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November 22, 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

FILED³

NOV 22 1999

Missouri Public
Service Commission

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 Response of Southwestern Bell Telephone Company to Joint Motion to Strike.

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

FILED³

NOV 22 1999

MCI WorldCom Communications, Inc. and)
Brooks Fiber Communications of Missouri,)
Inc.)

Missouri Public
Service Commission

Complainants)

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

v.)

Southwestern Bell Telephone Company.)

Respondent.)

**RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY
TO JOINT MOTION TO STRIKE**

COMES NOW Southwestern Bell Telephone Company (SWBT), and for its Response to MCI WorldCom Communications, Inc.'s (MCIWC's) and Brooks Fiber Communications of Missouri, Inc.'s (Brooks') Joint Motion to Strike, states to the Missouri Public Service Commission (Commission) as follows:

1. In their Joint Motion to Strike, MCIWC and Brooks argue that the Commission should strike SWBT's Reply to MCIWC's and Brooks' Joint Response to SWBT's Motions to Dismiss the complaints filed by MCIWC and Brooks. MCIWC and Brooks argue that SWBT's Reply is "improper" because it calls for a "premature" resolution of MCIWC's and Brooks' Complaints, and because, according to MCIWC and Brooks, SWBT's Reply does not satisfy *proposed* Rule 2.080 of the Commission.

2. Contrary to MCIWC's and Brooks' claims, SWBT's Reply to MCIWC's and Brooks' Joint Response is not improper under either the Commission's current rules (which are

the relevant authority) or under the Commission's proposed rules.¹ Nor does SWBT's Reply call for a premature resolution of MCIWC's and Brooks' complaints in this case. It is understandable why MCIWC and Brooks would want the Commission to not consider SWBT's Reply, however, since SWBT's Reply highlights why the Commission should, consistent with Commission Rule 2.070(6) and its Birch Telecom Internet arbitration decision,² dismiss MCIWC's and Brooks' complaints in this case. As described below, SWBT's Reply is not prohibited by the Commission's rules, is submitted for a completely proper purpose (i.e., to show the fundamental inconsistencies and defects in Brooks' and MCIWC's complaints and their Joint Response to SWBT's Motions to Dismiss), and should clearly not be stricken by the Commission. Rather, SWBT urges the Commission to carefully review SWBT's Reply, and for the reasons stated therein and in SWBT's Motions to Dismiss, dismiss Brooks' and MCIWC's complaints in this case.

3. In their Joint Response to SWBT's Motion to Dismiss, MCIWC and Brooks raised several arguments why SWBT's Motions to Dismiss should not be granted by the Commission. As SWBT pointed out in its Reply to their Joint Response, however, MCIWC and Brooks did not address "the now uncontroverted mountain of law and facts which points to the inescapable conclusion that Internet traffic is now and always has been interstate access traffic subject to the reciprocal local compensation." (SWBT Reply, pp. 1-2). SWBT also pointed out

¹ MCIWC and Brooks assert that SWBT's Reply would not be permitted under proposed Rule 2.080, based on MCIWC's and Brooks' claim that "such arguments are presented for improper purposes" and "are not warranted by existing law or a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (Joint Motion to Strike at pp. 1-2). This claim has no merit. SWBT's position is that the Commission should follow existing law (i.e., the Commission's Birch Telecom arbitration decision and the FCC's Internet Declaratory Ruling, not ignore it, as suggested by MCIWC and Brooks.

