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Southwestern Bell

June 6, 2001

FILED[3]

JUN 0 6 2001

Missouri Public
Service Commission

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

Re: Case No. TO-99-593

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 Comments.

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

Very truly yours,

Leo J. Bub

Enclosure

cc: Attorneys of Record

FILED[3]

JUN 0 6 2001

Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Investigation into Signaling Protocols, Call Records, Trunking Arrangements, and Traffic Measurement.	)))	Case No. TO-99-593

SOUTHWESTERN BELL TELEPHONE COMPANY'S COMMENTS

Southwestern Bell Telephone Company, pursuant to the Missouri Public Service Commission's Order Directing Additional Notice[1] respectfully submits the following Comments:

1. The Commission Established this Case to Investigate Technical Network Issues.

As the Commission acknowledged, it created this case to investigate the issues of signaling protocols, call records, trunking arrangements, and traffic measurement and provided notice on June 1, 1999, to all telecommunications companies in the State that these issues were being investigated.[2] The Commission indicated that during the course of this proceeding, certain issues were raised that "may be beyond the scope of the original notice," and provided additional notice to all telecommunications companies in the State of three additional issues:

- Should the Commission change the business relationship that currently exists among telecommunications companies so that the former primary toll carriers (PTCs) are responsible for all terminating traffic based on terminating recordings (with the exception of interstate feature group A, interstate intraLATA, IXC, MCA, and intraMTA wireless transited by another LEC to the terminating LEC)?

- Should the Commission require the former PTCs and the former secondary carriers (SCs) to divide the responsibility for unidentified traffic or discrepancies between originating recordings and terminating recordings?

- Should the Commission allow the former PTC s at the request of a former SC, to block traffic for non-compensation?

[1] Case No. TO-99-593, Order Directing Additional Notice, issued May 17, 2001.
[2] Id. p. 1.

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The Commission, in its Order Directing Additional Notice, provided that "any party wishing to intervene or to file comments in this matter shall filed an application, or shall file their written comments, no later than June 6, 2001. . . ."[3]

While the small companies sought to inject "business relationship" issues into this proceeding, Southwestern Bell consistently objected as those issues were beyond the technical network issues (signaling protocols, call records, trunking arrangements and traffic measurement) designated by the Commission for investigation.[4] Staff agreed indicating that when the Commission ordered "that this case be established, it did not identify business relationships as an issue that the parties should address in this case."[5] Until its Order Directing Additional Notice, the Commission never authorized or sanctioned the inclusion of such issues.

2. Southwestern Bell Opposes Expansion of this Proceeding. Southwestern Bell opposes the expansion of the investigation in this case to include such "business relationship" issues. Requiring tandem LECs to be responsible for terminating charges on other carriers' traffic would radically restructure long-standing industry intercompany compensation methods (as reflected in all LEC access tariffs, as well as CLEC interconnection agreements) and has no basis in law. The existing intercompany compensation method in use is not unique to Missouri, as can be seen in a recent order from the United States District Court in Montana. There, small independent LECs sued US West for terminating access charges on calls originated by other carriers that transited US West's network. As the Court indicated, the "heart" of the dispute was that the telephone networks of US West and the independent local exchange companies "create interconnecting facilities over which a wide array of communications traffic travels - including

[3] Id., p. 2.
[4] See, e.g., SWBT's Initial Brief, pp. 26-29.
[5] See, Staff's Statement of Position on the issues, p. 2.

inter-LATA, intra-LATA, and wireless communication. This common trunk access is known as Feature Group C, and effectively results in a co-mingling of traffic regardless of the call's origin or the caller's choice of long distance carrier."[6] In ruling that US West had no obligation to pay the access charges for other long distance carriers whose calls traverse US West facilities, the Court ruled:

> From the briefs and oral argument, the Court concludes that the accepted practice provides that the company liable for the terminating access charge is the company liable for the originating access charge - the company entitled to bill the end user for long distance calls. Plaintiffs conceded as much in their brief and at the hearing on the motion for summary judgment. However, Plaintiffs nevertheless argue that by 'accepting' the traffic over their network, thereby 'elect(ing) to treat all such traffic as its own,' US WEST is liable for the terminating access charges 'having received the benefit of those transactions.' But where is the benefit? If US WEST is not the end-user's long distance carrier and therefore lacks the ability to receive any compensation through billing for that call, no benefit accrues to US WEST for which it should be asked to pay charges to an independent local exchange company. Moreover, Defendant advances the uncontroverted argument that the national mandatory interconnection policy *requires* that it accept the traffic from the independent local exchanges. A fair reading of 47 U.S.C. § 202, which makes unlawful any discrimination in 'practice, ...facilities, or services for or in connection with like communication service, supports Defendant's view.[7]

