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October 13, 1999

**FILED**

OCT 13 1999

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-2000-226

Dear Judge Roberts:

Enclosed for filing with the Missouri Public Service Commission in the above-referenced case is an original and 14 copies of Southwestern Bell Telephone Company's Motion to Dismiss Complaint for Failure to State a Claim and in the Alternative, Answer to Complaint.

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

FILED  
OCT 13 1999  
Missouri Public  
Service Commission

Brooks Fiber Communications of Missouri )  
Inc. )  
v. )  
Southwestern Bell Telephone Company. )

Case No. TC-2000-226

**SOUTHWESTERN BELL TELEPHONE COMPANY'S  
MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM  
AND IN THE ALTERNATIVE, ANSWER TO COMPLAINT**

COMES NOW Southwestern Bell Telephone Company (SWBT), and for its Motion to Dismiss the Complaint filed in this case by Brooks Fiber Communications of Missouri, Inc. (Brooks), and in the alternative for its Answer to Brooks' Complaint, states to the Missouri Public Service Commission (Commission) as follows:

**BACKGROUND**

In its Complaint, Brooks, a subsidiary of MCI WorldCom, again asks the Commission to ignore the fundamental interstate jurisdictional nature of Internet traffic and, in direct contravention to the Commission's decision in the Birch Telecom Internet arbitration,<sup>1</sup> rule that interstate, interexchange traffic carried by Brooks for a portion of its journey to the Internet is really "local traffic" which Brooks "terminates." Brooks attempts to shoehorn this interstate and interexchange Internet traffic into a "local traffic" classification so that it can claim it is entitled to reciprocal local compensation for "terminating" such traffic pursuant to the interconnection agreement between SWBT and Brooks approved by the Commission on May 15, 1997, despite the fact that the Federal Communications Commission (FCC) has already held that this traffic is

<sup>1</sup> 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).

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not local and does not terminate on Brooks' network. For the reasons described below, the Commission should reject Brooks' attempt to do an end run around the Commission's well-reasoned decision in the Birch Telecom case, in which the Commission appropriately deferred to the jurisdiction of the FCC over this traffic, and dismiss Brooks' Complaint pursuant to Rule 2.070(6) for failure to state sufficient facts upon which relief can be granted.<sup>2</sup>

As background, SWBT and Brooks entered into a comprehensive interconnection agreement pursuant to the federal Telecommunication Act of 1996 (Act) on February 10, 1997. On February 18, 1997, Brooks submitted the interconnection agreement between SWBT and Brooks to the Commission for approval. Brooks did not file a request for arbitration of any unresolved interconnection issues relating to the interconnection agreement with SWBT. The Commission approved the relevant provisions of the interconnection agreement between SWBT and Brooks on May 15, 1997. It is pursuant to this interconnection agreement that Brooks makes its claim for reciprocal local compensation for Internet traffic in this case.

From 1983 until present, including specifically the time period when interconnection negotiations took place between Brooks and SWBT in early 1997, the FCC has exercised its jurisdiction over interstate enhanced service providers (ESPs), which according to the FCC includes Internet service providers (ISPs), and exempted these carriers from paying the interstate access charges which would otherwise apply to their provision of this interstate, interexchange traffic. Despite this undisputed fact, however, Brooks now claims -- nearly 3 years after the negotiations between Brooks and SWBT took place -- that both Brooks and SWBT actually intended and agreed in early 1997 to "reclassify" Internet traffic as "local traffic" to which

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<sup>2</sup> Rule 2.070(6) provides that "[T]he commission, without argument and without hearing, may dismiss a complaint for failure to state facts upon which relief can be granted or may strike irrelevant allegations."

reciprocal compensation applied, instead of the interstate, interexchange traffic the FCC had consistently determined it to be, and in addition, not even mention this alleged reclassification in the interconnection agreement!

As will be described below, there is absolutely no evidence that the parties even discussed ESP (including Internet) traffic, much less mutually agreed to recharacterize such traffic as something different (i.e., local) than what the FCC had already repeatedly determined it to be. Had Brooks taken the position during its interconnection negotiations with SWBT -- which it did not -- that Internet traffic should be treated differently (i.e., as "Local Traffic") for purposes of reciprocal local compensation than what the FCC had already determined it to be, and that such a provision should be included in the interconnection agreement, SWBT would not have agreed to include such language. Brooks could then have raised this issue as an unresolved issue and filed an arbitration petition with the Commission, just as Birch Telecom did some two years later when SWBT would not agree to reclassify Internet traffic as local traffic and pay Birch reciprocal local compensation for Internet traffic.

SWBT's position then -- as now -- was and is that Internet traffic is jurisdictionally interstate, interexchange traffic -- for which reciprocal local compensation is simply not applicable. SWBT did not agree to pay and has not knowingly paid any reciprocal local compensation to Brooks, MFS, MCI or any other CLEC for Internet traffic in Missouri. Beginning at least as early as 1997, when SWBT first became aware that some CLECs were taking the position that Internet traffic should be compensated as if it were local traffic, and continuing on a regular basis since then, SWBT has repeatedly advised CLECs -- including Brooks -- that Internet traffic is jurisdictionally interstate, interexchange traffic, for which reciprocal local compensation is not applicable. For example, on June 9, 1997, (approximately

three months before Brooks and SWBT first exchanged traffic pursuant to their February 10, 1997, interconnection agreement), SWBT sent a letter to numerous CLECs (including Brooks) and the Commission Staff, advising each that Internet traffic was interstate, interexchange traffic subject to the FCC's jurisdiction, to which reciprocal local compensation was not applicable. Copies of the letters sent by SWBT to Brooks and the Commission Staff are attached hereto as Exhibits 1 and 2.

SWBT's position then and now is completely consistent with the Commission's Birch Telecom decision, in which the Commission appropriately recognized that Internet traffic is interstate, not local, and does not terminate at an ISP's location, and deferred to the FCC's jurisdiction over this interstate traffic. SWBT's position is also completely consistent with the FCC's recent Internet Declaratory Ruling, described below, in which the FCC has again confirmed that Internet traffic is interstate, interexchange traffic subject to the FCC's jurisdiction, which is not local and which is not terminated by CLECs.

### **MOTION TO DISMISS**

In its Complaint, Brooks claims that it is entitled to reciprocal local compensation for Internet traffic it carries in Missouri. As used herein, Internet traffic refers to calls originated by the end user of one local carrier (e.g., SWBT), which are destined for and routed to points on or beyond "the Internet"<sup>3</sup> by an Internet Service Provider (ISP) served by (and often affiliated with) a second local carrier (e.g., Brooks) located in the same local calling scope as the SWBT end user originating the call to the Internet. When a SWBT end user originates a call to the Internet

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<sup>3</sup> Congress has defined the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. §230(e)(1). The United States Supreme Court has described the Internet as "an international network of interconnected computers" which "enables tens of millions of people to communicate with one another and to access vast amounts of information from around the world," Reno v. ACLU, 521 U.S. 844, 138 L.Ed. 2d 874, 884, 117 S.Ct. 2329, 2334 (1997).

through an ISP served by Brooks, the call begins on the network facilities of SWBT, is handed off to and traverses Brooks' network facilities (including network elements purchased from SWBT), and is connected to the Internet through the facilities of the ISP. In this example, a direct, unbroken, end-to-end stream of communication is established between SWBT's originating end user and the destination point(s) he or she wishes to reach on or beyond the Internet.

