

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

In the Matter of)	
)	CC Docket No. 97-158
Southwestern Bell Telephone Company)	
)	Transmittal No. 2633
Tariff F.C.C. No. 73)	
)	

**ORDER CONCLUDING INVESTIGATION
AND DENYING APPLICATION FOR REVIEW**

Adopted: November 14, 1997; Released: November 14, 1997

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement; Commissioner Powell issuing a statement.

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I. INTRODUCTION

1. By this Order, we conclude our investigation of Southwestern Bell Telephone Company's (SWBT's) Transmittal No. 2633, in which SWBT seeks permission to add to its interstate access tariff a new Section 29, "Request for Proposal (RFP)," in which SWBT would include its "response[s] to customer requests for proposal submitted to SWBT in competitive bid situations."¹ Under this Transmittal, SWBT seeks permission to offer access services in response to RFPs at rates below its other tariffed rates for those services. The Transmittal states that these lower rates would be available to "any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same central office(s)."² Under current Commission policies, we now reject Transmittal No. 2633 as violative of section 202(a) of the Communications Act of 1934, as amended (Act), and various specific Commission rules.³ Based on the record here, we find the competitive necessity doctrine inapplicable because of the potential for market foreclosure created by Transmittal No. 2633. We also note that we are considering in the *Access Charge Reform* rulemaking proceeding issues related to pricing flexibility for incumbent local exchange carriers (LECs) with the advent of competition in the local access and exchange access markets.

2. The Common Carrier Bureau's (Bureau's) Competitive Pricing Division commenced this investigation on June 13 when it suspended this tariff for five months from its effective date of June 15, 1997.⁴ The Division concluded that Transmittal No. 2633 raised significant questions of lawfulness, specifically with respect to the Commission's rules prohibiting dominant LECs from offering: (1) individual case basis (ICB) tariffs for other than new services;⁵ (2) contract tariffs; and (3) deaveraged access rates. Although SWBT recognizes its transmittal may conflict with at least some of these rules, it claims Transmittal No. 2633 is justified under the doctrine of competitive necessity.⁶ On July 14, 1997, the Bureau issued an order designating issues for investigation and establishing a pleading cycle.⁷

¹ Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2633 (Transmittal No. 2633), Proposed Section 29.1.

² *Id.* at Section 29.2.

³ 47 U.S.C. § 202(a). *See* 47 C.F.R. § 69.3(e)(7) (requirement of averaged rates).

⁴ *Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2633*, CC Docket No. 97-158, Suspension Order, DA 97-1251 (Comp. Pric. Div., rel. June 13, 1997) (*SWBT Tariff Suspension Order*), at para. 9.

⁵ An "individual case basis" or ICB offering occurs when a carrier adopts a separate price for a particular service or facility in response to each customer request for the service or facility. *See Local Exchange Carriers Individual Case Basis DS-3 Service Offerings*, CC Docket Nos. 88-136, 89-305, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*DS-3 ICB Order*).

⁶ Transmittal No. 2633, Description & Justification (D&J) at 3, n.4.

⁷ *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2633*, CC Docket No. 97-158, Order Designating Issues for Investigation, DA 97-1472 (Com. Car. Bur., rel. July 14, 1997) (*Designation Order*). Parties filing comments include Time Warner Communications

3. Based on the limited record before us, we here find that Transmittal No. 2633 is a customer-specific tariff offering that is not available to similarly-situated customers. We find that Transmittal No. 2633 unreasonably discriminates against SWBT's customers in violation of section 202(a) of the Act, 47 U.S.C. § 202(a). Based on serious public interest concerns regarding the potential for this tariff to result in anticompetitive market foreclosures, we conclude that the competitive necessity doctrine does not provide a defense that would render reasonable Transmittal No. 2633's discriminatory rates.

II. BACKGROUND

4. Section 202(a) of the Act makes it unlawful for a common carrier to engage in unjust or unreasonable discrimination in its charges, practices, classifications, and services for "like" communications services.⁸ In addition, the Commission's rules require dominant LECs, *i.e.*, those that possess market power,⁹ to offer interstate access services at rates that are averaged throughout their individual study areas.¹⁰

5. SWBT has argued that the competitive necessity doctrine may make an otherwise unreasonably discriminatory tariff lawful under section 202(a), and provide an exception to the Commission's rules. As explained in more detail below, dominant carriers have, on occasion, relied on this doctrine in their attempts to justify certain volume discounts for private line and special access tariffs that would otherwise be considered unreasonably discriminatory under section 202(a) of the Act.

6. The Commission's 1984 *Private Line Guidelines Order* established that a dominant LEC seeking to rely on the competitive necessity doctrine to offer volume discounts for generally available interstate special access services must demonstrate: (1) equally or lower priced competitive alternatives are generally available to customers of the discounted offering; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.¹¹ The Commission never has approved a customer-specific tariff under the competitive necessity doctrine.

Holdings Inc. (Time Warner), U S West, MCI Telecommunications, Inc. (MCI), GST Telecom, Inc. (GST), KMC Telecom, Inc. (KMC), Sprint Communications Company L.P. (Sprint), Teleport Communications Group Inc. (TCG), AT&T Corp. (AT&T), and Bell Atlantic.

⁸ 47 U.S.C. § 202(a).

⁹ See *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CC Docket 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8608 n.71 (*Hyperion Order*) (defining non-dominant carriers as those that do not possess market power).

¹⁰ See, *e.g.*, 47 C.F.R. § 69.3(e)(7). A "study area" ordinarily consists of the entire geographic area served by a particular LEC in a single state. See, *e.g.*, *Petition for Waivers Filed by GTE North Incorporated and PTI Communications of Michigan, Inc.*, 12 FCC Rcd 13882 (Acct. & Aud. Div. 1997).

¹¹ See *Private Line Rate Structure and Volume Discount Practices Guidelines*, CC Docket No. 79-246, Report and Order, 97 F.C.C.2d 923, 948 (1984) (*Private Line Guidelines Order*).

7. In the years since the adoption of the *Private Line Guidelines Order*, the Commission has granted dominant LECs several other types of pricing flexibility,¹² but has declined to authorize incumbent LECs to provide individualized service offerings under contract tariffs¹³ and has rejected incumbent LECs' attempts to justify individualized service offerings under the competitive necessity doctrine. In the *DS-3 ICB Order*, the Commission reviewed and rejected incumbent LECs' invocation of the competitive necessity doctrine without considering the threshold issue of whether the defense should apply to single-customer offerings. In a tariff investigation involving a proposed SWBT RFP tariff with the same terms and conditions as Transmittal No. 2633, the Commission assumed *arguendo* that the doctrine applied. In both cases, the Commission held that the dominant LECs had failed to meet the doctrine's requirements.¹⁴ The United States Court of Appeals for the District of Columbia Circuit remanded the latter order to the Commission, stating the Commission had inadequately explained its decision.¹⁵ In the *SWB RFP Order*, the Commission had found, *inter alia*, that SWBT failed to satisfy the first prong of the competitive necessity doctrine -- that an equal or lower priced alternative is generally available to customers of the discounted offering.¹⁶ The Commission had concluded that the mere existence of a customer request for a particular service does not establish that competitive alternatives actually exist. According to the Commission, "the existence and degree of competition might be determined by the existence of *responses* to a [request for proposal] not by the existence of the request for proposal itself."¹⁷ On review, the court identified what it termed a "Catch-22 situation" in the Commission's application of the competitive necessity doctrine to SWBT's RFP tariff. The D.C. Circuit observed that the Commission's order required SWBT either to obtain its competitors' rates, which could violate antitrust laws, or to lose competitive bids. The court thus remanded the matter to the Commission for clarification of the "difficult underlying policy issues"

¹² See, e.g., *Expanded Interconnection With Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) (volume and term discounts for special access and switched transport) (*Virtual Collocation Order*); *Access Charge Reform NPRM*, CC Docket No. 96-262, Third Report and Order, 11 FCC Rcd 21354, 21487 (1996) (removal of lower pricing limit in price caps). See also *NYNEX Telephone Companies Petition for Waiver*, Memorandum Opinion and Order, 10 FCC Rcd 7445 (1995) (*Universal Service Preservation Plan Order*); *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, 11 FCC Rcd 14028 (1996) (*Customers First Order*). See also Section IV.A.2.b.(1), *infra*.

¹³ See *Virtual Collocation Order*, 9 FCC Rcd at 5206-5207; *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion And Order, 9 FCC Rcd 2718, 2731 (1994) (*Expanded Interconnection Order*).

¹⁴ See *DS-3 ICB Order*, 4 FCC Rcd at 8643; *Southwestern Bell Telephone Company, Tariff FCC No. 73, Transmittals Nos. 2433 and 2449*, CC Docket No. 97-158, Order Terminating Investigation, 11 FCC Rcd 1215 (rel. Nov. 29, 1996) (*SWB RFP Order*), remanded, *Southwestern Bell Tel. Co. v. F.C.C.*, 100 F.3d 1004 (D.C. Cir. 1996).

¹⁵ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1008.

¹⁶ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1007. See also *SWB RFP Order*, 11 FCC Rcd at 1221.

¹⁷ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1007.

surrounding the application of the competitive necessity doctrine to an RFP tariff.¹⁸ This remand proceeding is currently pending before the Commission.

8. The Commission also is considering in our currently pending *Access Charge Reform* rulemaking proceeding, CC Docket No. 96-262, whether we should change our current policies regarding the circumstances in which incumbent price cap LECs may offer special RFP tariff or contract tariff rates in light of the new competitive paradigm embraced by the Telecommunications Act of 1996.¹⁹ In the rulemaking, the Commission is considering, in light of the statutory objectives of competition and deregulation, the possible public interest benefits of permitting incumbent LECs to offer lower prices in response to written bid requests and the anticompetitive effects of permitting substantial pricing flexibility prior to the development of significant competition in the local exchange and exchange access markets. The notice of proposed rulemaking in the *Access Charge Reform* docket did not specifically discuss the competitive necessity doctrine, but did expressly seek comment on the possibility of allowing dominant incumbent LECs to offer RFP tariffs if they could prove that certain levels of market-opening measures had been implemented or a certain level of competition existed in access markets.²⁰

III. STATEMENT OF FACTS

9. SWBT's Transmittal No. 2633 proposes to amend SWBT's interstate access tariff by adding a new Section 29, "Request for Proposal (RFP)." This new section sets forth the terms and conditions under which SWBT may respond to customer requests for proposal submitted to SWBT in competitive bid situations.²¹ Under the tariff, the only requirement governing the submission of an RFP is that submitting customers must "indicate in their RFP that the request involves a competitive situation."²² Under the terms of the proposed tariff provision, the RFP rates may be used by any "similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same Central Office(s)."²³ Nothing in the tariff requires SWBT to respond to any RFP submitted.

