

SBC Long Distance Application - Southwestern Bell Initial Comments OKC

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

CAUSE NO. PUD 970000064
IN THE MATTER OF APPLICATION OF
ERNEST G. JOHNSON, DIRECTOR OF
THE PUBLIC UTILITY DIVISION,
OKLAHOMA CORPORATION
COMMISSION TO EXPLORE THE
REQUIREMENTS OF SECTION 271 OF
THE TELECOMMUNICATIONS ACT
OF 1996

Initial Comments and Legal Memorandum of Southwestern Bell Telephone Company

In Support of Endorsement of Full InterLATA Competition in Oklahoma

Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act"), to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report"). Congress also spelled out how it intended to accomplish this goal: "by opening all telecommunications markets to competition." *Id.* (emphasis added). This proceeding provides the Commission with an opportunity to help ensure that the people of Oklahoma are among the first to realize the Act's intended benefits.

Under new subsection 271(d)(2)(B) of the Communications Act, 47 U.S.C. § 271(d)(2)(B), this Commission will be asked to advise the Federal Communications Commission ("FCC") concerning the compliance of Southwestern Bell Telephone Company and its affiliates (collectively, "Southwestern Bell") with the prerequisites for interLATA entry set out in section 271(c). Southwestern Bell has submitted extensive materials to assist the Commission in fulfilling its consultative role. These materials demonstrate how Southwestern Bell has complied and will comply with the relevant statutory requirements.(1)

Beyond this, however, the Commission should support Southwestern Bell's application for interLATA relief in Oklahoma before the FCC. Interexchange carriers currently do not compete vigorously for the business of lower-volume residential customers in states, such as Oklahoma, where the major local exchange carrier ("LEC") is barred from offering long distance. Real competition has erupted only where restrictions on LEC participation have been lifted. As the FCC has recognized, Bell company entry into interLATA services is the way to address this problem. In Oklahoma, Southwestern Bell's entry will help to ensure that consumers realize the benefits of full competition in long distance services, just as they are realizing the benefits of this Commission's policies promoting competition in other telecommunications services.

I. Southwestern Bell has satisfied Section 271(c)'s prerequisites for interLATA entry in

Oklahoma

Section 271(c)'s requirements are two-fold. First, Southwestern Bell must hold out to its local competitors terms for interconnection and network access, in the form of: (A) a state-approved agreement (or agreements) with a qualifying, facilities-based competitive local exchange carrier ("CLEC"); or (B) an effective statement of generally available terms and conditions. § 271(c)(1). Second, these terms must satisfy Congress' test for whether local markets are open to competitors, as set out in the so-called "competitive checklist." § 271(c)(2).

When these two requirements are satisfied, the Bell company has fulfilled its statutory obligation to ease entry by local competitors before providing in-region interLATA services. Congress emphasized this point by forbidding the FCC from adding requirements to the competitive checklist. § 271(d)(4). Thus, for instance, the FCC could not impose a requirement that the Bell company must enter into a local interconnection agreement with one of the major interexchange carriers, or furnish some threshold quantity of an unbundled network element to competitors. Nor may the FCC condition approval of a section 271 application upon a market-share test of actual local competition. Indeed, consistent with its belief that regulators should step aside once barriers to entry are down and market forces can operate,⁽²⁾ Congress specifically rejected proposals to require that Bell companies face some specific type of actual competition in their local businesses before they provide interLATA services. See Draft Br. at 51 n.28 (discussing Senate's rejection of Kerrey Amendment and defeat of parallel House proposal).

The fact that actual local competition is not a prerequisite for interLATA entry is confirmed by subsection 271(c)(1)(B), which allows a Bell company to secure interLATA relief after a statement of terms and conditions has been approved or allowed to go into effect by the appropriate state commission, even if the Bell company has received no requests for local interconnection and network access. As the Conference Report on the Act explains, "[n]ew section 271(c)(1)(B) . . . is intended to ensure that a [Bell operating company] is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has [requested interconnection]." Conference Report at 148.

