

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

In the Matter of)	
)	
Southwestern Bell Telephone Company)	Transmittal No. 2984
Tariff F.C.C. No. 73)	

**PETITION TO REJECT OR SUSPEND AND INVESTIGATE
PROPOSED TARIFF REVISIONS**

Cbeyond Communications, LLC¹ ("Cbeyond") hereby petitions the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.773 of the Commission's rules (47 C.F.R. § 1.773), to reject the proposed tariff revisions filed by Southwestern Bell Telephone Company ("SWBT") associated with the above-captioned Transmittal No. 2984. At a minimum, the Commission should suspend and investigate this transmittal.²

SWBT filed Transmittal No. 2984 to restructure the application of cancellation charges associated with certain special access service offerings in FCC Tariff No. 73. The restructured cancellation provisions are unjust and unreasonable because they permit SWBT to impose cancellation charges on access customers if SWBT misses a service date by more than 30 days even if SBC is responsible for the delay. These proposed tariff revisions would establish a

¹ Cbeyond Communications is a next generation Broadband Applications Service Provider (BASP) headquartered in Atlanta, Georgia. Cbeyond provides service over a Cisco powered IP-based network utilizing state of the art technology. Cbeyond's network deployment strategy permits it to provide a bundled offering of voice and advanced data services at affordable prices to small and medium-sized business customers. Cbeyond currently provides service in selected markets in Georgia, Colorado, and Texas.

² Suspension and investigation or rejection of a proposed tariff or tariff modification is warranted when significant questions of unlawfulness arise in connection with the tariff. *See BellSouth Telecommunications, Inc. Transmittal No. 657*, Order, DA 02-1886 (rel. Aug. 2, 2002); *AT&T Co., Transmittal No. 148*, Memorandum Opinion and Order, 56 RR 2d 1503 (1984); *ITT World Comms., Transmittal No. 2191*, Memorandum Opinion and Order, 73 FCC 2d 709, 719 (1979); *AT&T Co., Transmittal No. 11935*, CC Docket No. 19989, 46 FCC 2d 81, 86 (1974); *see also Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963).

perverse anticompetitive incentive for SWBT to deliberately delay in provisioning essential services to its competitors. Moreover, the charges SWBT proposes to assess unjustified and radical increases. For this reason, SWBT's proposed language is patently unreasonable and unlawful under Sections 201(b) and 202(a) of the Communications Act.

I. THE COMMISSION SHOULD REJECT OR SUSPEND AND INVESTIGATE THE TRANSMITTAL BECAUSE THE NEW TARIFF LANGUAGE IS UNJUST AND UNREASONABLE, IN VIOLATION OF SECTION 201 OF THE COMMUNICATIONS ACT

A. SWBT's Proposed Revision Is Unjust and Unreasonable Because It Emboldens SWBT to Miss Service Appointments By More Than 30 Days

SWBT's tariff revisions should be rejected, or suspended and investigated, because it is unjust and unreasonable for SWBT to have the right to miss appointments beyond 30 days and still assess a cancellation charge when SBC is responsible for the delay. Under SBC's proposal, access customers can only avoid cancellation charges when SWBT misses a service date by more than 30 days due to circumstances beyond SWBT's control. In particular, SWBT's proposed language for Section 5.3.3.1(4)(b) states the following:

If the Telephone company misses a service date by more than 30 days, due to circumstances over which it has no direct control (excluding acts of God, governmental requirements, work stoppage and civil disturbances), the customer may cancel Access Order without incurring cancellation charges.

If anything, this language emboldens SWBT to miss appointments by more than 30 days, as a general matter, because cancellation charges will still apply. At bottom, SWBT is attempting to compensate itself for providing dilatory service. SWBT has not explained why it should be permitted to recover cancellation charges in such instances nor could it. There is no attempt to justify this approach to imposing cancellation charges in its Description and Justification. Cbeyond submits that SBC proposed terms are self serving, give SBC improper incentives, and are therefore unlawful.

B. Approval of the SWBT's Tariff Revisions Would Be Contrary to Pro-Competitive Goals

In light of the Commission's decision to eliminate access to ILEC network elements as UNEs in a number of situations, CLECs may need to rely on access in some cases. It would seriously harm the pro-competitive goals of the Act if SWBT could force CLECs to accept tardy provisioning of service or pay cancellation charges. Indeed, with these tariff revisions, SWBT will have the perverse incentive to deny service to competitors in order to thwart competition and, at the same time, still collect cancellation charges even when SBC would not incur any, or very limited, costs. Basically, the proposed tariff revision would be a new tool for SWBT to disadvantage competitors. The Commission should reject the tariff for this reason as well.

C. The Commission Should Reject or Suspend the Transmittal Because it Fails to Meet the "Substantial Cause" Test

Under the substantial cause test, the Commission measures the reasonableness of a tariff modification by weighing two principal considerations: the "carrier's explanation of the factors necessitating the desired changes at that particular time," and the "position of the relying customer."³ Concerning the first leg of this test, SWBT has provided absolutely no explanation or rationale for the language mentioned herein. Nor has it provided any basis for not allowing CLECs to cancel orders without incurring a cancellation charge when its SBC fault for missing a service date by more than 30 days. There simply is no reason for SBC to have right to assess cancellation charges in such instances. Regarding the second leg of this test, SWBT's customers, *i.e.*, CLECs and other access customers, will be adversely impacted as discussed above.

³ *RCA American Comms., Inc.*, CC Docket No 80-766, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

It is clear that Transmittal 2884 fails the substantial cause test. Because SWBT's proposed tariff language is manifestly unjust and unreasonable, it cannot be allowed to become effective.

II. THE PROPOSED CANCELLATION CHARGES ARE UNREASONABLE

To make matters worse, not only is SWBT's proposed application of its cancellation charge inappropriate but the amount it proposes to charge is as well. In fact, SWBT's proposed cancellation charge will, for collocation to collocation transport and some other services, exceed the full non-recurring charge. This makes entirely no sense because nonrecurring charges recover the costs associated with establishing the service. Therefore, cancellation charges should be no higher than such charges. The Commission should recognize that fact that they are higher than SWBT's nonrecurring rates demonstrates how unreasonable and unjust they are.

III. SBC HAS MADE NO ATTEMPT TO EXPLAIN THE RADICAL INCREASE TO THE DS3 CANCELLATION CHARGE

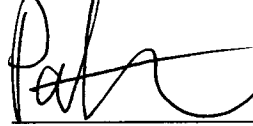
Along with having a deficient filing for the above reasons, SWBT's proposed DS3 cancellation charges shot up by 89% without any justification. The FCC should not accept carte blanche SWBT's dramatic increase proposed charges without explanation. If anything, the dramatic spike with no support provide sufficient grounds for the Commission suspend and or reject the tariff filing in *toto*.

IV. CONCLUSION

For the reasons described herein, the revisions proposed by Transmittal 2984 are on their face unjust and unreasonable, and therefore unlawful under section 201(b) of the Communications Act. Cbeyond respectfully requests that the Commission reject the tariff revisions. If the Commission fails to reject the tariffs outright, the Commission should at a

minimum suspend the revisions proposed by SWBT subject to an investigation to resolve the foregoing issues.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2003, copies of the foregoing **PETITION TO REJECT OR SUSPEND AND INVESTIGATE PROPOSED TARIFF REVISIONS**; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2984, were sent via Messenger and/or Facsimile, where indicated, to the following:

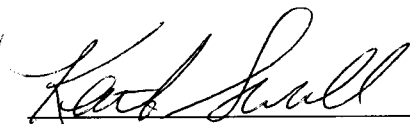
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