

CURTIS, OETTING, HEINZ, GARRETT & SOULE, P. C.
ATTORNEYS AT LAW

130 SOUTH BEMISTON, SUITE 200
ST. LOUIS, MISSOURI 63105

(314) 725-8788

FACSIMILE (314) 725-8789

www.cohgs.com

CARL J. LUMLEY

EMAIL ADDRESS
clumley@cohgs.com

August 8, 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

FILED²

AUG 10 2000

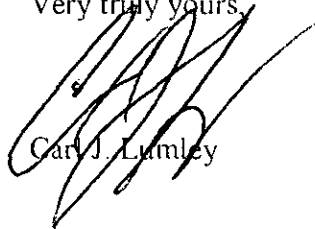
Missouri Public
Service Commission

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 BroadSpan Communications, Inc. d/b/a Primary Network Communications, Inc.'s Response to SWBT's Motion for Sanctions. 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

FILED²

AUG 10 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.)

BROADSPAN COMMUNICATIONS, INC.
D/B/A PRIMARY NETWORK COMMUNICATIONS, INC.'S
RESPONSE TO SWBT'S MOTION FOR SANCTIONS

COMES NOW BroadSpan Communications, Inc. d/b/a Primary Network Communications, Inc. (PNC) and for its response to SWBT's Motion for Sanctions states to the Commission:

1. PNC has responded in full to the two data requests that were addressed in the Commission's July 20 Order. A copy of PNC's response is attached to SWBT's Motion, so it will not be duplicated here. SWBT has no basis to complain about PNC's response, much less file a motion for sanctions.

2. The data requests sought the following information: (1) calculation of balance due for reciprocal compensation; (2) ISP customer monthly terminating minutes; (3) reciprocal compensation rates; (4) ISP customer name, address and telephone numbers; (5) prices charged to ISP customers; (6) identification of any incentives or revenue sharing with ISP customers; (7) ISP collocation contracts; and (8) ISP service agreements.

54

3. Regarding (1) calculation of balance due for reciprocal compensation, PNC provided an updated version of a spreadsheet that had already been provided with both direct and surrebuttal testimony. It was updated for changes since the surrebuttal testimony was filed. It includes total minutes terminated by PNC for SWBT. PNC had to identify these minutes itself because SWBT has failed and refused to provide complete originating records as required by the agreement. SWBT does not criticize the completeness of this response in its motion.

4. Regarding (2) ISP customer monthly terminating minutes, PNC provided a nine-page report containing the best available information, which was a full response. SWBT unjustifiably criticizes PNC for not being able to provide absolutely exact information. SWBT fails to recall that when SWBT was asked by Complainants to identify whether a portion of the amounts it had billed for reciprocal compensation was related to local calls terminated to ISPs served by SWBT, SWBT's response was: "As described below, SWBT cannot provide the documents requested.... For local calls originating from CLEC end users, **SWBT is currently unable to separately identify ISP traffic from other types of calls.**" (See Ashby Direct, p. 14-15, quoting SWBT response to request for production 3 (emphasis added). See also SWBT's responses to interrogatory 12 and interrogatory 13, quoted at Ashby Direct, p. 15-16). In other words, SWBT cannot identify calls to ISPs from its records. Complainants face a similar problem concerning SWBT's data request. That is why Complainants described the information as unavailable in their objections to the request (just as SWBT had stated in its aforesaid discovery response). The reciprocal compensation regime established by the interconnection agreements calls for the parties to exchange and rely upon originating records, not terminating records. However, SWBT has failed and refused to provide complete originating records to Complainants. Further, the agreements treat all local traffic the same, including for purposes of