The crux of Brooks' claim in this case is that the Commission should ignore the explicit definition of "Local Traffic" and "Terminating Traffic" contained in Appendix DEFINE of the February 10, 1997 interconnection agreement between SWBT and Brooks (which by their very terms exclude Internet traffic) and ignore the language contained at pp. 5-6 of the main body of the interconnection agreement between SWBT and Brooks which describes the type of traffic to which local reciprocal compensation applies, and instead "interpret" (i.e., redefine) these provisions to include Internet traffic. By belatedly attempting to characterize its claim as arising under its interconnection agreement with SWBT, which was executed nearly three years ago, Brooks seeks to avoid both the FCC's intervening Internet Declaratory Ruling<sup>4</sup> and this Commission's final decision in Birch Telecom that Internet traffic is not "local," but rather is interstate, interexchange access traffic subject to the jurisdiction of the FCC, and for which reciprocal compensation is not applicable under section 251(b)(5) of the Act. The Commission should reject Brooks' attempt to do an "end-run" around the specific language contained in the interconnection agreement and the FCC's and this Commission's previous decisions and dismiss

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<sup>4</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-98, FCC 99-38 (released February 28, 1999) (Internet Declaratory Ruling).

Brooks' Complaint pursuant to Rule 2.070(6) for one simple reason -- it fails to state facts upon which relief can be granted.

As Brooks admits in its Complaint, pursuant to the February 10, 1997. interconnection agreement between SWBT and Brooks, and as contemplated by §251(b)(5) of the Act, reciprocal compensation is only applicable to local traffic. Brooks Complaint, &16. As a critical component of the compensation arrangements between Brooks and SWBT, the parties did not leave the term "Local Traffic" undefined. Instead, the parties very explicitly defined "Local Traffic" in Appendix DEFINE of their interconnection agreement as follows:

"Local Traffic," means traffic that originates and terminates within a SWBT exchange including SWBT mandatory local calling scope arrangements. Mandatory Local Calling Scope is an arrangement that requires end users to subscribe to a local calling scope beyond their basic exchange service area. (emphasis added).

Nor did the parties leave "Terminating Traffic" undefined. Instead, Brooks and SWBT very explicitly defined "Terminating Traffic" in Appendix DEFINE as follows:

"Terminating Traffic" is a voice-grade switched 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.

Finally, in the main body of their interconnection agreement, beginning at the top of p. 5, SWBT and Brooks explicitly agreed to the type of traffic to which reciprocal local compensation would apply as follows:

A. Reciprocal Compensation for Termination of Local Traffic

1. Applicability of Rates

- a. The rates, terms and conditions in this subsection A apply only to the termination of Local Traffic, except as explicitly noted.
- b. Brooks agrees to compensate SWBT for the termination of Brooks Local Traffic originated by Brooks end users in the

SWBT exchanges described in Appendix DCO and terminating to SWBT end users located within those exchanges referenced therein. SWBT agrees to compensate Brooks for the termination of SWBT Local Traffic originated by SWBT end users in the SWBT exchanges described in Appendix DCO and terminating to Brooks end users located within those exchanges referenced therein.

Brooks' Complaint must be dismissed because there is no question -- either of law or fact -- that Internet traffic is not "Local Traffic" which is "terminating to Brooks end users" for which reciprocal compensation is applicable under the February 10, 1997, interconnection agreement between Brooks and SWBT. Contrary to Brooks' implication, the FCC -- which clearly has jurisdiction over Internet traffic -- has never characterized Internet traffic as "local traffic." To the contrary, over the past approximately 16 years, the FCC has repeatedly and unequivocally recognized that enhanced service providers (ESPs) -- which according to the FCC includes ISPs - - utilize interstate access service in connection with their provision of services. For example, in its original decision exempting ESPs from interstate access charges, the FCC stated:

Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small, who "leak" traffic into the exchange. In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried out of state. These may consist either of owned or leased transmission capacity or a specific message service such as WATS. Depending upon the nature of its operation, a given private line or WATS user may or may not make significant use of local exchange service for interstate access. Thus, in the case in which a user connects an interstate private line to a PBX, some traffic may originate and terminate at the user's location and other traffic may "leak" into the exchange in order that the calls can be completed at another location. A facilities-based carrier, reseller or enhanced service provider might terminate few calls at its own location and thus



would make relatively heavy interstate use of local exchange services and facilities to access its customers. (emphasis added).<sup>5</sup>

Since 1983, the FCC has continued to exercise its jurisdiction over this interstate, interexchange traffic by exempting ESPs, including ISPs, from the payment of tariffed interstate access charges which would otherwise be applicable to this interstate traffic. This exemption from paying interstate access charges, however, only confirms the fundamentally interstate and interexchange nature of this traffic. As Brooks recognizes in its Complaint, interstate access charges do not apply to local traffic. The FCC's long-standing policy of exempting ESPs from paying access charges on Internet traffic would be wholly unnecessary (and beyond the FCC's jurisdiction under Section 2 of the Communications Act of 1934, 47 U.S.C. §152) if Internet traffic was "local" traffic, as Brooks now claims in this case. The FCC reaffirmed this point in its Internet Declaratory Ruling when it stated:

The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the [FCC] exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary.<sup>6</sup>

Consistent with its long-standing treatment of ESP traffic as interstate, the FCC has recently specifically reaffirmed that Internet traffic is jurisdictionally interstate, is not "local" and does not "terminate" at the ISP's location, and in doing so has once again exercised its jurisdiction over Internet traffic and directly rejected the crux of Brooks' argument in this case. In its February 28, 1999, Internet Declaratory Ruling, the FCC concluded that "the communications at issue here [Internet traffic] do not terminate at the ISP's local server, as

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<sup>5</sup> In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, released August 22, 1983, Paragraph 79.

<sup>6</sup> Internet Declaratory Ruling, at ¶16.

CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state.<sup>7</sup> The FCC went on to state that:

We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of Section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic (emphasis added).<sup>8</sup>

The Missouri Commission has also recently addressed the jurisdictional nature of Internet traffic. In early 1998, Birch Telecom of Missouri, Inc. filed a petition for arbitration with the Commission in which it asked the Commission to determine -- just as Brooks does here -- that Internet traffic was local in nature and thus subject to the reciprocal compensation requirements of §251(b)(5) of the Act. Birch recognized that the definition of "Local Traffic" proposed by SWBT -- which is nearly identical to the definition of "Local Traffic" contained in the Brooks/SWBT interconnection agreement, would not include Internet traffic. As the Commission stated on April 6, 1999, "[T]he only issue presented for arbitration was whether calls made within the same local calling scope to an Internet Service Provider (ISP) are local in nature and subject to the payment of reciprocal compensation."<sup>9</sup> The Commission then recognized that it is the FCC -- not this Commission -- which has primary jurisdiction to determine appropriate compensation arrangements for interstate Internet traffic. As described above, for at least the past 16 years, the FCC has exercised this jurisdiction by repeatedly finding that Internet traffic is not local, does not terminate at the ISP's location, and, but for the FCC's

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<sup>7</sup> Internet Declaratory Ruling, at &12 (emphasis added).

<sup>8</sup> Internet Declaratory Ruling, at &26, note 87.

<sup>9</sup> Birch Telecom, p. 1.

temporary access charge exception for ESPs, interstate access charges would apply to this traffic. In the current rulemaking proceeding which has begun at the FCC, the FCC continues to exercise its jurisdiction over this inherently interstate traffic, and is addressing the very same issue Brooks seeks to litigate here, i.e., appropriate compensation arrangements for interstate Internet traffic.

