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August 21, 2000

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

FILED<sup>3</sup>  
AUG 21 2000

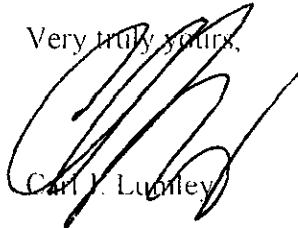
Missouri Public  
Service Commission

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

Dear Mr. Roberts:

Enclosed please find for filing with the Commission in connection with the above-referenced proceeding an original and nine copies of Complainants' Witness List, Order of Cross-Examination, and Statement of Position with highly confidential pages filed under seal. Upon your receipt, please file stamp the extra copy received and return to the undersigned. If you have any questions, please do not hesitate to contact us.

Very truly yours,



Carl J. Lumley

CJL:dn

Enclosures

cc. Michael Dandino, Office of Public Counsel (W/Enclosure)  
Dan Joyce, General Counsel (W/Enclosure)  
Anthony Conroy, SWBT (W/Enclosure)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED<sup>2</sup>

AUG 21 2000

Missouri Public  
Service Commission

MCI WorldCom Communications, Inc., )  
and Brooks Fiber Communications of )  
Missouri, Inc., and BroadSpan Communications, )  
Inc., d/b/a Primary Network Communications, )  
Inc., )

Complainants, )

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

vs. )

Southwestern Bell Telephone Company, )

Respondent. )

**COMPLAINANTS' WITNESS LIST, ORDER OF CROSS-EXAMINATION, AND  
STATEMENT OF POSITION**

COME NOW Complainants MCI WorldCom Communications, Inc. (MCIWC), Brooks Fiber Communications of Missouri, Inc. (Brooks) and BroadSpan Communications Inc. d/b/a Primary Network Communications Inc. (PNC) and for their Witness List, Order of Cross-Examination, and Statement of Position state to the Commission:

**Witness List**

Complainants intend to call witnesses in the following order, subject to any unforeseen problems:

Edward J. Cadieux

Don Price

Daniel Aronson

S. Blake Ashby

Pat Senft

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NP

Complainants are unsure as to the Commission's intentions with regard to potential testimony regarding the pending Motion for Sanctions and reserve the right to call witnesses during the argument regarding that preliminary matter.

### Cross-Examination

Complainants understand that the parties agree that SWBT shall cross-examine Complainants' witnesses first, followed by Staff and Public Counsel, and that Complainants shall cross-examine SWBT's witnesses first, followed by Staff and Public Counsel.

### Statement of Position

Only one issue is presented: **Is the traffic in dispute subject to local reciprocal compensation under the parties' respective interconnection agreements?**

Complainants' position on this issue is as follows:

This case involves a determination by the Commission as to whether the reciprocal compensation rates contained in the parties' respective interconnection agreements apply to local calls terminated to ISP end users. This is not a case involving a policy determination as to whether or not reciprocal compensation should apply to the traffic in dispute, but rather this case only involves the specific interconnection agreements of the parties. This is not an arbitration of new contracts like the Birch/SWBT proceeding. The Commission needs to examine the interconnection agreements and decide upon the applicability of the rates to the disputed traffic, in light of the parties' intentions and the meaning of the language of the agreements under the industry custom and practice that prevailed when the agreements were made. Complainants

maintain that the reciprocal compensation rates apply to all traffic between the parties' end users within a local calling scope, including the traffic in dispute.

The parties' agreements provide for the payment of reciprocal compensation for all local calls, meaning all calls that terminate to end users served by one party and originate from an end user served by the other party within the same local calling scope. Calls from SWBT end users to ISP end users served by the complainants in the same local calling area are local calls under the provisions of these agreements and, therefore, are subject to reciprocal compensation.

Specifically, the agreement between Brooks and SWBT (and adopted by PNC) provides for the payment of reciprocal compensation on local traffic, which is defined as "calls originated by one Party's end users and terminated to the other Party's end users ... in the same SWBT exchange area ... or within different SWBT exchanges which share a common mandatory local calling area." The Brooks agreement also defines "terminating traffic" as "voice-grade 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."

Likewise, the MCIWC agreement provides for payment of reciprocal compensation on local traffic, which is defined as "traffic that originates and terminates between or among end users within a SWBT local calling area". The agreement also defines "end user" as a "third-party residence or business that subscribes to Telecommunications Service provided by either of the Parties."

Complainants' witnesses confirm that the interconnection agreement language regarding the termination of traffic between end users within a local calling scope includes the traffic now in dispute, both as a matter of fact and as a matter of industry custom and practice. Courts and other commissions have agreed when considering similar language. In its binding admissions to written discovery, that it had over a month to compose, SWBT describes the traffic at issue as "local calls to ISP end users" (Interrogatory 9d) and "end user originated local calls" (Interrogatory 13), thereby confirming the traffic is included by the language of the agreements.

