

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Pacific Bell Telephone Company) Transmittal No. 539
Tariff F.C.C. No. 1)
Southwestern Bell Telephone Company) Transmittal No. 3428
Tariff F.C.C. No. 73)
Investigation of Certain Price Cap Local Exchange) WC Docket No. 15-247
Carrier Business Data Services Tariff Pricing Plans)

ORDER

Adopted: July 15, 2016

Released: July 15, 2016

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On July 1, 2016, Pacific Bell Telephone Company (PBTC), and Southwestern Bell Telephone Company (SWBT) (collectively AT&T) filed Transmittal Nos. 1847, 539, and 3428, respectively, proposing tariff revisions to PBTC’s interstate access Tariff F.C.C. No. 1, and SWBT’s interstate access Tariff F.C.C. No. 73, which they assert are “in compliance with the Commission’s rules, F.C.C. Order No. FCC 16-54 (the Order) and the requirements of the Communications Act of 1934, as amended.”

1 Pacific Bell Telephone Company Tariff F.C.C. No. 1; Southwestern Bell Telephone Company Tariff F.C.C. No. 73 (filed July 1, 2016); see Letter from Kristin Shore, Executive-Director, Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 539 (filed July 1, 2016) (Pacific Bell Telephone Company Transmittal Letter); Letter from Kristin Shore, Executive-Director, Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 3428 (filed July 1, 2016) (Southwestern Bell Telephone Company Transmittal Letter) (collectively Transmittal Letters).

2 See Transmittal Letters at 1.

3 See Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247, Tariff Investigation Order, FCC 16-54, 31 FCC Rcd 4723 (rel. May 2, 2016) (Tariff Investigation Order).

4 The Bureau is concurrently releasing an Order rejecting the proposed grandfathering language submitted in the PBTC and SWBT transmittals, as well as the simultaneously filed proposed grandfathering language submitted by Ameritech Operating Companies for Tariff F.C.C. No. 2 in Transmittal No. 3428.

II. BACKGROUND

2. In the *Tariff Investigation Order*, the Commission concluded that various incumbent LEC pricing plans were unjust and unreasonable and directed the incumbent LECs at issue, including AT&T, to submit a number of tariff revisions modifying or removing language from those plans. Among the modifications required, the Commission ordered AT&T to remove the shortfall and early termination provisions from the SWBT DS1 High Capacity Service Portability Commitment and the PBTC DS1 High Capacity Service Portability Commitment, but noted that it may elect to file tariff revisions that set shortfall and early termination penalties at an amount that is no greater than the amount of revenue that a customer would have paid had it met its minimum volume or term commitments.⁵ The Commission provided sixty (60) days for impacted incumbent LECs to file the tariff revisions, which required the revisions to be filed by July 1, 2016.⁶

3. AT&T filed the above-referenced proposed transmittals on July 1, 2016, to become effective on July 16, 2016.⁷ To address the *Tariff Investigation Order*'s direction on shortfall and early termination penalties, AT&T reduced the fixed per circuit shortfall and early termination liability to the current 2-year Zone 1 Channel Termination rate for the DS1 Term Payment Plan, which is \$126 for PBTC and \$195.00 for SWBT.⁸ On July 8, 2016, three separate petitions were filed by the following parties, all similarly asking the Commission to reject, or alternatively suspend and investigate, the proposed AT&T transmittals: Windstream Services, LLC; Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC (collectively "Birch"); and U.S. TelePacific Corp. d/b/a TelePacific Communications and Alpheus Communications, LLC ("TelePacific/Alpheus").⁹

4. The tariff language at issue is contained in PBTC Transmittal No. 539 proposed Sections 7.4.18(E)(4),¹⁰ and SWBT Transmittal No. 3428 proposed Section 7.2.22(E)(4).¹¹

III. DISCUSSION

5. We find that there are substantial questions regarding the lawfulness of AT&T's tariff revisions that require further investigation. The petitions collectively cite a number of concerns about the methodology AT&T utilized in calculating the revised shortfall and early termination penalties and raise questions about whether the revisions comply with the *Tariff Investigation Order*. For example, Birch argues that AT&T's methodology "would require that customers pay penalties that in many cases—and possibly all cases—would exceed expectation damages in violation of the *Tariff Investigation Order*."¹² Birch explains that because most or perhaps all customers purchase circuits for terms longer than three years, "all such customers that fall short of their volume commitments and/or disconnect circuits before the end of a term would be liable for shortfall and early termination penalties that exceed expectation

⁵ *Tariff Investigation Order*, 31 FCC Rcd at 4784, 4788, 4790, paras. 140, 152, 158.

