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August 2, 2000

FILED<sup>2</sup>

AUG 03 2000

Missouri Public  
Service Commission

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 eight copies of Southwestern Bell Telephone Company's Motion for Sanctions.

Please stamp "Filed" on the extra copy of the pleading and return the copy to me in the enclosed self-addressed, stamped envelope.

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

Very truly yours,

A handwritten signature in cursive script that reads "Anthony K. Conroy".

Anthony K. Conroy

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

AUG 03 2000

Missouri Public  
Service Commission

MCI WorldCom Communications, )  
Inc. et al., )  
 )  
Complainants, )  
 )  
v. )  
 )  
Southwestern Bell Telephone Company, )  
 )  
Respondent. )

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

SOUTHWESTERN BELL TELEPHONE COMPANY'S  
MOTION FOR SANCTIONS

COMES NOW Southwestern Bell Telephone Company (SWBT), and submits its Motion for Sanctions to the Missouri Public Service Commission (Commission) in the above-captioned case. Pursuant to this Motion for Sanctions, SWBT respectfully requests that the Commission impose sanctions on the Complainants herein, for their failure to comply with the Commission's July 20, 2000 Order Regarding Motion to Compel. The sanctions sought by SWBT include dismissal of Complainants' complaints, reimbursement of SWBT's expenses in defending against these complaints, including reasonable attorney's fees, and for such other relief as the Commission deems appropriate. In support of its Motion for Sanctions, SWBT states as follows:

1. On July 20, 2000, the Commission issued its Order Regarding Motion to Compel (Order) in these consolidated complaint cases. In its Order, the Commission recognized that "[D]iscovery is available in cases before the Commission on the same basis as in civil cases in circuit court. 4 CSR 240-2.090(1). The same time limits and sanctions apply. *Id.*; and see St. ex rel. Arkansas Power & Light Co. v. Missouri Public Service Com'n, 736 S.W.2d 457, 460

(Mo. App., W.D. 1987)("This court holds the PSC may impose sanctions pursuant to Rule 61.01.")" Order at pp. 1-2.

2. In its Order, the Commission also reviewed the two data requests SWBT had submitted to Complainants in April, 2000. SWBT's data requests (DRs) provide as follows:

1. For all traffic for which each complainant claims reciprocal local compensation in this case, please state the amount of such compensation claimed by each complainant, and how each complainant determined this amount. Please provide the following information, on a monthly basis, for any month in which each complainant claims compensation:

A. The number of minutes of traffic, by month [,] that each complainant claims was originated by a SWBT end user and which was delivered to each Internet Service Provider (ISP) served by a complainant, located in the same local calling scope as the SWBT end user;

B. The per minute reciprocal compensation rate which each complainant claims is applicable and owed for such traffic;

C. The name, address, and telephone numbers associated with each Internet Service Provider to which each complainant delivered traffic originated by a SWBT end user, and for which each complainant seeks reciprocal compensation in this case.

2. For each Internet Service Provider identified in response to data request 1.C above, please describe the following:

A. The financial arrangements between each complainant and each such Internet Service Provider, including the price paid, if each complainant for each service provided by each complainant in Missouri, for the time period 1996 until present;

B. Whether any complainant offered any such Internet Service Provider any financial compensation or incentive in connection with providing service to such Internet Service Provider;

C. Whether any complainant offered to share reciprocal compensation revenues with any such Internet Service Provider;

D. Whether any complainant agreed to permit any Internet Service Provider to collocate such Internet Service Provider's facilities with complainant's facilities. If such collocation arrangement[sic] existed or currently exist, provide a copy of the collocation agreement or similar

document describing the collocation arrangement and any financial arrangements relating thereto; and

E. Provide copies of any contracts and/or correspondence between complainants (including complainants' affiliates) and any Internet Service Provider (and its affiliates) relating to (1) the provision of any service in Missouri between the parties and (2) the flow of traffic or compensation in Missouri to such ISP.

