CURTIS, OETTING, HEINZ, GARRETT & SOULE, P. C.
ATTORNEYS AT LAW
130 SOUTH BEMISTON, SUITE 200
ST. LOUIS, MISSOURI 63105
(314) 725-8788
FACSIMILE (314) 725-8789
www.cohgs.com

CARL J. LUMLEY

EMAIL ADDRESSES
clumley@cohgs.com
MCI MAIL: (CLUMLEY / MCI ID: 505-3023)
0005053023@MCIMAIL.COM

October 22, 1999

Dale Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Truman State Office Building, 5th Floor
301 West High Street
Jefferson City, Missouri 65101-1517

Re: Case No. TC-2000-225
(Consolidated with Case No. TC-2000-226)

Dear Mr. Roberts:

Enclosed please find for filing with the Commission an original and fifteen copies of MCIWC and Brooks Joint Response to SWBT's Motions to Dismiss. Upon your receipt, please file stamp the extra copy received and return to the undersigned. If you have any questions, please do not hesitate to contact us.

Very truly yours,

Carl J. Lumley

CJL:dn
Enclosures
cc. Office of Public Counsel (W/Enclosures)
General Counsel (W/Enclosures)
SWBT (W/Enclosures)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Missouri, Inc.,	)	
Complainants,	)	Case No. TC-2000-225
vs.	)	(Consolidated With Case No. TC-2000-226)
Southwestern Bell Telephone Company,	)	
Respondent.	)	

MCIWC AND BROOKS JOINT RESPONSE TO SWBT'S MOTIONS TO DISMISS

Come Now MCI WorldCom Communications, Inc. (MCIWC) and Brooks Fiber Communications of Missouri, Inc. (Brooks) and submit their Joint Response to SWBT's Motions to Dismiss.

Introduction

MCIWC and Brooks have filed Complaints requesting the Commission to determine after hearing that they and SWBT intended and agreed that reciprocal compensation would be paid on all local calls (as defined by the prevailing industry terminology used in their respective interconnection agreements), including ISP-bound traffic. SWBT has reneged on its agreements and refused to pay substantial sums. The FCC has expressly directed parties like MCIWC and Brooks to present such disputes to state commissions like the Missouri PSC. SWBT has already been held to have made such agreements contemporaneously in other states. Nonetheless, SWBT persists in its efforts to break its promises. MCIWC and Brooks simply ask that SWBT fulfill its promises as required by law, including the orders of this Commission approving the agreements.

Contrary to SWBT's Motions to Dismiss, MCIWC and Brooks have filed Complaints that more than adequately and properly present claims upon which relief may be granted, that are entirely consistent and permitted by FCC decisions, and that are unrelated to the suspended Birch arbitration pending before this Commission. Hence, the Commission should deny SWBT's Motions to Dismiss and set a prehearing conference so a procedural schedule can be established in these consolidated cases.

SWBT's Motions seek dismissal for failure to state a claim and accordingly must be denied because the allegations of the Complaints are more than sufficient.

The Commission should deny SWBT's Motions to Dismiss the Complaints which seek dismissal "for failure to state sufficient facts upon which relief can be granted." (SWBT Motions, p. 2). Such motions must be evaluated with the understanding that technical rules of pleading do not apply to Commission proceedings. If a pleading "fairly presents for determination some matter which falls within the jurisdiction[1] of the Commission, it is sufficient." State ex rel Kansas City Terminal Ry. v. PSC, 272 SW 957, 960 (Mo. 1925). Furthermore, such a motion is solely a test of the adequacy of the Complaints, based on an assumption that all the averments therein are true and a grant of all reasonable inferences therefrom. See, e.g., Duggan v. Pulitzer Publishing Co., 913 SW2d 807 (Mo. App. 1995). The Complaints allege sufficient facts describing that the parties made their interconnection agreements, that they intended and agreed that all local traffic – including ISP-bound traffic - would be subject to reciprocal compensation under the prevailing industry terminology used in those agreements, and that SWBT subsequently breached the agreements by failing to pay

[1] SWBT does not contest the Commission's jurisdiction over the Complaints, but rather admits to such jurisdiction. (SWBT Answers, para. 8). Moreover, other sections of this Joint Response demonstrate that the Commission has such jurisdiction, under the Telecommunications Act of 1996 (as confirmed by various courts and the FCC) and under Missouri statutes and case law.

reciprocal compensation on all such traffic. No further factual allegations are required beyond those set forth in the Complaints. Hence, SWBT's Motions to Dismiss must be denied.