reciprocal compensation and the routing of traffic over local trunks. Hence, the parties (including SWBT) have no business need to and are not able to precisely segregate local traffic terminated to customers who happen to be ISPs from local traffic terminated to other customers. The parties do not even have a means of exactly identifying which customers are ISPs. SWBT has unilaterally decided to try to treat a portion of such traffic differently when the called party is a "potential" ISP. However, it uses a process that it describes as involving an arbitrary criteria (that SWBT unilaterally selected) of 200 calls per month or calls over 60 minutes, followed up by some type of manual dial tone check, and it has admitted the results are not accurate. (See SWBT Response to Interrogatory 13, quoted in Ashby Direct, p. 16). Thus, neither SWBT nor Complainants have a mechanism for precisely identifying each and every minute of local traffic they are terminating to ISPs as opposed to other customers, in Complainants' case in particular because SWBT is not providing full originating records as required by the agreements. PNC is better able to respond than the other Complainants are because it currently serves only one ISP, but it faces the same issues as the other Complainants going forward. SWBT states no basis for its criticism of PNC's detailed response, nor does it explain why PNC should be able to answer the question with complete precision when SWBT has stated a complete inability to provide the same information to Complainants. PNC had to undertake a special process, outside the ordinary course of business, to generate the information that it provided. That information was a full response.

5. Regarding (3) reciprocal compensation rates, PNC provided a full response by identifying the contract rate, which had previously been identified in testimony. SWBT does not criticize this response in its motion.

6. Regarding (4) ISP customer name, address and telephone numbers, PNC provided a full response. SWBT's criticism consists solely of the statement that PNC only identified one ISP. There is only one. PNC did not suggest in its response that it had omitted any information. As indicated in the response, the telephone numbers are identified in the nine-page report discussed above.

7. Regarding (5) prices charged to ISP customers, PNC provided a full response. SWBT did not criticize this response in its motion.

8. Regarding (6) identification of any incentives or revenue sharing with ISP customers, PNC provided a full response. SWBT did not criticize this response in its motion.

9. Regarding (7) ISP collocation contracts and (8) ISP service agreements, PNC provided a full response. SWBT's only criticism was that PNC stated that no document has been found. As best PNC can tell, there is no signed document. A draft document was prepared, which created uncertainty as to whether a signed document existed. PNC was not comfortable stating categorically that a document did not exist, and stated that if one was found it would be provided. Inquiries about the potential existence of such a document have continued since the July 31 response date, but it continues to appear that no document was ever signed. PNC does not understand the data request to encompass a draft document that was not signed and was not made into a contract. Nonetheless, PNC provided SWBT with a copy of the draft document on August 8, 2000.

10. PNC has complied with the Commission's July 20 order fully, in good faith, and to the best of its ability. SWBT's motion for sanctions is without merit.

11. SWBT continues to attempt to stand this case on its head. The agreements require the parties to pay reciprocal compensation on all local traffic, without regard to the identity or

business of the called party. Complainants have identified the amount of local traffic they have terminated for SWBT, as well as the amount of reciprocal compensation that SWBT has refused to pay, as best they can given SWBT's refusal to provide complete originating records as required by the interconnection agreements. SWBT did not assert in its Motion for Sanctions that Complainants' response regarding total local minutes and amounts due (item (1)) was incomplete. Complainants have identified the applicable agreements and information pertinent to the interpretation thereof. In testimony, Complainants have met their burden of proving that all local traffic, including the traffic in dispute, is subject to reciprocal compensation. It is SWBT that contends that it should not have to pay reciprocal compensation on a particular portion of local traffic, namely calls terminating to called parties that are ISPs. It is SWBT that contends the traffic is interstate, not local. It is SWBT that has the burden of proving this assertion. (See, e.g., Section 386.430, burden of proof on party seeking to avoid PSC order (i.e. here the order approving interconnection agreements applying reciprocal compensation to all local traffic), MAI 3.01, burden of proof of proposition of fact is upon party who relies upon the proposition). Further, as the testimony shows, SWBT had no right to withhold payments under the interconnection agreements and instead should have made payments and brought its challenge, again bearing the burden of proof. Yet, SWBT has admitted that it is not able to precisely separate out this portion of traffic. Complainants cannot precisely separate out this portion of local traffic either, nor is there any reason for them to have had established a process for doing so. The agreements do not require any such separation of local traffic, and Complainants have no established method for undertaking such a separation of local traffic. This discovery dispute only serves to confirm what SWBT has admitted in its discovery responses: calls to ISPs are local calls. SWBT stated: "For local calls originating from CLEC end user

customers, SWBT is currently unable to separately identify ISP traffic from other types of calls.” (SWBT Response to Interrogatory 13, quoted in Ashby Direct, p. 16)(emphasis added). All local calls are subject to reciprocal compensation under the agreements. There is no merit to SWBT’s attempt to avoid its obligation to pay such compensation through a motion for discovery sanctions.

