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Southwestern Bell

May 10, 2001

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

FILED[2]
MAY 10 2001
Missouri Public
Service Commission

Re: Case No. TO-2000-667

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and eight copies of Southwestern Bell Telephone Company's Application for Rehearing.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Leo J. Bub tm

Leo J. Bub

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[2]
MAY 10 2001
Missouri Public Service Commission

In the Matter of the Investigation Into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus® Service by Interexchange Companies and Facilities-Based Competitive Local Exchange Companies	)))))))	Case No. TO-2000-667

SOUTHWESTERN BELL TELEPHONE COMPANY'S
APPLICATION FOR REHEARING

Southwestern Bell Telephone Company respectfully requests[1] the Missouri Public Service Commission to reconsider its May 1, 2001 Report and Order.[2] This order requires Southwestern Bell, under the guise of "resale," to forego receiving its own terminating access charges and to be financially responsible for paying such charges to third-party LECs on facility-based CLEC's Local Plus-type calls (i.e., CLECs using their own switch to serve their customers or purchasing unbundled switching from Southwestern Bell). These requirements are unlawful, unjust and unreasonable and Southwestern Bell does not believe it could continue offering Local Plus in its current form if these requirements were imposed.

However, if the Commission has competitive concerns about Southwestern Bell's pricing of Local Plus and/or facility-based competitors' ability to offer a similar service if they had to pay terminating access to Southwestern Bell and other LECs, the appropriate remedy would be for the Commission to order Southwestern Bell to perform an imputation test. If so ordered, Southwestern Bell would certainly comply and perform an imputation test. Southwestern Bell believes it should be able to demonstrate that its current pricing is appropriate. But in the event

[1] Southwestern Bell makes this application pursuant to Section 386.500 RSMo (2000).
[2] Case No. TO-2000-667, Report and Order, issue May 1, 2001 ("Report and Order").

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it cannot pass imputation at the current price level for Local Plus, Southwestern Bell would conform its Local Plus service (either through pricing changes or revisions to the service) to bring itself into compliance.

Specifically, the Report and Order is unlawful, unjust and unreasonable for the following reasons:

1. The Commission improperly ignored the distinction between the provision of service on a resale versus a facility basis. The federal Telecommunications Act of 1996 (the "Act") and the FCC's First Report and Order interpreting the Act set out clear guidelines on how competition was to be introduced to the local telephone market: CLECs were allowed to resell an incumbent LEC's retail telecommunications service; or they were allowed to provide service as a facility-based carrier, using all unbundled network elements ("UNEs") purchased from the incumbent (e.g., loop, switch port and cross-connect), by using a combination of their own facilities and those of the incumbent (e.g., combining its own switch with the incumbent's loops) or by using all of their own facilities (e.g., using cable TV network facilities). The Commission, in its Report and Order, recognized that "such distinctions do exist" but improperly ignored them concluding "they are not particularly relevant in this situation."[3]

Contrary to the Commission's conclusion, this distinction is extremely relevant. It is not simply a matter of "placing particular services and service providers within a particular box."[4] While a CLEC can choose between resale and providing service on a facility-basis, it cannot serve a customer doing both. The two are mutually exclusive methods of providing service. As Southwestern Bell set out in its Initial and Reply Briefs, each method affords a CLEC specific

[3] Report and Order, p. 9.
[4] Report and Order, p. 9.

rights and specific responsibilities.[5] To ignore these distinctions, and their associated rights and responsibilities, would upset the carefully crafted balance established by Congress and the FCC for bringing competition into the local exchange.

These distinctions, which arise from the Act and the FCC's First Report and Order, have appropriately been reflected in prior Commission orders and in all of the interconnection agreements that have been negotiated between CLECs and incumbent LECs in the State. As Staff has confirmed, these agreements take great care in defining what is meant by resale, and what is meant by the provision of service using UNEs.[6] Even ALLTEL's witnesses acknowledged that resale and the provision of service using UNEs or one's own facilities were distinct methods of providing service.[7] It is unlawful, unjust and unreasonable for the Report and Order to ignore these distinctions.