For purposes of evaluating SWBT's Motions to Dismiss, the Commission must ignore all of SWBT's improper efforts to refute the facts stated in the Complaints. Again, all factual allegations must be assumed to be true. See Duggan, supra. In particular, the Commission must ignore the cursory and conclusory "affidavits" and the unverified and incomplete documentary "evidence" attached to SWBT's Motions. The Commission's rules do not provide for summary judgment proceedings, nor has SWBT even purported to seek such relief. The Complaints state sufficient information for this matter to proceed to a hearing on the merits, and MCIWC and Brooks cannot within the confines of due process be required to assemble and present all of their evidence in the few business days available between receipt of SWBT's Motions on October 15, 1999 and the filing of this Joint Response a week later, simply because SWBT improperly and prematurely attached a few snips of self-serving purported "evidence" to its Motions.[2] Hence, the Commission must ignore SWBT's improper "factual" allegations and deny the Motions to dismiss.

This proceeding does not concern the jurisdictional nature of ISP-bound traffic, but rather the parties agreement that such traffic is subject to reciprocal compensation.

Once the improper "factual" assertions that clutter SWBT's Motions are stripped away, there emerges SWBT's erroneous argument that it is impossible for MCIWC and Brooks to state a claim under their agreements that reciprocal compensation applies to ISP-bound traffic because

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[2] The Commission also should know that any attempt to resolve this proceeding by a "summary judgment" approach, after some type of notice and sufficient time to respond, would in any event be fruitless given SWBT's current position. MCIWC's and Brooks' witnesses will directly and specifically controvert the statements made in SWBT's "affidavits". With such a dispute over material matters of fact, summary judgment would not be possible and a hearing on the merits will be required. See, e.g., Mo. S. Ct. Rule 74.04.

such traffic is at least in large part interstate in jurisdictional nature. SWBT fails to mention, however, that the FCC has expressly rejected such a contention, as have numerous courts and state commissions.

The FCC has expressly ruled that its determination in February, 1999 of the interstate jurisdictional nature of the traffic has no bearing upon the question of whether parties to previously-made specific agreements (such as the 1996-97 agreements at issue here) intended that reciprocal compensation would be paid on ISP-bound traffic, or upon the enforceability of such agreements. Further, the FCC held that its long-standing policy of treating ISP-bound traffic as local traffic likely caused parties to agree to pay reciprocal compensation on such traffic, that such agreements should be enforced, and that state commissions should resolve any specific disputes. See In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, ISP Ruling in CC docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC-99-38 (rel. Feb. 26, 1999) (hereinafter the "FCC Order").[3]

Following the FCC Order, the U.S. Seventh Circuit Court of Appeals rejected Ameritech's arguments that the interstate jurisdictional nature of the traffic should be determinative and held instead that the "real issue" was whether the ICC had violated federal law by interpreting contract language similar to the language at issue in the instant case as requiring payment of reciprocal compensation on ISP-bound traffic. The Court concluded that the ICC decision did not violate federal law, but rather had been expressly contemplated under the Act and the FCC Order. The Court also observed that the ICC had acted in accordance with the

[3] The FCC Order is discussed in greater detail later in this Joint Response.

over-whelming majority of other state commissions. See Illinois Bell Telephone Co. dba Ameritech Illinois v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. June 18, 1999).[4]

Thus, the jurisdictional nature of the traffic as pronounced by the FCC in 1999 is totally irrelevant to the question presented by the Complaints - whether or not the parties agreement in 1996-97 to pay reciprocal compensation on all local traffic included ISP-bound traffic. This is a factual question that must be decided based upon the evidence after a hearing on the merits.

