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November 19, 1999

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-2000-294

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.

Please stamp "Filed" on the extra copy and return the copy to me in the enclosed self-addressed, stamped envelope.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Anthony K. Conroy

Enclosure

cc: Attorneys of Record

FILED

NOV 22 1999

Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
NOV 22 1999

Missouri Public
Service Commission

BroadSpan Communications, Inc. d/b/a)
Primary Network Communications, Inc.)
)
Complainant,)
)
v.)
)
Southwestern Bell Telephone Company)
)
Respondent.)

Case No. TC-2000-294

**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 BroadSpan Communications, Inc. d/b/a Primary Network Communications, Inc. (BroadSpan), and in the alternative for its Answer to BroadSpan's Complaint, states to the Missouri Public Service Commission (Commission) as follows:

BACKGROUND

In its Complaint, BroadSpan asks the Commission to ignore the fundamentally interstate jurisdictional nature of Internet traffic and, in direct contravention to the Commission's decision in the Birch Telecom Internet arbitration,¹ rule that interstate, interexchange traffic carried by BroadSpan for a portion of its journey to the Internet is really "local traffic" which is "terminated" by BroadSpan. BroadSpan attempts to improperly shoehorn this interstate and

¹ 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) (Birch Telecom).

interexchange Internet traffic into a "local traffic" classification to bolster its claim that it is entitled to reciprocal local compensation for "terminating" such traffic pursuant to the compensation provisions contained in the interconnection agreement between SWBT and BroadSpan, which were approved by the Commission on April 26, 1999.

BroadSpan asks the Commission to recharacterize Internet traffic as "Local Traffic" despite the fact that approximately two months prior to the Commission's approval of BroadSpan's adoption of the compensation provisions under which BroadSpan bases its claim, the Federal Communications Commission (FCC) determined that Internet traffic is not local and does not terminate on BroadSpan's network. In addition, nearly a month before the Commission approved BroadSpan's adoption of the compensation provisions under which it bases its claim, this Commission already properly determined in its Birch Telecom Internet arbitration decision that it would defer to the FCC's jurisdiction over interstate Internet traffic and not require SWBT to pay reciprocal local compensation for Internet traffic. For the reasons described below, the Commission should reject BroadSpan's 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 BroadSpan's Complaint pursuant to Rule 2.070(6) for failure to state sufficient facts upon which relief can be granted.²

As background, BroadSpan initially adopted, pursuant to Section 252(i) of the federal Telecommunication Act of 1996 (Act), the interconnection agreement between SWBT and AT&T Communications of the Southwest, Inc. (AT&T) which the Commission approved on March 19, 1998, in Case No. TO-98-115. The Commission approved BroadSpan's adoption of

² 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."

the SWBT/AT&T agreement on August 12, 1998. Neither SWBT nor AT&T, or any other CLEC which has adopted the SWBT/AT&T interconnection agreement pursuant to Section 252(i) of the Act, has ever asserted that under that agreement, the parties are required to pay reciprocal local compensation for Internet traffic. Approximately three months after the Commission approved BroadSpan's adoption of the SWBT/AT&T interconnection agreement, on November 20, 1998, BroadSpan filed a subsequent application with the Commission (Case No. TO-99-228), in which BroadSpan sought to adopt, again pursuant to §252(i) of the Act, selected portions of the interconnection agreement between SWBT and Birch Telecom of Missouri, Inc. including the provisions relating to "All Interconnection Rates (Section 251(c)(2) of the Act)".³ As the Commission will recall, the interconnection agreement between SWBT and Birch Telecom resulted from an arbitration proceeding in which Birch Telecom also asked the Commission to recharacterize interstate, Internet traffic as local traffic and require SWBT to pay reciprocal local compensation on such traffic.⁴ Less than two months after BroadSpan filed its application seeking to adopt portions of the SWBT/Birch Telecom arbitrated agreement, however, on January 14, 1999, BroadSpan withdrew its request.

