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Southwestern Bell

November 1, 1999

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

Re: Case No. TC-2000-225, et al.

Dear Judge Roberts:

Enclosed for filing with the Missouri Public Service Commission in the above-referenced case is an original and 14 copies of Reply of Southwestern Bell Telephone Company.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Anthony K. Conroy/tm

Anthony K. Conroy

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

MCI WorldCom Communications, Inc. and Brooks Fiber Communications of Missouri, Inc.	)	
Complainants	)	Case No. TC-2000-225, et al.
v.	)	
Southwestern Bell Telephone Company. Respondent.	)	

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

COMES NOW Southwestern Bell Telephone Company (SWBT), and for its Reply to the Joint Response of MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., MFS Communications Company, Inc., and any other interested MCI WorldCom affiliate (collectively MCIWC), states to the Missouri Public Service Commission (Commission) as follows:

MCIWC's Joint Response is not remarkable for what it attempts to do -- divert the Commission's attention away from the FCC's February 26, 1999, Internet Declaratory Ruling[1] and the Commission's subsequent Birch Telecom[2] final decision -- but rather is remarkable for what it ignores. In its Joint Response, MCIWC simply does not respond to the now uncontroverted mountain of law and facts which points to the inescapable conclusion that

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-98, FCC 99-38 (released February 28, 1999) (Internet Declaratory Ruling).

[2] In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company, Case No. TO-98-278, Order Clarifying Arbitration Order (April 6, 1999) (Birch Telecom).

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Internet traffic is now and always has been interstate access traffic subject to the jurisdiction of the FCC, and not local traffic subject to reciprocal local compensation. Also absent from MCIWC's Joint Response is any response to the affidavits attached to SWBT's Motions to Dismiss submitted by the SWBT representatives directly responsible for negotiating the reciprocal compensation provisions of the MFS and Brooks Missouri interconnection agreements with SWBT. If MCIWC had any facts whatsoever that even remotely tended to suggest that SWBT had agreed to carve out Internet traffic from what SWBT, Brooks, MFS and the FCC all recognized it to be in 1996 and 1997 (i.e., interstate access traffic) and recharacterize it as "local traffic," MCIWC should have and surely would have submitted this information to the Commission in its Joint Response. Since it did not, it should be clear to the Commission that no such facts exist. Finally, MCIWC also carefully avoids discussing the bulk of the FCC's Internet Declaratory Ruling and almost completely ignores the Commission's Birch Telecom decision, other than to mislabel the Commission's Birch Telecom decision as "suspended." MCIWC's obvious avoidance of these decisions is perhaps understandable, inasmuch as the FCC's Internet Declaratory Ruling *directly rejected* each and every argument made by MCIWC up to that date -- which arguments MCIWC has now conveniently abandoned or relabeled -- in support of its ridiculous and unsupported assertions that SWBT had actually agreed to pay reciprocal local compensation for interstate Internet traffic.

MCIWC cannot seriously question that in its Internet Declaratory Ruling, the FCC exercised its jurisdiction over Internet traffic. In that decision, the FCC stated:

> We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of Section 251(b)(5) of the Act . . . do not govern inter-carrier compensation for this traffic.[3]

[3] Internet Declaratory Ruling, &26, note 87.

The FCC's Internet Declaratory Ruling could not be more clear and unambiguous that since 1983, the FCC has considered Internet traffic to be jurisdictionally interstate access traffic. The Commission's Birch Telecom final decision -- issued approximately six weeks after the FCC's Internet Declaratory Ruling -- is consistent with and recognizes that the FCC has jurisdiction over this interstate Internet traffic.

Given that the FCC has rejected each of the arguments companies like Birch and MCIWC previously made to support their claim for reciprocal local compensation for Internet traffic, it is no surprise that MCIWC now attempts to assert a different argument, i.e., "even though the FCC and the industry have recognized that Internet traffic is interstate access traffic since 1983, the parties to this interconnection agreement really intended to recharacterize Internet traffic and include it in the definition of Local Traffic, they just didn't specifically say so." This argument is ludicrous.

MCIWC can run -- but it cannot hide -- from the arguments (now rejected by the FCC) it made in other states regarding its claim for reciprocal compensation for Internet traffic. In its Joint Response, MCIWC relies upon and directs the Commission's attention to an Oklahoma decision regarding a SWBT/Brooks interconnection agreement for Oklahoma.[4] What MCIWC conveniently fails to inform this Commission, however, is that the very same legal arguments which Brooks made to support its claim for reciprocal local compensation for Internet traffic in Oklahoma in 1998 are the very same arguments expressly rejected by the FCC in its 1999 Internet Declaratory Ruling. SWBT has attached hereto as Attachment 1 a copy of the brief which Brooks filed in Oklahoma in early 1998 in the case it filed asking the Oklahoma Commission to interpret the interconnection agreement between SWBT and Brooks to provide

[4] MCIWC Joint Response at p. 6.

for reciprocal compensation for Internet traffic. Brooks filed this brief approximately 13 months prior to the FCC's February 26, 1999, Internet Declaratory Ruling. In the Introduction section of its brief, on page 1, Brooks states:

> This case involves Brooks' request for an order enforcing its interconnection agreement with SWBT with respect to the payment of reciprocal compensation.