As alleged in the Complaints, the evidence will show that SWBT did agree with Brooks and MCIWC's predecessor in interest[5] that reciprocal compensation would be paid on all local traffic, as defined by the industry, including ISP-bound traffic. In fact, the parties discussed such matters in multiple states. This is not a matter of secret intentions, as SWBT suggests, but rather a matter of well-known industry convention and practices, including FCC practices.[6]

Contrary to SWBT's current argument, this intent and agreement of the parties did not involve "reclassification" or "relabeling" of ISP-bound traffic as local traffic or any other type of "special treatment" or "carve-out" that needed to be stated, but rather involved recognition of the fact that the industry and the FCC considered ISP-bound traffic to be local traffic. Given

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[4] Other courts have reached the same conclusion. See, e.g., Michigan Bell Tel. Co. v. MFS, No. 5:98CV 18, Opinion and Order (W.D. Mich. Aug. 2, 1999); BellSouth Telecommunications v. ITC Deltacom, No. 99-D-287-N, Memorandum Opinion & Order (M.D. Ala. Aug. 18, 1999); U.S. West v. Jennings, 46 F.Supp 2d 1004, 1006 (D. Az. 1999); BellSouth Telecommunications v. WorldCom Technologies, No. 4:98CV352-RH, Order Denying Stay (N.D. Fla. June 1, 1999); GTE Northwest, Inc. v. WorldCom, Inc., C990-912C, Order (W.D. Wash. June 11, 1999); Bell South v. MCImetro, No. 3:99CV97-MW Order (W.D. N.C. May 20, 1999).

[5] SWBT inaccurately states that MCIWC is acting "on behalf of its affiliate MFS." As alleged in the Complaint and as reflected in the Commission's records, MCIWC is the successor in interest to MFS under the interconnection agreement. (MCIWC Complaint, para. 4).

[6] SWBT inexplicably contends that it and MCIWC agreed that their reciprocal compensation arrangements only related to Section 251(b)(5) of the Act and, therefore, the two companies agreed to exclude ISP-bound traffic. (SWBT Motion, p. 12). There is no such statement in the agreement. Further, the FCC specifically recognized parties could agree to include ISP-bound traffic within their "section 251 and 252 interconnection agreements." (FCC Order para. 22). Hence, reference to these statutes cannot be construed as limiting the scope of traffic subject to reciprocal compensation. Moreover, SWBT's erroneous assertion that the parties agreed to exclude such traffic contradicts its erroneous assertions that such traffic was never discussed.

SWBT's mischaracterizations, it is worth repeating – the FCC has expressly confirmed that it has at all pertinent times treated ISP-bound traffic as local traffic.[7] Hence, if there was to have been "special treatment" of ISP-bound traffic, it would have been incumbent on SWBT to propose to expressly exempt such recognized local traffic from reciprocal compensation (as it later did in the Birch negotiations). SWBT did not do any such thing in the MCIWC and Brooks negotiations. The evidence will show that SWBT expressly intended, acknowledged and agreed that all local traffic, which as defined by the industry and FCC included ISP-bound traffic, would be subject to reciprocal compensation under these Missouri agreements – just as it has already been found to have so agreed in other states, such as Oklahoma.[8]

The evidence will show that all of SWBT's accusations turn back on SWBT itself. It is SWBT that has reneged on its agreements. It is SWBT that improperly attempts to "shoe horn" an inapplicable after-the-fact jurisdictional ruling into the agreements. It is SWBT that seeks to "renegotiate" the deal.

The evidence will show that SWBT changed its position on the applicability of reciprocal compensation to ISP-bound traffic only after it had entered into the agreements with MCIWC and Brooks (and at a time when the other incumbents were likewise changing their positions). While SWBT's change in position did in fact result in a subsequent dispute and arbitration between SWBT and Birch, that has no bearing upon the agreements that SWBT had already made with MCIWC and Brooks before it changed its position. Likewise, even if SWBT changed

[7] It is disturbing to say the least that SWBT repeatedly misrepresents that the FCC "has never characterized Internet traffic as 'local traffic'" (SWBT Motions, p. 7). As SWBT well knows, the FCC has expressly confirmed that it "has treated ISP-bound traffic as though it were local" and has described such treatment as a "longstanding policy". FCC Order para. 23 and 24.