As the Commission is aware, on February 26, 1999, the FCC issued its Internet Declaratory Ruling,⁵ in which it reaffirmed that Internet traffic is interstate access traffic, not local traffic as previously claimed by Birch, and as claimed now by Brooks Fiber, MFS and

³ Petition of BroadSpan Communications, Inc. for approval of interconnection agreement, Case No. TO-99-228, paragraph 6 (November 20, 1998).

⁴ The Commission issued an Order granting SWBT's Motion for Clarification in Birch Telecom on October 13, 1998, in which the Commission clarified that the interconnection agreement between SWBT and Birch which resulted from this arbitration was "deemed approved" as of June 25, 1998.

⁵ 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).

BroadSpan. Undeterred, approximately one month later, on April 5, 1999, BroadSpan returned to the Commission and filed yet another application, in which it sought to adopt, again pursuant to §252(i) of the Act, the compensation provisions of the interconnection agreement between SWBT and Brooks Fiber Communications of Missouri, Inc. (which had been executed in February, 1997). BroadSpan's adoption of the compensation provisions of the SWBT/Brooks Fiber interconnection agreement was subsequently approved by the Commission on April 26, 1999, approximately three weeks after the Commission issued its final decision in the Birch Telecom Internet arbitration. It is pursuant to these adopted compensation provisions which BroadSpan claims it too is entitled to reciprocal local compensation for interstate Internet traffic.

From 1983 until present, including very specifically the time period (March, 1999) when BroadSpan adopted the compensation provisions of the SWBT/Brooks Fiber interconnection agreement, 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, BroadSpan now seeks to "piggyback" on Brooks Fiber's claim -- made in Case No. TC-2000-225, that both Brooks and SWBT actually intended and agreed in early 1997 to "reclassify" Internet traffic as "local traffic" to which 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 SWBT described in its Motion to Dismiss for Failure to State a Claim which it filed in Case No. TC-2000-225, Brooks and SWBT did not mutually agree to recharacterize Internet 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.

Furthermore, when BroadSpan and SWBT discussed BroadSpan's request to adopt the compensation provisions of the SWBT/Brooks Fiber interconnection agreement, SWBT specifically advised BroadSpan that these compensation provisions did not provide for reciprocal local compensation to be paid for Internet traffic, and that SWBT did not agree that the compensation provisions being adopted by BroadSpan required reciprocal local compensation for Internet traffic. SWBT included a very explicit statement to this effect in the agreement to amend the SWBT/BroadSpan interconnection agreement executed by SWBT and BroadSpan on March 26, 1999 and March 23, 1999, respectively. A copy of this agreement is attached hereto as Exhibit 1.

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 Fiber, MFS, MCI, BroadSpan 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 Fiber and BroadSpan -- that Internet traffic is jurisdictionally interstate, interexchange traffic, for which reciprocal local compensation is not applicable. For example, on June 9, 1997, SWBT sent a letter to numerous CLECs (including Brooks Fiber) 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 Fiber and the Commission Staff are attached hereto as Exhibits 2 and 3.

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, BroadSpan 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"⁶ by an Internet Service Provider (ISP) served by (and often affiliated with)

⁶ 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).

a second local carrier (e.g., BroadSpan) 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 through an ISP served by BroadSpan, the call begins on the network facilities of SWBT, is handed off to and traverses BroadSpan's 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 BroadSpan's claim in this case is that the Commission should ignore the explicit definition of "Local Traffic" contained in "Attachment 12: Compensation" of the interconnection agreement between SWBT and BroadSpan and ignore the language which describes the type of traffic to which reciprocal local compensation applies, and instead "interpret" (i.e., redefine) these provisions to include an obligation to pay reciprocal local compensation on interstate Internet traffic. Having conveniently maneuvered itself into a position where it can now characterize its claim as arising under the compensation provisions of the SWBT/Brooks Fiber interconnection agreement, instead of the SWBT/AT&T interconnection agreement (which no party has claimed provides for reciprocal compensation for Internet traffic) and the SWBT/Birch Telecom arbitrated interconnection agreement (which the Commission determined does not require SWBT to pay reciprocal local compensation for Internet traffic), BroadSpan seeks to avoid both the FCC's intervening Internet Declaratory Ruling 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, for which reciprocal compensation is not applicable under section 251(b)(5) of the Act. The

Commission should reject BroadSpan's attempt to do an "end-run" around the specific language contained in the adopted compensation provisions in the SWBT/BroadSpan interconnection agreement and the FCC's and this Commission's previous decisions, and dismiss BroadSpan's Complaint pursuant to Rule 2.070(6) for one simple reason -- it fails to state facts upon which relief can be granted.