2. The Report and Order fails to recognize that resale of Local Plus cannot occur when another carrier has the switching. It was undisputed that a carrier's ability to provide a service like Local Plus comes from the use of the line class code functionality of its switch. By programming line class code translations into its switch, a carrier defines the local calling scope (i.e., what can be dialed on a local basis without a 1+) for each line served by the switch and sets the specific dialing pattern for that calling scope.[8] To add Local Plus-type service to a customer's line, a carrier would define that line's local calling scope within its switch as all NPA-NXX's in the LATA.

But if a carrier does not have the switching, it cannot provide Local Plus. Accordingly, it was unlawful, unreasonable and unjust for the Commission to attempt to require Southwestern

[5] See, SWBT's Initial Brief, pp. 15-25; and its Reply Brief pp. 1-4, which SWBT incorporates into this Application by this reference.
[6] Staff, Solt Tr. 259-269.
[7] ALLTEL, Krajci Tr. 346-347; Detling Tr. 373-374.
[8] See, SWBT's Initial Brief, p. 9, Hughes Direct, pp. 6-7, Surrebuttal, p. 10; ALLTEL, Detling Rebuttal, p. 5.

Bell to "resell" Local Plus to facility-based CLECs, since they are the ones that control the switching of their end-user customer's lines.

This is most clearly seen where a CLEC chooses to provide service using its own switch (i.e., the CLEC is either combining its own switch with loops from Southwestern Bell, or using all of its own facilities). In this situation, Southwestern Bell has no technical means to provide Local Plus to that CLEC because Southwestern Bell's local switching facilities are not involved in the provision of service to the customer. Rather, it is the CLEC's switch that provides dialtone to the end-user. As ALLTEL's witnesses admitted, that is the switch that sets, provides and controls the calling scope and dialing pattern for the end-user customer's line.[9] And as the Commission itself recognized, Southwestern Bell "might never touch the call."[10]

A CLEC similarly has the switching when it purchases switching UNEs from an incumbent LEC, even though it is the LEC's switch that is being used. As the FCC explained, CLECs purchasing UNEs obtain the exclusive access to that element:

> We adopt the concept of unbundled elements as physical facilities of the network, together with the features, functions and capabilities associated with those facilities. Carriers requesting access to unbundled elements within the incumbent LEC's network seek in effect to purchase the right to obtain exclusive access to an entire element or some feature, function or capability of that element. For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis. Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis.[11]

[9] ALLTEL, Detling Rebuttal, p. 5; see also, SWBT's Initial Brief, pp. 10-11, Hughes Direct, pp. 6-7, Surrebuttal, p. 10.
[10] Report and Order, p. 12.
[11] First Report and Order, para. 258. The incumbent LEC, however, still retains actual physical control of and its duty to repair and maintain its network. Ibid.

In essence, when a CLEC purchases UNEs, it steps into the incumbent's shoes and becomes the network provider. [12] But in ordering Southwestern Bell to "resell" Local Plus to CLECs purchasing its switching UNEs, the Report and Order improperly ignores the fact that it is the CLEC and not Southwestern Bell that is the service provider. (SWBT Initial Brief, pp. 10-11, Hughes Direct, p. 5, Surrebuttal, pp. 7-9). As a result, the Report and Order is unlawful, unjust and unreasonable.

3. The Report and Order unlawfully requires Southwestern Bell to be responsible for access charges incurred by facility-based CLECs. While incumbent LECs are obligated under the Act to interconnect with CLECs and supply them with UNEs to enable them to provide service to their own customers, the Act does not require incumbent LECs to bear the access expenses a CLEC might incur providing service to its own customers.[13] As even ALLTEL's two witnesses acknowledged, a facility-based carrier like ALLTEL -- under federal law, prior Commission orders, and Missouri interconnection agreements with Southwestern Bell -- is responsible for paying terminating compensation to other carriers that terminate its own customers' traffic: reciprocal compensation if it is local traffic and terminating access if it toll traffic.[14]

