

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
John Wine
Robert E. Krehbiel

In the Matter of an Investigation into)
Southwestern Bell Telephone Company's)
Cost to Provide Local Service, as required) Docket No. 98-SWBT-677-GIT
by K.S.A. 1996 Supp. 66-2008(d).)

ORDER APPROVING STIPULATION AND AGREEMENT

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration. Having reviewed the files and being fully advised of all matters of record, the Commission concludes as follows:

1. In Order 24, issued January 6, 2000, the Commission accepted a Stipulation and Agreement (S&A) that was intended to compromise and resolve the issues in this and other dockets. Parties signing the S&A included Commission Staff (Staff), the Citizens' Utility Ratepayers Board (CURB), AT&T Communications of the Southwest, Inc. (AT&T), and Southwestern Bell Telephone Company (SWBT). The S&A permitted SWBT: (1) to offset reduced Kansas Universal Service Fund (KUSF) support and access charges with increased local rates and Basket 3 rates; (2) to implement pricing flexibility for all toll and Wide Area Telecommunications Services (WATS); (3) to gain price deregulation of Plexar and Auto Redial/Speed Calling services; and (4) to be released from its status as Designated Carrier for intraLATA toll services. In return, SWBT agreed: (1) to deploy Digital Subscriber Line (DSL) capability in selected wire

centers; (2) to file cost studies and supporting data to establish Kansas-specific pricing for collocation services based on the latest Texas collocation tariff; (3) to permanently forgo \$15 million from the KUSF; (4) to withdraw an appeal pending in court related to a discovery dispute; and (5) to other smaller benefits.

2. In Order 24, ¶ 38, the Commission found the S&A represented the initial phase of DSL deployment for SWBT service areas and directed Staff to monitor the progress of this deployment. SWBT was to complete its DSL commitments under the S&A by August 1, 2003; all other aspects of the S&A were accomplished. SWBT provided two updates of its DSL deployment in letters to Staff dated December 26, 2001, and September 6, 2002, but these updates were not wire-center specific.

3. On March 17, 2003, the Commission directed SWBT to report on its compliance with the S&A approved in Order 24. SWBT's report filed April 7, 2003, detailed its progress in deploying DSL, the remainder of its planned deployment, and indicated its need for additional time beyond August 1, 2003, to complete the deployment. SWBT then filed a motion requesting additional time to deploy its DSL facilities pursuant to Order 24. Both Staff and CURB filed responses that criticized the level of SWBT's DSL deployment to date and opposed SWBT's request for additional time. Staff and CURB initially recommended the Commission consider imposing monetary penalties on SWBT for its failure to comply with the S&A approved in Order 24.

4. After these filings, SWBT, Staff and CURB began negotiating a possible settlement of issues remaining in this docket. On September 17, 2003, Staff, CURB and SWBT filed a Joint Motion for Approval of Stipulation and Agreement Modifying DSL

approve the Stipulation and Agreement filed September 17, 2003 (S&A filed Sept. 17, 2003), in its entirety. On October 1, 2003, Staff, CURB, and SWBT each filed testimony of a witness in support of the S&A filed Sept. 17, 2003.

5. The Commission established a procedural schedule setting a deadline of October 21, 2003, for parties to object to the S&A filed Sept. 17, 2003. Order issued October 6, 2003, ¶ 8. No objections were received. An evidentiary hearing to consider whether to approve the S&A filed Sept. 17, 2003, was conducted on October 29, 2003. Appearances of counsel were as follows: Eva Powers on behalf of Staff and the public generally; Timothy S. Pickering on behalf of SWBT; David Springe on behalf of the Citizens' Utility Ratepayers Board; and Frank A. Caro, Jr., on behalf of SBC Advance Solutions, Inc.

6. On November 12, 2003, a Notice of Filing was made that attached a copy of an electronic message from Senator Stan Clark to the Commissioners relating to the City of St. Francis's provision of broadband service via fixed wireless. The message expressed concern that the Commission was designating specific communities in which SWBT would deploy DSL service where municipalities have already installed high-speed internet service, instead of requiring SWBT to install DSL service in areas where no alternative exists. Also, the City of St. Francis expressed concern about its ability to continue offering internet service to the city and surrounding areas if its in-town, core, easy-to-serve customers are lost to SWBT or its affiliate.