Rather than expanding the issues in this case, Southwestern Bell would recommend the Commission direct the parties to work together to develop an industry plan to ensure that all carriers receive appropriate records and compensation for the traffic they terminate. While the former PTCs have opposed attempts to radically restructure the industry, they have no opposition to working cooperatively with the small LECs to make sure that all terminating carriers have appropriate records needed to bill and secure appropriate compensation for the traffic they terminate. The evidence presented to date in this case has shown that the former PTCs have been

[6] Three Rivers Telephone Cooperative, Inc., et al. v. US West Communications, Inc., Case No. CV-99-080-GF-RFC, Slip Op. at 3 (D. Mont December 11, 2000) (a copy of this Opinion is appended as Attachment 1).
[7] Id. p. 5 (emphasis added).

willing and have worked with the small LECs to develop and provide settlement records the small LECs can use to bill and receive appropriate payment from the originating responsible carrier:

- Since divestiture, the former PTCs have been providing the small LECs with access usage records that they have used and still use to bill IXCs for interstate and intrastate traffic;

- Southwestern Bell for years has been providing the settlement reports for Feature Group A ("FGA") traffic;

- The former PTCs, pursuant to the Commission's directives, have been providing Cellular Transiting Usage Summary Reports ("CTUSR") reports for transited wireless traffic. Some of the small companies are currently using these reports and the others have acknowledged to the Commission they can use them for billing wireless carriers;

- The former PTCs, pursuant to the Commission's Order in Case No. TO-99-254, worked cooperatively with the small LECs and their billing vendors to develop Category 11 Records in a format that was acceptable to the small LECs. Those records are now being used successfully by the small LECs to bill terminating compensation on intraLATA toll traffic;

- The former PTCs have been working with the small LECs to develop records the small LECs can use to identify and bill interstate intraLATA calls. This new process began operating within Southwestern Bell on February 1, 2001;

- The former PTCs and the small LECs, in a spirit of full cooperation, conducted an extensive test of the existing record systems for the purpose of identifying and addressing any problems that may exist. A tremendous amount of effort by all carriers went into this test and the report prepared by the industry has been filed in this case; and

- Southwestern Bell has committed significant capital resources to its deployment of the new Access 7 Business Intelligence System, which will provide the capability to monitor the interconnection traffic that comes into Southwestern Bell's network. Southwestern Bell is willing to share output of this new system with the small LECs. Sprint has begun to deploy the Access 7 System and is willing to share its output as well.

As the Commission is aware, the evidence presented in this proceeding showed that most of the records problems the small LECs encountered were the result of an isolated translations

error Southwestern Bell made in programming its Ericsson switches to handle Local Plus® traffic. That problem, however, was identified, resolved and appropriate settlements made to all LECs that were impacted. If the Commission is concerned that there may still be significant problems with the existing record system, Southwestern Bell would recommend the Commission direct the parties to conduct another test to determine whether any unaddressed problems remain. Southwestern Bell would submit that such a test would show that the current system is functioning properly. Any remaining records discrepancies would certainly not rise to the order of magnitude necessitating a wholesale scrapping of the existing system and radical restructuring of the industry.

SWBT continues to believe that it wholly inappropriate to make the former PTCs financially responsible for another carrier's traffic, simply because it transited one of the former PTC's network. The former PTCs are fully willing to work with the small LECs to make sure that sufficient information to bill their access to the appropriate originating carrier and are even willing to share the financial burden for any unidentified traffic that may exist until the industry has determined that any existing gap is narrowed to an acceptable level. However, it is inappropriate to shift the small LECs' billing and collection responsibilities and their normal business risks of delinquencies and non-payment to the former PTCs.

3. Additional Hearings Would be Required to Expand the Issues Designated for Investigation. Southwestern Bell believes that without a further opportunity for hearing, designating additional issues for consideration in this proceeding after the conclusion of the hearing is improper and would violates the parties' due process rights under the U.S. and State Constitutions. As the U.S. Supreme Court explained, an "essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing

appropriate to the nature of the case."[8] Here, changing the business relationship to make the former PTCs financially responsible for terminating charges on another carrier's traffic would necessarily result in a deprivation of the PTCs' property. A blocking requirement would also impose potentially significant costs on the former PTCs. Such deprivations require advance notice and an opportunity for hearing.