Faced with the FCC's unequivocal declaratory ruling that Internet traffic does not terminate at the ISP, is not local traffic and is not subject to the reciprocal compensation requirements contained in Section 251(b)(5) of the Act,<sup>10</sup> Brooks is left to argue that when it and SWBT negotiated their interconnection agreement back in early 1997, and specifically negotiated the reciprocal compensation provisions and definitions of "Local Traffic" and "Terminating Traffic," they actually intended to explicitly "carve out" Internet traffic from what Brooks, SWBT, this Commission and the FCC universally recognized it to be -- interstate access traffic -- and instead agreed to relabel Internet traffic (at least for purposes of intercompany compensation) as "local" traffic.

This last-ditch argument by Brooks to avoid both the Commission's Birch Telecom decision and the FCC's jurisdiction over this interstate traffic must also fall flat on its face, however. Brooks does not and cannot claim that either SWBT or Brooks even mentioned Internet traffic -- much less that both SWBT and Brooks intended and agreed that Internet traffic should be carved out and treated differently than what the FCC, SWBT and Brooks have all know it to be since 1983 (i.e., interstate access traffic) when they

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<sup>10</sup> It is interesting to note that before the FCC issued its Internet Declaratory Ruling, Brooks' affiliate MCI took the same position that Birch Telecom took in Missouri -- i.e., that as a matter of law, Internet traffic is terminated at the ISP's location, and is local in nature, not interstate. See Response of MCI Telecommunications Corporation in Support of the Motion for Summary Judgment by PAC-West Telecomm, Inc. and in Opposition to Pacific Bell's Motion for Summary Judgment, attached hereto as Exhibit 3. As described above, however, now that the FCC has specifically rejected each of these arguments, MCI WorldCom has apparently abandoned them as well.

negotiated their interconnection agreement in 1997. SWBT has attached to this Motion to Dismiss as Exhibit 4 the affidavit of Russell Ewing, who participated on behalf of SWBT in the negotiations with Brooks which led to the February, 1997, interconnection agreement, and who was specifically responsible for negotiating on behalf of SWBT the provisions applicable to reciprocal compensation for "Local Traffic." As described in Mr. Ewing's affidavit, the individuals negotiating on behalf of Brooks never mentioned treating enhanced service provider traffic, including Internet traffic, as something different than what SWBT understood it to be based on the FCC's access charge orders, i.e., interstate access traffic. (Exhibit 4, Ewing Affidavit, para. 3). Furthermore, as described in Mr. Ewing's affidavit, had Brooks taken the position during the negotiations that the parties should pay each other reciprocal compensation for Internet traffic "as if" it were local traffic, SWBT would not have agreed to such a provision, but instead would have arbitrated this issue, just as SWBT did with Birch Telecom. (Exhibit 4, Ewing Affidavit, para. 4). Finally, again as described in Mr. Ewing's attached affidavit, SWBT insisted on the very explicit definitions of "Local Traffic" and "Terminating Traffic" contained in the agreement and described above in order to make very clear that traffic which Brooks merely carried -- such as Internet traffic -- but which was not terminated by Brooks was not "Local Traffic" and thus not subject to the requirement to pay reciprocal local compensation. (Exhibit 4, Ewing Affidavit, para. 5).

There clearly was no "meeting of the minds" between SWBT and Brooks in 1997 that Internet traffic should be included in the definition of "Local Traffic" contained in the interconnection agreement between Brooks and SWBT. In fact, the parties' very explicit definitions of "Local Traffic" and "Terminating Traffic" point to the inescapable conclusion that from all outward, objective expressions of "intent," both SWBT and Brooks intended Internet

traffic to be treated just as what both parties and the FCC recognized it was -- interstate access traffic.

Under the specific terms of the interconnection agreement between Brooks and SWBT, in order for reciprocal local compensation to apply, the traffic in question must originate and terminate in the same local calling area, and traffic does not terminate unless delivered to an end user as a result of an attempt to communicate with that end user. Internet traffic is routed to an ISP not for the purpose of communicating with the ISP, but rather for the purpose of reaching a point on or beyond the Internet. What secret intent or belief Brooks now claims it harbored during negotiations in 1997 is irrelevant to what the parties explicitly agreed to. If indeed Brooks had such a desire that the parties treat Internet traffic differently than what the FCC had already decided, Brooks was required to raise it during the negotiations. Furthermore, Brooks knew as early as June, 1997, that SWBT would not pay reciprocal local compensation for interstate Internet traffic, yet inexplicably waited over two years to file its Complaint with the Commission. Brooks should not now be permitted to in effect renegotiate its 1997 interconnection agreement with SWBT. It is clear that much different language -- which SWBT would not have agreed to -- would have been necessary to accomplish the purpose Brooks now seeks.

Finally, in paragraph 21 of its Complaint, Brooks lists several "examples" which it claims indicates that SWBT and Brooks "understood and intended for local calls to ISPs to be treated as Local Traffic subject to reciprocal compensation under the Agreement." As will be described below, Brooks' misplaced reliance on these "examples" actually illustrates the lack of any real evidence to support its complaint. SWBT responds to each of Brooks' "examples" as follows:

- Brooks "example:" SWBT assigns its ISP customers a local seven-digit telephone number when they purchase local service for their use in providing information services;

SWBT response: SWBT assigns its ISP customers a local seven digit telephone number (just as Brooks does) because the FCC, in its exercise of jurisdiction over the interstate, interexchange services provided by ISPs, has ordered that ISPs are exempt from interstate access charges that would otherwise be applicable to this traffic. The number of digits a caller dials to reach an ISP is irrelevant for purposes of determining the jurisdictional nature of the call.

- Brooks "example:" When SWBT customers make local calls to ISPs, SWBT bills its customers for those calls pursuant to its local tariff;

SWBT response: SWBT customers do not make "local" calls to the Internet. SWBT does not charge its end-user customers access charges to reach any provider of interstate, interexchange services. Had the FCC in its exercise of jurisdiction over this traffic not exempted ISPs from paying interstate access charges, ISPs would pay originating interstate access charges to local carriers for calls placed to the Internet via the ISP.

- Brooks "example:" Similarly, SWBT provides local services to ISPs under ordinary local tariffs for business customers;

SWBT response: As Brooks is well aware, the FCC, which has jurisdiction over this interstate, interexchange Internet traffic, required all LECs to provide interstate access service to ESPs, including ISPs, for the same price as tariffed local business service.

- Brooks "example:" In ARMIS and other reports filed with the FCC, SWBT has treated revenues and expenses associated with ISP traffic as intrastate rather than interstate;

SWBT response: In January 1998, SWBT advised the FCC that beginning with its reported results for 1997 and going forward, SWBT was reporting and assigning Internet traffic as interstate access for separations purposes. A copy of the letter from SWBT to Ken Moran, Chief of the Accounting and Audits Division of the FCC, in which SWBT advised the FCC of its reporting of Internet traffic as interstate access traffic is attached hereto as Exhibit 5. Since 1997, SWBT has also noted in its ARMIS reports that it considers Internet traffic to be jurisdictionally interstate.

- Brooks "example:" SWBT does not have measures in place that segregate ISP traffic from other local traffic and measure such traffic for billing purposes. Indeed the industry standards that govern the form of bills that

carriers send one another for reciprocal compensation do not require local calls to ISPs to be segregated or treated any differently from any other local calls.