Regardless of whether a CLEC is using its own switch or that of an incumbent LEC on a UNE basis, it is undisputed that the CLEC is considered in both cases to be the facility-based network provider, not Southwestern Bell. In neither case is it Southwestern Bell's service. Instead, the CLEC is selling its own service that it is physically provisioning itself.[15] And just as a facility-based CLEC is entitled to receive all retail revenues and access charges for the use of

[12] First Report and Order, p. 466, fn. 2312.
[13] SWBT, Hughes Surrebuttal, pp. 11-12.
[14] ALLTEL, Krajci Tr. 348, 350-353, 359; Detling Tr. 383.
[15] ALLTEL, Krajci Tr. 374; Staff, Solt Tr. 266-267; SWBT, Hughes Surrebuttal, p. 5.

its facilities (including UNEs acquired by the CLEC) in originating and terminating toll calls, the CLEC is also responsible for paying terminating compensation to other LECs that terminate its own customers' calls.[16] The Report and Order recognizes this generally accepted responsibility both for CLECs providing service via UNEs:

> If a competing carrier purchases switching from SWBT as a UNE, it can choose to configure that switch in such a way as to provide a competing calling plan that would be similar to Local Plus as offered by SWBT. If a competing carrier were to choose to offer such a calling plan, it would, of course, be responsible for paying terminating access to third-party LECs as well as to SWBT when those local plus type calls are terminated by those other companies.[17]

and for CLECs using their own switch to provide service:

> When a facility-based carrier proposes to resell Local Plus utilizing its own switch, it seems at first glance that such a plan is neither reasonable nor feasible. A facility-based carrier, using its own switch, might service customers with no connection whatsoever with SWBT. It could certainly establish its own Local Plus type service. A customer of such service could phone a customer served by a third-party LEC or by the facility-based carrier itself and SWBT might never touch the call. In that circumstance it would seem to be unfair to require SWBT to pay the terminating access charges on such a call.[18]

But based on a belief that facility-based CLECs face a "competitive disadvantage," the Report and Order has created a fiction through which it required Southwestern Bell to "resell" Local Plus to them: even though these facility-based CLECs physically provided the service themselves, they would pay Southwestern Bell the wholesale rate for Local Plus and Southwestern Bell would forego its terminating access charges for terminating those carriers' Local Plus calls and would also be responsible for terminating access charges to third-parties for terminating the CLECs' Local Plus calls.[19]

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[16] Case No. TO-96-440, Report and Order, issued September 6, 1996, pp. 6-7 (Dial U.S. Order); and Case No. TO-98-115, Report and Order, issued December 23, 1997 at pp. 12-13 (Second AT&T Arbitration Order).
[17] Case No. TO-2000-667, Report and Order, issued May 1, 2001 at p. 11.
[18] Id. at p. 12.
[19] Report and Order, pp. 11-13.

Even Staff, which advocated requiring Southwestern Bell to forego its own terminating access charges, believed that requiring Southwestern Bell to pay for a third-party terminating access charge went too far. (Staff, Initial brief pp. 5-6; Accord, Dissenting Opinion of Commissioner Murray pp. 3-4). This requirement is unlawful, unjust and unreasonable and would expose Southwestern Bell to schemes like what it recently discovered in Arkansas, in which a CLEC employed auto-dialers to establish and maintain circuits for the sole purpose of generating reciprocal compensation payments from Southwestern Bell.[20] Here, imposing a requirement that Southwestern Bell be responsible for terminating access charges on a facility-based CLEC's Local Plus calls would provide an incentive for a CLEC to generate originating Local Plus traffic on its own switch that terminates to another one of its customers in another exchange. Instead of such traffic being noncompensable to the CLEC (since it would be terminating those calls to itself), each minute generated would improperly produce a minute of terminating compensation for that CLEC at Southwestern Bell's expense.

