdictional rating of wireless calls in its *Local Competition Order*.²⁷ There, the Commission reiterated that “in certain cases the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges.”²⁸ The Commission, agreed, however, that the mobile nature of wireless telecommunications “could complicate the computation of traffic flows and the applicability of transport and termination rates.”²⁹ Accordingly, the Commission concluded that “it is *not necessary* for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected.”³⁰ The Commission thus allowed parties to use alternate methods for determining appropriate intercarrier compensation for wireless originated and terminated calls. The Commission suggested that parties “may” use traffic studies as methods for rating wireless calls, but it did not require parties to use such studies.³¹ Moreover, even as to such traffic studies, the Commission further held that “the location of the initial cell site when a call

²⁵ *Id.*

²⁶ *Id.* ¶ 8.

²⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd. 15,499 ¶ 1044 (Aug. 8, 1996).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (Emphasis added.)

³¹ *Id.*

begins shall be used as the determinant of the geographic location of the mobile customer.”³² However, that is *not* how Global Crossing proposes to conduct traffic studies for wireless originated traffic. Rather, it proposes to use “the first point at which the call is encountered by the long distance company” as the geographic origin of a wireless originated call.³³

The use of call detail to determine jurisdiction is, moreover, fully supported by longstanding industry practice. Local carriers throughout the industry, including Bell companies³⁴ as well as rural incumbent local companies³⁵ have switched access service tariffs containing similar provisions concerning the use of call detail to determine the jurisdiction of a call.³⁶ Global Crossing’s claim that it merely requests clarification and application of two provisions of SWBT’s interstate access tariffs is thus an overly simplistic description of the matter.³⁷ What Global Crossing really seeks is a Commission determination as to the legitimacy of the longstanding general industry practice—as reflected in SWBT’s tariffs—of using

³² *Id.*

³³ *Global Crossing Petition* at 9.

³⁴ *See, e.g., BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1*, § 2.3.10(A)(1)(b) (“When the Telephone Company receives sufficient call detail to permit it to determine the jurisdiction of originating and terminating access minutes of use or message, the Telephone Company will bill according to these actual minutes of use and will not use customer reported Percent Interstate Usage (PIU) factors.”)

³⁵ *See, e.g., National Exchange Carrier Association, Inc. Tariff No. 5*, § 2.3.11(C)(1)(b) (“When the Telephone Company receives sufficient call detail to permit it to determine the jurisdiction of some or all of the originating and terminating access minutes of use, the Telephone Company will use that call detail to render bills for those minutes of use and will not use PIU factors(s) described in (2), below, to determine the jurisdiction of those minutes of use.”)

³⁶ Although CLECs are federally de-tariffed, it appears that they use a similar procedure for determining whether to charge interstate or intrastate rates for terminating switched access. *See, e.g., Z-Tel Communications, Inc. Colorado PUC Tariff No. 2*, § 2.3.3 (“Reported or default PIU factors are used only where the call detail is insufficient to determine the appropriate jurisdiction of the traffic.”)

³⁷ *Global Crossing Petition* at ii.

telephone numbers to determine the jurisdiction of wireless originated and terminated calls.³⁸ It is thus Global Crossing who advocates “prospective changes in policy” on this issue.³⁹

Global Crossing is, of course, free to seek changes in Commission policy in a rulemaking proceeding. Indeed, WilTel recently asked the Commission to address these very issues in the Commission’s intercarrier compensation proceeding.⁴⁰ For now, however, SBC is entitled to a declaratory ruling that, in those instances in which long distance carriers provide no accurate and reliable information in call detail records as to the geographic location of wireless callers, SWBT may use the telephone numbers of the calling and called parties in order to determine whether to charge interstate or intrastate terminating switched access rates.

II. THE COMMISSION SHOULD ISSUE A PUBLIC NOTICE SOLICITING INDUSTRY COMMENT ON THIS ISSUE

Both Global Crossing and SBC agree that the referral from the district court should be addressed by the Commission in a declaratory ruling proceeding. Global Crossing, however, suggests that its petition ought not be put on public notice or subject to comment, because its

³⁸ Moreover, Global Crossing’s statement that “*this issue* was referred to the Commission,” *Global Crossing Petition* at ii, i.e., the issue as described by Global Crossing in its petition is highly misleading. The court merely “stayed *the case* pending the outcome of a decision from the Federal Communications Commission.” *Referral Order* at 4. The court did not circumscribe the issue to be decided in the manner Global Crossing suggests. In fact, in deciding to refer the matter to the Commission, the court specifically agreed that Global Crossing’s complaint did not merely require an interpretation of SWBT’s interstate access tariffs, but rather, “*implicated broader concerns* about whether a classification within the tariff was reasonable and required delving into technical aspects of telecommunications service.” *Id.* at 3 (emphasis added). The court, moreover, agreed that “the need to draw on the expertise of the Federal Communications Commission is paramount here, *as is the need to promote uniformity and consistency within the telecommunications field.*” *Id.*

³⁹ *Global Crossing Petition* at ii.