10. SWBT initially proposes to establish RFP rates in response to RFPs received from two

¹⁸ *Id.* at 1008.

¹⁹ See *Access Charge Reform*, Notice of Proposed Rulemaking, CC Docket No. 96-262, 11 FCC Rcd 21354, 21439 (1996) (*Access Charge Reform NPRM*). See also *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, 95-272, First Report and Order, FCC 97-158 (rel. May 16, 1997) (*Access Charge Reform Order*) at para. 260 (announcing subsequent order in ongoing proceeding would address pricing flexibility).

²⁰ *Access Charge Reform NPRM*, 11 FCC Rcd at 21439.

²¹ See Transmittal No. 2633, Original Page 29-4.

²² *Id.*

²³ Transmittal No. 2633, Section 29.3, Original Page 29-4. An incumbent LEC's "central office" is where the local loops serving end users interconnect with the LEC's exchange system. See SWBT Tariff F.C.C. No. 73, Section 2.7. The central office contains switches, allowing the incumbent LEC to switch, transport, and terminate local and long distance traffic.

particular customers seeking competitive bids for the provision of access service.²⁴ SWBT seeks to provide those customers with individualized rates instead of offering SWBT's generally available tariffed rates. SWBT states it received the first RFP letter on February 11, 1997 from AT&T Corp. (AT&T), which requested that SWBT respond to an RFP for multiple DS-3 circuits in the Dallas, Texas area between various SWBT central offices and two of AT&T's points of presence (POPs).²⁵ AT&T's letter notes that SWBT's tariffed rates are "significantly higher than those of other access providers in the area."²⁶ SWBT states that it received a second RFP letter on February 13, 1997, from Coastal Telephone Company (Coastal), requesting a competitive bid to provide multiple 45 "Mbps" interfaces configured in a "self-healing" network architecture in the Houston, Texas area.²⁷ In the letter, Coastal indicates that it has contacted other vendors to obtain additional bids.²⁸ SWBT assumes that Coastal has access to its generally available tariffed rates for access service, which are publicly available, and thus that Coastal seeks a competitive bid from SWBT that will be less than SWBT's generally available tariffed rates.²⁹

11. The proposed tariff under review here restricts the availability of the special AT&T and Coastal rates to customers that have a specific number of DS3s, DS3/1 multiplexers, Digital Transmission links, and/or access nodes within a limited geographical location.³⁰ For example, the rate

²⁴ Under proposed tariff provisions, customers may utilize the facilities that would be provided by SWBT for special or switched access. Transmittal No. 2633, Proposed Section 29.3(4).

²⁵ *Transmittal No. 2633, Description & Justification* (D&J) at 4-5. SWBT provides a copy of AT&T's letter as Attachment 3 to its D&J. A "POP" is the long distance carrier's facility where it connects to the incumbent LEC's network.

²⁶ D&J, Attachment 3. Although this statement by AT&T appears to invite SWBT to deviate from its tariffed rates, AT&T contends in its petition that SWBT has no authority to do so. *See Id.* *See also* AT&T Comments at 4-6.

²⁷ *Id.* at 5. The acronym "Mbps" stands for megabits per second and is used to describe the rate at which digital signals are exchanged. A "self-healing" network is a fiber ring network, which uses digital signals, and is configured with redundant transmission over separate physical facilities so that the network will continue to operate even if a section of the ring is broken. *See* Kingsley, Scott & Jane F. Lipp, *Choices in SONET ring architecture*, Bus. Communications Review, Jun. 1, 1994 (explaining fiber ring technology).

²⁸ *Id.* SWBT provides a copy of Coastal's letter as Attachment 4 to its D&J.

²⁹ *Id.*

³⁰ A "DS3" is a high capacity access line, typically used for high volume traffic. It carries the equivalent of 672 voice-grade-equivalent channels of communication. A "DS3/1 multiplexer" is a device that electronically converts circuits on a DS1 traffic line so that they can be carried on a DS3 line. *See* SWBT Tariff F.C.C. No. 73, Section 20.2.1. An access node is either a telephone company central office or a customer-designated premises that has the equipment necessary to connect to a fiber ring. *Id.* at Section 2.6. The "Digital Transmission Link" is the facility that interconnects customer-selected access nodes to form the fiber ring configuration. *See Id.*, Section 19.1.

structure proposed in response to AT&T's RFP is restricted to customers with at least 164 DS3s in 25 specific locations in the Dallas area and at least 142 DS3/1 multiplexers, located within the geographical areas defined by AT&T's points of presence at Addison, Texas and Taylor, Texas and the twenty different SWBT end offices in Dallas.³¹ In the case of Coastal's RFP, the tariff provides specific rates for at least 25 Digital Transmission links and 2 multiplexers within the geographical area defined by Coastal's point of presence in Houston and SWBT's Houston specific end offices.³² For example, in the case of AT&T's RFP, the tariff makes these rates available to those customers that (1) have the requisite service requirements of at least 164 DS3s and 142 DS3/1 multiplexers, and (2) are located in proximity to the identified Dallas end offices. Thus, based on the language of the tariff, a customer in the SWBT Tulsa LATA that had 164 DS3s and 142 DS3/1 multiplexers would not be "similarly situated" and therefore could not take advantage of these proposed rates under Transmittal No. 2633, which are below SWBT's generally available tariffed rates.³³

12. The Bureau's designation order identified the following issues for investigation:

(1) Whether Transmittal No. 2633 violates the Commission's policy prohibiting dominant LECs from offering contract tariffs.

(2) Whether Transmittal No. 2633 violates the DS-3 ICB Order's restrictions on tariff offerings on an individual case basis by dominant LECs.

(3) Whether Transmittal No. 2633 violates section 69.3(e)(7) of the Commission's rules requiring dominant LECs to offer averaged rates throughout their individual study areas.

(4) Whether the Competitive Necessity doctrine applies, and if so, whether SWBT has satisfied its requirements.³⁴

13. The *Designation Order* tentatively concluded that Transmittal No. 2633 violates, *inter alia*, the Commission rule prohibiting dominant LECs from offering deaveraged access rates.³⁵ The *Designation Order* also denied SWBT's one-sentence waiver request, contained in a footnote to SWBT's Description and Justification for Transmittal No. 2633, on the ground that SWBT had failed to identify the rules to be waived or any special circumstances that would justify grant of a waiver.³⁶

³¹ See Transmittal No. 2633, Section 29.3, Original Page 29-4. See also D&J at 9.

³² See Transmittal No. 2633, Section 29.3, Original Page 29-6.

³³ See D&J at 13 ("[I]n the case of the RFP proposal for Coastal, any customer who requests an STN [self-healing] network for 25 DTLs and 2 multiplexers with 4 nodes (consisting of 1 customer premises and 3 SWBT central offices as listed in the tariff) would be eligible for the same rate as proposed in that RFP.").

³⁴ *Designation Order* at para. 15.

³⁵ *Designation Order* at para. 23.

³⁶ *Designation Order* at para. 14.

14. As indicated above, Designation Issue 4 asked about the applicability of the competitive necessity doctrine. The Bureau sought comment as to whether competitive necessity should be available to a dominant LEC as a defense to claims that its charges for particular interstate services are unreasonably discriminatory.³⁷ The Bureau also asked whether the competitive necessity doctrine should be changed in any way, and, if so, how.³⁸

IV. DISCUSSION

15. As explained below, based on the limited record before us, we find Transmittal No. 2633 unlawful. We find that the proposed tariff violates section 69.3(e)(7) of our rules requiring dominant LECs to offer study-area-wide averaged rates. We also find that the competitive necessity doctrine does not provide a defense to that violation or render reasonable the transmittal's discriminatory rates. We conclude that the Commission has never permitted a dominant carrier to justify, on the basis of competitive necessity, a tariff like Transmittal No. 2633, *i.e.*, a customer-specific offering not generally available to similarly-situated customers. In addition, we decline, based on the limited record here, to apply the competitive necessity defense to Transmittal No. 2633, because of serious public interest concerns that SWBT could unreasonably employ this proposed tariff to forestall the development of competition by foreclosing or deterring market entry.

A. Issues Designated for Investigation

1. Transmittal No. 2633 violates section 69.3(e)(7) of the Commission's rules requiring dominant LECs to offer averaged rates throughout their individual study areas.

16. In the *Designation Order* the Bureau noted that section 69.3(e)(7) of the Commission's rules requires dominant LECs to offer averaged rates throughout their individual study areas,³⁹ and that section 69.123(c) of the Commission's rules provides that dominant LECs that offer density zone pricing must provide averaged rates within each density zone.⁴⁰ The Bureau sought comment on whether Transmittal No. 2633 violates sections 69.3(e)(7) or 69.123(c) of the rules.

17. In its Direct Case, SWBT argues that Transmittal No. 2633 does not violate the Commission's rule requiring averaged rates because the competitive necessity doctrine is an exception to that rule.⁴¹ In support, SWBT argues that the Commission's prior order on SWBT's RFP tariff shows that such an exception exists to this rule.⁴² TCG argues that SWBT has misread the order, and that the Commission expressly took no position on whether the competitive necessity doctrine provides

³⁷ *Designation Order* at para. 24.

³⁸ *Designation Order* at para. 25.

³⁹ 47 C.F.R. § 69.3(e)(7).

⁴⁰ *Id.* at § 69.123(c).

⁴¹ SWBT Direct Case at 3-4.

