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June 16, 2000

FILED

JUN 16 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 to Compel Responses To Data Requests.

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

JUN 16 2000

Missouri Public
Service Commission

MCI WorldCom Communications,)
Inc. et al.,)

Complainants,)

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

v.)

Southwestern Bell Telephone Company,)

Respondent.)

MOTION TO COMPEL RESPONSES TO DATA REQUESTS

COMES NOW Southwestern Bell Telephone Company (SWBT), and for its Motion to Compel Responses to Data Requests, states to the Missouri Public Service Commission (Commission) as follows:

1. On April 24, 2000, SWBT served four data requests (DRs) on counsel for Complainants MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and BroadSpan Communications, Inc., d/b/a Primary Network Communications, Inc. (Complainants). This Motion to Compel relates to SWBT's DRs No. 1 and No. 2.

In DR No. 1, SWBT sought the following information from Complainants:

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.

In DR No. 2, SWBT sought the following information from Complainants:

- 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 any, by each Internet Service Provider to 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 consideration 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 arrangements 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.

2. On May 4, 2000, counsel for Complainants communicated the following objections to SWBT's DRs:

Request No. 1

Complainants object to the data request to the extent that it seeks information about each end user. Such information is not available, and further is irrelevant and not calculated to lead to the discovery of admissible evidence. SWBT has failed and refused to pay the full amount of reciprocal compensation owed to Complainants under the respective interconnection agreements and specifically has withheld amounts that it estimates are attributable to local calls to ISPs. The agreements to not allow such withholding, do not contemplate any separate

treatment of such traffic, and do not provide for any such method of estimation. Information at the end user level is not germane to the resolution of this dispute.

The request has already been answered in the aggregate in Complainants' Direct Testimony, hence Complainants consider this request to be answered in full, subject to the foregoing objection.

Request No. 2

Complainants object to the data request for the reasons stated in the objection to Request No. 1, and further because the specific arrangements between Complainants and their ISP customers are irrelevant and the request for such information is not reasonably calculated to lead to the discovery of admissible evidence.

3. Pursuant to Commission Rule 4 CSR 240-2.090(8)(A), counsel for SWBT certifies that prior to filing this Motion to Compel, he has in good faith conferred with Complainants' counsel by telephone in an attempt to resolve Complainants' objections to SWBT's DRs. Subsequently, counsel for SWBT arranged for a telephone conference with the presiding officer and opposing counsel, as required by Commission Rule 4 CSR 240-2.090(8)(B). This telephone conference took place on June 14, 2000.

4. Complainants' primary objection to SWBT's DRs No. 1 and No. 2 appears to be that the information sought is not relevant.¹ This objection has no merit. As the Commission has recently discussed in Case No. EC-99-553,² the permissible scope of discovery is set out in Rule 56.01(b)(1) of the Missouri Rules of Civil Procedure:

¹ Complainants also state that the information sought is "not available." Complainants do not describe which of the requested information is "not available." If the Complainants do not have any information about the amount of traffic for which they believe they are entitled to reciprocal compensation or the identity of their Internet Service Provider (ISP) customers (DR No. 1), or the financial and network arrangements between Complainants and their ISP customers, the Commission should consider whether the Complainants should be permitted to even proceed with their Complaints.

² GST Steel Company v. Kansas City Power & Light Company, Case No. EC-99-553, Order Regarding Kansas City Power and Light Company's First Motion to Compel Discovery.

Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

5. With respect to SWBT's DR No. 1, the information sought by SWBT is directly "relevant to the subject matter involved in the pending action," as described in Rule 56.01(b)(1). The central issue in this case is whether telephone calls originated by a SWBT customer which are routed to an Internet Service Provider (ISP) served by Complainants and then on to the Internet "originate" and "terminate" in the same local calling area, and thus are "Local Traffic" subject to reciprocal local compensation under Section 251(b)(5) of the Telecommunications Act of 1996 (Act) and the interconnection agreements between SWBT and each Complainant entered into pursuant to the Act. Complainants assert – erroneously – that they are entitled to reciprocal local compensation because the calls "terminate" at their ISP customers' location, allegedly in the same local calling scope. Yet, they object to providing any supporting detail with respect to this traffic, such as identifying the amount of such traffic for which they seek compensation, or the names and addresses of the ISPs to which they deliver this traffic.

In an attachment to its original Complaint, MCI WorldCom claimed it was owed reciprocal local compensation in the amount of \$7,519,917.98. In his direct testimony, however, MCI WorldCom witness Daniel Aronson claims that MCI WorldCom is now owed \$15,036,476.54 in reciprocal local compensation for traffic bound for the Internet, or nearly double the amount of compensation (and presumably traffic) MCI WorldCom claimed in its Complaint. SWBT's records of the traffic originated by its end users and delivered to MCI

WorldCom reflect that a different amount of traffic is actually at issue in this case (967.8 million minutes, or approximately \$10.1 million in reciprocal local compensation based on the per minute rate utilized by MCI WorldCom). Under the terms of the interconnection agreement between SWBT and MCI WorldCom, portions of which were also attached to MCI WorldCom's Complaint, MCI WorldCom is required to utilize SWBT's records relating to traffic originated by SWBT customers to bill SWBT for this traffic.

These significant discrepancies, and similar discrepancies with respect to the amount and types of traffic for which Complainants Brooks Fiber and BroadSpan seek compensation, strongly suggest that Complainants are not only seeking to have the Commission order SWBT to pay reciprocal local compensation for interstate, Internet-bound traffic, (which SWBT disputes) but that Complainants also are seeking compensation for some other yet to be described type or types of traffic.