. Southwestern Bell has satisfied the requirements of Section 271(c)(1)

Under these tests, Southwestern Bell may file its application for interLATA relief with the FCC. Brooks Fiber Communications ("Brooks Fiber"), a competitor with which Southwestern Bell has a Commission-approved agreement and which owns fiber-optic networks and switches in Tulsa and Oklahoma City (see Wheeler Aff. 4-8, 14-15), has informed the Commission that it has "actually completed interconnection and started to pass live traffic in mid-January with Southwestern Bell" in Oklahoma City.⁽³⁾ Brooks Fiber is serving multiple business customers entirely over its own network in Oklahoma City and is furnishing residential service as well. Hearing Tr. at 125. Brooks Fiber indicates that "the situation is pretty similar in Tulsa." Id. at 126.⁽⁴⁾ Thus, the facts available to Southwestern Bell indicate that Brooks Fiber is a qualifying, facilities-based provider of telephone exchange services whose implemented interconnection agreement allows Southwestern Bell to secure interLATA relief under subsection (A).

If Brooks Fiber is not a qualifying provider under subsection (A) for any reason, Southwestern Bell may still secure interLATA relief through its compliance with subsection (B). See Draft Br. at 10-12. As soon as Southwestern Bell's Statement of Terms and Conditions ("STC") becomes effective (or is approved by this Commission), Southwestern Bell will have fulfilled the requirements of subsection 271(c)(1)(B).

. Southwestern Bell's STC and agreements satisfy the competitive checklist

Congress further insisted that the terms available through agreements or an STC must provide a genuine opportunity for CLECs to compete, as measured by the 14-point checklist of section 271(c)(2)(B). In Oklahoma, Southwestern Bell also has satisfied this prerequisite to interLATA entry.

The draft brief provided to the Commission on February 20, and the accompanying draft affidavits, detail Southwestern Bell's point-by-point compliance with the checklist. See Draft Br. at 12-36 & materials cited. Southwestern Bell's STC ensures any competitor that wishes to provide local service in Oklahoma every opportunity Congress intended. Whether the competitor seeks to enter the local telephone business by building a complete network from scratch, by obtaining network elements from Southwestern Bell, or as a reseller of Southwestern Bell services, it can obtain the facilities or services it needs at rates that are consistent with the statutory standards.

Because many of the terms of the STC are taken from this Commission's decision in the recent AT&T arbitration, the Commission already has found that they are fair, reasonable and consistent with applicable requirements of the 1996 Act.(5) For instance, the STC incorporates the rates for unbundled network elements that were established in the AT&T arbitration, as well as the arbitrator's 19.8 percent discount rate for wholesale services. See Draft Br. at 17, 35-36.

Southwestern Bell also is able to demonstrate checklist compliance through its agreement with Brooks Fiber, as the draft brief explains. By virtue of the substantive terms contained in the Brooks Fiber agreement, a "most favored nation" clause that gives Brooks Fiber access to terms found in other Commission-approved agreements, and its ability to take advantage of the STC if it so chooses, Brooks Fiber has access to the full measure of network facilities and services identified in the checklist, on the required terms. Draft Br. at 15-36.(6)

Other competitors can choose from a range of provisions negotiated by CLECs and approved by this Commission. See 47 U.S.C. § 252(i). Southwestern Bell currently has approved agreements with Brooks Fiber, U.S. Long Distance, Dobson Wireless, Inc., and Western Oklahoma Long Distance. Stafford Aff. 14. Southwestern Bell anticipates that additional agreements will be approved before Southwestern Bell files its section 271 application with the FCC. These include signed agreements with Sprint and ICG Telecom Group, both of which are large, capable competitors and sophisticated negotiators. See id. 13 (listing filed agreements). By piggy-backing on arrangements negotiated by these companies, other new entrants can secure terms beyond those in the STC with virtually no negotiating costs.