7. The Commission invited parties in the docket to comment on the concern raised by Senator Clark's message. On December 9, 2003, comments were received from SWBT, Staff, and CURB. In addition, on December 8, 2003, comments were received

from Michael J. Day, the City Attorney for the City of St. Francis. Because the City of St. Francis did not appear to serve its comments on the parties in this proceeding, a Notice of Filing attaching these comments was served on the parties on December 11, 2003. Although the Commission permitted responsive comments to be filed by December 16, 2003, none were received.

8. The Commission expressly retained jurisdiction over the subject matter of this proceeding, Order 24, ¶ (E), and has continuing authority over telecommunications public utilities. K.S.A. 66-104; K.S.A. 66-1,188,

FINDINGS AND CONCLUSIONS

9. The issue of SWBT's deployment of DSL in Kansas arises out of the first S&A approved in Order 24 issued on January 6, 2000. That order approved the settlement of numerous issues, including a deployment schedule for DSL. Because SWBT did not meet the schedule for DSL deployment approved in Order 24, Staff and CURB asked the Commission to consider monetary penalties against SWBT. As an alternative to financial penalties, Staff and CURB began negotiations with SWBT to determine whether a new agreement could be reached that allowed SWBT more time to meet its obligations to deploy DSL, but expanded the scope of DSL deployment throughout Kansas. CURB has noted that numerous meetings were conducted during these negotiations and some were contentious. CURB Comm., ¶ 5. Also, the parties point out their negotiations used the best information available at the time. Staff Comm., ¶ 4; CURB Comm., ¶ 5. As a result of these negotiations, an alternative agreement was reached and is now pending before the Commission. The parties assert the S&A filed Sept. 17, 2003, is a reasonable compromise and beneficial to the consumers of Kansas.

10. The Commission notes that DLS is not a state jurisdictional service. The Commission does not have authority to order SWBT to deploy DSL in specific locations. The proposed S&A resulted from negotiations among SWBT, Staff, and CURB that were based upon information available at that time. Comments from the City of St. Francis illustrate the difficulties this Commission encounters in gathering information about services over which the Commission has no jurisdiction.

11. In its comments, Staff pointed out that the pending S&A filed Sept. 17, 2003, will require SWBT to deploy DSL service to all communities with 1,000 or more access lines. In accepting this criterion, SWBT agreed to deploy DSL in more communities than listed in the S&A approved in Order 24. Also, Staff noted this criterion establishes an inherently fair basis for determining which similarly situated communities will receive service. Staff Comm., ¶ 4. Furthermore, the pending S&A is consistent with the Legislature's declared public policy to "ensure that consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates." Staff Comm., ¶ 5, *quoting* K.S.A. 66-2001(b). Staff noted its support for the pending S&A that sets a uniform deployment criterion and, consistent with the Kansas Act, fosters competition in the state for the ultimate benefit of consumers. Staff Comm., ¶ 6.

12. CURB noted that it was guided by several general principles in its negotiations. CURB sought to reach a joint agreement among parties rather than engage in protracted litigation to enforce the original S&A. CURB was aware of the Legislature's expressed intent to expand broadband capabilities to more rural areas of the state and to encourage competition in telecommunications generally to benefit consumers

of the state. CURB concluded it was reasonable to pursue renegotiation of the original S&A with a focus on assuring the DSL deployment in rural areas of SWBT's territory, where no or fewer competitive options were available to consumers. CURB Comm., ¶ 4.

13. CURB pointed out that the Commission does not have the authority to designate specific communities where SWBT will deploy DSL. CURB Comm., ¶ 9. The objective standard of any wire center with 1,000 access lines or more presents a clear and unambiguous term for SWBT to meet and avoids uncertainty about where DSL deployment is to take place. CURB Comm., ¶ 6. However, CURB noted the dilemma of "cherry picking" customers is a consequence of providing Kansas consumers a competitive option, which is consistent with state policy. While recognizing concerns raised by St. Francis are valid, such concerns are present any time a competitor enters a market. When viewed from a consumer and a state policy perspective, CURB argued this type of competition is exactly what the Legislature intended and Kansas consumers are the intended beneficiaries. CURB Comm., ¶ 7.

