

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

In the Matter of )  
 )  
Southwestern Bell Telephone Company )  
 ) Transmittal No. 2633  
Tariff F.C.C. No. 73 )  
 )  
 )  
 )

SUSPENSION ORDER

Adopted: June 13, 1997; Released: June 13, 1997

By the Chief, Competitive Pricing Division, Common Carrier Bureau:

I. INTRODUCTION

1. On May 5, 1997, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2633, which is scheduled to become effective on June 16, 1997. This transmittal proposes to add to SWBT's interstate access tariff a new Section 29, "Request for Proposal (RFP)," in which SWBT would include its "response[s] to customer requests for proposal submitted to SWBT in competitive bid situations."<sup>1</sup> The Transmittal would permit SWBT, when responding to an RFP, to offer access services at rates below the otherwise tariffed rates for those services. The Transmittal would require customers to indicate in their RFPs that the request "involves a competitive" situation in order to obtain the reduced rates, and would make the rates available to "any similarly situated customer that submits a RFP requesting the same service" in the same quantities and at the same location.<sup>2</sup> SWBT would provide service using facilities that "are the same type as that used by [SWBT] in furnishing its other tariffed services."<sup>3</sup>

2. For the reasons set forth below, we find that Transmittal 2633 raises significant issues of lawfulness regarding the rate levels, rate structures and terms and conditions of SWBT's access service. We therefore suspend Transmittal No. 2633 for five months and initiate an investigation into the lawfulness of its provisions.

<sup>1</sup> Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Proposed Section 29.1.

<sup>2</sup> *Id.* at Section 29.2.

<sup>3</sup> *Id.* at Section 29.1.

---

## II. BACKGROUND

3. Section 202(a) of the Communications Act prohibits unjust or unreasonable discrimination in charges, practices, classifications and services by common carriers in connection with any "like" communications service.<sup>4</sup> In addition, the Commission's rules require dominant LECs, *i.e.*, those that possess market power, to offer averaged rates throughout their individual study areas.<sup>5</sup> Moreover, in its *DS-3 ICB Order* the Commission precluded dominant LECs from filing individual case basis (ICB) tariffs, that is, offering individualized contract rates to certain customers and not others.<sup>6</sup> A potential exception to these requirements is the "competitive necessity" doctrine. Under the competitive necessity test as applied by the Commission in the case of interexchange carriers (IXCs), a dominant carrier may offer what would otherwise be considered a discriminatory tariff under Section 202(a) by demonstrating that: (1) the customers of the discounted offering have a competitive alternative from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.<sup>7</sup> The Commission has never held that this defense applies to dominant LECs.

4. In a prior tariff investigation involving SWBT, the Commission considered whether the competitive necessity doctrine allows dominant LECs to offer RFP tariffs.<sup>8</sup> The Commission concluded that it need not determine whether dominant LECs should be able to invoke the competitive necessity doctrine, finding that SWBT could not satisfy the doctrine in

---

<sup>4</sup> 47 U.S.C. § 202(a).

<sup>5</sup> *See, e.g.*, 47 C.F.R. § 69.3(e)(7).

<sup>6</sup> *Local Exchange Carriers Individual Case Basis DS-3 Service Offerings*, 4 FCC Rcd 8634 (1989)(*DS-3 ICB Order*).

<sup>7</sup> *See Private Line Rate Structure and Volume Discount Practices Guidelines*, Report and Order, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984). Other limited exceptions exist to the Commission's rules and policies regarding geographically averaged access rates. For instance, the Commission has held that dominant LECs able to show a measure of competition in their markets may divide their service areas into three zones based on the density of customer locations, and may charge a different price in each zone for certain switched transport elements. *See Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992). However, Section 69.123(c) of the Commission's rules provides that dominant LECs must provide averaged rates within each density zone. 47 C.F.R. § 69.123(c).