4. The Report and Order unlawfully disregards Southwestern Bell's approved access tariffs. Southwestern Bell has no objection to interconnecting with a CLEC and accepting traffic the CLEC originates on its switch (or through the use of Southwestern Bell's switching UNEs) for termination in Southwestern Bell exchanges or transport to an exchange owned by another LEC. However, when a CLEC requests Southwestern Bell to perform such functions, it is clear under existing law, Commission-approved tariffs, and all CLEC interconnection agreements that it is traditional access services that are being requested (both from Southwestern Bell and any other LEC that may be involved in handling the CLEC customer's call).[21]

[20] See, the Complaint and Petition for Declaratory Relief in Southwestern Bell Telephone Company v. Connect Communications Corp. before the Arkansas Public Service Commission on May 2, 2001. Other LECs have encountered similar situations. See, e.g., Bell South v. US LEC of North Carolina, Inc., Docket No. P-561, Order Denying Reciprocal Compensation, released August 24, 1999.

[21] See, Dial U.S. Order, pp. 6-7; Second AT&T Arbitration Order, pp. 12-13; ALLTEL, Krajci Tr. 348-351.

Barring Southwestern Bell from receiving its tariffed access rates for terminating another carrier's calls would be unfair and unlawful. As Staff acknowledged, Southwestern Bell incurs costs when it terminates a facility-based CLEC's Local Plus type calls and to bar it from recovering those costs would be confiscatory.[22] Southwestern Bell's access tariffs have been approved and been on file with the Commission for years. Such rates, as approved by the Commission, are prima facie lawful and reasonable until found otherwise in a suit brought for that purpose.[23] The Report and Order's disregarding these tariffs is unlawful, unjust and unreasonable.

5. The Report and Order unlawfully forces Southwestern Bell to offer a service it has not voluntarily held itself out to offer. By requiring Southwestern Bell to forego its access charges and be responsible for terminating access charges of third-party LECs in exchange for the wholesale Local Plus rate, all under the guise of "resale," the Report and Order forces Southwestern Bell to provide a flat-rated terminating switched access service covering both its own exchanges and those of third-party LECs. Southwestern Bell has not and does not offer such a service. To the contrary, Southwestern Bell's state access tariffs, all of which have been approved by the Commission, offer exchange access service on a per minute basis and only in Southwestern Bell exchanges. Any attempt to force Southwestern Bell to provide a service it has not voluntarily held itself to offer would violate longstanding Missouri law and impose an unfair financial burden on it.[24]

[22] Staff, Solt Tr. 328-329.

[23] Section 386.270 RSMo (2000). See also, Lightfoot v. City of Springfield, 236 S.W.2d 348, 353-354 (Mo. 1951) (a public utilities revenue collected pursuant to lawful and approved rates are property interest protected by the due process provisions of the state and federal constitutions.

[24] State ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 416 S.W.2d 109, 113 (Mo. banc 1967) (the Bellflower case) (holding the Commission is without power to order a telephone company to provide services which it has not voluntarily professed to offer).

6. The imputation test is the appropriate remedy to address competitive pricing concerns. If the Commission is concerned that the level at which Southwestern Bell has priced Local Plus may impede facility-based CLECs' ability to compete, the appropriate remedy would be for the Commission to order Southwestern Bell to perform an imputation test. Staff agreed that if it is shown that Southwestern Bell passes an imputation test, it would not be necessary to force Southwestern Bell to forego its tariffed access charges for terminating a facility-based CLEC's Local Plus-type calls and that the imputation test is the normal method to ensure that the service is not priced below its cost.[25]

If so ordered, Southwestern Bell would comply and perform an imputation test. Southwestern Bell believes it should be able to demonstrate that its current pricing is appropriate. But in the even it cannot pass imputation at the current price level for Local Plus, Southwestern Bell would conform its Local Plus service (either through pricing changes or revisions to the service) to bring itself into compliance.

WHEREFORE, Southwestern Bell respectfully requests the Commission to grant this application and rehear this case.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY Leo J. Bub /TM

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[25] Staff, Solt Tr. 331-332.

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid U.S. Mail on May 10, 2001.

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