SWBT response: Since becoming aware that some CLECs intended to claim reciprocal local compensation for interstate Internet traffic, SWBT has developed processes to attempt to identify Internet traffic, based on records relating to calls originated by SWBT end-users to ISPs served by CLECs, and exclude it from true local traffic for which reciprocal compensation is paid. Beginning in late 1997, SWBT implemented procedures to identify and track this traffic. As it has been able to identify Internet traffic, SWBT has excluded Internet traffic from the traffic on which it pays CLECs reciprocal local compensation, including Brooks.

For the reasons described above, Brooks' Complaint for reciprocal local compensation for Internet traffic must be dismissed by the Commission, as it clearly fails to state sufficient facts upon which relief can be granted. The Commission has already recognized in the Birch Telecom decision that the FCC has jurisdiction over Internet traffic. It would clearly be an inefficient use of the Commission's resources to relitigate this issue repeatedly, as Brooks, MCI WorldCom and MFS now seek to do. For the reasons described above, SWBT respectfully requests that the Commission issue an Order dismissing Brooks' Complaint pursuant to Commission Rule 2.070(6) for failing to state facts upon which relief can be granted.

#### **SWBT'S ANSWER TO BROOKS' COMPLAINT**

Without waiving its position that Brooks' Complaint for reciprocal local compensation for Internet traffic fails to state sufficient facts upon which relief can be granted, SWBT answers each of the specific allegations contained in the corresponding numbered paragraphs of Brooks' Complaint as follows with the express understanding that unless SWBT specifically admits an allegation contained in Brooks' Complaint, SWBT denies the allegation:

1. SWBT specifically denies that Brooks' Complaint states a valid claim or action upon which relief can be granted. SWBT admits that the Commission is authorized to hear

Brooks' Complaint solely under the Act. SWBT denies the remaining allegations contained in paragraph 1 of Brooks' Complaint.

2. SWBT admits that it entered into an interconnection agreement with Brooks pursuant to the Act. SWBT admits that the entire interconnection agreement may be relevant to Brooks' Complaint. SWBT admits the remaining allegations of paragraph 2 of Brooks' Complaint.

3. SWBT admits that the interconnection agreement between SWBT and Brooks requires the parties to pay each other reciprocal compensation pursuant to the requirement of §251(b)(5) of the Act at the rates agreed therein for Local Traffic as defined in the agreement. SWBT denies that interstate Internet traffic is Local Traffic or Terminating Traffic as defined in the agreement or as defined by the FCC. SWBT denies that it has wrongfully withheld any reciprocal compensation payments relating to Internet traffic.

#### **PARTIES**

4. SWBT does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 of Brooks' Complaint regarding the corporate structure of Brooks or MCI WorldCom, and therefore denies those allegations.

5. The information contained in paragraph 5 of Brooks' Complaint does not call for any response by SWBT.

6-7. SWBT admits the allegations contained in paragraphs 6 and 7 of Brooks' Complaint.

#### **JURISDICTION**

8. SWBT admits that the Commission has jurisdiction pursuant to federal law over complaints relating to an interconnection agreement entered into pursuant to the Act and



approved pursuant to the Act by the Commission. SWBT denies that the Commission has jurisdiction under any state law to decide this Complaint, and denies that Brooks has asserted any claim under state law. SWBT denies that the Commission has jurisdiction over Internet traffic as defined above, or has authority to reclassify Internet traffic as "Local Traffic." SWBT denies the remaining allegations contained in paragraph 8 of Brooks' Complaint.

### **GENERAL ALLEGATIONS**

9. SWBT does not have sufficient information to either admit or deny the general allegations contained in paragraph 9 of Brooks' Complaint, and therefore specifically denies each and every allegation contained in this paragraph.

10. SWBT admits that in general, the Act requires incumbent LECs to open their networks for use by competitors.

11. SWBT admits that in general, that the terms and conditions upon which carriers such as Brooks interconnect with SWBT are contained in interconnection agreements entered pursuant to the Act. SWBT admits that the Act contemplates negotiated interconnection agreements between carriers, and also authorizes a state commission to arbitrate any open issue relating to negotiations contemplated by the Act. SWBT admits that pursuant to §252(e), any interconnection agreement under the Act adopted by negotiation or arbitration shall be submitted for approval to the state commission for approval or rejection.

12. SWBT admits in general, that parties to interconnection agreements under the Act may agree to obligations that exceed the requirements of the Act, but SWBT denies that it has done so here, and in particular with respect to the local reciprocal compensation provisions contained in the interconnection agreement between SWBT and Brooks.

13. SWBT admits that inter-carrier compensation is an issue that may arise in the context of negotiating an interconnection agreement under the Act. SWBT admits that customers of one local exchange carrier will likely call customers of another local exchange carrier. SWBT admits that reciprocal compensation and access charges are two mechanisms local exchange carriers utilize to receive compensation for originating and terminating calls. SWBT specifically denies the remaining allegations of paragraph 13.

14. SWBT admits that pursuant to the Act, LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of local calls. §251(b)(5). SWBT admits that under the Act, reciprocal compensation mechanisms must provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. §252(d)(2). SWBT admits that when a customer of one LEC originates a local call which is terminated to an end user customer served by a different LEC, the originating end user does not pay the LEC which terminates the local call for terminating this call. The caller originating this call pays its LEC for local telephone service, usually on a flat rate basis. SWBT admits that under the Act, the LEC serving the customer that originated a local call which terminates to a customer served by a different LEC is required to pay reciprocal compensation to the second LEC to permit the second LEC to recover its costs of terminating this call. SWBT denies any other allegations contained in paragraph 14 of Brooks' Complaint.

15. SWBT admits that access charges are another form of inter-carrier compensation, applicable generally to interexchange calls. SWBT admits that when any end user customer of a LEC initiates an interexchange call, the end user customer initiating this call will generally pay the interexchange carrier selected (which may be the same carrier as the end user's LEC) to carry

the call. SWBT admits that interexchange carriers generally pay LECs access charges to compensate LECs for the cost of local facilities utilized to either originate or terminate interexchange calls. SWBT admits that the service provided by LECs in this context is generally referred to as "exchange access" service as defined in the Act. SWBT would point out, however, that some providers of interstate interexchange service (e.g., enhanced service providers such as ISPs) are exempt under FCC rules from paying interstate access charges to LECs despite the fact that these interstate calls are interexchange -- and not local -- in nature. SWBT notes that the interstate character of Internet traffic is confirmed by the very existence of the FCC access charge exemption, as the FCC has jurisdiction to grant the exemption only because ESP traffic, including Internet traffic, is interstate in nature. SWBT denies any remaining allegations contained in paragraph 15 of Brooks' Complaint.

16. SWBT admits that Section 5.3 of the interconnection agreement between SWBT and Brooks defines "Local Traffic" and Terminating Traffic" as defined therein and described above, and also describes which traffic reciprocal local compensation applies to, again at the rates agreed therein. SWBT denies that "[L]ocal calls to ISPs constitute Local Traffic subject to reciprocal compensation under the Agreement" as alleged by Brooks in the last sentence of paragraph 16 of its Complaint. As described above in SWBT's Motion to Dismiss, Internet traffic is not local traffic, but rather is interstate, interexchange traffic subject to the FCC's jurisdiction, to which reciprocal compensation does not apply pursuant to the interconnection agreement between SWBT and Brooks.

