

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY

July 20, 2000

CASE NO: TC-2000-225

Office of the Public Counsel

P.O. Box 7800
Jefferson City, MO 65102

Anthony K. Conroy, Legal Department

Southwestern Bell Telephone Company
One Bell Center Room 3516
St Louis, MO 63101

Carl J. Lumley/Leland B. Curtis

Curtis, Oetting, Heinz, Garrett & Soule, P.C.
130 S. Bemiston, Suite 200
St. Louis, MO 63105

Colleen M. Dale

Broadspan Comm., Inc d/b/a Primary
Network Comm., Inc.
409 Cedar Lane
Columbia, MO 65201-6509

General Counsel

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

**Stephen Morris, Esq./Patricia Ana Garcia
Escobedo, Esq.**

MCI Worldcom Communications, Inc.
701 Brazos, Suite 600
Austin, TX 78701

Jim Levin, Director

Center For Dispute Resolution
206 Hulston Hall
Columbia, MO 65211

Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

MCI WorldCom Communications, Inc., Brooks)	
Fiber Communications of Missouri, Inc.,)	
and BroadSpan Communications, Inc., d/b/a)	
Primary Network Communications, Inc.,)	
)	
Complainants,)	
)	
v.)	<u>Case No. TC-2000-225</u>
)	
Southwestern Bell Telephone Company,)	
)	
Respondent.)	

ORDER REGARDING MOTION TO COMPEL

Pending herein is Respondent Southwestern Bell Telephone Company's (SWBT) Motion to Compel Responses to Data Requests, filed on June 16, 2000. Complainants MCI WorldCom Communications, Inc. (MCI), Brooks Fiber Communications of Missouri, Inc. (Brooks), and BroadSpan Communications, Inc., d/b/a Primary Network Communications, Inc. (PNC; collectively, Complainants), replied on July 3, 2000, and the motion is now ripe for determination.

Discussion:

Discovery is available in cases before the Commission on the same basis as in civil cases in circuit court.¹ 4 CSR 240-2.090(1). The same

¹The Commission was authorized to provide for interrogatories by rule even before Chapter 536 was amended to make that option generally available to administrative agencies. See St. ex rel. Southwestern Bell Tel. Co. v. Public Service Commission, 645 S.W.2d 44, 50-51 (Mo. App., W.D. 1983).

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."). Thus, parties may freely make use of depositions, written interrogatories, requests for production, and requests for admissions. *Id.* The various privileges apply in Commission proceedings just as they do in circuit court. 4 CSR 240-2.130(5).

In addition to the traditional instruments of civil discovery, parties before the Commission may employ the data request (DR). A DR is "an informal written request for documents or information, which may be transmitted directly between agents or employees of the commission, public counsel or other parties to a proceeding before the commission." 4 CSR 240-2.090(2). Responses to DRs are due within 20 days of receipt of the request, but need not be made under oath nor in any particular format. *Id.* Objections are due within ten days of the receipt of the request. *Id.* Sanctions for noncooperation are the same as those applicable to other forms of discovery. *Id.*

On April 24, 2000, SWBT served its DRs 1 and 2 upon the Complainants, 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 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 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 arranges [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.

Complainants timely served their objections on SWBT on May 4, 2000, as follows:

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 [sic] 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.

In its Motion to Compel, counsel for SWBT asserts that he conferred with counsel for Complainants in an attempt to resolve this discovery dispute and arranged a conference call with the presiding officer, on June 14, 2000, all as required by Commission Rule 4 CSR 240-2.090(8), (A) and (B). These steps failed to resolve the dispute and SWBT filed its Motion to Compel on June 16, 2000.

In its Motion, SWBT states, first, that Complainants' objection that the requested information is "not available" should result in dismissal of the complaint. "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." SWBT also complains that Complainants have failed to specify exactly which information requested by DRs 1 and 2 is "not available."