Alternatively, a competitor could use Southwestern Bell's STC and the Commission-approved

agreements as a starting point for its own negotiations with Southwestern Bell. Southwestern Bell has done everything reasonably possible to accommodate competitors that want tailor-made agreements, and will continue to do so. See generally Zamora Aff. (describing Southwestern Bell's negotiating practices).

II. Southwestern Bell's entry into interLATA services will benefit consumers

Aside from fulfilling this Commission's intended role under section 271, a favorable report to the FCC will advance competition in the telecommunications industry in Oklahoma and serve the public interest. The Commission has long worked to break down barriers to entry in telecommunications markets. As this Commission is well aware, Oklahoma was the first state to adopt rules, in Cause No. RM 950000019, pertaining to local exchange service competition following passage of the 1996 Act. See Stafford Aff. 6. At least 19 companies have applied for certificates of public interest, convenience, and necessity to provide local exchange service in Oklahoma and at least nine have received such authorization. *Id.* This Commission also has opened intraLATA toll services, exchange access, operator services, payphones, and other services to competition. See *id.*

Yet there is one more step to be taken before the goal of full and free competition can be realized. Section 271's barrier to entry into the interexchange business sets Southwestern Bell apart from every other telecommunications carrier in Oklahoma, including even GTE and other major LECs. This unique prohibition on competition directly harms consumers.

Section 271 phases out the judicial prohibitions of the Modification of Final Judgment ("MFJ").⁽⁷⁾ In adopting this approach, federal legislators were well aware of the benefits associated with opening long distance markets to in-region Bell companies, and they wanted full competition quickly. Senator Pressler, then Chairman of the Senate Commerce Committee, explained that Bell company entry "will lower prices on long-distance calls through competition," 142 Cong. Rec. S686, S686-87 (daily ed. Feb. 1, 1996), while Senator Burns noted that "[u]nnecessary delay [in approving Bell company entry] will hinder job creation." 141 Cong. Rec. S7942, S7966 (daily ed. June 8, 1995). Others concurred that the long distance industry displays "at best, limited competition" in the absence of Bell company participation and that Bell company entry is overdue to create jobs and benefit the economy. 141 Cong. Rec. S77881, S7906 (daily ed. June 7, 1995) (statement of Sen. Lott). Senator Harkin, for instance, observed that "by removing barriers between distinct telecommunications industries and allowing everyone to compete in each other's business," the 1996 Act would allow consumers to benefit from "low cost integrated service with the convenience of having only one vendor and one bill to deal with." 142 Cong. Rec. S687, S713-14 (daily ed. Feb. 1, 1996).

During debates on the 1996 Act, Congress relied upon estimated savings of \$333 billion from greater long distance competition. 142 Cong. Record S687, S704 (Feb. 1, 1996) (statement of Sen. Ford). Other experts predict nationwide benefits in the same range. See Draft Br. at 67 (noting MacAvoy estimate of \$306 billion gain to consumers). The WEFA Group has undertaken to estimate the benefits specifically for Oklahoma. It concluded that Southwestern Bell's entry into interLATA services would "benefi[t] the State, generating faster [economic] growth and creating new jobs." WEFA Rep. at 1. Immediate long distance entry by Southwestern Bell in

Oklahoma is projected to result in the creation of more than 10,000 additional jobs and an increase of more than \$700 million in the Gross State Product by the year 2006. *Id.* The new jobs would be "spread across all major industry groups as the benefits of lower prices and the resulting enhanced applications boost economic activity throughout the economy." *Id.* Robert Dauffenbach, Director of the Center for Economic and Management Research at the University of Oklahoma, has concluded that this study is "complete and competent," although he notes that the WEFA study may understate the benefits of Southwestern Bell's entry due to conservative assumptions about the Oklahoma economy. Dauffenbach Aff. at 5-8; accord Price Aff. at 9 (forecasting "an even larger impact on the Oklahoma economy" than estimated by WEFA). Benefits such as these are the natural outcome of adding vigorous new competitors into a market. They will be particularly pronounced in this case.