17. SWBT admits that pursuant to the interconnection agreement between it and Brooks, the reciprocal compensation arrangements set forth therein are not applicable to Switched Exchange Access Services. SWBT admits that the interconnection agreement between

it and Brooks provides that when the parties provide each other with Switched Exchange Access Services, they will share any access charges paid by long-distance companies. SWBT specifically denies that it has treated Internet traffic as "Local Traffic" subject to reciprocal compensation under the interconnection agreement with Brooks. SWBT specifically denies all other allegations contained in paragraph 17 of Brooks' Complaint.

18. SWBT denies the allegations contained in paragraph 18 of Brooks' Complaint.

19. SWBT admits that ISPs regularly provide their customers with a service which allows their customers to initiate an interstate, interexchange telephone call to access the Internet. SWBT admits that the Act contains a definition of "Information Services" as quoted in paragraph 19 of Brooks' Complaint. Pursuant to numerous FCC decisions, all enhanced service providers (ESPs), including ISPs, are exempt from paying interstate access charges to LECs for the interstate access service they use. The FCC jurisdiction over this traffic and to exempt it from access charges because it is interstate traffic. Based solely on the FCC's access charge exemption, ESPs are permitted to purchase their links to the public switched telephone network at prices equivalent to intrastate business tariffs, rather than through interstate access tariffs. SWBT specifically denies any remaining allegations contained in paragraph 19 of Brooks' Complaint.

20. SWBT does not have sufficient information to either admit or deny whether the "most common method by which an Internet user connects to an ISP is via the public switched telephone network" and therefore denies this allegation. SWBT admits that pursuant to the FCC's access charge exemption decisions, ESPs (including ISPs) purchase their interstate access at rates contained in SWBT's intrastate business tariff. If a SWBT customer chooses to initiate an interstate, interexchange call, SWBT does not bill its customer for this call. Rather, SWBT

receives its tariffed access rates from the interexchange carrier that carries this call between exchanges. In the case of interstate Internet traffic, however, based on the FCC's exercise of jurisdiction over this traffic, SWBT does not receive any access revenues, but instead receives only an amount equal to SWBT's tariffed basic local rate for businesses. SWBT denies that Internet traffic destined for ISPs is "local traffic." SWBT cannot answer for other local exchange carriers, but SWBT specifically denies that it has not attempted to report Internet traffic as interstate traffic in reports filed with the FCC. SWBT denies any other allegation contained in paragraph 20 of Brooks' Complaint.

21. SWBT denies each of the allegations and "examples" contained in paragraph 21 of Brooks' Complaint.

22. SWBT denies each of the allegations contained in paragraph 22 of Brooks' Complaint.

23. SWBT denies that it breached the interconnection agreement with Brooks. Internet traffic is not local traffic, and therefore SWBT's refusal to pay Brooks reciprocal local compensation for Internet traffic does not violate, but rather is consistent with, the interconnection agreement.

24. SWBT admits that approximately two years after Brooks and SWBT executed their interconnection agreement, SWBT received the demand letter attached to Brooks' Complaint claiming that SWBT was required to pay Brooks reciprocal local compensation for Internet traffic. As described above, the 1997 interconnection agreement between SWBT and Brooks does not provide for reciprocal local compensation to be paid for interstate Internet traffic, and therefore SWBT denies that the "obligation" alleged by Brooks exists. SWBT denies that it has failed to perform its obligations under, and denies that it is in material breach of, its

interconnection agreement with Brooks. SWBT denies that Brooks has suffered any compensable damages, and denies that the amount of damages alleged by Brooks is accurate. In any event, SWBT denies that the Commission has any jurisdiction to award money damages to Brooks in this case.

WHEREFORE, SWBT respectfully requests that the Commission enter an Order dismissing Brooks' Complaint for the reasons described above.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY Anthony K. Conroy /tm  
PAUL G. LANE #27011  
LEO J. BUB #34326  
ANTHONY K. CONROY #35199  
KATHERINE C. SWALLER #34271  
Attorneys for Southwestern Bell Telephone Company  
One Bell Center, Room 3516  
St. Louis, Missouri 63101  
314-235-6060 (Telephone)  
314-247-0014 (Facsimile)



June 9, 1997

Mr. Edward Cadieux  
Director, Regulatory Affairs - Central Region  
Brooks Fiber Properties  
425 Woods Mill Road South,  
Suite 300  
Town and Country, MO 63017

RE: Local Terminating Compensation for Delivery of Internet Service Provider Traffic

Dear Mr. Cadieux:

The purpose of this letter is to address local terminating compensation for the delivery of traffic destined for internet service providers (ISPs).

Originating access to an ISP is accomplished by the ISP's subscribers dialing a seven digit telephone number which local exchange carriers route through their switching networks to the ISP's premises. The ISP often uses special access circuits to transport this originating interexchange access traffic to a distant location.

The FCC has found, and the courts have agreed, that the jurisdiction of traffic is determined by the end-to-end nature of a call. In paragraph 28 of the FCC's *Order Designating Issues for Investigation* in CC Docket No. 88-180, released April 22, 1988, the FCC disagreed with an argument by Southwestern Bell that 800 credit card traffic terminated at the DXC's credit card switch for jurisdictional purposes. The FCC stated that the switching performed at a credit card switch was an intermediate step in a single end-to-end communication. It is the ultimate destination that must be used to jurisdictionalize a call. In the *NARUC vs. FCC* decision issued October 26, 1984, (746 F.2d 1492), the court found that even the use of facilities that are wholly within an exchange may be jurisdictionally interstate as a result of the traffic that uses them.

The FCC provided ISPs, insofar as they are also enhanced service providers, with an access charge exemption that permits ISPs to use local exchange services in lieu of access services to receive originating interstate calls (and to terminate interstate calls to the extent this functionality is required). The use of local exchange services by an ISP does not change, in any way, the jurisdiction of the originating interstate traffic transported over these services to the ISP's premises. In other words, this originating interstate access traffic does not become "local traffic" simply because the FCC permits an ISP to use business local exchange service as its exchange access service.

Mr. Edward Cadieux  
June 9, 1997  
Page 2

In paragraph 1034 of its *Local Competition Order* in CC Docket No. 96-98, released August 8, 1996, the FCC stated that the reciprocal compensation provisions of section 251(b)(5) would only apply to local traffic as defined by the state commission (paragraph 1035). Further, the FCC specifically ruled that reciprocal compensation did not apply to interstate or intrastate interexchange traffic. As such, Southwestern Bell/Pacific Bell will not request, nor will it pay, local terminating compensation for interstate or intrastate interexchange traffic. This includes calls passed to ISPs pursuant to local interconnection agreements since this traffic is jointly provided originating interexchange access. This decision satisfies the spirit and intent of the Telecommunications Act of 1996 and is consistent with the provisions of local interconnection agreements.

If you would like to discuss this matter further, I can be reached on 214-464-8145 or you may call your account manager, Sharon McGee, on 214-464-8147.

Sincerely,



cc: Sharon McGee





June 1, 1997

Mr. John VanEschen  
Manager Telephone Department  
Missouri Public Service Commission  
301 West High Street, Suite 530  
Jefferson City, MO 65101

Dear John:

As discussed in our telephone conversation of June 5, 1997, the purpose of this letter is to address local terminating compensation for the delivery of traffic destined for Internet Service Providers (ISPs).

Originating access to an ISP is accomplished by the ISP's subscribers dialing a seven digit telephone number which local exchange carriers route through their switching networks to the ISP's premises. The ISP often uses special access circuits to transport this originating interexchange access traffic to a distant location.