Part of Southwestern Bell's opposition to including "business relationship" issues was that not all necessary parties were present in the proceeding to adjudicate the issues the small companies sought to inject into the case. The Commission's now simply providing notice to all telecommunications carriers in the state and allowing them an opportunity to intervene in this proceeding does not cure this defect.

As the Commission is aware, not all carriers that are originating the traffic in dispute are present. For example, Spectra, the fourth largest LEC in the state is not a party. And neither are any CLECs or wireless carriers. Simply providing notice to such carriers and giving them an opportunity to intervene may not bind them to an order that could potentially require them to change their access tariffs or interconnection agreements with other carriers. Unless upstream carriers are joined as parties to this case, adjudicating "business relationship" issues would unfairly subject the former PTCs to liability for upstream carriers' traffic with no means of recovery from them on the traffic they originated and sent through the former PTCs' networks to the small LECs for termination.

As the Commission is aware, the former PTCs' transport charges were designed to recover only their own costs to carry calls across their own networks, not the facility costs of the terminating carriers. Even the small LECs do not dispute that the transport charges the former

[8] Cleveland Bd. of Ed. v. Loudermill, 470 US 523, 542 (1985) quoting Mullane v Central Hanover Bank & Trust Co., 339 US 306, 313 (1950) (emphasis supplied).

PTCs collect from the originating carriers are insufficient to cover the small LECs' terminating charges.[9]

Under both the former PTCs' and the small LECs' existing Commission-approved tariffs, such terminating charges are to be recovered from the originating carrier on a meet point billing basis (i.e., both the former PTC through whose tandem the call passed and the terminating LEC directly bill the originating carriers for the portion of their respective networks used in handling the call and do so at their respective tariff rates).[10] Similarly, all of the interconnection agreements Southwestern Bell, Sprint and Verizon have with the CLECs follow this same principle. They each require the CLEC to be responsible for compensating all other carriers involved in handling the traffic its customers originate.[11] Neither existing tariffs nor carrier interconnection agreements provide a mechanism for the former PTCs to be reimbursed for the charges the small LECs seek to have imposed.

Undertaking such a major restructuring of the long-standing compensation arrangements between all carriers in the State cannot be accomplished without the mandatory inclusion of all necessary parties. Otherwise, the Commission would have no means of providing a reimbursement mechanism to the former PTCs on charges for which another carrier is responsible.

4. If the Investigation is to be Expanded to include "Business Relationship" Issues, Underlying Jurisdictional and Other Appropriate Issues Must Also be Addressed. For the Commission to investigate whether the business relationship among carriers should be changed,

[9] Southwestern Bell's transport charges are $0.007 per minute -- less than a penny (SWBT, Hughes Surrebuttal, p. 8) -- and the small LECs' terminating access charges range from $0.04 to $0.12 per minute (e.g., Mid-issouri's rate is slightly over $0.12 per minute). MITG, Jones Tr. 266.
[10] STCG, Schoonmaker, Tr. 123, 124.
[11] Sprint, Cowdrey Tr. 484; SWBT, Hughes Rebuttal, pp. 5-7; Verizon, Allison Tr. 646.

several significant issues must be considered and addressed besides the ultimate question of whether the Commission should change the business relationship. Such issues, many of which are threshold jurisdictional questions, include:

- Whether the Commission has authority under state and federal law to mandate changes in existing interconnection agreements previously negotiated and approved pursuant to the federal Telecommunications Act? If so,
    - Can the Commission mandate changes midstream or can it do so only on a prospective basis after the expiration of the current interconnection agreements?
- Whether changing the "business relationship" to require tandem companies to be financially responsible for terminating charges on other carriers' traffic would impermissibly interfere with interconnection requirements under the Act and explicit federal and state policies encouraging interconnection between carriers?
- Whether the Commission has the authority to require one carrier (e.g., tandem LECs) to be financially responsible for terminating charges on another carrier's traffic? If so,
    - Would it be confiscatory to require tandem LECs to be financially responsible for terminating charges on other carrier's traffic?
    - How can the tandem companies recover those charges when they are prohibited by the price cap statute from raising their own access rates?
    - What mechanisms should be put in place to allow the tandem LECs to recoup the small LECs' terminating charges from originating carriers?
    - Should the small LECs be required to reimburse the tandem LECs for costs they will incur in developing and implementing systems and procedures for billing the small LECs' terminating charges to the upstream carriers that originate the traffic?
    - Are the tandem LECs entitled to be compensated for the expenses and other costs they will incur in billing and collecting the small LECs' terminating charges from the upstream carriers that originate the traffic?
    - Should the small LECs pay a billing and collection charge to compensate the tandem LECs for performing the small LECs' billing and collection function?
- Does the Commission have authority to permit one LEC to direct a tandem LEC to block a third carrier's traffic? If so,

- Is such a blocking requirement consistent with state and federal law?