On page 2 of its brief, Brooks states the fundamental dispute between the parties:

> Brooks' position is that for compensation purposes under its interconnection agreement with SWBT, the disputed traffic terminates at the ISP's location.

Brooks' argument seemed straightforward in 1998. In its Internet Declaratory Ruling, however, the FCC explicitly rejected this argument, concluding "that the communications at issue here do not terminate at the ISP's local server as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state."[5] Likewise, in its Oklahoma brief, Brooks argued that Internet traffic consisted of two "calls," and that Internet traffic consisted of one part "telecommunications service" and one part "information service." The FCC also specifically rejected these arguments in its Internet Declaratory Ruling.[6] Given the FCC's rejection of MCIWC's previous theories, MCIWC has apparently now dropped these arguments and shifted gears, now claiming only that SWBT and MFS and Brooks actually (but secretly) intended to pay reciprocal local compensation for Internet traffic. MCIWC makes its unfounded assertion as to SWBT's intent not on anything SWBT said or did during its negotiations with Brooks or MFS, but instead by asserting that the "industry" definition of "local traffic" applies and the "industry" definition of "local traffic" includes Internet traffic. (See, MCIWC Joint Response at p. 5).

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[5] Internet Declaratory Ruling, &12.

[6] Internet Declaratory Ruling, &13.

As described above, however, MCIWC completely misstates what the telecommunications industry -- including specifically the FCC -- the regulatory agency with jurisdiction over this interstate traffic -- considered Internet traffic to be in 1996 and 1997.[7] The telecommunications industry understood, based on the FCC's ESP access charge exemption decisions, that Internet traffic was interstate access traffic subject to the FCC's jurisdiction, and not local traffic subject to reciprocal local compensation. As the FCC stated in its Internet Declaratory Ruling, it "has recognized that enhanced services providers (ESPs), including ISPs, use interstate access service" and has done so continuously since 1983.[8] MCIWC does not identify which "industry" members it claims characterized Internet traffic as local traffic, but it certainly could not have been any members of the telecommunications industry with knowledge of the FCC's decisions, because the telecommunications industry has understood since at least 1983 that ESP traffic, which includes Internet traffic, is jurisdictionally interstate traffic. One need look no farther than the FCC's Internet Declaratory Ruling for a succinct statement of the telecommunications industry's understanding of the interstate (and non-local) nature of interstate traffic from 1983 until present:

> That the Commission exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would be unnecessary.[9]

Since there is still no evidence that SWBT agreed or intended to agree with either Brooks or MFS that Internet traffic should be treated "as if" it was local for purposes of reciprocal local compensation, MCIWC's claim must fail. Likewise, since there is absolutely no basis to assert

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[7] The SWBT/MFS interconnection agreement was negotiated and executed in 1996, and the SWBT/Brooks interconnection agreement was negotiated and executed in 1997.

[8] Internet Declaratory Ruling, &5.

[9] Internet Declaratory Ruling, &16.

that the telecommunications "industry" considered Internet traffic to be "local" in 1996 or 1997, MCIWC's claim must fail. MCIWC raises no new issues in its Joint Response, and rarely even responds to SWBT's Motion to Dismiss. In short, the hollowness of MCIWC's Joint Response to SWBT's Motions to Dismiss serves only to confirm that the Commission should dismiss MCIWC's Complaints for reciprocal local compensation for Internet traffic.

In short, the Commission should recognize that MCIWC's Complaints are nothing more than a thinly veiled attempt to avoid the FCC's Internet Declaratory Ruling and collaterally attack and undermine the Commission's Birch Telecom decision.[10] A complaint with fictional assertions of SWBT's intent, however, is not an appropriate forum to relitigate the Commission's Birch Telecom decision. The Commission should not be required to embark on an arduous hearing process and waste scarce Commission resources to allow MCIWC to try to get the Commission to reconsider its Birch Telecom decision in the context of a complaint case. MCIWC seeks to convince the Commission that it is entitled to reciprocal local compensation for Internet traffic under the language contained in the interconnection agreements between Brooks and MFS and SWBT. If MCIWC succeeds, the Commission would perversely hand MCIWC millions of dollars in reciprocal local compensation payments under nearly identical contractual language as that which the Commission approved in the Birch Telecom interconnection agreement, which this Commission has already determined does not require payment of reciprocal compensation for Internet traffic. Contrary to MCIWC's assertion, the Commission has not "suspended" its Birch Telecom decision. Rather, in Birch Telecom the Commission appropriately deferred to the jurisdiction of the FCC over this interstate traffic, and should

[10] MCIWC admits as much in footnote 12 of its Joint Response, when it states:

> The Commission's decision not to act [in the Birch Telecom case], however, seems to be based on a misinterpretation of the FCC's Notice of Proposed Rulemaking.

continue to do so. There is no evidence SWBT ever agreed to pay reciprocal local compensation for Internet traffic, and under the undisputed facts of this situation, the Commission is clearly empowered to dismiss MCIWC's Complaint pursuant to 4 CSR 240-2.070(6).