[8] SWBT v. Brooks, Case No. 98-CV-468-K(J), USDC OK ND (9/20/99). The Oklahoma case involved an agreement between SWBT and Brooks involving substantially the same language, that was negotiated just prior to the Missouri agreement. Given these rulings in other states, it is nothing short of remarkable that SWBT asserts that it "would never have agreed" to pay reciprocal compensation on ISP-bound traffic. It has agreed in Missouri and other states, plain and simple.

its position before the parties actually exchanged traffic, that would not release it from its previously executed agreements. The evidence will show that neither MCIWC nor Brooks ever acquiesced to any change in position by SWBT on this issue, but rather have always insisted that SWBT abide by its agreements to pay reciprocal compensation on all local traffic, as defined by industry and FCC practices, including ISP-bound traffic. Unfortunately, despite the overwhelming tide of decisions adverse to incumbent LECs on this subject, SWBT has forced MCIWC and Brooks to bring this matter to the Commission.[9]

The intent and agreement of the parties are matters of fact and the Commission cannot accept SWBT's invitation to err by sidestepping the facts and interpreting the agreements "as a matter of law". The Commission cannot interpret the contractual meaning of "local traffic" as a matter of law based on an after-the-fact FCC jurisdictional ruling that was expressly not meant to have such consequences. Rather, the Commission must construe the agreements in light of the parties intentions and the factual circumstances that prevailed when the parties made their agreements. The evidence will show that the parties intended and understood that ISP-bound traffic was considered to be traffic that originates and terminates between or among end users within a local calling area, as those terms were used by the industry and, therefore, was to be subject to reciprocal compensation. Again, at the time the industry described ISP-bound traffic in such a manner, consistent with the FCC's policy of treating the traffic as local.[10] Technical terms such as those employed in these agreements "are to be given the meaning accorded to them

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[9] SWBT makes several gratuitous remarks about the timeliness of the instant Complaints, but apparently concedes that there is no legal issue in that it makes no substantive argument. In any event, the Complaints were timely filed.

[10] For example, the Illinois Commerce Commission has recognized this industry usage and has been upheld by the District Court and the US Seventh Circuit Court of Appeals. See Illinois Bell v. WorldCom, 157 F.3d 500; aff'd 179 F.3d 566 (The courts affirmed the ICC's decision to define call termination by reference to "industry practice in which call termination occurs when a call connection is established between the caller and the

in the trade or business," Foley Co. v. Walnut Assoc., 597 SW2d 685, 689 (Mo. App. 1980), and must be so construed as of the date the contract was made, 17A CJS Contracts § 302(1) note 23 (citing Oresta v. Romano Bros., Inc., 73 S.E.2d 622; Tide Water Oil Sales Corp. v. Harper, 169 S.W. 454. See also Louisiana Public Service Commission v. FCC, 476 U.S. 355, 372 (1986). The FCC has expressly recognized that parties negotiated agreements "in the context of the Commission's (the FCC's) longstanding policy of treating this (ISP-bound) traffic as local" and left it to state commissions to consider "all the relevant facts" to determine the scope and intent of the reciprocal compensation language of such agreements. (FCC Order ¶ 24). Accordingly, the Missouri PSC must deny SWBT's Motions to Dismiss and proceed to hear the facts before it makes any determination.

The FCC has ruled that parties such as MCIWC, Brooks and SWBT are bound by their agreements to pay reciprocal compensation on ISP-bound traffic.

SWBT wrongly contends that the FCC has somehow excused it from paying reciprocal compensation on ISP-bound traffic under existing agreements. To the contrary, the FCC has ruled that when parties have agreed to pay reciprocal compensation on such traffic, they are bound by their agreements.

In its February 26, 1999 Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (the "FCC Order"), the FCC held as follows:

- "the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet" (FCC Order, ¶ 18);
- "a substantial portion" of ISP-bound traffic is interstate, but "in the current absence of a federal rule governing inter-carrier compensation" it is not

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telephone exchange service to which the dialed telephone number is assigned and answer supervision is returned.").