ISPs purchase local service as end users, as required by the FCC's longstanding policy of treating ISPs as local end users (irrespective of any regulatory jurisdictional classification). Accordingly, SWBT reports revenues from ISPs as intrastate revenues. Other local customers call ISPs by local dialing. If the calling parties use local measured service, they pay SWBT for each specific local call to the ISP. Other local customers pay SWBT for such calls through their flat monthly local rates. The parties handle the disputed traffic as local traffic as required by the FCC.

These were the facts and circumstances under which the parties negotiated the agreements. Calls to ISPs were not handled differently than other local calls. Under industry custom, practice and terminology, calls to ISPs terminate just like any other local call, when the call is answered by the called party, in this case the ISP.

When Brooks and SWBT negotiated their agreement, Brooks made it clear that it expected that all local calls terminated to its end users for SWBT would be subject to reciprocal

compensation, without exception. SWBT negotiator Sparling expressly acknowledged that calls to ISPs would be subject to reciprocal compensation. Mr. Cadieux, who negotiated on behalf of Brooks, testifies in detail to the discussion, which he immediately confirmed in writing in the company's business records. SWBT's representative Zamora, who signed the agreement for SWBT, HC\*\*\*

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\*\*\* (Exhibit RFA 1).

When MCIWC (then MFS) and SWBT negotiated their agreement, MCIWC also made it clear that it expected that all local calls terminated to its end users for SWBT would be subject to reciprocal compensation, without exception. Mr. Devine, who negotiated on behalf of MCIWC, testifies that SWBT did not propose to exempt calls to ISPs from reciprocal compensation. Mr. Zamora was the lead negotiator for SWBT.

All witnesses agree that the parties did not discuss and that the agreements do not provide for carving out the now-disputed traffic for any separate treatment, segregating the traffic in any way from other local traffic, or carrying the traffic over different trunks than other local traffic. Complainants maintain that given the customary handling of the traffic as local and the language of the agreement, it would have been incumbent upon SWBT to propose any such exceptional treatment. There is no dispute that SWBT did not do any such thing. There is no dispute that the parties would not pay each other anything for terminating such calls for each other unless the calls are subject to reciprocal compensation.

After the agreements were made, SWBT attempted to renege upon its contracts. It sent self-serving letters to CLECs declaring that it had always contended that the traffic in question was not subject to reciprocal compensation. Its assertions are contradicted by its conduct, both during the negotiations and afterwards. HC\*\*\*

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\*\*\* (Exhibits RFA 2 and 3). Even after SWBT changed its position, it kept making payments to Brooks because it could not separate the now-disputed traffic from other local traffic. (Exhibit RFA 4).

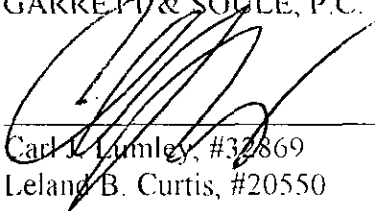
Ultimately, SWBT began breaching the agreements. First, it has refused to provide full originating records as required by the agreements. Instead it has provided altered records from which it had arbitrarily deleted traffic that it suspected was local calling to ISPs. Second, it has refused to pay complainants' invoices and then present a dispute, as required by the agreements. Instead, it has withheld payment and forced complainants to present this dispute. Witnesses Aronson and Senft provide testimony regarding the amount of money in dispute, so that the Commission can appreciate the significance of this case to complainants' business operations. The total figure exceeds \$30 million.

PNC adopted the Brooks agreement after SWBT had changed its position and attempted to renege. Mr. Ashby testifies that PNC adopted the agreement for the specific purpose of gaining a higher rate of reciprocal compensation on local calls to ISPs. When SWBT advised PNC that it disputed the applicability of reciprocal compensation to such traffic under the Brooks

agreement, PNC advised SWBT that it was entitled to the Brooks contract provisions as made and approved under Section 252(i) and that SWBT could not unilaterally alter those provisions.

Under standard principles of contract interpretation, which include consideration of the factors that the FCC has instructed states to examine and is itself now examining in a similar case out of Virginia, the Commission should find and conclude that the reciprocal compensation rates in the MCIWC and Brooks (and therefore the PNC) agreements apply to calling within a local calling scope from SWBT's end users to ISPs served by complainants. In an overwhelming tide, court and commission decisions across the country have reached the same conclusion regarding similar contracts, including in Texas and Oklahoma regarding SWBT agreements.

CURTIS, OETTING, HENIZ,  
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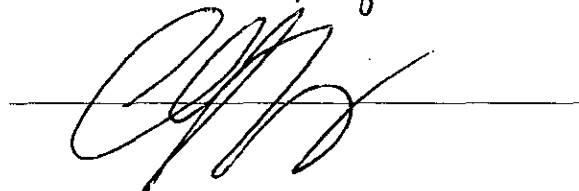
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Inc. and BroadSpan Communications, Inc.  
d/b/a Primary Network Communications, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was sent to all parties listed on the attached service list by fax, on the 21 day of August, 2000.



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