WHEREFORE, SWBT respectfully requests that the Commission enter an Order dismissing Brooks' and MCIWC's Complaints for failure to state sufficient facts upon which relief can be granted, pursuant to Commission Rule 2.070(6).

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY Anthony K. Conroy /tm

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Attachment 1

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF BROOKS FIBER COMMUNICATIONS OF OKLAHOMA, INC., AND BROOKS FIBER COMMUNICATIONS OF TULSA, INC., FOR AN ORDER CONCERNING TRAFFIC TERMINATING TO INTERNET SERVICE PROVIDERS AND ENFORCING COMPENSATION PROVISIONS OF THE INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY	)	CAUSE NO. PUD 970000548

BRIEF OF BROOKS FIBER COMMUNICATIONS OF OKLAHOMA, INC., AND BROOKS FIBER COMMUNICATIONS OF TULSA, INC.

Joint Applicants Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc., (hereinafter collectively referred to as "Brooks") hereby submit their brief in the above-styled Cause. This brief provides further discussion and analysis of various FCC decisions cited by the parties in their pleadings, and replies to certain arguments advanced by Southwestern Bell Telephone Company ("SWBT") in written form subsequent to the filing of all of Brooks' pleadings in this Cause. Brooks' Application, as amended, and all of the arguments contained therein, is hereby incorporated by reference.

1. Introduction

This case involves Brooks' request for an order enforcing its interconnection agreement with SWBT with respect to the payment of reciprocal compensation. Specifically, this case stems from SWBT's refusal to pay reciprocal compensation for local traffic on calls placed by SWBT end-users to those Internet Service Providers (ISPs) which are customers

of Brooks where such ISPs are located in the same local calling area as the point of origination of the call. This case does not directly involve interstate access charges or the FCC's policy concerning whether or not to apply those access charges to enhanced service providers (ESPs), of which ISPs are a subset. Rather, this case is a question of the proper interpretation of Brooks' interconnection agreement with respect to the application of reciprocal compensation.

The Commission has authority to enforce the interconnection agreement based on its approval thereof under § 252(e) of the Telecommunications Act of 1996[1] (hereinafter, "Telecommunications Act"), and the recent decision of the Untied States Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. Federal Communications Commission, et al., Nos. 96-3321 et seq.*, slip opinion (8th Cir., July 18, 1997).

Brooks' position is that for compensation purposes under its interconnection agreement with SWBT, the disputed traffic terminates at the ISP's location. SWBT, on the other hand, contends that the disputed traffic terminates at points "on or beyond the Internet", is jurisdictionally interstate and should be treated on a bill and keep basis for compensation purposes with Brooks. The importance of the question of where the traffic terminates for compensation purposes flows from interconnection agreement's provisions regarding the applicability of compensation to different types of traffic and the relevant definitions associated with those definitions. Pursuant to the agreement, the local traffic reciprocal compensation rate of $0.012 applies when one party terminates local traffic originated by the other party.[2] The agreement defines local traffic as "...traffic that originates and terminates

[1] 47 U.S.C. § 252(e).
[2] Interconnection Agreement at pp. 4-5, § III. A. 1 and 2.

within a SWBT exchange including mandatory local calling scope arrangements."[3] Moreover, as SWBT has pointed out in its pleadings, "terminating traffic" is defined in the agreement as "...a voice-grade switched telecommunications service which is delivered to an end-user(s) as a result of another end-user's attempt to establish communications between the parties."[4]

The fundamental proposition underlying SWBT's position in this Cause is that for compensation purposes the disputed traffic constitutes an integrated, end-to-end communication, with terminus points on or beyond the Internet, with the ISP viewed as merely an intermediate processing point. In its Response to Application, SWBT cites various FCC and court decisions in support of this proposition. See, SWBT Response to Application at pp. 4 and 8. As explained below, however, SWBT's contention flagrantly ignores, and is directly contradicted by, the Telecommunications Act and subsequent FCC orders which have construed and implemented the Telecommunications Act., which draw a clear legal distinction between "telecommunications" and "telecommunications services", on the one hand, and "information services", on the other hand. Moreover, none of the pre-Act FCC or court decisions cited by SWBT, are applicable, since the Telecommunications Act itself first establishes the applicable requirements for reciprocal compensation. In any event, none of the decisions cited by SWBT actually stand for the proposition it asserts – i.e., none of them establish that calls delivered to ISPs should be treated for jurisdictional purposes as terminating at whatever points are accessed on or beyond the Internet.

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[3] Interconnection Agreement at Appendix DEFINE, p. 2
[4] *Id.* at Appendix DEFINE, p. 4.

2. SWBT's Attempt To Combine, For Jurisdictional Purposes, Regulated Local Exchange Traffic With Unregulated Information Services Is Contrary To The Telecommunications Act Of 1996 And Recent FCC Decisions Interpreting the Act.