Second, SWBT asserts that the information sought by its DRs 1 and 2 is indeed relevant. SWBT explains that the central issue in this case is whether or not a call dialed by a SWBT subscriber, which is then routed to an Internet Service Provider (ISP) served by Complainants and then on to the Internet, is "Local Traffic" subject to reciprocal compensation pursuant to the federal Telecommunications Act of 1996 (the Act) and the interconnection agreements between SWBT and each of the Complainants. SWBT contends that the information sought by its DRs 1 and 2 is relevant to its defense against Complainants' claims for reciprocal compensation.

SWBT points out that in its Complaint, Complainant MCI alleged that SWBT owed it \$7,519,917.98 in unpaid reciprocal compensation, while MCI's witness, Daniel Aronson, stated in his Direct Testimony that SWBT owes MCI \$15,036,476.54 in unpaid reciprocal compensation. SWBT's own

records suggest that the true amount at issue with respect to MCI is about \$10.1 million. SWBT contends that similar discrepancies exist with respect to the claims of Brooks and PNC and that SWBT is consequently entitled in discovery to examine all of the details relied upon by Complainants to support their claims. SWBT further asserts that the information sought in DR No. 1 is necessary to permit SWBT to determine the accuracy of its system for tracking ISP-bound traffic. Complainants, in their pleadings, question the accuracy of SWBT's tracking system.

As for DR No. 2, SWBT states that Complainants' allege in their Complaints that they will receive no compensation at all for the ISP-bound traffic at issue in this case unless SWBT is ordered to pay reciprocal compensation. SWBT states that the information sought by DR No. 2 is relevant to these allegations and will show that the ISPs are compensating the Complainants for the traffic at issue. SWBT further asserts that some competitive local exchange carriers (CLECs) have offered financial and other incentives, such as collocation, to entice ISPs to subscribe to their services, thereby permitting the CLECs to seek a large amount of reciprocal compensation. DR No. 2 is designed, in part, to determine whether Complainants are engaging in such practices.

Finally, SWBT states that DR No. 2 is also intended to gather information as to whether or not the traffic herein at issue is, in fact, delivered to ISPs within a local calling scope. SWBT asserts that it is entitled to investigate through discovery whether or not the traffic at issue is indeed "local" as asserted by Complainants.

In their response to SWBT's Motion to Compel, filed on June 26, 2000, Complainants assert, first, that the level of detail sought by SWBT in its DRs 1 and 2 is unnecessary because the Commission is unable to determine the actual amount due or to award money damages. According to Complainants, the Commission's only role herein is to determine whether or not reciprocal compensation is owed on local ISP-bound traffic:

The parties have submitted testimony regarding the total amount of traffic involved, to give the Commission a sense of the scope of the dispute. SWBT refers to discrepancies regarding the total amount of traffic at issue, as described in the competing testimonies of the parties. The Commission will not be resolving such discrepancies.

Next, Complainants assert that the Direct Testimony of their witnesses has provided the information sought in DR No. 1 "in the aggregate." For the same reason, Complainants assert, the information sought in DR No. 1 as to monthly traffic to each ISP and the name, address and telephone number of each ISP is irrelevant.

Next, Complainants assert that all of the information sought in SWBT's DR No. 2 is irrelevant. "This case concerns the agreements between SWBT and Complainants, not any other agreements." Complainants assert that the accuracy of SWBT's mechanism for tracking ISP-bound traffic is not at issue in this case. Complainants also assert that it is irrelevant, with respect to the reciprocal compensation obligation created by the parties' interconnection agreements, whether or not Complainants receive compensation from their ISP end-users. In conclusion, Complainants again assert that "this case simply concerns the terms and conditions of the parties' agreement."

SWBT replied on July 3, 2000, to Complainants' response of June 26. First, SWBT states that Complainants have misrepresented the scope of the dispute before the Commission in this case. Contrary to Complainants' assertions, the dispute includes (1) whether or not the traffic herein at issue is truly local traffic and (2) whether or not a call routed to an ISP for further routing to the Internet may be said to "terminate" at the ISP for purposes of reciprocal compensation. Second, SWBT denies that the aggregate information presented in Complainants' Direct Testimony satisfies its DRS. SWBT suggests that Complainants are resisting discovery, and dealing only with aggregate figures, because they are concealing the true nature of some of the traffic at issue. Next, SWBT points out that the identity and location of Complainants' ISP end-users is relevant to a determination of whether or not the traffic at issue is truly local traffic. Again, SWBT points out that Complainants have made the financial arrangements between themselves and their ISP subscribers relevant by their claim that they are receiving no compensation for ISP-bound traffic. Finally, SWBT asserts that the timing of its motion was dictated largely by counsel for Complainants in that he failed to make himself promptly available for a telephone conference with the presiding officer.