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).

that MCIWC and Brooks had presented no facts to establish their fundamental claim, i.e., that SWBT had agreed to carve out Internet traffic from what MCIWC, Brooks, SWBT and the FCC all recognized it to be in 1996 and 1997 (i.e., interstate access traffic) and recharacterize it as "local traffic." Finally, in its Reply, SWBT pointed out that in their Joint Response to SWBT's Motion to Dismiss, MCIWC and Brooks had carefully avoided discussing the bulk of the FCC's Internet Declaratory Ruling and this Commission's Birch Telecom decision, except to mislabel the Commission's Birch Telecom decision as "suspended." (SWBT Reply, p. 2). SWBT pointed out that MCIWC's and Brooks' avoidance of these cases was "perhaps understandable, inasmuch as the FCC's Internet Declaratory Ruling *directly rejected* each and every argument made by MCIWC up to that date -- which MCIWC has now conveniently abandoned or relabeled -- in support of its ridiculous and unsupported assertions that SWBT actually agreed to pay reciprocal local compensation for interstate Internet traffic." (SWBT Reply, p. 2).

4. SWBT's Reply was permissible and appropriate under the Commission's rules. SWBT filed its Motions to Dismiss MCIWC's and Brooks' complaints pursuant to Commission Rule 2.070(6) in a timely manner on October 13, 1999. MCIWC and Brooks filed a timely Joint Response on October 22, 1999. SWBT filed its Reply to MCIWC's and Brooks' Joint Response in a timely fashion on November 1, 1999. In its Reply, SWBT directly responded to the allegations contained in MCIWC's and Brooks' Joint Response, and pointed out the inconsistencies between MCIWC's and Brooks' positions now and their position before the FCC's Internet Declaratory Ruling and the Commission's Birch Telecom Internet arbitration decision. It is normal and customary Commission practice to permit a motion, a response to that motion, and a reply to any such response. MCIWC and Brooks can point to no Commission rule which precludes SWBT from filing a Reply which directly responds to a response to a motion.

5. SWBT would also point out that MCIWC's and Brooks' Joint Motion to Strike appears in large part to be nothing more than an impermissible and untimely attempt to "supplement" its October 22, 1999, Joint Response to SWBT's Motion to Dismiss.³ In their Joint Motion to Strike, MCIWC and Brooks submitted two affidavits which attempt to counter portions of the affidavits attached to SWBT's Motions to Dismiss. The affidavits attached to MCIWC's joint Motion to Strike are untimely as they only attempt to respond to affidavits which were attached to SWBT's Motion to Dismiss, which was filed on October 13, 1999. In order to be considered timely filed as part of Brooks' and MCIWC's Joint Response, these affidavits were required to be filed within 10 days (i.e., on or before October 23, 1999). However, these two affidavits were not filed until November 10, 1999, and no leave was sought or obtained by MCIWC or Brooks to file them late. The claim that these affidavits are responsive to an allegation of unethical conduct is false; no such allegation was made. Inasmuch as these two affidavits are in reality an untimely attempt to bolster their Joint Response, the affidavits submitted by MCIWC and Brooks should be rejected by the Commission. MCIWC's and Brooks' request to strike SWBT's affidavits submitted with SWBT's Motions to Dismiss, is equally untimely. Any such motion should have been filed, if at all, in the Joint Response to SWBT's Motion to Dismiss.

6. Whether the Commission chooses to consider or ignore the affidavits filed in connection with the various pending motions, dismissal of MCIWC's and Brooks' complaints for reciprocal local compensation for Internet traffic is still the appropriate remedy in these consolidated cases. The FCC's Internet Declaratory Ruling and this Commission's Birch

³ The affidavit of MCIWC's Gary Ball does not establish any factual dispute. As conceded in the affidavit, Mr. Ball was not personally involved in the SWBT-MFS negotiations, and cannot address either party's statements or positions. The affidavit is entitled to no weight, even if it were properly filed.

Telecom arbitration decision appropriately interpret and apply the law. As in Birch Telecom, no compensation is due for Internet bound traffic as it is interstate, not local traffic.

WHEREFORE, SWBT respectfully requests that the Commission deny MCIWC's and Brooks' Joint Motion to Strike, and enter an order dismissing MCIWC's and Brooks' complaints in this case.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY Anthony K. Conroy /tm

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on November 22, 1999.


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