The FCC has found, and the courts have agreed, that the jurisdiction of traffic is determined by the end-to-end nature of a call. In paragraph 28 of the FCC's *Order Designating Issues for Investigation* in CC Docket No. 88-180, released April 22, 1988, the FCC disagreed with an argument by Southwestern Bell that 800 credit card traffic terminated at the IXC's credit card switch for jurisdictional purposes. The FCC stated that the switching performed at a credit card switch was an intermediate step in a single end-to-end communication. It is the ultimate destination that must be used to jurisdictionalize a call. In the *NARUC VS. FCC* decision issued October 26, 1984, (746 F.2d 1492), the court found that even the use of facilities that are wholly within an exchange may be jurisdictionally interstate as a result of the traffic that uses them.

The FCC provided ISPs, insofar as they are also enhanced service providers, with an access charge exemption that permits ISPs to use local exchange services in lieu of access services to receive originating interstate calls (and to terminate interstate calls to the extent this functionality is required). The use of local exchange services by an ISP does not change, in any way, the jurisdiction of the originating interstate traffic transported

June 9, 1997

over these services to the ISP's premises. In other words, this originating interstate access traffic does not become "local traffic" simply because the FCC permits an ISP to use business local exchange service as its exchange access service.

In paragraph 1034 of its *Local Competition Order* in CC Docket No. 96-98, released August 8, 1996, the FCC stated that the reciprocal compensation provisions of section 251(b)(5) would only apply to local traffic as defined by the state commission (paragraph 1035). Further, the FCC specifically ruled that reciprocal compensation did not apply to interstate or intrastate interexchange traffic. As such, Southwestern Bell/Pacific Bell will not request, nor will it pay, local terminating compensation for interstate or intrastate interexchange traffic. This includes calls passed to ISPs pursuant to local interconnection agreements since this traffic is jointly provided originating interexchange access. This decision satisfies the spirit and intent of the Telecommunications Act of 1996 and is consistent with the provisions of local interconnection agreements.

If you have any questions, I can be reached on 314 247-2509.

Sincerely,

**(SGD.) MARK RUDLOFF**

Director-Competitive Strategy &  
Regulatory Policy

bcc: Mr. Bailey  
Mr. Lane

RUDLOFF 3;

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Pac-West Telecomm, Inc., )  
 )  
Complainant, )  
 )  
v. )  
Pacific Bell, )  
 )  
Defendant. )  
\_\_\_\_\_ )

C. 97-11-034  
Filed November 21, 1997

**RESPONSE OF  
MCI TELECOMMUNICATIONS CORPORATION (U 5011 C)  
IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT  
BY PAC-WEST TELECOMM, INC. AND IN OPPOSITION TO  
PACIFIC BELL'S MOTION FOR SUMMARY JUDGMENT**

Nikayla K. Nail, Esq.  
Regulatory Manager  
Western Public Policy Group  
MCI TELECOMMUNICATIONS CORPORATION  
201 Spear Street, 9<sup>th</sup> Floor  
San Francisco, CA 94105  
Telephone: (415) 228-1150  
Facsimile: (415) 228-1094

March 13, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Pac-West Telecomm, Inc., )

Complainant, )

v. )

Pacific Bell, )

Defendant. )

---

C. 97-11-034

Filed November 21, 1997

**RESPONSE OF  
MCI TELECOMMUNICATIONS CORPORATION (U 5011 C)  
IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT  
BY PAC-WEST TELECOMM, INC. AND IN OPPOSITION TO  
PACIFIC BELL'S MOTION FOR SUMMARY JUDGMENT**

MCI Telecommunications Corporation ("MCI") files this Response pursuant to Rule 45 of the California Public Utilities Commission's ("CPUC") Rules of Practice and Procedure. MCI successfully intervened in this case on January 20, 1998 and files this Response in accordance with the ALJ's Order on the Prehearing Conference, dated February 23, 1998. Consistent with that Ruling, MCI has complied with the following requirements: 1) MCI has not broadened the issues raised under the parties' common briefing outline; 2) MCI has adhered to the common briefing outline; and 3) MCI has complied with the already established procedural schedule set forth in the ALJ's Ruling.

**I. INTRODUCTION**

As discussed below, MCI supports Pac-West Telecomm, Inc.'s ("Pac-West") Motion for Summary Judgment against Pacific Bell ("Pacific") based on Pac-West's

discussion of the jurisdictional nature of Internet Service Provider ("ISP") traffic. The jurisdictional classification of ISP traffic is of growing concern to MCI and other carriers that have interconnection agreements with local exchange companies ("LECs") who, like Pacific, have attempted to evade their responsibilities under those agreements by redefining ISP traffic as interstate instead of local.

Pac-West's argument irrefutably shows that the traffic originated by Pacific's end-users and terminated to ISPs hosted on Pac-West's network are local calls and entitled to reciprocal compensation under the Pac-West/Pacific Interconnection Agreement ("Agreement"). MCI fully supports Pac-West's motion for summary judgment based on the fact that such calls are local. For this reason, MCI opposes Pacific's argument that such calls are interstate calls which should be subjected to access charges.

## **II. ARGUMENT**

### **A. Pac-West is Entitled to Summary Judgment Based on the Jurisdictional Nature of Calls to ISP's Hosted on its Network.**

Without taking into account Pac-West's other arguments in its Motion for Summary Judgment,<sup>1</sup> Pac-West is entitled to summary judgment based solely on the jurisdictional nature of calls to ISP's hosted on its network.<sup>2</sup> The issue drawn by Pacific (whether ISP traffic is interstate or intrastate for purposes of reciprocal compensation)<sup>3</sup> can be even more narrowly drawn: whether a call begun on Pacific's network and

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<sup>1</sup> See Memorandum of Points and Authorities in Support of Motion by Pac-West Telecomm Inc. for Summary Judgment, *Pac-West Telecomm, Inc. v. Pacific Bell*, Case No. C.97-11-034 (filed February 27, 1998) ("Pac-West Memorandum of Points and Authorities").

<sup>2</sup> Summary judgment is appropriate where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. Cal. Code Civ. Pro. §437(c).

<sup>3</sup> Memorandum of Points and Authorities in Support of Pacific Bell's Motion for Summary Judgment, *Pac-West Telecomm, Inc. v. Pacific Bell*, Case No. C.97-11-034 (filed February 27, 1998) ("Pacific's Memorandum of Points and Authorities") p. 10.

terminated at an ISP hosted on Pac-West's network is classified as interstate or intrastate as a matter of law.<sup>4</sup> It is undeniable that such calls are local calls.

Under the FCC's Local Competition Order,<sup>5</sup> a call placed over the public switched telephone network is "terminated" for the purposes of reciprocal compensation when the call is delivered to the telephone exchange service bearing the "called" telephone number.<sup>6</sup> In other words, the call terminates when it reaches the called party at the phone number that the end-user dialed—in this case the ISP.

The calls in question here occurred when an end-user on Pacific's network connected to an ISP's computer equipment hosted on a Pac-West line by a telephone call to a number with an NPA-NXX assigned to the same local calling area as the end-user. Since the Pacific end-user calls at issue here are well within the 12 mile radius between rate centers of Pac-West and Pacific, the traffic is local.<sup>7</sup> The fact that additional, enhanced information services ("EIS") occurred after the call was completed at the ISP is irrelevant for the purposes of classifying the call.