⁴² SWBT Direct Case at 4 (citing *SWB RFP Order*).

a defense to the Commission's deaveraging rules.⁴³ GST contends that Transmittal No. 2633 does not comply with either section 69.3(e)(7) or any of the exceptions to this rule recognized by the Commission.⁴⁴ MCI argues that SWBT has cited no precedent that would permit SWBT to utilize competitive necessity to de-average rates beyond the point contemplated by section 69.123(c).⁴⁵ In its Reply, SWBT argues that section 69.3(e)(7) does not impose a mandatory obligation on all LEC tariffs because it states that a carrier "may file a tariff that is not an association tariff." SWBT argues that, because the section does not state that a LEC *must* file a tariff, it is a permissive rather than a mandatory rule, and as such, a waiver is not required.⁴⁶

18. We conclude that Transmittal No. 2633 would permit SWBT to offer service at deaveraged rates within its study area, and does not comply with the density zone pricing exception provided by section 69.123(c).⁴⁷ We reject SWBT's argument that section 69.3(e)(7), which prohibits deaveraging, does not apply to SWBT's tariff. SWBT does not dispute that its tariff is filed pursuant to section 69.3(e) and concedes that such a tariff "must comply with" subsection (7) of that rule. It is thus beyond question that this tariff must contain averaged rates in order to be lawful, subject to any exceptions that the Commission may recognize. Accordingly, we find that Transmittal No. 2633 violates section 69.3(e)(7) of our rules.

2. The competitive necessity doctrine is not available in this situation.

19. SWBT relies on the competitive necessity doctrine as a defense against the rule violations identified in the *Designation Order*. In response to the *Designation Order*, various parties submitted comments concerning the use of the doctrine in this context.

a. Comments

20. SWBT's legal arguments that competitive necessity must apply stem from its interpretation of the D.C. Circuit's ruling in *Southwestern Bell Tel. Co. v. FCC*, and past Commission precedent. SWBT argues that *Southwestern Bell Tel. Co. v. FCC* does not leave room for the Commission to refrain from applying the competitive necessity doctrine to incumbent LECs. SWBT characterizes the Commission's action in the *SWBT RFP Order* as "explicitly refraining from holding that the competitive necessity doctrine" did not apply to dominant LECs. It argues that, because the Commission explicitly refrained from holding that the doctrine did not apply in that case, we must now hold that it does apply in the instant matter.⁴⁸ SWBT further argues that prior rulings, such as *Private*

⁴³ TCG comments at 8.

⁴⁴ GST comments at 6.

⁴⁵ MCI comments at 4-5.

⁴⁶ SWBT Reply at 5.

⁴⁷ See 47 C.F.R. § 69.123(c) (explaining exception to averaged rates rule). See also *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1005-1006 (recognizing that SWBT RFP tariff offered services at rates "lower than its geographically averaged rates").

⁴⁸ SWBT Direct Case at 5.

Line Guidelines Order, did not distinguish between different kinds of common carriers, and thus, any carrier may invoke the doctrine.⁴⁹ SWBT argues that, because the Commission did not draw any distinctions between the kinds of carriers permitted to invoke the doctrine in the past, it may not do so now.⁵⁰ SWBT also attaches to its comments a 1989 law review article describing the history of the Commission's application of the competitive necessity doctrine, and describing the economic benefits of making this doctrine applicable to individual customer offerings.⁵¹

21. SWBT argues that it does not seek a determination that the competitive necessity doctrine is a complete defense to any claimed violation of section 202(a). Rather, SWBT states that it is merely asking the Commission to apply the competitive necessity doctrine "consistently" with its other orders, rules, and policies. SWBT points to the *Hyperion Order* in which the Commission permitted competitive LECs the use of pricing flexibility in the form of permissive detariffing, notwithstanding section 202(a). According to SWBT, the Commission's reasoning in the *Hyperion Order* granting permissive detariffing should not be limited to competitive LEC providers, especially in those situations where competition is evidenced by an RFP.⁵²

22. SWBT further claims that the Commission, in the *Regulation of Basic Services NPRM* issued in 1987, recognized the need to reduce regulation for dominant carriers. The *Regulation of Basic Services NPRM* sought comment on whether the Commission could target as candidates for deregulation services awarded after bidding by a business or governmental organizations.⁵³ SWBT states that in the *Regulation of Basic Services NPRM*, the Commission tentatively concluded that no further proof of competition was necessary other than the fact that "such a [competitive] bidding process takes place."⁵⁴ According to SWBT, this tentative conclusion "confirms" that SWBT need not show anything more to satisfy the first prong of the competitive necessity test in an RFP situation.

23. SWBT, U S West, and Bell Atlantic contend that the access services market today does not differ from the long distance market during the period when the Commission permitted AT&T to invoke the competitive necessity doctrine. SWBT argues that access service is merely a part of long distance service, and that to consider the access market separately from the long distance market is to draw an artificial distinction that was created by the divestiture of the Bell Operating Companies

⁴⁹ SWBT Direct Case at 5.

⁵⁰ SWBT Direct Case at 7.

⁵¹ SWBT Direct Case at Appendix 1 (Alexander C. Larson, Calvin S. Monson, Patricia J. Nobles, "Competitive Necessity and Pricing in Telecommunications Regulation," 42 F. Comm. L. J. 1 (1989)).

⁵² SWBT Direct Case at 1-2.

⁵³ *Ex parte*, Letter from Thomas A. Pajda, Attorney for Southwestern Bell Telephone Company, to William F. Caton, Secretary, Federal Communications Commission, October 9, 1997 (*SWBT October 9, 1997 Ex Parte*) at 2 (citing *Decreased Regulation of Certain Basic Telecommunications Services*, 2 FCC Rcd 645 (1987) (*Regulation of Basic Services NPRM*)).

⁵⁴ *Id.* at 3.

(BOCs) from AT&T.⁵⁵ SWBT argues there is no reason for presently regulating those pieces differently.⁵⁶ SWBT also claims generally that, like the IXC market in the 1980s, there exist many competing providers of access services, including both facilities-based and resale providers. SWBT argues that, based on the RFPs at issue in this case, as well as past RFPs, it has apparently lost business to another provider, a situation SWBT contends is not uncommon in many of the markets it serves.⁵⁷ SWBT claims that in 1984 AT&T maintained an 84.2% share of the interstate switched market. Citing a November 1996 Quality Strategies Report, SWBT asserts that its losses exceed AT&T's market share losses in the 1980s, because SWBT's competitors have won more than a 40% share of certain major access markets.⁵⁸ U S West claims it also has experienced significant losses of market share in the special access market in several large cities in its region. U S West asserts that competition for high capacity special access service is "full blown" in many markets and, given this high level of competition, there is no need for case-by-case application of the competitive necessity doctrine for this service. U S West also argues that the Commission should approve contract tariff flexibility as soon as possible in its *Access Charge Reform* proceeding.⁵⁹ U S West also includes an affidavit from an economist discussing the benefits of contract pricing for LECs.⁶⁰

24. U S West further argues that, where the competitive necessity doctrine is met, there exists no economic or other policy justification for barring incumbent LECs from relying on it.⁶¹ It argues that the same considerations that led the Commission to allow AT&T pricing flexibility long before it was found to face substantial competition, let alone non-dominance, exist in today's access market.⁶² U S West contends that the Commission applied the doctrine to private line and MTS services in the mid-1980s because AT&T then faced emerging, not full or substantial, competition. U S West further asserts that, in the *OCP Guidelines*⁶³ case, the Commission recognized it would not be wise to prevent AT&T from responding to competition prior to the market becoming "fully competitive" as this would send erroneous signals to the marketplace, resulting in inefficient competitive entry.⁶⁴ U S West additionally claims that failure to permit SWBT to respond to competition for its high revenue, low cost customers will cause SWBT to lose revenue, eventually endangering its ability to provide

⁵⁵ SWBT Direct Case at 7.

⁵⁶ SWBT Direct Case at 7.

⁵⁷ SWBT Direct Case at 7-8.

⁵⁸ SWBT Direct Case at 8.

⁵⁹ U S West comments at 13-14.

⁶⁰ Affidavit of Robert G. Harris attached to U S West comments.

⁶¹ U S West comments at 11.

⁶² U S West comments at 11.

⁶³ *Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans*, CC Docket No. 84-1235, Memorandum Opinion and Order, 59 Rad.Reg.2d 70 (1985) (*OCP Guidelines*).

⁶⁴ U S West comments at 11.

universal service.

25. In opposition to Transmittal No. 2633, MCI and AT&T argue that in deciding the *Interexchange Order*,⁶⁵ which held that AT&T could offer contract tariffs only upon a showing that substantial competition existed for the long-distance services that could be included in the contract tariff, the Commission effectively abandoned the competitive necessity doctrine for individualized offerings, and replaced it with a substantial competition standard.⁶⁶ AT&T contends that allowing the pricing flexibility sought by SWBT here might stifle the emerging competition for access services before competitors can gain a meaningful foothold in the market.⁶⁷ Time Warner argues that high local entry barriers in combination with new entrants' disproportionate reliance on a small number of large customers make strategic pricing by dominant LECs especially threatening to emerging competition in the local market context.⁶⁸ In contrast, Time Warner asserts, once an incumbent LEC faces substantial competition, and new entrants have sunk the costs required to enter the local market on a widespread basis, strategic pricing is unlikely to be successful.⁶⁹

26. Sprint states that SWBT has provided no evidence that the local access market is subject to meaningful competition or that SWBT is close to the degree of private line competition AT&T faced in 1984. Sprint further notes SWBT has furnished market figures only for Dallas and Houston, and only for high capacity service, whereas the market share given for AT&T reflects competition for switched services in general, not the discrete private line market segment.⁷⁰ Time Warner asserts that SWBT's citation of market penetration by competitors is misleading. It states SWBT's share of the entire market for access services, as opposed to its share of the market for high capacity services, is much higher today than was AT&T's share of the long distance market in 1984.⁷¹ AT&T states that although SWBT may have presented data that there is emerging competition for high capacity access services in Dallas, SWBT retains the overwhelming share of the market in other major cities in its serving area, including St. Louis (85%) and Kansas City (93%).⁷²

27. MCI argues that, to obtain the relief it seeks, SWBT must file a waiver petition and prove that competition exists within a defined geographic area, like the showings of NYNEX in the

⁶⁵ *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5897 (1991) (*Interexchange Order*).

⁶⁶ MCI comments at 7-8; AT&T comments at 5.

⁶⁷ AT&T comments at 7.

⁶⁸ Time Warner comments at 14.

⁶⁹ Time Warner comments at 14.

⁷⁰ Sprint comments at 6.

⁷¹ Time Warner comments at 16 n.31.

⁷² *Ex parte*, Letter from Charles Griffin, AT&T to William F. Caton, Acting Secretary, Federal Communications Commission, November 7, 1997 (citing *SWBT Transmittal No. 2622*, filed March 25, 1997, Southwestern Bell HICAP Track, Third Quarter 1996, p. 7).