As noted above, SWBT's position in this case is dependent upon a characterization of calls to ISPs as being integrated, end-to-end communications, originating at the location of the end-user placing the call and terminating at whatever points are accessed on or beyond the Internet during the time the connection from the end-user to the ISP is engaged. This assertion flies in the face of the plain terms of the Telecommunications Act of 1996. Among the various obligations which the Act imposes on local exchange carriers is the duty to "to establish reciprocal compensation for the transport and termination of *telecommunications*."[5] The Act defines "telecommunications", in turn, as "the transmission...of information...without change in the form or content of the information as sent and received."[6] This definition distinguishes telecommunications services from "information services", which are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications..."[7] A call by an SWBT end-user destined for an ISP traverses the public switched network – whether the ISP is on the SWBT or Brooks' network – until the point that it is delivered to the ISP. *Thus, there is no question but that the call from the end-user to the ISP is a "telecommunications" under the Telecommunications Act. As such, it is – as a matter of law – subject to the Act's reciprocal compensation requirements.* It is likewise clear that what the Internet access, which is provided by the ISP once the call reaches its location, is an "information service", and distinguishable from the call from the end-user to the ISP.

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[5] 47 U.S.C. § 251(a)(5) (emphasis added).
[6] *Id.* § 153 (43)
[7] *Id.* § 153 (20).

This distinction was recently confirmed by the FCC in its recent Universal Service Order[8], with specific reference to determining the applicability of federal universal service contribution obligations. The FCC specifically posed and answered the questions of whether enhanced service providers, and ISPs in particular, were covered by the Telecommunication Act's universal service contribution provisions. The FCC found that to the extent enhanced service providers engage in the provision of information services (as defined by the Act), they are not providing "telecommunications" and therefore do not fall within the Act's universal service contribution obligations.[9] The FCC went on to address ISPs specifically, confirming that the services they offer constitute "information services", rather than "telecommunications".

> We observe that ISPs alter the format of information through computer processing applications such as protocol conversion and interaction with stored data, while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent. [footnote omitted]. When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering. The language in section 254(h)(2) [of the Telecommunications Act] also indicates that information services are not inherently telecommunications services.[10]

The Brooks-SWBT interconnection agreement was negotiated pursuant to the Telecommunications Act of 1996, and was approved by the Commission under the framework of the Act.[11] The interconnection must, therefore, be interpreted in a manner consistent with

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[8] In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (1997). A copy of the pertinent section of the decision is attached hereto as Appendix A.
[9] *Id.* at ¶ 788.
[10] *Id.* at ¶ 789.
[11] Order No. 406237, Cause No. PUD 960000256, October 22, 1996.

the Act. Thus, the federal statutory distinction between "telecommunications" and "information services" prevails for purposes of interpreting the agreement. In essence, this merely confirms -- in the specific context of interconnection agreements -- the long-standing distinction between basic and enhanced communications which the FCC first established in the 1970's in its *Computer II* decision.[12]

3. SWBT's Attempt To Combine, For Jurisdictional Purposes, Regulated Local Exchange Traffic with Unregulated Information Services Is Not Supported By Any Of The Decisions It Has Cited.

What SWBT attempts to pass off as settled law is actually a completed unsupported proposition – that a regulated communication service and an unregulated information service should be "knitted together" for purposes of determining the jurisdictional nature of calls. None of the decisions cited by SWBT in its Response to Application stands for this proposition. New York Telephone Company v. FCC, 631 F. 2d 1059, 1066 (2d Cir. 1980) – cited at page 4 of SWBT's Response to Application -- involved an appeal from an FCC order which had preempted a state-approved tariff purporting to assess a substantially higher rate on customers of interstate foreign exchange (FX) and common control switching arrangement (CCSA) services than on corresponding intrastate FX and CCSA services. The Court of Appeals upheld the FCC's determination that tariffs which apply a surcharge to interstate customers must be filed at the FCC, rather than with a state commission. From a jurisdictional standpoint, the *New York Telephone* decision merely holds that the FCC has reserved to it the authority to assert jurisdiction over state tariffs where they result in

[12] *See, e.g.*, In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC Rcd 2d 384.

discrimination against interstate services.[13] The underlying FCC decision involved, local exchange, FX and CCSA services, all of which were subject to regulation at the state and/or federal level.

The decision in United States v. AT&T, 57 F. Supp. 451, 454 (S.D.N.Y. 1944), *aff'd sub nom* Hotel Astor v. United States, 325 U.S. 837 (1945) – also cited at page 4 of SWBT's Response to Application – involved an action by the FCC to enjoin AT&T and its New York Telephone Company subsidiary from allowing interstate toll services to be provided to hotels in circumstances where hotels were assessing surcharges on interstate calls to calls placed from guest rooms in violation of a condition in AT&T's interstate tariff. In affirming the FCC, the District Court rejected a contention asserted by the hotels that the FCC lacked jurisdiction to interfere with the assessment of the surcharges on the grounds that the interstate toll calls end (or begin) at the hotel's PBX. The *AT&T* decision, like the *New York Telephone* holding, does not involve jurisdictional implications regulated communications which provide access to information services.[14]

In the final case cited at page 4 of the Response to Application – Reno v. American Civil Liberties Union, 138 L.Ed.2d 874 (1997) – no jurisdictional issues are even presented. The holding involves various first amendment issues associated with the Communications Decency Act of 1996 and provisions contained therein intended to protect against harmful dissemination of material over the Internet. In passing, the Court's opinion merely characterizes the Internet as an international network of worldwide computers.