- Should the LEC requesting the blocking be required to reimburse the tandem LEC for the costs it incurs in performing the blocking?

- Should the LEC requesting the blocking be required to indemnify and defend the tandem LEC against claims arising from the requested blocking?

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY _____

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

3 RIVERS TELEPHONE COOPERATIVE, INC., et al.,	)	
Plaintiff,	)	CV-99-080-GF-RFC
vs.	)	**ORDER**
U.S. WEST COMMUNICATIONS, INC.,	)	
Defendant.	)	

Plaintiffs are nine independent telephone companies who allege that Defendant U.S. WEST has wrongfully withheld payments for the completion of long distance calls in areas served by the Plaintiffs' telephone networks. The Scheduling Order of this Court allowed for a motion for summary judgment by the Defendant. The motion was fully briefed by the parties and oral argument was held on the motion. The Court is now prepared to rule.

Following the divestiture of the Bell system in 1984, US WEST became one of seven Regional Bell Operating Companies which not only served as telephone customers' local exchange provider, but also was allowed to provide "local" long distance service, i.e., long distance service within the same Local Access and Transport Area (so-called intra-LATA

service).[1]

Twenty independent companies, including Plaintiffs, also serve areas in Montana as local exchange companies. At the time of divestiture, US WEST provided local long distance service for sixteen of the independent companies' subscribers as the designated carrier for intra-LATA calls since most of the independent local exchange companies were not then providing that service. Since then, the communications landscape has dramatically changed. Many local exchange companies, including most of the Plaintiffs, have replaced US WEST as their designated intra-LATA long distance service carrier. Several even provide their own intra-LATA and inter-LATA service to their customers. Moreover, there has been a marked increase in the number of wireless carriers over the period.[2]

It is undisputed that when a telephone company is the designated carrier of long distance, it pays an access charge to the local exchange company in which the call originates as well as the local exchange company where the call terminates. These two charges are known as "originating access charge" and "terminating access charge," respectively. The long distance carrier pays both charges since it is receiving revenue from the long distance subscriber in the form of billed charges for a call that could neither be initiated nor completed without the presence of, or access to, the local exchange company's telephone network.

Following divesture of the Bell system, US WEST, as the designated intra-LATA

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[1] US WEST is prohibited from providing long distance service between separate Local Access and Transport Areas (so-called inter-LATA service).

[2] As discussed further herein, the growth of wireless traffic and the regulations governing the levying of charges by local exchange companies on such traffic limit the issue of which long distance traffic is subject to access charges.

carrier, paid the local exchange companies access charges in accordance with the justification given above. However, since the enactment of the Federal Telecommunications Act of 1996, designed to promote competition in the telecommunications industry, US WEST's dominance as the intra-LATA carrier for the independent local exchange companies has waned considerably. Plaintiffs do not dispute US WEST's contention that it now only serves as the designated intra-LATA carrier for four of the twenty local exchange companies in Montana. In December of 1998, US WEST notified Plaintiffs that henceforth it would pay the terminating access charges only for those calls originating with US WEST customers or those local exchange companies who had retained US WEST as their designated intra-LATA long distance carrier. Thus, Plaintiffs filed the present action alleging breach of contract, unjust enrichment, estoppel, and breach of the covenant of good faith and fair dealing.

As previously mentioned, there has been a decided increase in intra-LATA communication by cellular phone. Significantly, no local exchange company, including US WEST or the plaintiffs, may levy access charges against wireless carriers by Order of the Federal Communications Commission. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* FCC Docket 96-325 ¶ 1036.

The heart of this dispute is that the telephone networks of US WEST and the independent local exchange companies create interconnecting facilities over which a wide array of communication traffic travels – including inter-LATA, intra-LATA, and wireless

communication. This common trunk access is known as Feature Group C, and effectively results in a co-mingling of traffic regardless of the call's origin or the caller's choice of long distance carrier. The result is that four different types of communication traverse the system as follows:

1) calls from US WEST users to other US WEST users;

2) calls from US WEST users that terminate at independent local exchange companies such as Plaintiffs;

3) wireless calls that terminate at independent local exchange companies such as Plaintiffs; and

4) calls that originate from an independent local exchange company and terminate at another local exchange company.