The scope of discovery in proceedings before the Commission is the same as in civil cases generally under Rule 56.01(b)(1), Mo. R. Civ. Pro., which provides:

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.

"Relevant" evidence, in turn, is that which tends to prove or disprove a fact of consequence to the pending matter. W. SCHROEDER, 22 MISSOURI PRACTICE SERIES—MISSOURI EVIDENCE, Section 401.1(a) (1992). Relevance must be determined by reference to the pleadings. See St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985). Under this standard, all of the information sought by SWBT's DRs 1 and 2 is clearly relevant, as explained by SWBT in its motion and reply.

Complainants' relevancy argument is based on a theory of the jurisdiction of this Commission that the Commission rejects. However, an extended analysis of the Commission's jurisdiction is not necessary here. Whether or not the Commission has authority to determine the actual amount of money owed, if any, with respect to the traffic herein at issue, the record will be made before this Commission and not in a reviewing court. Thus, SWBT is surely entitled to demand the details of the debts that Complainants claim it owes them because, to the extent that SWBT disputes those details, SWBT must make that record before this Commission. Likewise, SWBT is fully entitled to know the identities of Complainants' ISP 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. Furthermore, as SWBT has pointed out, the agreements and financial arrangements between Complainants and their ISP end-users are relevant to issues raised by Complainants in their pleadings. Finally, as to Complainants' vague assertion that the information in question is "not available," the Commission simply does not find that statement credible.

Because Complainants' objections to SWBT's DRs 1 and 2 are without merit, the Commission will grant the Motion to Compel.

IT IS THEREFORE ORDERED:

1. That the objections of Complainants MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and BroadSpan Communications, Inc., d/b/a Primary Network Communications, Inc., to Respondent Southwestern Bell Telephone Company's Data Requests 1 and 2 are overruled.

2. That Respondent Southwestern Bell Telephone Company's Motion to Compel Responses to Data Requests, filed on June 16, 2000, is granted.

3. That Complainants MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and BroadSpan Communications, Inc., d/b/a Primary Network Communications, Inc., shall serve full and complete responses to the Data Requests in question on Respondent Southwestern Bell Telephone Company on or before July 31, 2000. To 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.

4. That the parties may supplement their Direct, Rebuttal and Surrebuttal Testimony already filed herein as may be necessary in view of the Commission's decision herein. Complainants' supplemented Direct Testimony, if any, shall be filed on or before August 7, 2000; Complainants' supplemented Surrebuttal Testimony, if any, shall be filed on or before August 18, 2000. Respondent's supplemented Surrebuttal Testimony, if any, shall be filed on or before August 14, 2000. Any such supplemented testimony must be received by all parties no later than the same day the testimony is filed with the Commission. The parties may also supplement the issues list, position statements and witness list previously filed herein as may be necessary in view of the Commission's decision herein. Any such supplemented issues list, position statements, and witness list, if any, shall be filed on or before August 21, 2000, and received by all parties no later than the day of filing.

5. That this order shall become effective on July 31, 2000.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to
Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 20th day of July, 2000.

FYI: To Be Issued By Delegation

AL/Sec'y: Thompson / Pope

7-19

7-24

Date Circulated

Return by 3:00 p.m.

10 a.m.

TC-2000-225

CASE NO.

absent

Lumpe, Chair

add p. 5

Draimer, Vice Chair

[Signature]

Murphy, Commissioner

[Signature]

Schemenauer, Commissioner

KS

Simmons, Commissioner

pp. 4, 10

CONTESTED

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 20th day of July 2000.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