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[13] A copy of the Second Circuit's decision in *New York Telephone* is attached hereto as Appendix B.
[14] A copy of the *AT&T* decision is attached hereto as Appendix C.

In its June 9, 1997 letter[15] to Brooks in which SWBT announced its refusal to pay compensation on calls delivered to ISPs, SWBT cited two decisions which are not found in its Response to Application: (1) an FCC 1988 order regarding 800 credit card traffic – CC Docket No. 88-180, *Order Designating Issues for Investigation*, April 22, 1988, 3 FCC Rcd No. 8, 2339 – and (2) NARUC v. FCC, 746 F.2d 1492 (1984) (which is discussed below.) In the *800 Credit Card* order, the FCC designated for investigation various issues related to reporting requirements for 800 access service which SWBT had imposed on interexchange carriers (IXCs) in its interstate access tariff. Among various issues raised against the reporting requirements was the contention advanced by several IXCs that the requirements would, when applied in the specific circumstance of IXC credit card calls using an 800 number (to access the IXC's calling card platform), produce inaccurate jurisdictional information. SWBT's position was that this reporting complication would not materialize since, in SWBT's view, the termination point of the 800 credit card call would be at the location of the IXC's calling card platform, and that a second communication would occur from the IXC's calling card platform to the location of the called party.[16] The FCC rejected SWBT's two-call approach and designated the issue for investigation. In so doing, the FCC held that, "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."[17]

The facts upon which the *800 Credit Card* Order was based are fundamentally different from those presented to the Commission in this Cause. In the *800 Credit Card* case, the intermediate processing (i.e., the processing performed by the IXC at its credit card

[15] SWBT's June 9, 1997 letter is "Attachment C" to Brooks' Application in this Cause.
[16] 3 FCC Rcd No. 8, 2339, 2341, at ¶¶ 24-27.
[17] *Id.* at ¶ 28. A copy of the *800 Credit Card* Order is attached hereto as Appendix D.

switching platform) occurs in the middle of a communication that is subject to regulation all the way from the location of the calling party to the location of the called party. The traffic involved is an integrated, end-to-end interstate toll call where the call is carried over the public switched network, with an 800 number used to access the IXC's intermediate calling card traffic processing functions (e.g., verification of Personal Identification Number, collection of billing information, etc.). The called number (NPA-NXX-XXXX) designates the "address" on the public switched network where the call is to be delivered -- which is at the location of the called party, not the location of the point at which intermediate processing functions are performed by the IXC.

Calls delivered to ISPs are fundamentally different for regulatory/jurisdictional purposes. As explained above, for a call delivered to an ISP a regulated communication exists only from the location of the originating end-user to the location of the ISP.[18] SWBT's analogy to 800 credit card traffic could only hold up if the services/transmissions of the ISP over the Internet are likewise regulated communications, which they are not. As noted above, SWBT's analogy also ignores the critical distinction between "telecommunications" and "information services" under the Telecommunications Act. As with the 800 credit card interstate toll call, for a call delivered to an ISP the called number (NXX-XXXX) designates the address on the public switched network where the call is to be delivered. In the case of ISP bound traffic, that delivery point is the ISP's location. For SWBT's 800 credit card analogy to apply, the dialed number would need to dictate the various points on the Internet

[18] See, Section 2, *supra*.

which might be accessed in any particular Internet session, but the dialed number performs no such function.

SWBT's attempt to analogize the ISPs functions as essentially the same as an IXC's intermediate processing functions on a 800 credit card interstate toll call ignore the crucial regulatory distinction – unlike the IXC's intermediate credit card processing functions on an interstate toll call, what the ISP provides is an unregulated information service. The terminus point of the regulated communication on the 800 credit card interstate toll call is beyond the intermediate point of intermediate credit card processing, while the terminus point of the regulated communication for calls delivered to an ISP is the ISP's location.

What the above-discussion demonstrates is *that SWBT's notion that for reciprocal compensation purposes a call delivered to an ISP constitutes an integrated, end-to-end communication – from the originating end-user's location to points access on or beyond the Internet through the ISP's information services – is a complete fiction.* Rather, a call delivered to an ISP consists of a regulated communication (i.e., a "telecommunication" under the Act) from the originating end-user to the ISP which, in turn, provides the end-user access to the information services offered by the ISP.

4. SWBT's Contention That The FCC Has Determined The Disputed Traffic To Be Subject To Exclusive Interstate Jurisdiction For Reciprocal Compensation Purposes is Erroneous.