Types one and two are not at issue here. In example #1, the Court understands that the payment of access charges amounts to a transfer within divisions of US WEST. As for example #2, Plaintiffs' counsel conceded at oral argument that calls originating with US WEST and terminating at an independent company are not at issue since US WEST continues to pay termination access charges based upon its Total Usage Tracking (TUT) report.

The third type of call, from a wireless carrier to an independent local exchange company, is troubling for two reasons. First, as stated previously, the FCC has ruled that local exchange companies may not collect terminating access charges from wireless carriers.[3] Second, wireless calls may account for much of the traffic for which Plaintiffs are seeking terminating access charges from US WEST. Plaintiffs conceded that point at oral argument,

[3] An exception exists if the wireless call travels outside a so-called Major Trading Area, but that exception has no application in the case before the Court.

Mr. Squires stating that "I would agree that a large amount of those numbers (minutes of calls traversing US WEST's wires) probably are wireless. I can't and wouldn't dispute that." US WEST certainly is not obligated to pay terminating access charges to Plaintiffs for those minutes.

That leaves us with calls from one independent local exchange company to another for which US WEST is not the end-user's designated intra-LATA long distance provider.

From the briefs and oral argument, the Court concludes that the accepted practice provides that the company liable for the terminating access charge is the company liable for the originating access charge – the company entitled to bill the end user for long distance calls. Plaintiffs conceded as much in their brief and at the hearing on the motion for summary judgment. However, Plaintiffs nevertheless argue that by "accepting" the traffic over their network, thereby "elect(ing) to treat all such traffic as its own," US WEST is liable for the terminating access charges "having received the benefit of those transactions." But where is the benefit? If US WEST is not the end-user's long distance carrier and therefore lacks the ability to receive any compensation through billing for that call, no benefit accrues to US WEST for which it should be asked to pay charges to an independent local exchange company. Moreover, Defendant advances the uncontroverted argument that the national mandatory interconnection policy *requires* that it accept the traffic from the independent local exchanges. A fair reading of 47 U.S.C. § 202, which makes unlawful any discrimination in "practices, ...facilities, or services for or in connection with like communication service, supports Defendant's view.

Certainly, charges should be assessed and collected for originating and terminating intra-LATA telephone calls between independents, but to accept Plaintiffs' position results in the nonsensical proposition that US WEST should be liable for payment of money owed by one plaintiff to another plaintiff simply because US WEST is acting as a transport carrier. Moreover, the record before this Court suggests that Plaintiffs could correctly assess charges if they but shared their written records. Instead, they argue that US WEST should switch to a different system (Feature Group D trunking) which would better segregate the traffic and spare the Plaintiffs the inconvenience of having to share their records with one another. Plaintiffs' argument in this regard is without effect since they admit that this Court lacks the authority to order such a system reconfiguration even if it was of a mind to do so. Moreover, this Court must conclude that the tariffs do not require Defendant to acquire Feature Group D for the Plaintiffs in this action.

Each independent local exchange company obviously knows who the designated intra-LATA carrier is for their subscribers through the Primary Interexchange Code (PIC). The independent local exchange companies such as Plaintiffs need only exchange their information in order for the correct entity responsible for the access charges to be identified. As such, Plaintiffs' appeal to the Telephone Exchange Carriers of Montana (TECOM) tariffs and reliance on the "filed rate doctrine" are irrelevant to the issue at hand. This action is not a dispute over rates -- the thrust of the dispute addresses obligations, and US WEST has no obligation to pay the access charges for other long distance carriers whose calls traverse US WEST facilities.

Cut to its central issue, Plaintiffs argue that US WEST should be obligated to pay terminating access charges even though it is not required to pay originating access charges since it is not the long distance carrier of choice for Plaintiffs' customers. Plaintiffs offer no controlling legal authority – not one case – that supports this novel proposition that the filed rate doctrine forms the basis for a breach of contract action. Given the record before the Court, Plaintiffs cannot prevail on any of their claims.

Summary judgment is appropriate when the moving party demonstrates that "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). US WEST has met that burden, and Plaintiffs have failed to make a sufficient showing that there is a genuine issue for trial.

Wherefore, IT IS HEREBY ORDERED that:

1) defendant's motion for summary judgment (docket #26) is GRANTED;

2) since US WEST's counterclaim was preconditioned on a determination that US WEST be found liable, the counterclaim is DISMISSED as moot;

3) the clerk is directed to enter judgment for the defendant by separate document, the parties to bear their own costs.

DATED this 11th day of December, 2000.

RICHARD F. CEBULL
United States Magistrate Judge

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on June 6, 2001.

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