Universal Service Preservation Plan Order,⁷³ and *Ameritech in the Customers First Order*.⁷⁴

28. Time Warner further argues that today's access market differs markedly from the long distance market of the 1980s. It argues that, unlike post-divestiture AT&T, today incumbent LECs such as SWBT are the sole suppliers of facilities essential to the success of their competitors, such as reasonably priced collocation and operations support systems (OSS).⁷⁵ According to Time Warner, to encourage cooperative behavior by incumbent LECs, the Commission must withhold pricing flexibilities such as competitive necessity until incumbent LECs prove they furnish needed competitive inputs to their competitors.⁷⁶ Time Warner contends there is no way for the Commission to use competitive necessity to prevent predatory and strategic pricing by incumbent LECs prior to development of adequate competition.⁷⁷ As noted above, Time Warner believes strategic pricing remains likely until substantial competition for access services exists.

29. Time Warner contends the law review article cited by SWBT in its Direct Case is inapposite because lower entry barriers existed in the long distance market of the 1980s. In contrast, facilities-based competition, which requires high sunk costs, remains the only viable source of competition to incumbent LEC access services.⁷⁸ Time Warner argues that resale, a significant source of competition to AT&T during the 1980s, is less threatening to incumbent LECs today because resale requires functioning OSS, which must be provided by the incumbent LEC.⁷⁹

30. Time Warner additionally notes that the Commission already has granted incumbent LECs significant pricing flexibility to enable these companies to respond to competition. This flexibility includes eliminating the lower price bands for access services, allowing substantial volume and term discounts, and permitting geographic deaveraging for switched transport services. Time Warner refutes SWBT and U S West's arguments about inefficient entry by new entrants. According to Time Warner, the new entrants' knowledge that the Commission will likely grant additional pricing flexibilities will deter SWBT's competitors from engaging in inefficient entry.⁸⁰ Time Warner asserts that the existence of two alternative providers of high capacity service is insufficient evidence of competition for the Commission to make a determination about whether SWBT should be allowed to employ RFP tariffs that are

⁷³ 10 FCC Rcd 7445. In this order, the Commission permitted NYNEX to deaverage certain access charge elements in LATA 132 after finding that "the earlier monopoly environment has eroded to a sufficient degree" in that LATA. *Id.* at 7462.

⁷⁴ 11 FCC Rcd 14028.

⁷⁵ Time Warner comments at 10-11.

⁷⁶ Time Warner comments at 12-13.

⁷⁷ Time Warner comments at 13.

⁷⁸ Time Warner comments at 15.

⁷⁹ Time Warner comments at 14-15.

⁸⁰ Time Warner comments at 15, n.29.

anticompetitive.⁸¹ Instead, Time Warner argues that the Commission should examine the competitiveness of other services SWBT provides over the same facilities (including supply and demand and prices SWBT has charged under price caps) to determine opportunities for cross-subsidy, similar to the inquiry that the Commission engaged in prior to granting contract tariff authority to AT&T. According to Time Warner, allowing competitive necessity pricing prior to conducting such an inquiry might permit SWBT to lower the price it charges for high capacity service by overallocating joint and common costs to other services. Time Warner believes the Commission also would need to define properly the geographic markets at issue in order to prevent SWBT and other incumbent LECs from utilizing competitive necessity to misallocate joint and common costs from competitive to non-competitive markets.⁸²

b. Discussion

31. We find for the reasons detailed below that the competitive necessity doctrine does not provide a defense for any of the violations at issue here.⁸³ Specifically, we find that Commission precedent does not address the specific circumstances at issue here and therefore does not require application of the competitive necessity doctrine for the individualized tariff offerings that Transmittal No. 2633 would permit. Moreover, because of our concerns about facilitating the development of competition and preventing foreclosure or deterrence to market entry by new entrants, we decline, based on the record here, to apply the competitive necessity defense to Transmittal No. 2633, a customer-specific tariff offering that is not available to similarly situated customers.

(1) Commission precedent does not require application of the competitive necessity doctrine to tariffs that are not generally available.

32. Contrary to the arguments advanced by SWBT, we do not find that past Commission precedent requires the conclusion that SWBT is entitled to invoke the competitive necessity doctrine in defense of Transmittal No. 2633. Commission precedent reveals instead that this agency has rarely applied the competitive necessity doctrine as a defense for otherwise discriminatory rates or practices, particularly in the context of offerings that were not generally available to similarly situated customers. In those rare instances when the Commission has considered the doctrine as a defense for tariff offerings that were not generally available to similarly situated customers, the Commission rejected the proposal as unlawfully discriminatory in violation of section 202(a), finding that the carrier was unable to satisfy its burden under the competitive necessity doctrine.⁸⁴ We discuss below those cases that form the history of the Commission's consideration of the competitive necessity doctrine as a defense to claims that a carrier's proposed rates were unjust and unreasonable.

33. Telpak Proceedings. In the *Telpak* proceedings in the 1960's and 1970's, the

⁸¹ Time Warner comments at 16.

⁸² Time Warner comments at 16.

⁸³ In this Order, we conclude that Transmittal No. 2633 violates section 202(a) and our rules requiring rate averaging. Because these grounds are sufficient for rejecting the tariff, we do not reach the issue of whether the Transmittal violates other rules as well. *See* Section IV.A.3., *infra*.

⁸⁴ *See DS-3 ICB Order, AT&T CPP Order, infra*.

Commission permitted AT&T to invoke the competitive necessity doctrine on multiple occasions as a possible defense to allegations that proposed volume discounts for certain "private line" services were discriminatory.⁸⁵ AT&T proposed the volume discounts in response to competition presented by new market entrants using new technology to provide a less expensive alternative to AT&T's private line services.⁸⁶ In the absence of an articulated policy regarding pricing flexibility for AT&T services, the Commission imported to address these issues the Interstate Commerce Commission's application of the competitive necessity doctrine.⁸⁷ Under the Commission's application of the competitive necessity doctrine at that time, AT&T was unable to satisfy the heavy burden necessary to justify its facially discriminatory rates.⁸⁸ In finding that the Telpak tariff was discriminatory and that the discrimination was not justified by the competitive necessity doctrine, the Commission ruled that the Telpak rates must be offered under a generally available tariff.⁸⁹ The Court of Appeals upheld the Commission's strict

⁸⁵ See *American Tel. and Tel. Co. Tariff F.C.C. No. 250, TELPAK*, Tentative Decision, 38 F.C.C. 370, Final Decision, 37 F.C.C. 1111 (1964); *Telpak Tariff Sharing Provisions of American Tel. and Tel. Co. and the Western Union Tel. Co.*, CC Docket No. 17457, 23 F.C.C.2d 606, 613 (June 10, 1970), *aff'd in part, rev'd in part, American Tel. and Tel. Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971); *American Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 260 and 267 concerning Resale and Shared Use, Transmittal No. 12715*, CC Docket 20097, Memorandum Opinion and Order, 64 F.C.C.2d 1003, 1004 (rel. June 16, 1977), *aff'd in part and rev'd in part sub nom. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). Private line services provide a customer with continuous communication between fixed points without the necessity of establishing a new circuit for each call or message. See *Aeronautical Radio v. FCC*, 642 F.2d 1221, 1224 (D.C. Cir. 1980).

⁸⁶ *American Tel. and Tel. Co. Tariff F.C.C. No. 250, TELPAK*, Tentative Decision, 38 F.C.C. 370, Final Decision, 37 F.C.C. 1111 (1964).

⁸⁷ 38 F.C.C. at 374.

⁸⁸ *Telpak Tariff Sharing Provisions of American Tel. and Tel. Co. and the Western Union Tel. Co.*, CC Docket No. 17457, 23 F.C.C.2d 606, 613 (June 10, 1970), *aff'd in part, rev'd in part, American Tel. and Tel. Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971). Specifically, the Commission stated that the carrier seeking to invoke the doctrine must demonstrate:

- (1) That those benefiting from the discrimination have an alternative of satisfying their communications requirements from a substitute source of supply and that they will shift to the substitute source unless the discrimination is maintained;
- (2) That the discriminatory rate or preference is just sufficient to retain the business which would otherwise be lost; [and]
- (3) That the discrimination benefits the users of the companies' services who are discriminated against; *i.e.*, charges to other users are lower because of the discriminatory rate than they would be without such rates.

⁸⁹ *American Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 260 and 267 concerning Resale and Shared Use, Transmittal No. 12715*, CC Docket 20097, Memorandum Opinion and Order, 64 F.C.C.2d 1003, 1004 (rel. June 16, 1977), *aff'd in part and rev'd in part sub nom. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). See also *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 23-24 (2d Cir.), *cert. denied, International*

application of the doctrine to AT&T's discriminatory rates.⁹⁰

34. Private Guidelines Order. In early 1984, with the implementation of the AT&T divestiture and the initiation of LEC access tariffs, the Commission also considered the availability of competitive necessity as a defense against charges of otherwise unlawful discrimination.⁹¹ In the *Private Line Guidelines Order*, the Commission promulgated certain guidelines for review of proposed volume discounts in the generally available tariffs for unswitched services offered by AT&T (private line) and the LECs (special access).⁹² In addition, the Commission, referencing a Robinson-Patman Act competitive necessity case, found that a dominant carrier could attempt to justify a volume discount in a private line or special access offering under a somewhat relaxed version of a *Telpak* competitive necessity showing.⁹³ Under this test, which remains the Commission's most recently applied test, the dominant carrier could seek to justify such a generally available offering by demonstrating that: (1) the customers of the discounted offering have equal or lower priced alternatives that are generally available from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.⁹⁴ In the *Private Line Guidelines Order*, the Commission's discussion indicated only that carriers could make competitive necessity showings to attempt to justify volume discounts for generally available private line and special access services.

35. OCP Guidelines Order. In 1985, the Commission developed guidelines for the review of certain AT&T switched long-distance service offerings (called optional calling plans (OCPs)) for

Business Machines Corp. v. FCC, 439 U.S. 875, 99 S.Ct. 213, 58 L.Ed.2d 190 (1978) (upholding Commission policy of unlimited Telpak sharing as remedy to unlawful discrimination under Telpak).

⁹⁰ *American Tel. and Tel. Co. v. FCC*, 449 F.2d at 450.