SWBT contends that the FCC has conclusively determined the disputed traffic to be jurisdictionally interstate, including for purposes of reciprocal compensation between incumbent and competitive LECs. One can search in vain for an explicit FCC holding that the communication between the end-user and an ISP is inherently interstate in nature. No

such holding exists. Nevertheless, that is precisely the conclusion which SWBT seeks to have the Commission accept. The SWBT rationale focuses on the fact that in several of its decisions the FCC has referred, in a generic sense, to services purchased by enhanced service providers as "exchange access", and the fact that the FCC has referred to its policy regarding enhanced service providers as an "access charge exemption". From these references, SWBT contends that the FCC has determined that calls delivered to ISPs are inherently interstate in nature and must therefore be viewed as subject to exclusive interstate jurisdiction.

SWBT's theory seriously misrepresents the actions of the FCC, particularly in light of prevailing law regarding federal preemption. As described by the United States Supreme Court in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), preemption can occur in several circumstances: Where Congress, in enacting a federal statute has expressed a clear intent to pre-empt state law; where it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby left no room for states to supplement federal law; and where compliance with both state and federal law is impossible. [citations omitted]. In carrying out its duties under federal statutes, the FCC can preempt state action if it determines to do so and the determination "represents a reasonable accommodation of conflicting policies" that are within the agency's domain. *Id.* at p. 691, quoting from United States v. Shimer, 367 U.S. 374, 383 (1961). (A copy of the *Capital Cities* decision is attached hereto as Appendix E). Whether an FCC preemptive assertion of exclusive federal jurisdiction over calls delivered to ISPs would be lawful is speculative at this point and is not at issue here, since the FCC has made no such assertion. SWBT's effort to imply federal preemption is wholly unwarranted and improper – any exercise of federal preemption by the FCC must be

explicit and be accompanied by a full and persuasive explanation of why such preemption is required, and SWBT can point to no FCC decision which has made such an explicit determination.

Additionally, it is untenable to believe that the FCC would have permitted – as it has to date – various state commissions to make their own determinations concerning this issue if the FCC had (as SWBT contends) long-ago determine that calls delivered to ISPs are inherently interstate. As noted in Brooks Application, as amended, at least nine states have to date found that this same traffic is local traffic for reciprocal compensation purposes. More recently, a Texas arbitrator has issued an opinion holding that the traffic is interstate. It should be noted, however, that this recent Texas decision has been held over for reconsideration by the Texas Public Utility Commission and is not yet final.

Rather than asserting a preemptive exercise of exclusive federal jurisdiction over communications from end-users to ISPs, the FCC's orders regarding enhanced service providers evidence a pattern where the FCC, on several occasions, has considered asserting federal jurisdiction over these communications for purposes of determining the type of charges LECs can apply to ISPs. This consideration has come in the form of the FCC's evaluation of whether it would permit local exchange carriers (LECs) to charge interstate access charges to enhanced service providers. The FCC's first consideration of the question occurred in 1983 in the context of the initial implementation of the access charge system. In its *Access Charge Reconsideration Order*[19], the FCC determined that it would, at least on a

[19] In the Matter of MTS and WATS Market Structure, 97 FCC 2d 682 (1983). *(Access Charge Reconsideration Order)*. A copy of the pertinent portion of the *Access Charge Reconsideration Order* is attached hereto as Appendix F.

temporary basis, not allow LECs to charge interstate access charges to ISPs.[20] Several years later, through a June 10, 1987 order, the FCC commenced to revisit the issue by opening a rulemaking proceeding.[21] While the FCC's tentative conclusion in its Notice of Proposed Rulemaking was that it would begin to permit LECs to charge interstate access charges to ESPs,[22] it reversed that tentative conclusion in its April 27, 1988 order in the same docket.[23] More recently the FCC has again raised the question, this time in the specific context of Internet usage, but has tentatively concluded that it should continue its policy of prohibiting LECs from charging interstate access charges to ESPs.[24]

> Although our original decision in 1983 to treat ESPs as end users rather than carriers was explained as a temporary exemption [footnote omitted], we tentatively conclude that the current pricing structure should not be changed so long as the existing access charge system remains in place.[25]

How, then, can the FCC's various orders be reasonably construed in terms of the status of calls delivered to ISPs. SWBT's version – that the traffic has been made subject to exclusive federal jurisdiction through preemptive action by the FCC cannot be sustained, since no explicit preemption decision has been issued by the FCC. (Moreover, even if the FCC's pre-Telecommunications Act actions had effected federal preemption, the Act's dichotomy between "telecommunications" and "information services" would prevail for purposes of

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[20] *Id.* at ¶ 84.
[21] Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 2 FCC Rcd 4305 (1987). A copy of this order is attached hereto as Appendix G.
[22] *Id.* at ¶ 1.
[23] Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (1988). A copy of the decision is attached hereto as Appendix H.
[24] Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, released December 24, 1996. ("Internet NOI"). A copy of the order is attached hereto as Appendix I.
[25] *Id.* at ¶ 288.

reciprocal compensation under interconnection agreements.) *By declining to permit the LECs to charge ESPs interstate access charges and, instead, requiring LECs to allow ESPs to purchase services "under the same intrastate tariffs available to end-users"* [26] *the FCC has considered, but to this point declined, to exercise federal jurisdiction over the connections which LECs provide to ISPs.* By raising the question several times since 1983, it is clear that the FCC believes it has the authority to exercise federal jurisdiction over the connections between the end-user and the ISP, at least with respect to the determination of which tariffs ISPs from for their connections with LECs. But to date the FCC has not exercised interstate jurisdiction, even in that regard. Under prevailing circumstances, calls delivered to ISPs are carried on connections purchased under intrastate tariffs and are subject to intrastate, not interstate, jurisdiction. Moreover, since the FCC has explicitly held that ESPs can purchase services under the same intrastate tariffs that are available to end-users and end-users purchase services from LEC local exchange tariffs, the clear implication is that calls to ISPs are to be considered local traffic under the prevailing regulatory framework.