<sup>8</sup> *Southwestern Bell Telephone Company*, Tariff FCC No. 73, Transmittals Nos. 2433 and 2449, Order Terminating Investigation, 11 FCC Rcd 1215 (1995)(*Transmittals Nos. 2433 and 2449*), remanded, *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004 (D.C. Cir. 1996).

any event, under the circumstances presented there.<sup>9</sup> The United States Court of Appeals for the District of Columbia Circuit remanded this order to the Commission stating the Commission had inadequately explained its decision.<sup>10</sup> That matter is currently pending before the Commission. The Commission also is currently considering the issue of competitive response tariffs in its Access Reform docket, No. 96-262.<sup>11</sup> In addition, in a recent order designating issues for investigation regarding SWBT tariff Transmittal No. 2622, the Bureau stated that the competitive necessity doctrine may not be applicable to dominant LECs.<sup>12</sup> SWBT later withdrew Transmittal No. 2622, and the Bureau issued an order terminating that investigation.<sup>13</sup>

### III. PLEADINGS SUMMARY

5. In its Description and Justification, SWBT recognizes that a tariff that would respond to individual RFPs with rates below those offered in SWBT's general tariffs would require an exception to the Commission's rules requiring incumbent LECs to offer geographically averaged access rates. SWBT contends, however, that Commission orders recognize the "competitive necessity" doctrine as a justification for differential pricing of LEC access services<sup>14</sup> that renders lawful Transmittal No. 2633's differential treatment of similarly situated customers. SWBT argues that because it satisfies the Commission's competitive necessity test, it may offer this transmittal without seeking a waiver of the *DS-3 ICB Order's* requirement that LECs file averaged rates for their DS-3 offerings.<sup>15</sup> Alternatively, SWBT argues that the *DS-3 ICB Order* can be interpreted to provide carriers with sufficient pricing flexibility to offer customer-specific tariffs.

6. According to SWBT, the existence of RFPs from two customers demonstrates that competition exists, and thus, Transmittal No. 2633 satisfies the "competitive

---

<sup>9</sup> *Transmittals Nos. 2433 and 2449*, 11 FCC Rcd at 1220.

<sup>10</sup> *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1008 (D.C. Cir. 1996).

<sup>11</sup> In the Matter of Access Charge Reform, First Report and Order, FCC No. 97-158, CC Docket No. 96-262 (rel. May 16, 1997) ("*Access Reform First Report and Order*").

<sup>12</sup> *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal 2622, Order Designating Issues for Investigation*, (Com. Car. Bur. rel. May 23, 1997) at para. 11 (*SWBT Designation Order*).

<sup>13</sup> *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal 2622, Order Terminating Investigation*, (Com. Car. Bur. rel. June 5, 1997).

<sup>14</sup> See Transmittal 2633, Section 1.2 (arguing that Commission has recognized competitive necessity as a justification for individual case basis (ICB) pricing and citing *DS-3 ICB Order*, 4 FCC Rcd at 8634).

<sup>15</sup> *DS-3 ICB Order*, 4 FCC Rcd at 8644.

alternative" prong of the competitive necessity test. SWBT argues that the transmittal satisfies the second prong because the promotion is available to all "similarly situated" customers.<sup>16</sup> Finally, SWBT argues that the transmittal satisfies the third prong because the promotion will attempt to "keep this business" on SWBT's network, resulting in additional revenue that will contribute to overall reasonable rates and efficient services for all users.<sup>17</sup> SWBT argues its pricing is reasonable and in the public interest because Transmittal No. 2633 will provide revenue contribution that will help lower other customers' rates overall.

7. On May 16, 1997, AT&T Corp. (AT&T), MCI Communications Corporation (MCI), and Sprint Communications Company L.P. (Sprint) filed oppositions urging the Commission to reject or, alternatively, to suspend and investigate SWBT's Transmittal No. 2633.<sup>18</sup> Sprint argues SWBT has failed to satisfy the competitive necessity defense.<sup>19</sup> MCI and AT&T contend that the transmittal will enable SWBT to engage in anti-competitive behavior such as cross-subsidizing prices where competition exists with revenues from customers where competition does not exist,<sup>20</sup> which MCI argues violates Section 202(a) of the Communications Act.<sup>21</sup> AT&T and MCI assert Transmittal No. 2633 will enable SWBT to quash competition before it has gained a foothold in the market.<sup>22</sup> AT&T further argues that the transmittal violates section 69.3(e)(7) of the Commission's rules, which prohibits geographic deaveraging and disaggregation.<sup>23</sup> MCI also asserts the transmittal should be rejected because it would predetermine pricing flexibility issues that the Commission has proposed to consider in its *Access Reform* docket.<sup>24</sup> MCI further argues that

---

<sup>16</sup> Transmittal No. 2633, Section 1.5.