⁹¹ Although the Commission had adopted rigid rate structure rules governing the provision of the new switched access service provided by LECs, effectively prohibiting the use of volume discounts for switched access service, it had not adopted rate structure rules for special access service and had no comparable rules to govern AT&T private line services.

⁹² *Private Line Guidelines Order*, 97 F.C.C.2d at 925. The guidelines included: (1) rate structures for the same or comparable services should be integrated; (2) rate structures for the same or comparable services should be consistent with one another; (3) rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics; a rate element which appears separately in one rate structure should appear separately in all other rate structures; (4) rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and (5) rate structures should be simple and easy to understand. The guidelines did not preclude a carrier, in a given case when a private line tariff did not comply with the guidelines, from justifying its departure from them by showing that the tariff is just, reasonable, and nondiscriminatory. *Id.* at 950-951.

⁹³ *Id.*, 97 F.C.C.2d at 947-48.

⁹⁴ *See Id.*, 97 F.C.C.2d at 948.

generally available volume discounts.⁹⁵ The Commission crafted a standard known as the "net revenues" test, which permitted discounts if a carrier could prove the discounts contributed to its overhead over a given period.⁹⁶ The Commission held its decision should not be construed as "ruling out" use of the competitive necessity doctrine where a carrier could not satisfy the net revenues test, but found that the circumstances would be rare where a carrier that could not satisfy net revenues test would be able to pass the competitive necessity test.⁹⁷

36. DS-3 ICB Order. In 1989, the Commission addressed LEC offerings of individual case base (ICB) rates for special access DS3 services, finding that ICB pricing of DS-3 service raised a presumption of unreasonable discrimination under section 202(a) of the Act.⁹⁸ The Commission found that the ICB DS3 services and the generally tariffed DS3 services were "like" services provided at disparate rates. The Commission found that in that instance, the simultaneous use of averaged cost rates for some facilities and individual cost rates for other facilities would result in unreasonable discrimination that was unlawful.⁹⁹ Although LECs argued that the competitive necessity doctrine was a defense to claims of discrimination, the Commission concluded that the LECs had failed to meet their burden under the competitive necessity doctrine, finding that the LECs had offered merely anecdotal evidence of competition to justify the individual offerings.¹⁰⁰ The Commission specifically ordered SWBT to convert its ICB rates for DS-3 service to generally available rates.¹⁰¹

37. AT&T CPP Order. Also in 1989, in the *AT&T CPP Order*, AT&T sought to offer a discounted rate to a single customer in response to an offer to that same customer by MCI.¹⁰² During the course of the litigation, MCI broadened its offer, making it generally available to all similarly situated customers. Applying the competitive necessity doctrine, the Commission held AT&T's transmittal to be unreasonably discriminatory, ruling that under the second prong of the test AT&T's offer was required

⁹⁵ *OCP Guidelines Order*, 59 Rad.Reg.2d 70. Optional calling plans (OCPs) offer discounts or reduced rates for a specified period of calling to long distance customers in exchange for the customer's commitment to a fixed monthly charge or to participate for a minimum period of service.

⁹⁶ *OCP Guidelines Order*, 59 Rad.Reg.2d at 80-84. See also *AT&T Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, 3543*, CC Docket No. 92-95, 7 FCC Rcd 7730 (1992) (approving AT&T calling card plan as not violating section 202(a) because the rates were generally available to any interested customer, citing *OCP Guidelines Order*).

⁹⁷ *OCP Guidelines Order*, 59 Rad.Reg.2d at 86.

⁹⁸ *DS-3 ICB Order*, 4 FCC Rcd at 8641-8642.

⁹⁹ *DS-3 ICB Order*, 4 FCC Rcd at 8642 (concluding that although it "might be theoretically possible" for such an arrangement to be fair, just, and reasonable, based on the record, the LECs failed to "achieve such a result").

¹⁰⁰ *DS-3 ICB Order*, 4 FCC Rcd at 8643.

¹⁰¹ *DS-3 ICB Order*, 4 FCC Rcd at 8645, 8648.

¹⁰² *AT&T Communications Tariff F.C.C. No. 15 Competitive Pricing Plans*, CC Docket No. 88-471, Memorandum Order and Opinion, 4 FCC Rcd 7933 (1989) (*AT&T CPP Order*).

to be equal in scope to MCI's. The Commission stated that it expressed no opinion regarding whether AT&T's transmittal was lawful at the time it was first filed, when MCI's offer had been limited to a single customer.¹⁰³ The Commission ultimately did not reach the issue of whether single-customer offerings were permissible under the competitive necessity doctrine.

38. AT&T's Tariff 15. In 1991, AT&T raised the issue of competitive necessity in the context of customer-specific offerings by filing its Tariff 15. This tariff proposed to permit AT&T to match individual competitors' offers brought to it by customers. In *Resort Condominiums International (RCI Order)*, the Commission rejected AT&T's attempt to justify below-tariff rates. Not reaching AT&T's competitive necessity argument, the Commission ruled that Tariff 15 represented an anti-competitive price signalling scheme.¹⁰⁴ Specifically, the Commission found that the pricing mechanism created under Tariff 15 had the effect of ensuring that AT&T's competitors had an understanding that, so long as they maintained their rates at a certain level, they would not trigger a rate reduction by AT&T. In addition, the Commission found that Tariff 15 limited the scope of competition by permitting rate reductions only in response to reductions initiated by competitors, and also by limiting its response merely to matching the competitor's price cut.¹⁰⁵

39. SWBT RFP Order. In 1995, in the *SWBT RFP Order*, involving an SWBT RFP tariff similar to this one, the Commission did not find that the competitive necessity doctrine provided a defense to discrimination charges in situations involving customer-specific tariffs. Rather, stating that it had never addressed the applicability of the competitive necessity doctrine to dominant LEC special access services, the Commission assumed *arguendo* that the doctrine applied, but found SWBT failed to meet the defense's requirements.¹⁰⁶

40. In summary, our precedent does not compel us to apply the competitive necessity

¹⁰³ *AT&T CPP Order*, 4 FCC Rcd at 7935.

¹⁰⁴ *AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International*, CC Docket No. 90-11, 6 FCC Rcd 5648, 5649 (1991) (*RCI Order*), remanded in an unpublished order (D.C. Cir., Jan. 21, 1992).

¹⁰⁵ *RCI Order*, 6 FCC Rcd at 5649-50. Later in 1991, the D.C. Circuit granted AT&T's motion for a stay of the *RCI Order*. The D.C. Circuit's three-sentence order granting the stay stated that AT&T "demonstrated satisfaction of the stringent standards required for a stay pending court review," but did not otherwise explain why the court granted AT&T's motion. In its brief, AT&T argued, *inter alia*, that the Commission had erred by relying on a price matching theory in rejecting Tariff 15. According to AT&T, the competitive necessity doctrine, as established under general antitrust law, justified Tariff 15. In 1992, the D.C. Circuit granted the Commission's motion for a voluntary remand of the *RCI Order*. Ultimately, the tariff at issue in the *RCI Order*, along with several similar AT&T tariffs based on competitive necessity, went into effect by operation of law.

¹⁰⁶ *SBC RFP Order*, 11 FCC Rcd at 1220. See also *GTE Telephone Operating Companies*, 11 FCC Rcd 3698 (Com. Car. Bur. 1995) (rejecting RFP tariff on vagueness grounds without reaching competitive necessity doctrine issue). SWBT appealed the *SBC RFP Order* and the DC Circuit remanded the matter to the Commission to resolve the difficult issues underlying the application of competitive necessity. *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1008.

doctrine in this case. In the overwhelming majority of our cases in which we considered the doctrine, the proposal involved tariffs that were generally available to similarly situated customers. In those rare instances that the Commission has applied the doctrine in the context of individualized offerings not generally available to similarly situated customers, the Commission rejected the proposals as unlawful without reaching the question of whether the doctrine even should be available to carriers proposing individualized offerings. In this case, we will directly address whether the competitive necessity doctrine should be available here.¹⁰⁷ For the reasons explained below, the public interest in this case requires that we not apply the competitive necessity doctrine to Transmittal No. 2633.

(2). Serious public interest concerns presented by Transmittal No. 2633 require that we prohibit SWBT from using the competitive necessity doctrine as a defense in this situation.

41. The Act, as amended by the 1996 Telecommunications Act, directs the Commission to establish rules and policies that remove barriers to entry in the local exchange and exchange access marketplace. Competition in these markets will lead to lower prices and better quality service. The benefits of a competitive marketplace can be derailed, however, by the practices of dominant carriers improperly seeking to retain their position in the marketplace through anticompetitive means.

42. Based on this record, we are concerned that Transmittal 2633 may permit SWBT unreasonably to deter or foreclose competitive entry into the markets in which it has a monopoly. As formulated, Transmittal 2633 allows SWBT a virtually unlimited opportunity to preempt new market entrants in its territory by reducing rates to individual customers to which it believes new entrants may make offers, without making those rates available to similarly situated customers elsewhere. The threat of such market foreclosure is inconsistent with our ultimate goal -- competition for the provision of access service and the deregulation of incumbent LEC access services.¹⁰⁸ Thus, absent a more persuasive showing of competition than exists in the record here, we find that the potential for SWBT to use this targeted tariff to deter market entry into its local exchange and exchange access market or to drive recent entrants from the market warrants a finding that offerings under Transmittal No. 2633 would be unreasonably discriminatory, the competitive necessity doctrine should not be available and, therefore, that Transmittal 2633 is unlawful.

43. The Customer-Specific Nature of Transmittal No. 2633. Transmittal No. 2633 sets forth a structure permitting the carrier to file specific rate quotes in response to RFPs. The proposed tariff would permit SWBT to file "application-specific rates," *i.e.*, rates not available in its generally available tariffs, in response to a customer RFP so long as the customer indicates in its RFP "that the request involves a competitive situation." Under the tariff, the entire definition of an RFP is that it: "Denotes a written request from a customer for a competitive bid on a service to be provided by the Telephone Company." Transmittal No. 2633 indicates that SWBT would make: "[t]he rates quoted to a customer in response to a RFP . . . available to any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same Central Office(s)." As SWBT explains in its supporting justification, the tariff language does not commit it to offer a special rate on all written requests that satisfy the tariff's definition of RFP. Under the tariff, a customer has "one hundred and eighty (180) days after receiving a Request for Proposal rate to order the service requested at the

¹⁰⁷ This is in contrast to the Commission's approach in the *RCI Order*.