⁴⁰ Letter from Adam Kupetsky, Director of Regulatory, WilTel Communications to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 95-116 and 01-92 (June 23, 2004). Global Crossing is thus flatly incorrect in its assertion that its petition does not “relate to any pending rulemaking or other request for relief.” *Global Crossing Petition* at 13. It clearly relates to the Commission’s intercarrier compensation proceeding. Global Crossing, moreover, clearly was aware of WilTel’s *ex parte* in that proceeding because counsel for SBC provided a copy of WilTel’s *ex parte* to counsel for Global Crossing on October 21, 2004.

petition "seeks interpretation of existing tariff language in the course of a primary jurisdiction referral matter between private parties."⁴¹ The Commission should reject Global Crossing's effort to bar the industry from participating in this proceeding.

As discussed above, local carriers throughout the industry have interstate terminating switched access tariffs similar to SWBT's, and the use of the telephone numbers to determine whether to assess interstate or intrastate terminating switched access rates is a longstanding industry practice. Any Commission decisions in this proceeding will thus impact all such local carriers who terminate wireless originated traffic.

Moreover, restricting participation may necessitate duplicative proceedings. In a suit filed by SBC to collect unpaid access charges for "IP-in-the-middle" traffic,⁴² AT&T has asserted counterclaims alleging, among other things, that SBC unlawfully assessed intrastate rather than interstate access charges on wireless originated calls.⁴³ In other words, AT&T has raised the very same issue raised by Global Crossing in the very same district court that referred the Global Crossing matter to the Commission. On November 1, 2004, SBC moved to dismiss AT&T's counterclaims based on the primary jurisdiction doctrine.⁴⁴ It is thus highly likely that the Commission will be presented again with the very same issue in the near future, this time with respect to claims brought by AT&T. But whether or not the district court refers AT&T's counterclaims to the Commission, the presence of those counterclaims demonstrates that the

⁴¹ Letter from Tamara E. Connor, Kelley Drye & Warren to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 27, 2004).

⁴² *Southwestern Bell Tel., L.P. v. AT&T Corp.*, United States Dist. Ct. Eastern Dist. Mo., Eastern Div., Case No. 4:04CV474HEA.

⁴³ *Southwestern Bell Tel., L.P. v. AT&T Corp.*, United States Dist. Ct. Eastern Dist. Mo., Eastern Div., Case No. 4:04CV474HEA; *Answer and Counterclaims of AT&T Corp. et. al.* at 33-35.

⁴⁴ *Southwestern Bell Tel., L.P. v. AT&T Corp.*, United States Dist. Ct. Eastern Dist. Mo., Eastern Div., Case No. 4:04CV474HEA; *Plaintiff's Motion to Dismiss Counterclaims* (Nov. 1, 2004).

issue of terminating switched access charges for wireless originated calls is one that reaches well beyond SWBT and Global Crossing. Commission action on this referral matter will necessarily implicate the manner in which all carriers account for and charge terminating access for wireless originated calls.

Accordingly, the Commission should issue a public notice requesting comments from the industry on both Global Crossing's petition as well as SBC's. Such action would be consistent with the manner in which the Commission has handled similar issues. Specifically, putting both petitions out for public notice and comment is precisely what the Commission did in WT Docket No. 01-316, which also involved a United States district court referral of an access charge issue. In that case, both Sprint and AT&T filed petitions for declaratory ruling asking the Commission to address the issue referred by the district court. And although the dispute was between AT&T and Sprint only, the Commission issued a public notice seeking comments from the industry. Similarly, the Commission should issue a public notice and invite industry comment in this instance.⁴⁵

⁴⁵ The Commission should treat the proceeding as permit-but-disclose for *ex parte* purposes pursuant to 47 C.F.R. § 1.1206(a)(3).

III. CONCLUSION

In response to the referral from the United States District Court for the Eastern District of Missouri, SBC requests that the Commission affirm that, in the absence of accurate and reliable information included in the call detail provided by long distance carriers as to the actual geographic location of wireless subscribers, SWBT's interstate tariffs permit SWBT to use calling and called party telephone numbers to determine whether to assess interstate or intrastate terminating switched access rates for wireless originated calls.

Respectfully Submitted,

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