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<sup>4</sup> Pacific argues that Pac-West carries the additional burden of showing that the parties intended such calls to be considered local. (emphasis original) See Pacific's Memorandum of Points and Authorities at 10. This is not true. As a general principle of law, common industry usage is incorporated into the parties' understanding of the technical terms of their contracts. See Civil Code § 1655. When the Agreement was negotiated, the phenomenon of Internet traffic was well known to the parties.

<sup>5</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket no. 96-98, First Report and Order, FCC 96-325 (rel. August 8, 1996) ("Local Competition Order").

<sup>6</sup> *Id.* at ¶1040.

<sup>7</sup> The Agreement defers to the Commission's existing definition of local calls. See Pac-West Telecomm., Inc.'s Separate Statement of Undisputed Material Facts and Evidence on Supporting Motion for Summary Judgment, (filed February 27, 1998) ("Pac-West's Undisputed Facts") ¶5. The Commission defines local calls as calls measured within a 0-12 mile radius from the rate centers of the originating and terminating NPA-NXX of the centers (including ZUM Zone 1, 2, and 3 and EAS). See Decision No. 89-10-031, Ordering Paragraph 1.

**B. Pacific's Argument that the Internet as a Whole is an Interstate Network Mischaracterizes the Actual Communication between Pacific and Pac-West's Networks.**

Pacific's entire argument is based on the nature of the Internet as a network. Specifically, Pacific argues that the Internet is a "world-wide packet-switched data network of interconnected computers" and that information accessible via the Internet crosses state lines and is therefore interstate.<sup>8</sup> This confuses the issue. The issue before the Commission is not whether the Internet itself is interstate, but whether the traffic carried between Pacific and Pac-West's demarcation points are local or interstate in nature.

Pacific mischaracterizes the portion of the call entitled to reciprocal compensation in its statement that "the traffic [is] interstate in nature because it originated in one state and terminated in another."<sup>9</sup> Pacific contends that calls to ISPs do not "terminate" at the ISP's equipment, but rather terminate on the Internet itself.<sup>10</sup> This simply is not true.

The portion of the call contemplated by the reciprocal compensation provisions of the Agreement and that provided for in the Telecommunications Act of 1996<sup>11</sup> is that portion of the call that terminates at the ISP not the EIS that occur after the Internet connection is made. Pacific mistakenly compares the ISP to a "leaky PBX"<sup>12</sup> and takes into account the information transfer that occurs well after the call is terminated at the ISP. Pac-West demonstrates that traffic which occurs after the call is terminated at the

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<sup>8</sup> See Pacific Bell's Memorandum of Points and Authorities at 13.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 7.

ISP has never been deemed a part of regulated interstate communications.<sup>13</sup> Thus, ISPs are, in essence, considered end-users.<sup>14</sup> These points were recently emphasized by the Public Utilities Commission of Texas when it analyzed the multiple components of Internet Service:

The Commission agrees with the FCC's view that the provision of Internet service via the traditional telecommunications network involves multiple components. One component is the information service—the content—which appears to consist of a significant amount of non-local traffic. The network component, however, is the carrier-to-carrier and carrier-to-end-user telecommunications transmission component, which in the case of a call between two end-users in the same local calling area is local traffic.<sup>15</sup> (citations omitted)

**C. Authorities in Other Jurisdictions have Unanimously found that Intrastate Calls Terminated at ISP's are Local Calls.**

Although the Commission is not bound by Commission decisions in other jurisdictions, they are instructive here, if for no other reason, than for the fact that every single state commission that has ruled on this issue has found that reciprocal compensation rates apply to local calls terminating at ISP end-users.<sup>16</sup> Similarly, the

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<sup>13</sup> Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified as amended, 47 U.S.C. §§ 201 et. seq. ("1996 Act").

<sup>14</sup> See Pacific's Memorandum of Points and Authorities at 15.

<sup>15</sup> Pac-West correctly tracks the history of ISP regulation which illustrates the difference in regulation between ISP traffic and traffic carried on traditional exchanges. See Pac-West's Memorandum of Points and Authorities at 15-21.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Complaint and Request for Expedited Ruling of Time Warner Communications*, Order of Texas PUC, Docket No. 18082 (rel. March 2, 1998), citing, FCC, *Report and Order on Universal Service*, CC Docket No. 96-45, FCC 97-157 at ¶ 83 (May 8, 1997).

<sup>18</sup> See e.g. *supra*, note 15, Texas PUC, Docket No. 18082 (rel. March 2, 1998); *Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic*, Decision of Connecticut PUC, Docket No. 97-05-22 (rel. September 17, 1997); *Petitions of AT&T Communications of the Midwest, Inc., MCI Metro Access Transmission Services, Inc. and MPS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Decision of Minnesota PUC Docket No. P442, 421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729, 1996 Minn. PUC LEXIS 161 at \*171 (rel. December 6, 1996); *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, New York Public Utilities Commission Order Denying Petition and Instituting



National Association of Regulatory Utility Commissioners ("NARUC") passed a Resolution in November stating that ISP traffic should remain subject to state jurisdiction.<sup>17</sup> Finally, it is noteworthy that Pacific itself treats calls between its end-users and its own ISP customers as local calls and charges local rates to its customers for such calls.<sup>18</sup>

### III. CONCLUSION

The law is clear that calls made by Pacific's end-users and terminated at ISPs on Pac-West's network are intrastate calls and subject to reciprocal compensation. It is anticompetitive for Pacific to reclassify such traffic for competitors that it classifies for itself as local.

For all the reasons stated above, MCI supports Pac-West's Motion for Summary Judgment and opposes Pacific's Motion.

Respectfully submitted this 13<sup>th</sup> day of March, 1997.

By: 

Nikyia K. Nail Esq.  
Regulatory Manager  
Western Public Policy Group  
MCI TELECOMMUNICATIONS CORPORATION  
201 Spear Street, 9<sup>th</sup> Floor  
San Francisco, CA 94105  
Telephone: (415) 228-1150  
Facsimile: (415) 228-1094

---

Proceeding, Case No. 97-C-1275 (rel. June 10, 1997); *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Oregon Public Utilities Commission Order, Case No. 96-324 (rel. December 9, 1996); *In the Matter of Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications Company, Inc. Pursuant to 47 USC Section 252*, Washington Utilities and Transportation Commission Order, Docket No. UT-960323 (rel. November 8, 1996).

<sup>17</sup> Resolution #97C-7, Adopted November 11, 1997.

<sup>18</sup> Pac-West's Undisputed Facts at ¶14.

**CERTIFICATE OF SERVICE**

I, Dorothy L. Maddux certify that the following is true and correct:


I am a citizen of the United States, State of California, am over eighteen years of age, and am not a party to the within cause.

My business address is 201 Spear Street, 9<sup>th</sup> Floor, San Francisco, California, 94105.

I hereby certify that I have this day caused the foregoing attached **RESPONSE OF MCI TELECOMMUNICATIONS CORPORATION (U 5011 C) IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT BY PAC-WEST TELECOMM, INC. AND IN OPPOSITION TO PACIFIC BELL'S MOTION FOR SUMMARY JUDGMENT** to be served upon all parties by regular mail, postage prepaid, upon each person on the enclosed service list.

Executed this 13th day of March, 1998, at San Francisco, California.