14. CURB acknowledged that some communities with no broadband provider still will not receive DSL deployment while other communities with existing broadband providers will receive DSL deployment. CURB emphasized the difficulty the parties faced in determining which communities currently had a broadband provider. For example, the parties thought the City of Oakley did not have a broadband provider but later learned it had several. Due to imperfect information, CURB asserted that a process that attempts to pick and chose individual communities "is fraught with its own difficulty, and will engender its own level of criticism." CURB Comm., ¶ 8. CURB urged the Commission to avoid this. While arguing that it would be harmful to remove the

deployment certainty of the S&A filed Sept. 17, 2003, CURB pointed out that, as SWBT begins to deploy DSL, nothing in the pending S&A prevents SWBT from approaching the Commission and requesting permission for an alternative placement if adequate justification is found. CURB Comm., ¶ 6.

15. CURB urged the Commission to consider whether the process and principles employed in reaching the S&A filed Sept. 17, 2003, are sound and the result is reasonable. Considering the difficulties involved in evaluating and deciding which specific community should receive deployment next, and recognizing that the proposed S&A is not a perfect agreement, CURB urged approval of the pending S&A because it is reasonable, the principles supporting its adoption are sound, and it will provide benefits to Kansas consumers. CURB Comm., ¶ 11.

16. SWBT stressed that its DSL offering is limited by the constraints of its landline-based broadband deployment, not a strategy to “cherry pick” customers. DSL equipment has limited ability to provide service beyond about 16,000 loop feet and is more expensive to deploy than a wireless-based service. Therefore, SWBT argued that it is operating within the technological and financial constraints of DSL. SWBT Comm., ¶ 2. Regarding the rates charged St. Francis, SWBT noted these are tariffed rates, offered on a nondiscriminatory basis as approved by the Commission. SWBT Comm., ¶ 3. Finally, SWBT argued that it is taking a financial risk in deploying DSL in markets where customers already have access to high-speed internet service because such customers will likely be hesitant to change service. Deployment of DSL in markets that already have an internet service provider will give consumers a choice and provide real competition for broadband service. SWBT Comm. ¶ 4.

17. SWBT urged approval of the S&A filed Sept. 17, 2003, because it will greatly increase deployment of broadband in Kansas, will deliver DSL to many communities that do not currently have any local broadband alternative, and will promote competition by giving consumers a choice. Deploying DSL to all communities with 1,000 or more access lines is fair and will ensure an equitable opportunity in similarly sized communities across the state. SWBT Comm., ¶ 5.

18. The Commission will approve the S&A filed Sept. 17, 2003. The agreement of the parties that DSL will be deployed in communities with 1,000 or more access lines is reasonable and is a fair basis for determining which communities within SWBT's territory will receive deployment. As noted by the parties in urging approval of the agreement, the S&A filed Sept. 17, 2003, will expand broadband capability in more rural areas of the state and will encourage competition through increased services and improved telecommunications facilities and infrastructure across the state for the benefit of Kansas consumers. While the Commission recognizes the concerns of the City of St. Francis, the Commission finds the pending S&A is a reasonable and fair compromise of the issues pending before the Commission and is in the public interest. Therefore, the Commission approves the S&A filed Sept. 17, 2003.

19. While the Commission cannot direct SWBT to deploy DSL in particular locations, it urges SWBT to consider the needs of individual communities in developing its business plan for DSL deployment. To gain the benefit of customer loyalty, SWBT's business plan for DSL deployment may want to focus first on communities with no high-speed internet service. Furthermore, if SWBT concludes it would prefer to deploy DSL in a smaller community that does not have a high-speed internet provider instead of a

community that has more than 1,000 access lines but already has several alternative providers, the Commission would be willing to consider modifications to the S&A filed Sept. 17, 2003.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Commission approves the Stipulation and Agreement filed September 17, 2003.

(B) A party may file for reconsideration of this Order within fifteen days, plus three days if service is by mail, from the date of service of this Order. K.S.A. 66-118b; K.S.A. 2002 Supp. 77-529(a)(1).

(C) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary.

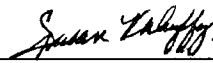
BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Wine, Com.; Krehbiel, Com.

Dated: JAN 08 2004

ORDER MAILED

JAN 09 2004



Susan K. Duffy
Executive Director

mjc