¹⁰⁸ *Access Charge Reform NPRM*, 11 FCC Rcd at 21363; *Access Charge Reform Order*, at para. 273.

rate quoted." Transmittal No. 2633 would permit the use of RFP quotes throughout the SWBT service territory, though as noted, any particular quote would be for specific quantities of specific services at specific central offices.

44. Although SWBT claims that its tariff is "generally available to similarly situated customers," the tariff language belies this assertion. According to the tariff, the rates are only available to customers putting out written bid requests seeking the same services at the same quantities at the same central offices. We conclude, based on the restrictive language of Transmittal No. 2633 and our knowledge of the interstate access market, that the likelihood of more than the original requesting customer requiring the same quantities of the same services at the same central offices is negligible if not non-existent. SWBT has offered no evidence to convince us otherwise. Because the terms of Transmittal No. 2633 in practice prevent the possibility of a similarly situated customer, we find that Transmittal No. 2633 is not "generally available to similarly situated customers."

45. SWBT seeks the ability to offer RFP tariffs anywhere in its region without offering the discount to similarly situated customers, so long as that customer has submitted an "RFP." As defined by Transmittal No. 2633, an "RFP" is merely a written request for a price quote.¹⁰⁹ Such an approach could readily lead to numerous arrangements resulting from bilateral negotiations between customers seeking to obtain service at prices below tariffed rates and incumbent carriers, rather than *bona fide* competitive RFP procedures.¹¹⁰ Thus, it could be relatively easy for specific long-distance carriers to transfer their access purchases from a tariffed basis to a contract basis. Transmittal No. 2633 would permit SWBT to offer or decline to offer such rates to customers if, in its sole judgment, it determines that a "competitive situation" exists.¹¹¹ In light of the record before us, we decline to grant an incumbent LEC the unfettered ability to decide when to offer its interstate access services pursuant to individually negotiated contracts rather than pursuant to generally available access tariffs subject to Commission rules that further our public interest goals, such as competition and deregulation.

46. Evidence of Competition in this Record. SWBT's evidence of competition to justify Transmittal No. 2633 consists of the following: (1) "RFPs" consisting of one to two page letters from two customers, with one-page attachments;¹¹² (2) customer anecdotes, set forth in footnote 16 of the Description and Justification filed with Transmittal No. 2633, from a study commissioned by SWBT in 1993, in which SWBT customers state they would like to see SWBT be permitted to offer below-tariff rates;¹¹³ (3) tariff pages from MFS and TCG tariffs purporting to demonstrate that these companies offer equal- or lower-priced competitive alternatives;¹¹⁴ (4) a quotation from a Time Warner

¹⁰⁹ See Transmittal No. 2633, Proposed Section 29.1-29.2.

¹¹⁰ Indeed, the Coastal competitive bid request specifically contemplates such extended negotiations.

¹¹¹ Transmittal No. 2633, Proposed Section 29.1-29.2.

¹¹² D&J at Attachments 3-4.

¹¹³ D&J at 11 n.16.

¹¹⁴ SWBT Direct Case at Exhibit A. SWBT also states that American Communications Service, Inc. and MCImetro Access Transmission Services, Inc. operate in Dallas and Houston. See D&J at 7-

promotional brochure describing Time Warner's SONET ring network in Indianapolis, and a quotation from an MFS brochure describing that company's facilities in unspecified locations, which SWBT contends, demonstrate that the services described in the Time Warner and MFS tariff pages are comparable to the service that SWBT seeks to offer under this transmittal; (5) a letter from AT&T acknowledging SWBT's response to AT&T's request and informing SWBT that AT&T had decided to "pursue other options;" and (6) an assertion that SWBT has lost 43 percent of its share of the high capacity market in Dallas, and 38 percent in Houston.¹¹⁵

47. We agree with MCI, AT&T, and others that SWBT's evidence of competition is inadequate to demonstrate that sufficient competition exists in Dallas and Houston to justify the grant of the additional pricing flexibility that would be permitted under Transmittal No. 2633 to SWBT in those cities, much less throughout SWBT's serving area. The existence of only two RFPs and their informal nature also adds credence to the opponents' view that the requests for competitive bids may have been issued solely to gauge the extent of competition in the relevant markets. SWBT's customer anecdotes, taken from a 1993 report which SWBT did not submit into the record of this proceeding, and the MFS and Time Warner tariff pages and brochures¹¹⁶ are similarly unprobative.

48. SWBT's additional evidence is no more persuasive. With respect to SWBT's market share loss data, we note that in this proceeding SWBT failed either to submit its consultant's report asserting the market share losses, or to identify the docket number where this information could be found. SWBT's assertions in this record also are limited to special access services in Dallas and Houston. Yet nothing in Transmittal No. 2633 would limit SWBT from responding to competitor efforts to enter the switched access market as opposed to the special access market or from offering customer-specific RFP bids anywhere in SWBT territory.¹¹⁷ SWBT's showing of competition is no more persuasive than the anecdotal evidence we rejected in the *DS-3 ICB Order*.¹¹⁸

49. Non-availability of Competitive Necessity Doctrine. Based on this record, we find significant potential that SWBT, by offering customer-specific discounts under Transmittal 2633, may be able unreasonably to foreclose or deter entry into its markets. To enter the access market successfully, a new entrant must be able to attract a sufficient amount of business to achieve significant economies of scale. New entrants must make large up-front investments before they can begin offering

8.

¹¹⁵ SWBT Direct Case at 8, n.15.

¹¹⁶ SWBT Exhibit A, MFS tariff at 3.3.2; Time Warner tariff at 8.8.1. We note that, unlike SWBT's tariff, which limits availability to customers "requesting the same service in the same quantities and at the same central office(s)," *see* Transmittal No. 2633, Section 29.2., the MFS and Time Warner tariffs do not contain geographic restrictions on availability. MFS's tariff provides that rates and terms may be subject to, among other things, "availability of existing MFS facilities." SWBT Exhibit A, MFS tariff at 3.3.2. Inasmuch as MFS, unlike SWBT, lacks ubiquitous facilities, we find MFS' condition to be a reasonable one.

¹¹⁷ Transmittal No. 2633, Proposed Section 29.3.4 (providing that facilities may be used for switched or special access).

¹¹⁸ *See DS-3 ICB Order, supra.*

service. For example, a new entrant planning to offer direct-trunked transport and special access would have to invest in transmission equipment, fiber, and a variety of other equipment to connect access customers with interexchange carriers (IXCs). A new entrant's decision to enter is, therefore, based on its expectation that it will be able to recover, within a reasonable time frame, its cost of these up-front investments, along with the on-going costs of providing access services, plus a reasonable return on its investment. SWBT, being the incumbent provider, has already made such investments and has a customer base that allows it to benefit from significant economies of scale.¹¹⁹ Therefore, it may well be in SWBT's long-term interest to deprive entrants of the opportunity to achieve significant economies by locking in large customers using customer-specific, long-term contracts before a competitor enters on a facilities basis. SWBT may find it advantageous to offer lower prices to a few relatively large access customers even when such reductions might not, in the short term, contribute as much to profits as would a generally available tariffed rate.¹²⁰

50. The broad geographic reach of Transmittal No. 2633 exacerbates our public interest concerns. SWBT's proposal would allow it to respond to any RFP within its region, even in areas in which new competition is incipient or is absent altogether. If the incumbent is able to develop a reputation of aggressively competing via targeted bids with recent entrants by doing so in a handful of markets, it may be able to dissuade potential entrants from entering any of its other markets. Thus, the incumbent may protect its monopoly position in all of its markets by aggressively competing in markets where entry initially occurs.¹²¹ The ability to lower prices on a customer-specific basis anywhere in SWBT territory would make this strategy much less costly for SWBT, and would weigh heavily in a new entrant's decision to establish a facilities-based presence in any SWBT geographic market. Similarly, entrants that have yet to realize such economies may be forced to withdraw from the market or curtail expansion plans if SWBT is able to capture a large portion of the market through customer-specific responses to written requests for bids. Thus, we also consider here the amount of competition faced by an incumbent throughout its entire region and the openness of its markets rather than considering solely whether a single new entrant has responded to an individual customer's RFP.

51. We also find that competitors are likely to have to enter SWBT's market in part by relying on the use of SWBT's network. Therefore, in evaluating Transmittal 2633, we must also consider the potential for SWBT to use its market power to foreclose or deter entry arising from SWBT's control and provision of the inputs that some of its competitors may require access to in order to compete. Allowing SWBT to respond to RFPs before its market is open to competition creates a situation where SWBT can disadvantage its rivals by denying them access to key inputs. We are therefore considering whether incumbent LECs should be required to make key inputs available at

¹¹⁹ Because an incumbent has already invested in facilities, a large portion of its costs are considered sunk, and should not affect pricing decisions. Only on-going costs, or variable costs, must be covered in the short-run once an investment is made.

¹²⁰ In this situation, SWBT would not have to price its service below its incremental cost. When new entrants have not reached a level of output where they benefit from economies of scale, their incremental costs are greater than the incumbent's. See Rasmusen, Eric B., J. Mark Armseyer, and John S. Wiley, Jr. "Naked Exclusion," *American Economic Review* (December 1991) Vol. 81, No. 5, pp. 1137-1145.

¹²¹ Ordover, Janusz, A. and Garth Saloner "Predation, Monopolization, and Antitrust" in *Handbook of Industrial Organization*, Schmalensee, Richard & Robert D. Willig, eds., Vol. 1, 1989 Elsevier Science Publishers B.V., pp. 550-556.

reasonable rates before they are allowed to respond to RFPs.¹²²

52. To the extent that SWBT is arguing that it should have precisely the same pricing flexibility freedoms as we accord to competitive access providers (CAPs) and other new entrants and therefore be permitted to offer Transmittal No. 2633, we disagree.¹²³ For example, the Telecommunications Act of 1996 specifically recognizes that incumbent LECs and new entrants are not equivalent; section 251(c) creates a series of market-opening obligations that apply to incumbent LECs but not other LECs.¹²⁴ When robust competition is widespread we should do everything possible to eliminate anomalies or asymmetries between the rules applicable to incumbents and the rules applicable to new entrants. In the interim, we expect to continue to lessen regulatory constraints as competition increases. Our access charge proceeding will enable us to consider as a broader matter, beyond the record presented here, when and under what circumstances incumbent LECs should be accorded greater pricing flexibility than they already have. The present record in this case, however, incorporates no persuasive showing that SWBT is experiencing substantial competition throughout its region. In short, the regulatory treatment of CAPs and SWBT is predicated on their markedly different economic circumstances and competitive opportunities.