As noted above, in its June 9, 1997 letter SWBT also cites NARUC v. FCC, 746 F.2d 1492 (D.C. Cir., 1984), in support of its contention that the disputed traffic is interstate in nature and not subject to local compensation. Once again, however, SWBT has misconstrued and misrepresented a holding to conform to its position in this dispute. In *NARUC*, the D.C. Court of Appeals denied a challenge to an FCC ruling which had prohibited restrictions in various Bell Operating Company state tariffs which purported to restrict the resale and sharing of WATS and MTS services. The FCC outlawed such restrictions with respect to

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[26] *Id.* at ¶ 285.

interstate communications, including in circumstances where an interstate communication is transmitted by use of intrastate WATS or MTS facilities. In affirming the FCC, the Court of Appeals held that the FCC's jurisdiction is defined in terms of the nature of the communication, and is irrespective of the physical location of the facilities used. (A copy of the *NARUC* decision is attached hereto as Appendix J).

The *NARUC* decision fails to support SWBT's position in this Cause for several reasons. First, as with other cases cited by SWBT, the *NARUC* holding involved regulated services – WATS and MTS. It did not present the question of whether a regulated local exchange communication and an unregulated information service should be melded together for purposes of determining the jurisdictional nature of calls placed by an end-user to an ESP. Second, the *NARUC* case involved a situation where the FCC had affirmatively acted to exercise its jurisdiction (i.e., to invalidate state tariffs permitting the restriction of resale and sharing of WATS and MTS services where interstate communications were involved), whereas with respect to ESPs the FCC has not, to this point, restricted the availability of state tariffs – indeed, the FCC has done precisely the opposite by maintaining a consistent policy of allowing ESPs to purchase service under the same intrastate tariffs as end-users. Further, Brooks' position that the disputed traffic should be treated as local traffic for reciprocal compensation purposes under the interconnection agreement is not based on the physical location of the facilities used – i.e., Brooks' position is not premised on the fact that the facilities between the end-user and the ISP are located wholly within a particular state. Rather, as explained herein Brooks position is based on the specific language regarding compensation contained in the interconnection agreement, upon the Telecommunications Act's distinction between "telecommunications" and "information services"; upon the fact that

the regulated communication terminates at the ISP location, upon the FCC's consistent policy of treating ESPs (and ISPs) as end-users, upon SWBT's own treatment of its end-users' traffic delivered to ISPs as local (see below), etc.

5. SWBT's Contention That Calls Delivered To ISPs Do Not "Terminate" At The ISP's Location Is Contradicted By The Manner In Which SWBT Bills Its End-Users For Such Traffic.

SWBT's contention that calls delivered to ISPs do not "terminate" at the ISP for reciprocal compensation purposes under the Brooks-SWBT interconnection agreement, SWBT has a completely contrary approach when it comes to billing its end-users for calls delivered to ISPs. Such calls are not assessed toll charges but instead are treated as local calls – i.e., covered under the end-user's flat-rate monthly local service. It is wholly inconsistent for SWBT to contend that the same traffic is inherently interexchange and interstate in nature for reciprocal compensation purposes, while it has historically treated the traffic as local for purposes of billing its end-users, and continues to do so.

Nor can SWBT rely on the FCC's access charge exemption as justification for this discrepancy. While SWBT is prohibited by the FCC from charging interstate access charges to the ISP, none of the FCC's orders on the subject purport to determine what charges SWBT may establish to its end-users. SWBT's position in this Cause is that it is virtually self-evident that calls to ISPs do not "terminate" at the ISPs location, but instead terminate at points on the Internet. Yet, for purposes of billing its end-users for these same calls, SWBT treats the calls as terminating at the ISP location. SWBT's treatment of these calls as local for purposes of billing its own end-users demonstrates that its contention that the traffic does not terminate at the ISP's location is merely an argument of convenience designed

to allow it to avoid its reciprocal compensation obligations to Brooks under the interconnection agreement.

6. The Interconnection Agreement's Definition Of "Terminating Traffic" Supports The Conclusion That The Disputed Traffic Should Be Treated As Local Traffic For Reciprocal Compensation Purposes.