As explained in the draft brief previously submitted by Southwestern Bell, competition in long distance has stagnated where incumbent LECs are forbidden from entering the business. Long distance carriers' costs are falling sharply due to reductions in LEC access charges and technological innovations, yet, as the above chart illustrates, AT&T, MCI, and Sprint have repeatedly raised their basic rates in parallel over the last few years. Draft Br. at 53-55. Ordinary residential customers who have long distance bills below \$10 per month typically pay these rates, and receive no benefit from the discount plans that provide higher-volume callers some limited relief. Draft Br. at 56-58.(8) This is true even though the long distance carriers concede that their basic rates are above the cost of serving customers with monthly bills of as little as \$3 per month. See Draft Br. at 58; Kahn/Tardiff Aff. 20-22. The potential benefits of Southwestern Bell's entry into interLATA services are particularly great for lower-volume residential callers.

Currently, these customers are "neglected in the competition among interexchange carriers." Schmalensee Aff. 18. Because it already provides local service to these customers and has billing, collection and administrative systems in place, Southwestern Bell can serve them (through the separate affiliate required by section 272 of the federal Act) with lower start-up and marketing costs than other potential new entrants. See Draft Br. at 63-64.

Southwestern Bell's exclusion from interLATA services has hurt Oklahoma consumers in concrete ways. For instance, callers who live near LATA boundaries cannot receive the full benefits of Southwestern Bell's "32 Mile Circle Saver Plan," a wide-area calling plan that can reduce the cost of calling friends, family or merchants up to 32 miles away. Nor can many Oklahomans take full advantage of Southwestern Bell's "One-Plus Saver Direct Plan"--which allows unlimited intrastate calling to a single number for \$17 per month--where such calls cross LATA boundaries.

Experience in other states also illustrates the potential benefits of Southwestern Bell's entry into interLATA services in Oklahoma. Today there is strong interLATA competition only in areas of the country where large incumbent LECs have been permitted to compete. These include Connecticut, where SNET offers rates 17-25 percent below AT&T's basic rates, and two "corridors" in New Jersey, where Bell Atlantic and NYNEX have been allowed to carry interLATA calls and likewise undercut the rates offered by AT&T, MCI, and Sprint. Draft Br. at 59-61; see Kahn/Tardiff Aff. 51-52; Gordon Aff. 22. AT&T responded to this competition by seeking permission to lower its rates in particular areas where incumbent LECs compete, while keeping them higher elsewhere. See Draft Br. at 60-61. This proves that incumbent LECs have put serious competitive pressure on the major carriers where they are allowed to offer interLATA services.

SNET has demonstrated a particular ability to inject competition for the business of lower-volume callers who are ignored by the major national carriers; its interLATA customers in Connecticut disproportionately have below-average calling volumes. See Draft Br. at 61. Furthermore, SNET's entry into interstate services in Connecticut has prompted AT&T to price and market its intrastate services more aggressively in that state. *Id.* This confirms the convergence of interLATA and intraLATA markets and suggests that Southwestern Bell's offering of long distance will cause interexchange carriers to respond by speeding their own entry into local service markets in Oklahoma.(9)

Upon its entry into interLATA services, Southwestern Bell also will be able to offer bundled packages of local and long distance services. Such service packages can "have clear advantages for the public," such as greater convenience and the ability to secure volume discounts by aggregating purchases of different services.(10) See Draft Br. at 64-65. Long distance carriers are able to offer such packages today, giving them a substantial advantage over Southwestern Bell as a provider of local services.(11) They are well aware of this advantage and seek to enlarge it by delaying and opposing section 271 applications.(12) That strategy contradicts Congress' intent to (in the FCC's words) "lin[k] the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing interexchange carriers could enjoy an advantage from being the first to enter the other's market."(13)