"necessary to reach the question of whether such traffic is separable into intrastate and interstate traffic" (FCC Order, ¶ 18 and 19);

- "in the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements" (FCC Order, ¶ 22);

- "where parties already have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions" (FCC Order ¶ 22);

- parties already "may have agreed to treat the traffic as subject to reciprocal compensation" because "the Commission has treated ISP-bound traffic as though it were local" (FCC Order ¶ 23);

- "against these backdrops, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic" (FCC Order ¶ 24)

- state commissions, not the FCC, must ascertain "the parties intentions" and "construe the parties' agreements to determine whether the parties so agreed" based on "all the relevant facts" (FCC Order ¶ 24);

- state commission shall determine "what factors are relevant in ascertaining the parties intentions" (FCC Order ¶ 24);

- state commission may consider, for example, the following factors:

    - "the negotiation of the agreement in the context of [the FCC's] longstanding policy of treating this traffic as local"

    - "the conduct of the parties"

    - whether the incumbent LEC services ISPs out of intrastate tariffs and counted such revenues as intrastate revenues

    - whether the parties "made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation"

    - whether the incumbent has included calls to ISPs in message-unit-billed local telephone charges

- whether the parties would otherwise be compensated for such traffic if it is not "treated as local and subject to reciprocal compensation" (FCC Order ¶ 24)[11]

- "the Commission's holding that parties' agreements, as interpreted by state commission, should be binding also applies to those state commissions that have not yet addressed the issue" (FCC Order ¶ 28)

The FCC Order is not particularly long or difficult to read. A reading of either the excerpts set forth above or the entire text of the Order reveals that SWBT has not fairly or accurately characterized the holdings of the FCC in its Motions to Dismiss.

Again, the FCC held:

- parties may have agreed to apply reciprocal compensation to ISP-bound traffic, because the FCC has treated it as local traffic;

- if the parties so agreed, they are bound by their agreements; and

- it is up to state commission to decide based on all the relevant facts whether the parties so agreed, if there is a dispute.

Thus, the FCC Order confirms that the instant agreements are binding, directs the filing of complaints such as the instant ones, and provides absolutely no support for SWBT's contention that the Complaints fail to state a claim upon which relief may be granted.

MCIWC and Brooks have properly presented their Complaints regarding operative interconnection agreements to this Commission, consistent with FCC directives, and the Birch/SWBT arbitration has no bearing upon these proceedings.

[11] The examples cited in the Complaints (¶ 21) relate to some of these relevant factors identified by the FCC. Again, SWBT's unsubstantiated efforts to "refute" these factual allegations are premature and cannot be considered in the context of a motion to dismiss. Interestingly, however, SWBT carefully fails to disclose its full practices regarding local billing for calls to ISPs (diverting to a discussion of access charge) and fails to disclose that the FCC rejected SWBT's efforts to recast its separations reporting practices. (May 18, 1999 letter from FCC Common Carrier Bureau Chief Lawrence Strickling to SBC Senior VP Dale Robertson, stating SBC's attempted reclassification "does not comport with Commission decisions" which "consistently characterize the traffic sensitive costs associated with ISP-bound tariff as intrastate for jurisdictional separations purposes." Quoted in State & Local Communications Report, Vol. 7, No. 11, p. 12-13 (June 4, 1999)).

As explained above, the FCC has directed CLECs like MCIWC and Brooks to present the issues framed by their Complaints to this state commission. MCIWC and Brooks are each party to an interconnection agreement with SWBT. MCIWC and Brooks each are prepared to prove their allegations that both they and SWBT intended and agreed that reciprocal compensation would apply to all local traffic as defined by the industry, including ISP-bound traffic. The FCC and numerous courts, as discussed above, have confirmed that this Commission has jurisdiction under the Act to construe the parties' intentions and agreements to determine whether the parties did in fact intend that ISP-bound traffic would be treated as local traffic under industry practices, and hence would be subject to reciprocal compensation.