As BroadSpan admits in its Complaint, pursuant to the February 10, 1997, interconnection agreement between SWBT and Brooks Fiber, and as contemplated by §251(b)(5) of the Act, reciprocal compensation is only applicable to local traffic. BroadSpan Complaint, ¶16. As a critical component of the compensation arrangements between Brooks and SWBT (which as described above were adopted by BroadSpan after the FCC's Internet Declaratory Ruling), the parties did not leave the term "Local Traffic" undefined in their interconnection agreement. The compensation provisions adopted by BroadSpan provide as follows:

Calls originated by one Party's end users and terminated to the other Party's end users shall be classified as "Local Traffic" under this agreement if the call: (i) originates and terminates in the same SWBT exchange area; or (ii) originates and terminates within different SWBT exchanges which share a common mandatory local calling area. Calls not classified as local under this Agreement shall be treated as interexchange for intercompany compensation purposes.

In addition, the compensation provisions from the Brooks Fiber/SWBT interconnection agreement adopted by BroadSpan explicitly describe 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.

BroadSpan's Complaint must be dismissed because there is no question -- either of law or fact -- that under the compensation provisions of the SWBT/Brooks Fiber interconnection agreement adopted by BroadSpan, Internet traffic is not "Local Traffic" which "terminates" to BroadSpan end users for which reciprocal local compensation is applicable. Contrary to BroadSpan's implication, the FCC -- which clearly has jurisdiction over Internet traffic -- has never recharacterized this interstate access traffic as "local traffic" for which reciprocal local compensation is due pursuant to the Act. Rather, 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).⁷

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 BroadSpan 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 BroadSpan 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.⁸

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

⁷ 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.

⁸ Internet Declaratory Ruling, at ¶16.

jurisdiction over Internet traffic and directly rejected the crux of BroadSpan's 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 CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."⁹ 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).¹⁰

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 BroadSpan does here -- that Internet traffic was local in nature and terminated by Birch, 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 compensation provisions of the Brooks/SWBT interconnection agreement adopted by BroadSpan, 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."¹¹ The Commission then recognized that it is the FCC -- not this Commission -- which has primary jurisdiction to determine appropriate compensation

⁹ Internet Declaratory Ruling, at ¶12 (emphasis added).

¹⁰ Internet Declaratory Ruling, at ¶26, note 87.

¹¹ Birch Telecom, p. 1.

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 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 BroadSpan 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, BroadSpan is left to argue that when Brooks and SWBT executed their interconnection agreement back in early 1997, 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 in their interconnection agreement. BroadSpan must piggyback on Brooks' complaint in Case No. TC-2000-225 because BroadSpan was not present when SWBT and Brooks agreed to these provisions and can only make unsubstantiated assumptions (based on its own self-interest) as to what the parties intended, especially where the linchpin of BroadSpan's complaint is that Brooks and SWBT actually agreed to something different than the plain language contained in their interconnection agreement.