**MCI TELECOMMUNICATION CORPORATION**  
201 Spear Street, 9<sup>th</sup> Floor  
San Francisco, CA 94105  
(415) 228-1245

  
Dorothy L. Maddux

March 13, 1998

**Service List for C97-11-034**

**Mary Vanderpan**  
**Regulatory Vice President**  
**Pacific Bell**  
**Room 1814**  
**140 New Montgomery Street**  
**San Francisco, CA 94105**

**John L. Clark**  
**Goodin, Macbride Squeri Schlotz & Ritchie**  
**505 Sansome Street, 9<sup>th</sup> Floor**  
**San Francisco, CA 94111**

**State Service**

**Ann Watson**  
**California Public Utilities Commission**  
**Division of Administrative Law Judges**  
**505 Van Ness Avenue, Room 5042**  
**San Francisco, CA 94102-3214**

**Barbara Ortega**  
**California Public Utilities Commission**  
**Executive Division**  
**107 S. Broadway, Room 5109**  
**Los Angeles, CA 90012**

**Natie Billingsley**  
**California Public Utilities Commission**  
**Market Development Branch**  
**505 Van Ness Avenue, Room 4102**  
**San Francisco, CA 94102-3214**

**March 13, 1998**

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Brooks Fiber Communications of Missouri, )	
Inc. )	
)	Case No. TC-2000-226
v. )	
)	
Southwestern Bell Telephone Company. )	

**AFFIDAVIT OF RUSSELL H. EWING**

COUNTY OF BEXAR	)	
	)	SS
STATE OF TEXAS	)	

Before me the undersigned on the 8th day of October, 1999 personally appeared Russell H. Ewing, Director-State Regulatory who, upon being by me duly sworn on oath deposed and said the following:

1. My name is Russell Ewing. I am over the age of twenty-one and in all other respects competent to make this affidavit, which is based upon my personal knowledge.
2. I am currently employed by Southwestern Bell Telephone Company (SWBT) as Director-State Regulatory. In 1997, I was responsible, on behalf of SWBT, for negotiating portions of an interconnection agreement between SWBT and Brooks Fiber Communications of Missouri, Inc. (Brooks) for Missouri. My specific area of responsibility included negotiating the rates, terms and conditions applicable to intercompany compensation for the exchange of traffic, and in particular, reciprocal compensation for "Local Traffic" as defined in the interconnection agreement between SWBT and Brooks.
3. During the interconnection negotiations between SWBT and Brooks, representatives of Brooks never mentioned treating interstate enhanced services traffic as "Local Traffic" for which reciprocal local compensation would be paid. Based on the long history of the FCC's access charge exemption for enhanced service providers, I was aware in 1997 that the FCC considered enhanced services, including Internet services, to be interstate, interexchange services to which interstate access charges would apply, but for the FCC's exemption.

4. Had Brooks taken the position during its interconnection negotiations with SWBT that interstate Internet traffic should be included in the definition of "Local Traffic" contained in the agreement, and that the parties should therefore pay each other reciprocal local compensation for Internet traffic as if it were local traffic and not interstate, interexchange traffic, I would not have agreed on behalf of SWBT to include such a provision in the interconnection agreement. Had Brooks demanded such a reclassification of Internet traffic, SWBT would not have agreed to it, and if Brooks wanted to arbitrate that issue, it certainly could have done so. SWBT's position in that arbitration would have been that Internet traffic is interstate, interexchange traffic for which reciprocal local compensation is not applicable.
5. The definition of "Local Traffic" which the parties agreed to in the final interconnection agreement between SWBT and Brooks does not include Internet traffic originated by a SWBT end user and carried by Brooks to an Internet Service Provider. SWBT specifically insisted that "Local Traffic" be defined to include only such traffic which originates and terminates in a local calling scope. As the FCC has found, Internet traffic does not terminate locally.

Further affiant sayeth not.

Russell H. Ewing  
Russell H. Ewing

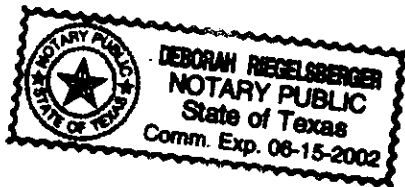
Russell H. Ewing, being duly sworn appeared before me and stated that the foregoing statements are true and correct to the best of his knowledge.

Subscribed and sworn to before me this 8th day of October, 1999

Deborah Riegelberger  
Notary Public

My Commission Expires: 06/15/2002

STATE OF TEXAS  
COUNTY OF BEXAR





January 20, 1998

Ken Moran, Chief  
Accounting & Audits Division  
Federal Communications Commission  
2000 L Street, NW, Room 812  
Washington, DC 20554

Re: Jurisdictional Separations Adjustments - Internet Usage

This is to advise you of action we are taking with regard to jurisdictional separations data for Southwestern Bell Telephone Company (SWBT), Pacific Bell, and Nevada Bell, as it relates to Internet traffic volumes and 1997 reported results.

As you know, with the phenomenal growth of Internet/Internet Service Provider (ISP) usage in recent years, the jurisdictional nature of Internet traffic has quickly become a significant issue. Initially, this usage which is originated and transported by SWBT to a CLEC appeared to be "local exchange" (like Feature Group A usage) and seven-digit dialed. Due to a lack of switch measurement capabilities previously in place, and prior to the rapid growth of Internet traffic volumes, this usage residually defaulted to "local" or "other" for separations study purposes. However, due to the significant growth of this traffic, SBC Communications Inc. (SBC) implemented procedures to identify this usage and jurisdictionally reclassify it in separations.

As we are able to identify Internet traffic, SBC is adjusting Part 36 jurisdictional traffic volumes to assign this usage to interstate (i.e., as in the case of FGA, usage is identified, removed from "local," and assigned to interstate or intrastate access). This classification of Internet usage is consistent with a) the FCC having asserted jurisdiction over ISP usage, b) the nature of the origination/termination characteristics of the traffic, and c) current Part 36 practice and industry procedures relating to the treatment of other "contaminated" services which are assigned to interstate. In other words, in keeping with the principle that where it is difficult to determine the jurisdiction of the traffic using a particular service through measurements or reporting, the service is considered "contaminated" (a service handling both interstate and intrastate calls) and may be directly assigned to interstate if the end-to-end interstate usage is more than ten percent of the total usage of the service (CC Docket Nos. 78-72 and 80-286, Decision and Order, released July 29, 1989).

Page Two  
January 20, 1998  
Ken Moran, Chief  
Accounting & Audits Division

These procedures have been implemented starting in 1997, going forward. However, for that Internet traffic which existed prior to 1997, SBC has no appropriate means to go back and retroactively capture such usage or adjust prior years' separations data. Therefore, any jurisdictional data previously reported prior to 1997, via ARMIS 01, 03, and 04 Reports may be slightly misstated in that ISP traffic was originally identified as intrastate (local) for separations and reporting purposes, instead of interstate, as discussed above.

Please feel free to call me at 202-326-8894 or Mr. Paul Cooper at 320-235-8111 should you have any questions or if further information is required.

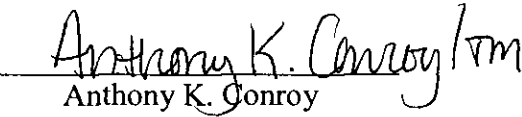
Sincerely

*BJ Samuels*



**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on October 13, 1999.

  
Anthony K. Conroy

DAN JOYCE  
MISSOURI PUBLIC SERVICE COMMISSION  
301 W. HIGH STREET, SUITE 530  
JEFFERSON CITY, MO 65101

MICHAEL F. DANDINO  
OFFICE OF THE PUBLIC COUNSEL  
301 W. HIGH STREET, SUITE 250  
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CARL J. LUMLEY  
LELAND B. CURTIS  
CURTIS, OETTING, HEINZ, GARRETT &  
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