Because these Complaints present the question of interpretation of applicable rates under existing agreements, the Commission's decisions in the Birch Telecom/SWBT arbitration are inapplicable. In the Birch proceeding, Case No. TO-98-278, Birch and SWBT did not reach an agreement on whether or not local traffic subject to reciprocal compensation would include ISP-bound traffic. At that point in time, SWBT had changed its position and proposed to exempt such local traffic from reciprocal compensation. Hence, Birch sought arbitration. Thus far, this Commission has not made a substantive determination in that arbitration, but rather has chosen to await further FCC action.[12] In contrast, MCIWC and Brooks do not present an unresolved matter for arbitration, but rather present disputes over applicable rates under existing agreements as directed by the FCC.

Because MCIWC and Brooks present an issue under operative agreements, rather than requests for arbitration to establish an agreement, this Commission cannot follow the wait-and-

[12] See Order Clarifying Arbitration Order, Case No. TO-98-278 (April 6, 1999). The Commission's decision not to act, however, seems to be based on a misinterpretation of the FCC's Notice of Proposed Rulemaking. The FCC specifically contemplated that state commissions would continue to resolve such arbitrations until adoption of a final rule. (FCC Order, ¶ 28). Further, the FCC's tentative conclusions about the content of a final rule indicate that the FCC may not select a universally applicable compensation mechanism, but rather may continue to rely on commission negotiations backed-up by arbitrations before state commission or the FCC staff.

see approach adopted in the Birch arbitration proceeding. The FCC has ruled that parties like MCIWC, Brooks and SWBT are bound by their agreements "as interpreted and enforced by the state commissions". (FCC Order, ¶ 22). The FCC emphasized that its "holding that parties' agreements, as interpreted by state commissions, should be binding also applies to those state commission that have not yet addressed the issue." (FCC Order ¶ 28). Consequently, it is incumbent upon this Commission to resolve these matters after a hearing on the merits. (FCC Order ¶ 24).

Given the clear language of the FCC Order, it is incomprehensible that SWBT would even try to contend that this Commission's continuing suspension of the Birch arbitration has any bearing upon the instant Complaints. There is a dramatic difference between the factual question of what MCIWC, Brooks and SWBT agreed upon in the past, and the policy question of what the Commission should do in the future in the absence of an agreement between Birch and SWBT. Each question must be answered separately.

In short, SWBT's contention that MCIWC and Brooks have asked the Commission to act "in direct contravention" to its decision not to rule yet in the Birch arbitration (SWBT Motion to Dismiss p. 1), is specious. Likewise, there is no attempt to "do an end run" (Id. p. 2) around the unrelated Birch proceeding. This case is a totally different type of proceeding, that must be resolved independent of the Birch case, without waiting for any further action by the FCC.[13]

Again, the FCC expressly held that existing agreements such as those that are at issue herein are binding and further that, in the event of a dispute, the state commission should determine whether the parties intended to treat ISP-bound traffic as local traffic subject to reciprocal compensation in accordance with industry practices. This Commission must not

defer, suspend or abate, because there is nothing for which to wait. The MCIWC and Brooks agreements are in place and approved by Commission orders, the parties are exchanging traffic, and SWBT must pay the applicable rates under these approved agreements. These Complaints are distinct from the Birch arbitration and this case should proceed to a hearing on the merits independent of the Birch proceeding.

The MCIWC and Brooks Complaints raise matters within the jurisdiction of this Commission.

SWBT agrees the Commission has jurisdiction to hear these Complaints under the Telecommunications Act of 1996. (SWBT Answer ¶ 8). As explained above, the FCC has expressly confirmed such jurisdiction. See FCC Order. So have numerous courts. See, e.g., Illinois Bell Telephone Co. dba Ameritech Illinois v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. June 18, 1999); Michigan Bell Tel. Co. v. MFS, No. 5:98CV 18, Opinion and Order (W.D. Mich. Aug. 2, 1999); BellSouth Telecommunications v. ITC Deltacom, No. 99-D-287-N, Memorandum Opinion & Order (M.P. Ala. Aug. 18, 1999); U.S. West v. Jennings, 46 F.Supp 2d 1004, 1006 (D. Az. 1999); BellSouth Telecommunications v. WorldCom Technologies, No. 4:98CV352-RH, Order Denying Stay (N.D. Fla. June 1, 1999); GTE Northwest, Inc. v. WorldCom, Inc., C990-912C, Order (W.D. Wash. June 11, 1999); Bell South v. MCImetro, No. 3:99CV97-MW Order (W.D. N.C. May 20, 1999). See also 47 U.S.C. § 252(3)(6).