12. SWBT’s frustration that Complainants do not have information helpful to its efforts to prove an exception to the applicability of reciprocal compensation to local traffic should be seen for what it really is, namely frustration over its inability to prove something that does not exist. The information is not there, because SWBT’s claim is spurious. Complainants’ testimony does prove that the traffic in dispute is “true local traffic”, to use SWBT’s phrase (not a contract phrase). PNC’s obligation under the Commission’s July 20 order was not to prove its case, but rather to respond to the questions as best as it could. The questions do not seek the information SWBT describes as “critical” to its case regarding the beginning point of communications (Motion for Sanctions, paragraph 10) – i.e. SWBT’s own originating records. PNC provided the information regarding the “end point” of the communications in its nine-page report, identifying its ISP customer and the telephone numbers to which SWBT-originated calls have been terminated, contrary to SWBT’s unfounded complaints. Moreover, SWBT’s assertion in its Motion that the ISP telephone numbers to which calls are delivered constitute the “end point of the communications” (Motion, paragraph 10), concedes the ultimate factual issue in the case – local calls do terminate to called ISPs. SWBT did not request any information about what the ISPs have specifically done for each of their customers once calls have been terminated to them, precisely because such information has nothing to do with the “end point of the

communications". Local calls to ISPs terminate to ISPs and are subject to reciprocal compensation.

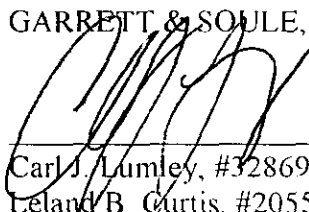
13. As explained in the WorldCom Motion for Protective Order to Conclude Discovery, the Complaints only seek a determination that reciprocal compensation applies to all local traffic, including calls terminated to ISPs. They do not seek a call-by-call evaluation of all traffic terminated for SWBT or a determination therefrom of the actual amount owed by SWBT, or an award of such amount. Such matters will be resolved between the parties through dispute resolution or litigation in court, once the Commission resolves the dispute over SWBT's failure to pay reciprocal compensation on all local traffic and its attempt to obtain free termination of a portion of that traffic based on its unilateral and arbitrary identification of a portion of that traffic as potentially being terminated to ISPs. The Commission need only address the applicability of reciprocal compensation rates to local traffic and the fact that calls terminated to ISPs within a local calling scope constitute local traffic.

14. SWBT may have requested the information more than three months ago, but Complainants timely objected. Given that SWBT did not promptly take issue with the objections, Complainants reasonably concluded that SWBT accepted the objections. It was only recently that SWBT apparently changed its mind and began to pursue the matter further. In the end, Complainants were afforded 7 working days to respond initially by July 31, not three months, and not the 20 days that would usually be available under the rules. Presumably, that is why the Commission's Order expressly acknowledged that the initial responses might be incomplete. However, PNC was able to respond fully on July 31 because of the smaller scale of its operations.

15. SWBT will no doubt reply to this filing. The Commission should not consider any new information or criticism from SWBT. SWBT offered only minimal, unexplained criticisms of PNC in its motion and should not be allowed to expand upon them after PNC has responded.

WHEREFORE, PNC prays the Commission to deny SWBT's Motion for Sanctions.

CURTIS, OETTING, HENIZ,
GARRETT & SOULE, P.C.

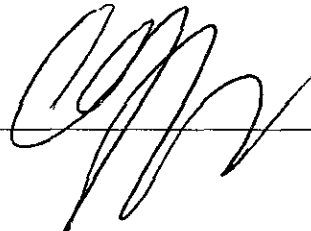


Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 South Bemiston, Suite 200
Clayton, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)
clumley@cohgs.com
lcurtis@cohgs.com

Attorneys for 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 mailed to all parties listed on the attached service, via U.S. Mail, postage paid, on the 9th day of August, 2000.



Michael Dandino
Office of Public Counsel
Missouri Public Service Commission
P.O. Box 7800
Jefferson City, MO 65102
(573) 751-5562

Dan Joyce
General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
(573) 751-9285

Anthony K. Conroy
Legal Department
Southwestern Bell Telephone Company
One Bell Center, Room 3516
St. Louis, MO 63101
(314) 247-0014