The FCC acknowledges that Bell company entry provides "the best solution" to shortfalls in interLATA competition.(14) Southwestern Bell and other Bell companies already have contributed to healthy competition in markets such as wireless services, information services, and customer premises equipment. In each of these markets, as in long distance, competitors depend upon connections to local exchange facilities. Yet each of these markets has been notable for falling prices and increasing output, and Bell companies such as Southwestern Bell have shown no capability to monopolize any of them. See Draft Br. at 85-87; Kahn/Tardiff Aff. 53-58.

If there were any significant competitive risks associated with Southwestern Bell's entry into interLATA services (which history suggests there are not) they would be fully addressed by the safeguards of the Telecommunications Act, the FCC's implementing regulations and this Commission's continuing oversight powers. The FCC may not approve Southwestern Bell's section 271 application unless it finds that Southwestern Bell will comply with the structural separation and operational requirements of section 272. § 271(d)(3)(B). These restrictions--as well as the practical impossibility of gaining market power when entering as a new provider, without market share, in a business dominated by large incumbents with high sunk costs--ensure that anticompetitive strategies based on discrimination or cost misallocation cannot succeed. See Draft Br. at 36-47 (section 272 compliance); id. at 70-82 (statutory, regulatory, and practical constraints on Southwestern Bell). Southwestern Bell's entry into interLATA services will be entirely positive for competition and consumers.

Conclusion

Southwestern Bell has complied with all requirements for interLATA entry in the State of Oklahoma. While the final decision on Southwestern Bell's entry rests with the FCC, this Commission has an important role to play. Through its investigation of Southwestern Bell's compliance with the requirements of section 271(c)(1), and its verification that the terms available to competitors through Southwestern Bell's STC and approved agreements satisfy the competitive checklist, this Commission can assist the FCC and improve the chances that consumers in Oklahoma will be among the first in the country to benefit from full local and long distance competition.

Delay in granting interLATA relief would be contrary not only to the 1996 Act, but also to the interests of the State of Oklahoma and its citizens. When Southwestern Bell files its federal application, this Commission should advise the FCC that Southwestern Bell is authorized to file pursuant to section 271(c)(1) and has satisfied all requirements of the competitive checklist, and should encourage federal regulators to grant the application.

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1. Materials filed in draft form on February 20, 1997, include the draft Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma ("Draft Br.") and draft supporting affidavits. The affidavits are cited in these Comments by using the proposed affiant's last name (e.g., the draft Affidavit of Robert E. Stafford is cited as the "Stafford Aff.").

2. Congress' desire to establish a "de-regulatory national policy" based on open entry into all markets is stated in the Conference Report, at 1, and appears throughout the floor debates. See, e.g., 142 Cong. Rec. H1145, H1150 (daily ed. Feb. 1, 1996) (statement of Rep. Goss) (Act will "reduce Federal involvement in decisions that are best made by the free market"); id. at H1161 (daily ed. Feb. 1, 1996) (statement of Rep. Oxley) (Act "is antiregulatory and antibureaucratic in philosophy"); 141 Cong. Rec. H4520, H4521 (daily ed. May 3, 1995) (statement of Rep. Bliley) (proposed legislation would "substantially reduce Federal regulations of telecommunications").

3. Transcript of Proceedings at 125, Application of Southwestern Bell Tel. Co. for Approval of a Statement of Generally Available Terms and Conditions Pursuant to the Telecommunications Act of 1996, Cause No. PUD 970000020 (Feb. 13, 1997) ("Hearing Tr.").