The Commission also has jurisdiction under Sections 386.320, 386.330, 386.390 and 386.400 to address complaints regarding SWBT's failure to abide by the Commission's orders approving the interconnection agreements.

[13] SWBT also fails to mention that many state commissions have already acted to resolve such disputes as directed by the FCC, presumably because SWBT and its sister incumbents have not fared well in such proceedings, to say the least.

Moreover, it is well established that the Commission has primary and exclusive jurisdiction to determine whether certain existing rates (such as reciprocal compensation rates) apply to specific types of traffic (such as ISP-bound traffic). See, e.g., Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co., 889 S.W.2d 875, 877-78 (Mo. App. 1994); State ex rel. Kansas City Power & Light v. Buzard, 168 S.W.2d 1044, 1046 (Mo. Banc 1943); DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674, 676 (Mo. App. 1978). In the Buzard decision, the Missouri Supreme Court held that the Commission had exclusive expertise and jurisdiction to determine which of several existing rates should apply in a given situation. The Court observed that "the legislature realizing that to make proper classification as to the service rendered and the applicable rate for such service, has wisely left the technical facts to be determined by experts of the Public Service Commission." 168 S.W.2d at 1047. Interpreting and applying the Buzard decision, the Court stated in the Inter-City Beverage opinion: "Our Supreme Court has determined that the regulation and fixing of rates or charges for public utilities, and the classification of the users or consumers to whom the rates are chargeable, is the function of the MPSC." 889 S.W.2d at 877. The courts justifiably rely upon the Commission to resolve matters such as have been presented in the Complaints.

Accordingly, there should be no concern about the Commission's jurisdiction to hear these Complaints.[14]

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[14] Because SWBT seems confused by the point, MCIWC and Brooks emphasize that the Complaints ask the Commission to determine that reciprocal compensation applies to ISP-bound traffic under the agreements, but do not ask the Commission to exceed its jurisdiction by awarding damages. MCIWC and Brooks assume that SWBT will voluntarily obey the Commission's decision in this case, but if not they will then seek damages (including attorney's fees) in court in accordance with Missouri law. See, e.g. State ex. rel DePaul Hospital School of Nursing v. PSC, 464 S.W.2d 737 (Mo. App. 1970); 539 S.W.2d 542 (Mo. App. 1976); Section 392.350 R.S.Mo.

Conclusion

The Complaints fairly present matters which fall within the jurisdiction of the Commission. MCIWC and Brooks present the Complaints to this Commission pursuant to FCC directive. The Commission should deny SWBT's Motions to Dismiss and set a prehearing conference so a procedural schedule can be established. Subsequently, based on the facts adduced at the hearing, the Commission should determine that SWBT agreed to pay reciprocal compensation on all local traffic, including ISP-bound traffic, in accordance with prevailing industry terminology and practices.

Respectfully submitted,

CURTIS, OETTING, HENIZ,
GARRETT & SOULE, P.C.

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 South Bemiston, Suite 200
Clayton, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)

Stephen F. Morris, #14501600
Senior Attorney
MCI WORLDCOM Communications, Inc.
701 Brazos, Suite 600
Austin, Texas 78701
(512)495-6727
(512)477-3845 (FAX)

Patricia Ana García Escobedo, #12544900
Senior Attorney
MCI WORLDCOM Communications, Inc.
701 Brazos, Suite 600
Austin, Texas 78701
(512)495-6848
(512)477-3845 (FAX)

Attorneys for MCI WorldCom Communications, Inc.
and Brooks Fiber Communications of Missouri, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this MCIWC and Brooks Joint Response to SWBT's Motions to Dismiss has been sent to all parties of record by first class U.S. Mail on on the 22 day of October, 1999.

PARTIES OF RECORD:

Office of Public Counsel
Missouri Public Service Commission
P.O. Box 7800
Jefferson City, MO 65102

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Legal Department
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101