⁶ *Id.* at 4772, para. 110.

⁷ See Transmittal Letters.

⁸ See PBTC Description and Justification at 5; SWBT Description and Justification at 5.

⁹ See Petition of Windstream Services, LLC to Reject or Suspend and Investigate (filed July 8, 2016); Petition of Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC to Reject or Suspend and Investigate (filed July 8, 2016); Petition of U.S. TelePacific d/b/a TelePacific Communications and Alpheus Communications LLC to Reject or Suspend and Investigate (filed July 8, 2016).

¹⁰ See PBTC Tariff F.C.C. No. 1 at Section 7.4.18(E)(4).

¹¹ See SWBT Tariff F.C.C. No. 73 at Section 7.2.22(E)(4).

¹² Birch Petition at 3-4.

damages.”¹³ Similarly, TelePacific/Alpheus argues that the rates AT&T chose were arbitrary and are significantly higher than other rates.¹⁴ In response, AT&T argues that the amount it chose was reasonable because the rates chosen are well below what AT&T would actually expect to receive for an average circuit.¹⁵

6. In light of the arguments and evidence presented in the Petitions, we conclude that substantial questions of lawfulness of AT&T’s tariff revisions regarding the shortfall and early termination penalties exist that require further investigation, and we suspend those provisions of the tariff filings for one day, impose an accounting order, and initiate an investigation into the lawfulness of the shortfall and early termination penalties.¹⁶ The specific issues that will be the subject of the investigation will be identified in an upcoming designation order and may include, but not be limited to, the issues identified in this Order. We may also, by order, identify discrete issues that do not warrant further investigation.

IV. *EX PARTE* REQUIREMENTS

7. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁷ Persons making *ex parte* presentations must file in WC Docket No. 15-247 a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and through the authority delegated pursuant to sections 0.91 and 0.291 of the Commission’s rules, 47 C.F.R. §§ 0.91 and 0.291, the shortfall and early termination penalty provisions of the Pacific Bell Telephone Company Tariff F.C.C. No. 1 contained in Transmittal No. 539; and Southwestern Bell Telephone Company Tariff F.C.C. No. 73 contained in Transmittal No. 3428 ARE SUSPENDED for one day and an investigation IS INSTITUTED.

9. IT IS FURTHER ORDERED that Pacific Bell Telephone Company and Southwestern Bell Telephone Company SHALL FILE a supplement advancing the currently scheduled effective date to

¹³ *Id.* at 4-5.

¹⁴ TelePacific/Alpheus Petition at 6.

¹⁵ AT&T Reply at 17.

¹⁶ 47 U.S.C. § 204.

¹⁷ 47 C.F.R. §§ 1.1200 et seq.

July 15, 2016, and then SUSPEND its tariff revision for one day, until July 16, 2016. For this purpose, we waive sections 61.58, 61.59, and 61.86 of the Commission's rules, 47 C.F.R. §§ 61.58, 61.59, 61.86.

10. IT IS FURTHER ORDERED that Pacific Bell Telephone Company and Southwestern Bell Telephone Company SHALL FILE a supplement within five business days from the release date of this order reflecting the suspension. Pacific Bell Telephone Company and Southwestern Bell Telephone Company should cite the "DA" number on the instant order as the authority for the filing.

11. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 204(a), and pursuant to the authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, Pacific Bell Telephone Company and Southwestern Bell Telephone Company SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the penalties that are subject to this investigation.

12. IT IS FURTHER ORDERED that the Petitions of Windstream Services, LLC; Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC; and U.S. TelePacific Corp. d/b/a TelePacific Communications and Alpheus Communications, LLC to Reject or Suspend and Investigate the proposed tariff revisions contained in Pacific Bell Telephone Company Transmittal No. 539, and Southwestern Bell Telephone Company Transmittal No. 3428 are GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero
Chief, Wireline Competition Bureau