3. In its Order, the Commission found that "all" of the information sought by SWBT in its DRs is "clearly relevant." (Order at p. 7). The Commission went on to state that Complainants' objections to SWBT's DRs were "without merit." (Id.) Finally, the Commission stated that "as to Complainants' vague assertion that the information in question is 'not available', the Commission simply does not find that statement credible." (Id.).

4. The Commission ordered that Complainants' objections to SWBT's DRs were overruled. (Order, p. 7, par. 1). The Commission ordered Complainants to:

"serve full and complete responses to the Data Requests in question on Respondent Southwestern Bell Telephone Company on or before July 31, 2000." (Order, p. 8, par. 3).

The Commission also stated that "[t]o the extent that Complainants are unable to comply because some portion of the information in question is not available, Complainants shall include full particulars in their responses." (Id.)(emphasis added).

5. Late on July 31, 2000, counsel for Complainants faxed two letters to counsel for Respondent, the first on behalf of Complainant "PNC," and the second on behalf of the "WorldCom" Complainants. Copies of these response letters, along with the attachments thereto (some of which are designated Highly Confidential (HC) or Proprietary) are submitted as an attachment to this Motion for Sanctions, under seal. As will be described below, the response of PNC contains some of the information requested by SWBT which the Commission ordered PNC to produce, although it does not describe what efforts PNC undertook to find documents which

PNC stated it could not locate. The responses submitted on behalf of WorldCom, however, wholly fail to respond to SWBT's DRs, despite the Commission's direct order to "provide full and complete responses."

6. Specifically, with respect to SWBT's DR 1, Complainants' "responses" fail to include the information requested in subpart A (the number of minutes of traffic, by month, that each Complainant claims was originated by a SWBT end user and which was delivered to each ISP served by Complainants), and subpart C (the name, address and telephone number associated with each ISP to which each Complainant delivered traffic originated by a SWBT end user, and for which Complainants seek reciprocal compensation).

The only information provided by Complainant PNC in response to DR 1 is a "best available estimate." (See PNC response letter, p. 1). The MCI WorldCom Complainants, however, provided absolutely no responsive information. Instead, they provided an estimate of suspected ISP-bound traffic for one recent month (June, 2000), and ignored the Commission's Order with respect to the rest of the months in question (from 1997 through 2000). MCI WorldCom also stated that information for preceding months is available, but MCI WorldCom did not attempt to retrieve it, so it has no idea how long the process might take. With respect to older Brooks' information, MCI WorldCom states that "the location of older Brooks information is uncertain, as is the capability of generating such a special report from it if it in fact can be located." This "response" suggests that absolutely no effort was made to locate this information, despite the fact that MCI WorldCom is seeking over \$10 million in reciprocal compensation payments for this traffic alone! With respect to the information MCI WorldCom was ordered to produce in response to subpart (C), WorldCom produced a list consisting of "information from

the billing system for most of the customers identified on schedule 1A as possible ISPs," but added that "[w]ork continues on this schedule."

7. Complainants' lack of acceptable responses to SWBT's DR 2 are even more flagrant. Complainant PNC identified only one ISP, CDM Online, Inc. d/b/a Primary Network, Inc. (an affiliate of PNC), to which it delivers Internet traffic. PNC also stated that CDM is allowed to collocate its equipment with PNC "at no charge," but "no document regarding this arrangement has been found." Complainant PNC did not describe the efforts it undertook to locate any such correspondence or documents.

The MCI WorldCom Complainants produced no information responsive to SWBT's DR 2, again despite the Commission's direct order to do so. MCI WorldCom Complainants refuse to provide the information requested in subpart A (regarding the financial arrangements between Complainants and ISPs, including the price paid to MCI WorldCom, if any, by each ISP), subpart D (specific collocation arrangements between Complainants and ISPs) and subpart E (copies of contracts or correspondence between Complainants and any ISP relating to the provision of service in Missouri and the flow of traffic or compensation to such ISP). In addition, it is unclear whether MCI WorldCom responded to subpart B (whether any Complainant offered any ISP any financial compensation or incentive in connection with providing service to such ISP) and subpart C (whether any Complainant offered to share reciprocal compensation revenues with any ISP). Incredibly, the only information provided by MCI WorldCom in response to SWBT's DR 2 are three blank collocation agreement forms. MCI WorldCom's response is completely unresponsive and unacceptable, and evidences a lack of any effort, much less a good faith effort, to comply with the Commission's July 20, 2000 Order Regarding Motion to Compel.