The information sought by SWBT is also relevant because as SWBT has described in its pleadings, even if Complainants deliver Internet traffic to their ISP customers in the same local calling scope, traffic bound for the Internet does not terminate at an ISP's location. Internet bound traffic is interstate, interexchange traffic which is merely routed by ISPs to the Internet. As SWBT has described in its pleadings and testimony in this case, SWBT is screening and tracking locally dialed traffic originated by its end users and delivered to Complainants to identify suspected ISP-bound traffic. Complainants, however, assert that SWBT cannot accurately track ISP-bound traffic, and have repeatedly asserted that SWBT is only "estimating" the amount of Internet traffic delivered to Complainants for routing to the Internet. While SWBT believes its tracking mechanism is accurate, obtaining the ISP-specific information requested by SWBT in DR No. 1 from Complainants will enable SWBT and the Commission to

verify the accuracy of the tracking mechanism employed by SWBT and questioned by Complainants in their pleadings. The information sought by SWBT in DR No. 1 is clearly relevant to the subject matter of the Complaints in this case.

6. With respect to SWBT's DR No. 2, the information sought by SWBT concerning the network and financial arrangements between Complainants and ISPs receiving service from Complainants is also directly relevant to the subject matter involved in the Complaints in this case. In each of the Complaints, one of the claims made by each Complainant is that if the Commission does not interpret the interconnection agreements between SWBT and Complainants to require reciprocal local compensation for calls bound for the Internet, the Complainants "would not be compensated for the service it provides in delivering local calls made by SWBT customers to MCIWC customers that are ISPs." (See MCI WorldCom Complaint, Par. 18). Yet despite this assertion, upon which the Complainants rely to support their claims for reciprocal compensation for Internet traffic, Complainants refuse to identify what compensation, if any, they are receiving from their ISP customers.

As the FCC has repeatedly determined since 1983, enhanced service provider traffic, including Internet traffic, is interstate, interexchange access traffic. Normally, local carriers such as Complainants would collect per minute access charges for carrying access traffic. However, because of the FCC's access charge exemption for interstate enhanced services providers, which the FCC has determined is applicable to ISPs, ISPs do not pay usage based switched access, but instead, pay their local carrier (such as Complainants) a rate equivalent to a local business line rate to obtain the network facilities necessary to allow their customers to connect with the Internet.

Thus, contrary to the assertions in their Complaints, Complainants are being compensated – or at least are entitled to be compensated – by ISPs for their use of Complainants' network facilities to carry Internet traffic. However, as has been discovered in other jurisdictions and described in SWBT witness Albert Halprin's testimony, due to the huge potential economic windfall generated by lopsided reciprocal compensation payments which would result if the Commission interprets the interconnection agreements between Complainants and SWBT to require SWBT to treat Internet traffic as "Local Traffic," some CLECs have apparently offered financial incentives to affiliated and unaffiliated ISPs in order to entice them to obtain service from the CLEC. These CLECs recognize that by focusing only on ISPs – instead of end users – as customers, they can claim large reciprocal compensation payments from incumbent LECs, who cannot pick and choose their customers. These one-way reciprocal compensation payments will likely far exceed a CLEC's cost to provide service to the ISP, particularly if the ISP collocates its facilities with the CLEC.

The information regarding the financial arrangements between Complainants and their ISP customers sought by SWBT in DR No. 2 is directly relevant to establish that contrary to their assertions in their Complaints, Complainants are receiving compensation from ISPs for their use of Complainants' network facilities. If the information sought by SWBT reveals that Complainants are offering free service to ISPs, or are paying ISPs to provide service to them based on the expectation that ISP traffic will generate huge reciprocal compensation revenues for Complainants, the information is likewise relevant because it supports SWBT's position that it would not be in the public interest for the Commission to interpret the interconnection agreements at issue in this case in such a manner as to discourage real competition.

In DR No. 2, SWBT also seeks information relating to the network arrangements between Complainants and their ISP customers, including collocation arrangements. The network arrangements between Complainants and their ISP customers are relevant to the subject matter of the Complaints in this case. SWBT believes that in at least some instances Internet traffic sent from a CLEC to its ISP customers may appear to be delivered to an ISP in the same local calling scope, but in fact the traffic is forwarded and delivered to the ISP outside the exchange or outside the state. In DR No. 2, SWBT seeks a description of the network facilities between each Complainant and their ISP customers in order to determine whether the traffic in question is in fact interexchange and/or interstate in nature. If the network facilities are interstate (or even interexchange), it is clear that no reciprocal compensation would be owed for such calls even if Complainants were correct (which they are not) that ISP-bound traffic which Complainants deliver to ISPs located in the same local calling scope is subject to reciprocal compensation.

7. Finally, with respect to both DR No. 1 and DR No. 2, SWBT would point out to the Commission that Complainants have not objected to either of these DRs on the basis that responding would be unduly burdensome. Furthermore, the Commission has previously entered its standard protective order in this case, so any concerns the Complainants may have about the proprietary nature of the information requested can be adequately addressed pursuant to the protections provided by such protective order.

WHEREFORE, for the reasons described above, SWBT respectfully requests that the Commission order Complainants to provide the information sought by SWBT in DR No. 1 and DR No. 2.

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 June 16, 2000.


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