<sup>17</sup> *Id.*

<sup>18</sup> Petition of AT&T Corp. to Suspend and Investigate SWBT Transmittal No. 2633 (AT&T petition); MCI Petition to Reject, or, Alternatively Suspend and Investigate SWBT Transmittal No. 2633 (MCI petition); Sprint Communications Company L.P.'s Petition to Reject, or Alternatively Suspend and Investigate SWBT Transmittal No. 2633 (Sprint petition).

<sup>19</sup> Sprint petition at 4-6.

<sup>20</sup> AT&T petition at 4; MCI petition at 11-12.

<sup>21</sup> MCI petition at 12.

<sup>22</sup> AT&T petition at 4; MCI petition at 5.

<sup>23</sup> AT&T petition at 3.

<sup>24</sup> MCI petition at 2. See In the Matter of Access Charge Reform, Notice of Proposed Rulemaking and Third Report and Order, FCC No. 96-488, CC Docket No. 96-262 (rel. Dec. 24, 1996) at para. 195-196 (proposing that LECs should be permitted to offer competitive response tariffs upon a showing that a certain level of competition exists in the access market). The Commission did not resolve this issue in its First Report and Order in the

the streamlined tariff process under which SWBT has filed Transmittal No. 2633 is the incorrect forum for resolving these issues because it offers parties less opportunity to build an adequate record.<sup>25</sup>

8. Sprint and MCI argue the tariff is unreasonably discriminatory in violation of Section 202(a).<sup>26</sup> Specifically, Sprint argues that Transmittal 2633, in practical effect, would be available only to a specific customer that instituted an RFP, and that to offer both individual case basis tariffs and averaged rates for the same service violates the conditions set out in *DS-3 ICB Order*.<sup>27</sup> MCI argues that Transmittal 2633 is a contract tariff. MCI asserts that Commission policy prohibits contract tariffs for dominant carriers in the absence of "substantial competition," which MCI contends does not exist here.<sup>28</sup> According to MCI, Section 204 of the Communications Act places the burden on SWBT to justify its filing by demonstrating substantial competition exists, and that SWBT has failed to do so here.<sup>29</sup> Additionally, MCI argues SWBT has violated Commission policies by filing cost information for its tariff under seal.<sup>30</sup>

#### IV. DISCUSSION

9. We find that Transmittal No. 2633 raises significant questions as to its lawfulness, including whether it: 1) offers rates that are unreasonably discriminatory in violation of Section 202(a) of the Communications Act; 2) violates Section 69.3(e)(7) of the Commission's rules requiring dominant LECs to offer averaged rates throughout their individual study areas; 3) violates the Commission's policy prohibiting dominant LECs from offering contract tariffs; and 4) complies with the *DS-3 ICB Order*'s restrictions on individual case basis tariff offerings by dominant LECs. We therefore shall suspend Transmittal No. 2633 for five months and initiate an investigation into the lawfulness of its provisions. In addition, we will issue a separate order designating the issues to be investigated and establishing a pleading cycle.

---

*Access Reform* docket, but stated it would consider these issues in a forthcoming rulemaking. See *Access Reform First Report and Order* at para. 14.

<sup>25</sup> MCI petition at 2.

<sup>26</sup> Sprint petition at 2-3; MCI petition at 11-12.

<sup>27</sup> Sprint petition at 3-4.

<sup>28</sup> MCI petition at 4-5.

<sup>29</sup> MCI petition at 8.

<sup>30</sup> MCI petition at 12-13.

---

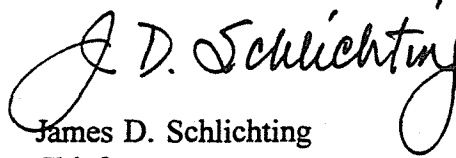
**V. ORDERING CLAUSES**

10. Accordingly, **IT IS ORDERED** that, pursuant to Sections 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, SWBT's Transmittal No. 2633 **IS SUSPENDED FOR FIVE MONTHS** and an investigation of the provisions of this transmittal **IS INSTITUTED**.

11. **IT IS FURTHER ORDERED** that SWBT **SHALL FILE** tariff revisions within five business days of the release date of this Order to reflect this suspension.

12. **IT IS FURTHER ORDERED** that the petitions to suspend and investigate filed by MCI Communications Corporation, Inc., Sprint Communications Company L.P. and AT&T Corporation **ARE GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION



James D. Schlichting  
Chief,  
Competitive Pricing Division  
Common Carrier Bureau