8. As this Commission found in its July 20, 2000, Order, SWBT is entitled to the information requested in its DRs 1 and 2. Both Complainants, but particularly MCI WorldCom, have blatantly refused to comply with the Commission's Order by refusing to produce (and in most cases even look for) the information they were ordered to produce. Complainants' refusal to comply with the Commission's Order amounts to a deliberate disregard for the authority of the Commission, and warrants sanction by the Commission. Under Rule 4 CSR 240-2.090, "[S]anctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure." (emphasis added). As this commission recognized in its July 20, 2000, Order, in which it directed Complainants to respond to SWBT's DRs, the courts have also held that the Commission is authorized to impose sanctions as provided in the Missouri Rules of Civil Procedure. Under Rule 61.01(A), as described herein, Complainants' responses are evasive and incomplete, and should be treated as a failure to answer. Dismissal of these complaints, particularly after Complainants have been ordered to respond to SWBT's DRs and then refused to do so, is the appropriate sanction. See Rule 61.01 (b)(1); 61.01 (d)(2); 61.01 (f) and (g).

9. SWBT would also point out – as it did in its original Motion to Compel – that without the information Complainants were ordered to produce but have refused to produce to SWBT, the Commission should again consider whether Complainants can, as a matter of law, even establish their affirmative case. If the Complainants cannot establish that the traffic for which they seek reciprocal local compensation is true local traffic, and refuse to produce or even look for documents which would establish that Internet traffic is interstate (i.e., not local) traffic, the Commission clearly should dismiss Complainants' complaints.

10. By refusing to provide (or even look for) most of the information the Commission ordered the Complainants to produce, Complainants are wrongfully depriving SWBT of critical information which SWBT needs -- and requested over three months ago -- to present one of its defenses in this case. From the beginning, SWBT has asserted that the traffic in question, consisting of calls bound for the Internet is interstate in nature. Documents containing specific information which would conclusively establish this claim (i.e., the beginning and end point of the communications) are in the custody and control of Complainants or their ISP customers. However, Complainants refuse to produce or even look for this information, or definitively identify their specific ISP customers, despite a specific Commission Order to do so, and despite the fact that Complainants are seeking tens of millions of dollars in reciprocal compensation for such traffic!

11. Finally, as raised in Complainants' Motion to Close Discovery, (which SWBT received sometime after the close of business yesterday, and to which SWBT will file a separate response), SWBT would once again point out that as the Commission stated in its Order,

SWBT is fully entitled to know the identities of Complainants' end-users, their locations, and their agreements and financial arrangements with Complainants. The ISPs, if nothing else, are witnesses who are probably in possession of admissible information. One purpose of discovery is to identify witnesses. (Order at p. 7).

SWBT sought all of this information in April, 2000, and it is blatantly unfair for Complainants to now suggest that they do not have time or the resources to find the information the Commission ordered them to produce. It would be a miscarriage of justice for the Commission to allow Complainants to unilaterally decide to refuse to comply with a Commission Order, and then grant Complainants' request to preclude further discovery of information which the Commission has already determined is discoverable.



WHEREFORE, for the foregoing reasons, SWBT respectfully requests that the Commission dismiss Complainants' Complaints in this proceeding based on Complainants' refusal to comply with the Commission's July 20, 2000 Order Regarding Motion to Compel. SWBT also requests that the Commission impose whatever additional or alternative sanctions it deems just and appropriate, given Complainants contumacious and deliberate disregard for the Commission's Order.


Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed prepaid postage to the following parties on August 2, 2000.

  
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Anthony K. Conroy

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