SWBT points to the interconnection agreement's definition of "terminating traffic" in a claim that this definition confirms its position. See, SWBT Response to Application at p. 5. The agreement defines "terminating traffic" as a "voice grade switched telecommunications service which is delivered to an end user(s) as a result of another end-user's attempt to establish communications between the parties."[27] The disputed traffic clearly is covered under this definition. The call placed by the end-user is a voice-grade communication traversing the public switched network from the end-user to the ISP. The purpose of the call is for the end-user to communicate with the ISP and obtain Internet access (an information service) from the ISP. The key element of this equation -- which SWBT steadfastly ignores -- is that the FCC's orders are unequivocal on the point *that ESPs (and, therefore, ISPs) are to be treated by the LECs as end-users.* In its 1996 *Internet NOI* the FCC characterized its 1983 *Access Charge Reconsideration Order*[28] as one of "[treating] ESPs as end users rather than carriers..."[29], and, in recounting its various orders regarding ESPs, stated:

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[27] Interconnection Agreement, Appendix "DEFINE" at p. 3.
[28] 97 FCC 2d 682.
[29] Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, released December 24, 1996, at ¶ 288. (emphasis added). A copy of the pertinent portion of this FCC decision is attached hereto as Appendix I.

> As a result of these decisions, ESPs may purchase services from incumbent LECs under the same intrastate tariffs available to end-users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates.[30]

Moreover, as noted above the Telecommunications Act itself defines "telecommunications" as, "the transmission...of information...without change in the form or content of the information as sent and received,[31] and defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[32] Those definitions prevails for purposes of interpreting the interconnection agreement, since the agreement was adopted within the framework of the Act's provisions. As noted above, the Telecommunications Act also separately defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[33] Interpretation of the interconnection agreement's definition of "terminating traffic" in a manner consistent with the Act compels the conclusion that calls delivered to an ISP terminate at the ISP's location, since the call from the end-user to the ISP constitutes a "telecommunications", and the service provided by the LEC to the ISP constitutes a "telecommunications service", under the Act.

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[30] *Id.* at ¶ 285. (emphasis added).
[31] 47 U.S.C. § 153 (43)
[32] 47 U.S.C. § 153 (46) (emphasis added).
[33] 47 U.S.C. § 153 (20).

7. The Interconnection Agreement's Compensation Provisions Reasonably Construed Require A Conclusion That Local Reciprocal Compensation Is Applicable To The Disputed Traffic.

The Brooks-SWBT interconnection agreement divides traffic exchanged between Brooks and SWBT into two categories – local traffic and interexchange traffic.[34] The agreement specifies that termination of local traffic is to be compensated at a rate of $0.012 per minute and that termination of interexchange traffic is to be compensated at each party's prevailing access charges.[35] The agreement further provides that, "[c]alls not classified as local under this Agreement shall be treated as interexchange for intercompany compensation purposes under the interconnection agreement."[36] As noted above, the agreement provides that termination of interexchange traffic is to be compensated by access charges. Thus, compensation for termination of traffic between Brooks and SWBT is either at the $0.012 local traffic rate or on the basis of access charges.

SWBT's position – that the disputed traffic is subject to absolutely no compensation (i.e., to be treated on a bill and keep basis) – is completely untenable. Calls delivered to ISPs where the ISP is located in the same local calling area as the originating end-user are not set out as a separate and distinct category of traffic. Moreover, bill and keep is not mentioned or utilized in the interconnection agreement for any purpose. As discussed above, the FCC has prohibited LECs from charging ESPs (including ISPs) interstate access charges. It is important to recognize that the FCC's decisions prohibiting LECs from charging interstate access charges to ESPs in no way limited the type of arrangement Brooks and SWBT might

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[34] Interconnection Agreement, at § III.
[35] *Id.*
[36] *Id.* at p. 4.

negotiate for the termination of traffic under an interconnection agreement. Pursuant to the Telecommunications Act, Brooks and SWBT were free to negotiate any traffic termination agreement consistent with the general standards of § 252(e) regarding negotiated interconnection agreements. SWBT could have insisted upon specialized treatment of calls delivered to ISPs, but it did not.

If the Commission agrees with Brooks that the FCC has not preemptively determined calls delivered to ISPs to be inherently interstate, including for reciprocal compensation purposes, then the traffic must be treated for compensation purposes either as local traffic or interexchange traffic since those are the two categories of traffic defined in the interconnection agreement. If the Commission determines that the disputed traffic is local traffic under the interconnection agreement, then the $0.012 reciprocal local traffic compensation rate applies to this traffic. This is the result which Brooks believes is required under a reasonable construction of the agreement. In any event, if the Commission rejects SWBT's interstate preemption contention, then the SWBT position – that no compensation whatsoever is applicable to the disputed traffic – cannot be sustained. The Commission cannot interpret into the interconnection agreement a compensation mechanism (bill and keep) that is not to be found in the document. Indeed, it would be more consistent with the language of the interconnection agreement (although not the correct construction, in Brooks' view) to hold that compensation between the parties for termination of the disputed traffic be on the basis of access charges, than it would to adopt SWBT's bill and keep approach – access charges being the other (i.e., other than the $0.012 local traffic rate) compensation mechanism agreed to by the parties for termination of each other's traffic.

Conclusion

For all of the above-stated reasons, Brooks respectfully urges the Commission to issue its order enforcing the interconnection agreement by directing SWBT to pay Brooks reciprocal local traffic compensation of $0.012 per minute on all disputed traffic.

Respectfully submitted,

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CERTIFICATE OF MAILING

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