This last-ditch argument by BroadSpan 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. BroadSpan can present no credible evidence 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 executed their interconnection agreement in 1997. There clearly was no "meeting of the minds" between SWBT and Brooks Fiber in 1997 that Internet traffic should be included in the definition of "Local Traffic" contained in the interconnection agreement between Brooks Fiber and SWBT. In fact, the parties' very explicit language to the contrary points to the inescapable conclusion that from all outward, objective expressions of "intent" contained in the interconnection agreement, 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 compensation provisions contained in the interconnection agreement between Brooks and SWBT which were adopted by BroadSpan, in order for reciprocal local compensation to apply, the traffic in question must originate and terminate in the same mandatory local calling area. As the FCC again recognized recently in its Internet Declaratory Ruling, Internet traffic does not originate and terminate in the same local calling scope. 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 BroadSpan now claims Brooks harbored when it executed the interconnection agreement with SWBT in 1997 is irrelevant to what the parties explicitly agreed to. 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 in Case No. TC-2000-225 with the Commission. BroadSpan should not now be permitted to in effect renegotiate Brooks' 1997 interconnection agreement with SWBT, and unilaterally discard SWBT's very clear intent regarding Internet traffic as described in Exhibit 1 attached hereto, yet that is exactly what

BroadSpan seeks to do. It is clear that much different language would have been required in the SWBT-Brooks Fiber interconnection agreement -- which SWBT would not have agreed to -- to accomplish the purpose BroadSpan now seeks.

Finally, in paragraph 21 of its Complaint, BroadSpan 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, BroadSpan's misplaced reliance on these "examples" actually illustrates the lack of any real evidence to support its complaint. SWBT responds to each of BroadSpan's "examples" as follows:

- BroadSpan "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 and BroadSpan 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.

- BroadSpan "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.

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

SWBT response: As BroadSpan 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.

- BroadSpan "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 4. Since 1997, SWBT has also noted in its ARMIS reports that it considers Internet traffic to be jurisdictionally interstate.

- BroadSpan "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 BroadSpan.

For the reasons described above, BroadSpan's 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 its Birch Telecom arbitration 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, MFS and now BroadSpan seek to do. For the reasons described above, SWBT respectfully requests that the Commission issue an Order dismissing BroadSpan's

Complaint pursuant to Commission Rule 2.070(6) for failing to state facts upon which relief can be granted.

SWBT'S ANSWER TO BROADSPAN'S COMPLAINT

Without waiving its position that BroadSpan's 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 BroadSpan's Complaint as follows with the express understanding that unless SWBT specifically admits an allegation contained in BroadSpan's Complaint, SWBT denies the allegation:

1. SWBT specifically denies that BroadSpan's Complaint states a valid claim or action upon which relief can be granted. SWBT admits that the Commission is authorized to hear BroadSpan's Complaint solely under the Act. SWBT denies the remaining allegations contained in paragraph 1 of BroadSpan's Complaint.

2. SWBT admits that it entered into an interconnection agreement with BroadSpan pursuant to the Act as described above. SWBT admits that the entire interconnection agreement may be relevant to BroadSpan's Complaint, including the amendment agreement attached hereto as Exhibit 1. SWBT admits the remaining allegations of paragraph 2 of BroadSpan's Complaint.

3. SWBT admits that the interconnection agreement between SWBT and BroadSpan 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 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 BroadSpan's Complaint regarding the corporate structure or authorized activities of BroadSpan, and therefore denies those allegations.

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

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

GENERAL ALLEGATIONS

9. SWBT does not have sufficient information to either admit or deny the general allegations contained in paragraph 9 of BroadSpan's 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 BroadSpan 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 or SWBT and BroadSpan.

INTER-CARRIER COMPENSATION IN THE CONTEXT OF LOCAL COMPETITION

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 BroadSpan's 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 BroadSpan's Complaint.

**TREATMENT OF RECIPROCAL COMPENSATION AND ACCESS CHARGES
IN THE INTERCONNECTION AGREEMENT**

16. SWBT admits that Section 5.3 of the interconnection agreement between SWBT and Brooks defines "Local 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 BroadSpan 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 BroadSpan.

17. SWBT admits that pursuant to the interconnection agreement between it and BroadSpan, the reciprocal compensation arrangements set forth therein are not applicable to Switched Exchange Access Services. SWBT admits that the interconnection agreement between it and BroadSpan 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 BroadSpan. SWBT specifically denies all other allegations contained in paragraph 17 of BroadSpan's Complaint.

18. SWBT denies the allegations contained in paragraph 18 of BroadSpan's 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 BroadSpan's 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 has 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 BroadSpan's 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 BroadSpan's Complaint.