53. Thus, in a competitive setting, we generally would agree that regulation of new entrants and incumbent LECs should be symmetrical, and recognize that allowing SWBT to respond to written bid requests in markets where entrants have sufficiently established themselves would result in lower prices, and presents SWBT little opportunity to take actions that may lessen competition. Based on this record, however, we conclude that SWBT is experiencing minimal competition throughout its region and the economic characteristics of CAPs and SWBT are strikingly different. First, CAPs are attempting to enter a market dominated by incumbent providers, may not have attracted a sufficient amount of business to achieve economies of scale, and are, therefore, generally unable to behave anti-competitively. Because CAPs face substantial competition from incumbent LECs, they are often unable to take any action that will result in a lessening of competition. In contrast, SWBT, by virtue of its incumbency, enjoys significant economies of scale, and could potentially deter entry by targeting access service offerings to a few large customers. We, therefore, generally find it in the public interest to regulate SWBT and its competitors differently to reflect the economic characteristics of the marketplace.¹²⁵ Thus we conclude that, absent a more compelling showing that competition for access services exists throughout SWBT's region, allowing SWBT under Transmittal No. 2633 to respond to any written request for bids within its territory is contrary to the public interest, but find no compelling public policy reason to limit the actions of CAPs.

54. In conclusion, on the current record, we find that in such markets, the benefit of allowing SWBT to respond on a customer-specific basis to a written bid request as provided in Transmittal No. 2633 is outweighed by the threat that SWBT will use such pricing flexibility unreasonably to deter or foreclose entry. We recognize that this may result in SWBT losing some

¹²² See *Access Charge Reform NPRM*, 11 FCC Rcd at 21427, 21439.

¹²³ SWBT Direct Case at 2, n.2.

¹²⁴ Cf. 47 U.S.C. § 251(c) (additional obligations imposed only on incumbent LECs) with 47 U.S.C. § 251(b) (obligations imposed on all local exchange carriers).

¹²⁵ The ability of new entrants to win customers through the use of contracts guarantees them a stream of revenues, increasing the likelihood that their entry will be successful.

customers in RFP situations. Granting SWBT the ability selectively to respond with highly particularized offers to written bid requests, before new entrants have established themselves in a particular market, however, may result in SWBT deterring more efficient entrants from profitably entering the market. Thus, Transmittal 2633 may well result in less, rather than more, competition in the long run. We find that Transmittal No. 2633 is against the public interest for the reasons stated above. Because Transmittal No. 2633 is against the public interest, its discriminatory rates are unjust and unreasonable in violation of section 202(a). We further conclude that, at least until we revisit these issues in the broader context of the rulemaking proceeding, we will not apply the competitive necessity doctrine to dominant local exchange carriers who are proposing customer-specific tariffs because we find that such an application would thwart the public interest of promoting competition in the local exchange and exchange access markets.

55. We also reject SWBT's arguments relying on the Commission's Notice of Proposed Rulemaking in the *Regulation of Basic Services* docket.¹²⁶ The Commission terminated that docket in 1990 in light of "sufficient changes in the telecommunications marketplace and regulation" that had occurred since 1987, including the introduction of price cap regulation for AT&T and proposals to adopt such regulation for LECs, integrated service offerings under AT&T's Tariff 12, and other changes in the interexchange marketplace.¹²⁷ In light of such changes that granted other significant forms of pricing flexibility, the Commission decided not to adopt its competitive bid proposal. Accordingly, the tentative conclusions of the NPRM are of no decisional significance here.

56. The Access Reform Proceeding. In the past, the Commission has demonstrated that as competition develops, it will grant flexibility to incumbent LECs to allow them greater freedom to address that competition.¹²⁸ SWBT already has available to it various measures of pricing flexibility, to meet such competition, including volume and term discounts. As SWBT moves to respond to competition, it has the freedom to file new volume and term discounts and new zone density rates as generally available tariffs. In the *Access Charge Reform* proceeding, we are considering various proposals concerning pricing flexibility for incumbent LECs. The various proposals concern, *inter alia*, the issues of competitive response tariffs, contract tariffs, volume and term discounts, geographic

¹²⁶ *SWBT October 9, 1997 Ex Parte* at 2.

¹²⁷ *Decreased Regulation of Certain Basic Telecommunications Services*, Order, 5 FCC Rcd 5412 (1990) (*Regulation of Basic Services NPRM*).

¹²⁸ See *NYNEX Telephone Companies Petition for Waiver*, Memorandum Opinion and Order, 10 FCC Rcd 7445, 7462 (1995) (*Universal Service Preservation Plan Order*) (NYNEX permitted to deaverage certain access charge elements in LATA 132 after finding that "the earlier monopoly environment has eroded to a sufficient degree" within that LATA); *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, 11 FCC Rcd 14028 (1995) (*Customers First Order*) (permitting Ameritech to deaverage the transport interconnection and carrier common line access charges in the Chicago and Grand Rapids LATAs). In both of these cases, the carriers filed formal waiver requests and made significantly greater competitive showings for approval of less discriminatory pricing practices than that sought by SWBT here. The grant of flexibility to those carriers included competitive safeguards, such as removal of the discounted rates from the carriers' price cap calculation to ensure that other customers would not pay higher rates as a result of the discounts.

deaveraging.¹²⁹ A more complete record may convince us that our concerns here about an incumbent LEC's ability to foreclose or deter market entry should not apply to these or similar sorts of tariffs. Based on the record before us, however, we find that Transmittal 2633 presents a significant potential for harm to the competitive market, and we, therefore, reject it as unlawful.

3. The competitive necessity doctrine is not a defense to any violation here of the DS-3 ICB Order's prohibition against dominant LECs offering tariffs on an individual case basis or of the Commission's policies concerning contract tariffs.

57. DS-3 ICB Order. Under the *DS-3 ICB Order*, the Commission held that ICB pricing of DS-3 service raises a presumption of unreasonable discrimination under section 202(a) of the Act.¹³⁰ In the *Designation Order*, the Bureau questioned whether Transmittal No. 2633 complied with the *DS-3 ICB Order's* restriction on ICB tariff offerings by dominant LECs.¹³¹

58. SWBT, in its Direct Case, contends that, because it has not "filed" its RFP tariff as an ICB tariff, its RFP tariff does not violate the Commission's prohibition against ICB tariffs for other than new offerings.¹³² The IXC's and new entrants disagree, stating that the individualized pricing options embodied in Transmittal No. 2633 render it an ICB tariff, and that SWBT has failed to comply with the stringent requirements that enable incumbent LECs to offer ICB pricing.¹³³ Sprint and GST observe that the Commission has interpreted section 202(a) as prohibiting a carrier from pricing the same service as both ICB and non-ICB, and that Transmittal No. 2633 violates this policy.¹³⁴ In its Reply, SWBT argues that because the Commission's competitive necessity doctrine applies to Transmittal No. 2633, all other Commission rules and policies (including prohibitions against contract tariffs and ICB offerings) must be read in light of the doctrine's applicability.¹³⁵ It argues that to reject Transmittal No. 2633 as an unlawful contract tariff or ICB tariff without considering the doctrine would be arbitrary and

¹²⁹ See *Access Charge Reform NPRM*, 11 FCC Rcd at 21432-21440. See *id.* at 21445-448 (discussing possible deregulation reforms including different prices for access for different classes of end users, modifications to our rate structure rules for transport and local switching, and the consolidation of various baskets).

¹³⁰ *DS-3 ICB Order*, 4 FCC Rcd at 8641-8642.

¹³¹ *Designation Order* at para. 12. According to the Bureau, ICB offerings refer to the carrier practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions. *Id.* at para. 20 (citing "Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings," Public Notice, 11 FCC Rcd 4001 (Com. Car. Bur. 1995)).

¹³² SWBT Direct Case at 3-4.

¹³³ TCG comments at 6-7; GST Comments at 5;

¹³⁴ Sprint comments at 4; GST comments at 5.

¹³⁵ SWBT Reply at 2.

capricious.¹³⁶

59. As stated above, because of our concerns that Transmittal No. 2633 might stifle competitive entry, we conclude it would not be in the public interest to permit SWBT to invoke the competitive necessity defense to justify Transmittal No. 2633's discriminatory pricing. We have already concluded that Transmittal No. 2633 violates our rules requiring averaged rates.¹³⁷ SWBT does not contend that Transmittal No. 2633 fits any of the exceptions that would make it a *lawful* ICB tariff, irrespective of competitive necessity and the average rates requirement. Because we find this tariff unlawful on other grounds, we need not reach the issue of whether Transmittal No. 2633 is also unlawful under our ICB pricing prohibitions.

60. The Commission's Contract Tariff Policies. In the *Designation Order*, the Bureau raised the issue of whether Transmittal No. 2633 violates the Commission's policy prohibiting dominant LECs from offering contract tariffs.¹³⁸ The Bureau noted that, in the *Access Charge Reform NPRM*, the Commission has proposed to permit dominant LECs to offer RFP and other contract tariffs upon a showing that a certain level of competition exists in the market and has sought comment on the level of competition that must be shown to exist prior to permitting incumbent LECs to offer contract and RFP tariffs.¹³⁹ The Bureau observed that, although the Commission ultimately may decide that LECs may offer contract and RFP tariffs, current Commission policy prohibits such tariffs,¹⁴⁰ and that Transmittal No. 2633 appeared to run afoul of this prohibition. The Bureau sought comment on this issue. The Bureau also observed that a finding that Transmittal No. 2633 is an RFP tariff would compel rejection of the transmittal, assuming the Commission were to find against SWBT on the issue of competitive necessity.¹⁴¹

61. In its Direct Case, SWBT argues that current Commission policy does not prohibit RFP tariffs. According to SWBT, section 61.3(m) of our rules stands only for the proposition that interexchange carriers (IXCs) and non-dominant carriers *may* offer contract tariffs, but does not preclude LECs from offering them.¹⁴² SWBT further argues that, although RFP tariff filings are the subject of an ongoing Commission rulemaking, competition for LEC services has not waited for the Commission's decision in that proceeding, and that the competitive necessity doctrine justifies SWBT's

¹³⁶ SWBT Reply at 2-3.