4. In addition to its statements before this Commission, Brooks Fiber has informed Southwestern Bell that it began to offer telephone exchange services (beyond exchange access) in January 1997 and now has seven business customers and three residential customers in Oklahoma. All of the business customers are being served over network facilities owned by Brooks Fiber. The residential customers (who constitute a minority of Brooks Fiber's local telephone exchange service customers) are being served through resale of Southwestern Bell's service, on a test basis.

5. See Order Regarding Unresolved Issues, Application of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996, Cause No. PUD 960000218, Order No. 407704, at 4 (Dec. 12, 1996) (approving and adopting arbitrator's decision, with modifications); see also 47 U.S.C. § 252(c) (standards for arbitration decisions).

6. That is not to say that Brooks Fiber actually takes every checklist element from Southwestern Bell. Even with respect to demonstrations that interconnection agreements (as opposed to the

general offerings of a statement of terms and conditions) satisfy the checklist, the 1996 Act nowhere requires that every element be furnished. Such a rule would hold Bell company entry into interLATA services hostage to the business strategies of local competitors--a situation Congress sought to avoid. See Draft Br. at 13-14. As Representative Paxon explained during consideration of the final congressional legislation:

Where the Bell operating company has offered to include all of the checklist items in an interconnection agreement and has stated its willingness to offer them to others, the Bell operating company has done all that can be asked of it and, assuming it has satisfied the other requirements for in-region interLATA relief, the Commission should approve the Bell operating company's application for that relief.

142 Cong. Rec. E261 (daily ed. Feb. 1, 1996).

7. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (adopting MFJ); 1996 Act § 601(a)(1) (eliminating prospective effect of MFJ).

8. The new "one price" plans offered by AT&T and MCI likewise afford little if any relief for residential callers who place most of their long distance calls at night and on weekends. See Draft Br. at 57-58.

9. Southwestern Bell's entry into interLATA services automatically will trigger full 1+ intraLATA toll competition in Oklahoma under section 271(e)(2)(A) of the federal Communications Act and this Commission's order in Cause No. PUD 910001159, bringing additional competition in this market as well.

10. Applications of Craig O. McCaw, 9 FCC Rcd 5836, 5878-80 (1994), *aff'd sub nom. SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); Memorandum Opinion & Order, Applications of Pacific Telesis Group and SBC Communications, Inc., FCC No. 97-28 48, 1997 FCC Lexis 568, *47 (rel. Jan. 31, 1997) ("[T]he bundling of local access and long distance services . . . may be a desirable feature for some customers."); see also *Kahn/Tardiff Aff.* 66.

11. Smaller interexchange carriers -- ranging from the fourth-largest carrier (WorldCom) on down -- are able to market their long distance service with resold Southwestern Bell local services, even though Southwestern Bell cannot market its own services in this way. While Congress banned this type of joint marketing by the "big three" long distance carriers pending approval of Bell company section 271 applications, § 271(e)(1), the FCC nevertheless has held that, in its view, the Act allows AT&T, MCI, and Sprint to accomplish a similar result by jointly marketing long distance with local services they provide entirely over a Bell company's unbundled network. See First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15505, 15669 335-336 (1996). Upon approval of Southwestern Bell's application for interLATA authority in Oklahoma, all restrictions on joint marketing by the large long distance carriers will be lifted and full competition in this area by all providers will be possible.

12. See Joint Brief of Applicants Pacific Telesis Group and SBC Communications Inc. at 120-26, Matter of the Joint Application of Pacific Telesis Group ("Telesis") and SBC Communications Inc. ("SBC") for SBC to Control Pacific Bell, App. No. 96-04-038 (Cal. PUC Dec. 20, 1996) (appended to Draft Br. at Vol. 1, Tab. 13) (discussing interexchange carrier internal documents).

13. First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Dkt. No. 96-149, FCC 96-940 at 8, 1946 FCC Lexis 7126, *11 (rel. Dec. 24, 1996).

14. Second Report and Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace, 4 Comm. Reg. (P & F) 1199, 1238 at 125 (rel. Oct. 31, 1996).