¹³⁷ See Section IV.A.1., *supra*.

¹³⁸ See *Designation Order* at para. 18.

¹³⁹ *Designation Order*, at para. 4 (citing *Access Charge Reform NPRM*, 11 FCC Rcd at 21439).

¹⁴⁰ See *Access Charge Reform NPRM* at 21428, 21439-21440.

¹⁴¹ SWBT argues that the competitive necessity doctrine provides a defense to this requirement. See Section IV.A.2.a., *supra*.

¹⁴² SWBT Direct Case at 3.

filing of an RFP tariff.¹⁴³ SWBT further argues that it did not formally file its RFP tariff as a contract tariff, and therefore should not be subject to the Commission's prohibition against contract tariff filings by dominant LECs.¹⁴⁴ AT&T states SWBT is being "disingenuous" in claiming it did not file Transmittal No. 2633 as a contract tariff. AT&T argues that Transmittal No. 2633 must be considered a contract tariff because its offer of customized service to a specific customer contains all the elements the Commission previously has identified as characteristics of a contract tariff.¹⁴⁵ TCG characterizes SWBT's argument that it did not "file" Transmittal No. 2633 as a contract tariff as an attempt to elevate form over substance.¹⁴⁶ AT&T, TCG, KMC, and GST all contend that, pursuant to section 61.3(m), dominant LECs by definition may not offer contract tariffs.¹⁴⁷

62. The Commission has never authorized dominant LECs to offer contract tariffs. In the *Expanded Interconnection* and *Virtual Collocation* orders, the Commission rejected incumbent LEC pleas that they be permitted to offer contract tariffs.¹⁴⁸ We have already concluded that Transmittal No. 2633 violates our rules requiring averaged rates, and found that the record does not support permitting use of the competitive necessity doctrine as a defense for this rule violation.¹⁴⁹ SWBT has put forth no argument (other than competitive necessity) that Transmittal No. 2633 somehow constitutes a lawful contract tariff, so as to cure the violation of our averaging requirement. Accordingly, we need not reach the issue of whether Transmittal No. 2633 constitutes an unlawful contract tariff.

B. Application for Review of Bureau denial of SWBT's waiver request.

63. In footnote 5 of its Description and Justification, SWBT sought a waiver of the *DS-3 ICB Order*, or "any of [the Commission's] rules . . . necessary for SWBT's filing to take effect."¹⁵⁰ Under section 1.3 of our rules, the Commission may waive any provision of its rules or orders if "good cause" is shown.¹⁵¹ The standard of good cause requires the petitioner to demonstrate that special circumstances warrant deviation from the rules or orders and that such a deviation would better serve the public interest than the general rule. Moreover, grant of a waiver presumes the validity of the

¹⁴³ SWBT Direct Case at 3.

¹⁴⁴ SWBT Direct Case at 3.

¹⁴⁵ AT&T comments at 2.

¹⁴⁶ TCG comments at 5.

¹⁴⁷ AT&T comments at 2-3; TCG comments at 4; KMC comments at 2, GST comments at 3.

¹⁴⁸ See *Virtual Collocation Order*, 9 FCC Rcd at 5206-5207 (rejecting incumbent LEC arguments that they should be able to engage in individual case basis contract and competitive response pricing); *Expanded Interconnection Order*, 9 FCC Rcd at 2731 (rejecting contract tariffs).

¹⁴⁹ See Sections IV.A.1. and IV.A.2., *supra*.

¹⁵⁰ D&J at 3 n.5.

¹⁵¹ See 47 C.F.R. § 1.3.

general rule, must not undermine the policy served by the rule, and must not be so broad as to eviscerate the rule. Rather, the request must be tailored to the specific contours of the exceptional circumstances.¹⁵² Parties must obtain a waiver before filing any tariff that would conflict with the Commission's rules. Failure to observe this procedure is grounds for rejecting the tariff.¹⁵³

64. The Bureau found that SWBT's one-sentence waiver request, contained in a footnote to its Description and Justification, failed to identify each of the particular rules from which it seeks relief or to describe any special circumstances justifying grant of a waiver.¹⁵⁴ On August 13, 1997, SWBT filed an application for review of the Bureau's denial of its waiver request, arguing that the Bureau's decision was premature "since even the Bureau is unsure as to which rules might affect SWBT's RFP tariff filing." According to SWBT, it is therefore inappropriate to reject SWBT's waiver request on the "sole ground" that SWBT has not identified each of the particular rules from which SWBT seeks relief. SWBT argues that the better course of action would be to allow the waiver request to remain in effect pending a ruling by the Commission on SWBT's Transmittal No. 2633.¹⁵⁵

65. In opposition, MCI argues that SWBT mischaracterizes the Bureau's decision. According to MCI, the Bureau rejected SWBT's waiver request because SWBT failed to satisfy any of the applicable waiver standards, including the identification of the particular rules for which waiver is sought.¹⁵⁶ MCI states further that SWBT's mere invocation of competitive necessity does not permit it to file a tariff that violates Commission rules, and that SWBT must first file a formal waiver request as NYNEX and Ameritech have done in comparable situations.¹⁵⁷ Sprint comments that, since SWBT did not support its waiver request, the Bureau properly denied it.¹⁵⁸

66. We disapprove of the practice of inserting vague, unsupported waiver requests in footnotes to Description and Justification transmittals. SWBT's argument that it need not identify the rules for which waiver is sought is unavailing. It is not the Bureau's role to evaluate vague requests for waiver and identify all possible rule violations in order to determine whether those rules should be

¹⁵² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *See also Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹⁵³ *U S West Communications, Inc., Revisions to Tariff F.C.C. No. 5, Transmittal No. 525*, 9 FCC Rcd 5228 (Com. Car. Bur. 1994).

¹⁵⁴ *Designation Order*, at para. 14.

¹⁵⁵ *Application for Review of Southwestern Bell Telephone Company*, CC Docket No. 97-158, at 2-3 (filed Aug. 13, 1997).

¹⁵⁶ *MCI Opposition to Application for Review*, CC Docket No. 97-158 (filed Aug. 28, 1997) at 2.

¹⁵⁷ MCI comments at 5-6 (citing *NYNEX Telephone Companies Petition for Waiver, Memorandum Opinion and Order*, 10 FCC Rcd 7445, 7462 (rel. May 4, 1995) and *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, 11 FCC Rcd 14028 (rel. Feb. 15, 1996)).

¹⁵⁸ Sprint comments at 5.

waived. Further, SWBT's application for review fails to answer the substantive shortcomings the Bureau identified in the initial waiver request. In any event, to the extent that SWBT's waiver request was intended to be a part of its defense based on the competitive necessity doctrine, we have concluded above that such a defense is not available here, and thus any accompanying waiver request should be denied. Accordingly, SWBT's application for review is denied.

V. CONCLUSION

67. We conclude that competitive necessity is not available as a defense for a dominant carrier to justify a customer-specific offering that is not generally available to similarly situated customers. We conclude that Transmittal No. 2633's provisions could enable SWBT to forestall unreasonably the development of competition by foreclosing or deterring market entry by potential competitors, and therefore that the discrimination inherent in the transmittal is unreasonable. For the reasons stated above, we find that the public interest requires us to find Transmittal No. 2633 unlawful.

VI. ORDERING CLAUSES

68. **IT IS ORDERED** that, pursuant to Sections 4(i), 202(a), 204, and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 202(a), 204, and 205 that the tariff revisions proposed in Southwestern Bell Telephone Company Transmittal No. 2633 **ARE UNLAWFUL**.

69. **IT IS FURTHER ORDERED** that the Southwestern Bell Telephone Company **SHALL FILE** revisions to remove all of the tariff revisions submitted under Transmittal No. 2633 no later than five business days after the release of this Order. Southwestern Bell Telephone Company shall refer to the "FCC" number of this Order as the authority for making this filing.

70. **IT IS FURTHER ORDERED** that Southwestern Bell Telephone Company's application for review of the Common Carrier Bureau's denial of Southwestern Bell Telephone Company's request for waiver of the Commission's rules is **DENIED**.

71. **IT IS FURTHER ORDERED** that pursuant to section 204(a) of the Communications Act, 47 U.S.C. § 204(a), the investigation instituted by the Common Carrier Bureau in CC Docket No. 97-158 for Southwestern Bell Telephone Company Transmittal No. 2633 **IS TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

November 14, 1997

**Concurring Statement of
Commissioner Harold Furchtgott-Roth**

Re: Southwestern Bell Telephone Company, Tariff F.C.C. No. 73

Based on the facts and record of this proceeding, I believe that Southwestern Bell Telephone Company's (SWBT's) Transmittal No. 2633 should be rejected. I share the concern, expressed in the majority's decision, that Southwestern Bell has not on this record demonstrated adequately that it faces competition sufficient to warrant the pricing flexibility sought by its tariff offering. Accordingly, I concur in the result the majority's decision reaches.

Nevertheless, I write separately because I believe that the majority's decision, in its public interest analysis, addresses issues that are more appropriately considered in the context of the pending *Access Reform* proceeding's broader inquiry into pricing flexibility for dominant local exchange carriers (LECs).¹ The competitive necessity defense issue raised by SWBT's tariff transmittal is only part of the larger issues concerning pricing flexibility for dominant LECs. As such, the more developed record in the *Access Reform* proceeding provides the appropriate context in which to consider the issues relating to the circumstances under which dominant LECs should be accorded additional pricing flexibility. Consequently, I reserve judgment on those issues until the upcoming *Access Reform* order.

¹ Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354, 21439 (1996); Report and Order, FCC 97-158, at para. 260 (1997).

November 14, 1997

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Southwestern Bell Telephone Company, Tariff F.C.C. No 73

I support this decision to reject Southwestern Bell Telephone Company's Transmittal No. 2633. I agree that at this time, based on this record, we cannot grant the broad relief the company seeks. I do so reluctantly in cases where consumers stand to benefit from lower prices, as is the case here. However, I am convinced that to grant the relief requested now would very possibly raise new barriers to entry and that the question of pricing flexibility is a component of a whole host of complex questions that are best addressed in our Access Reform Proceeding. Nonetheless, I write separately to emphasize how important it will be for the Commission to provide clear guidelines as to when and under what conditions, dominant local exchange carriers can offer customers lower prices in response to competitive pressures from new entrants as we transition from a regulatory regime to a market-oriented one.