21. SWBT denies each of the allegations and "examples" (as described above) contained in paragraph 21 of BroadSpan's Complaint.

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

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

24. SWBT admits that BroadSpan has attempted to claim reciprocal local compensation for Internet traffic. As described above, the 1997 interconnection agreement between SWBT and Brooks, and BroadSpan's adoption of the compensation provisions thereto, do not provide for reciprocal local compensation to be paid for interstate Internet traffic, and therefore SWBT denies that the "obligation" alleged by BroadSpan 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 BroadSpan. SWBT denies that BroadSpan has suffered any compensable damages, and denies that the amount of damages alleged by BroadSpan is accurate. In any event, SWBT denies that the Commission has any jurisdiction to award money damages to BroadSpan in this case.

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

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY Anthony Kloung

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)

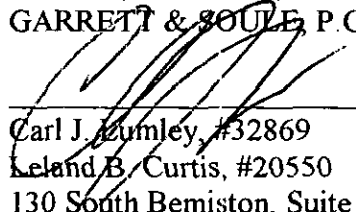
314-247-0014 (Facsimile)

Conclusion

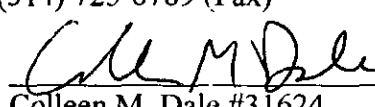
The Complaints fairly present matters that fall within the jurisdiction of the Commission. PNC and Brooks present the Complaints to this Commission pursuant to FCC directive. The Commission should deny SWBT's Motions to Dismiss, consolidate the PNC and Brooks Complaints, and set a prehearing conference so a procedural schedule can be established. Subsequently, based on the facts adduced at the hearing, the Commission should determine that SWBT agreed to pay Brooks, and therefore PNC as well, reciprocal compensation on all local traffic, including ISP-bound traffic, in accordance with prevailing industry terminology and practices.

Respectfully submitted,

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



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(314) 214-0066
(314) 569-7110 (FAX)

Attorneys for BroadSpan Communications, Inc. dba
Primary Network Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response to SWBT's Motion to Dismiss has been sent to all parties of record by first class U.S. Mail on the 24 day of November, 1999.



PARTIES OF RECORD:

Office of Public Counsel
Missouri Public Service Commission
P.O. Box 7800
Jefferson City, MO 65102

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

Legal Department
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101

**AMENDMENT NO. 2 TO INTERCONNECTION AGREEMENT
BY AND BETWEEN
SOUTHWESTERN BELL TELEPHONE COMPANY
AND
BROADSPAN COMMUNICATIONS, INC. (MISSOURI)**

The Interconnection Agreement ("the Agreement") by and between Southwestern Bell Telephone Company ("SWBT") and BroadSpan Communications, Inc. ("BCI") signed August 25, 1998 is amended to adopt the Interconnection rates, terms, and conditions of the Brooks Fiber Communications of Missouri, Inc./SWBT Interconnection Agreement signed February 10, 1997.

(1) The Agreement is amended as set forth below:

**THE FOLLOWING SECTIONS/PROVISIONS HAVE BEEN AMENDED
IN THE BROADSPAN/SWBT INTERCONNECTION AGREEMENT:**

- **Table of Contents**
- **General Terms and Conditions**
- **Attachment 11: Network Interconnection Architecture**
- **Appendix Interconnection Trunking Requirement (ITR)**
- **Attachment 12: Compensation**
- **Appendix Wireless**

**THE FOLLOWING SECTIONS/PROVISIONS HAVE BEEN ADDED TO
THE BROADSPAN/SWBT INTERCONNECTION AGREEMENT:**

- **Appendix DCO**
- **Schedule OCA**

**THE FOLLOWING CHANGES HAVE BEEN MADE TO THE LIST OF
ATTACHMENTS IN THE TABLE OF CONTENTS:**

ATTACHMENTS

Resale

Attachment 1: Resale

Appendix Services/Pricing

Exhibit A: SWBT's Telecommunications Services Available for Resale

Exhibit B: SWBT's Other Services Available for Resale

Appendix Customized Routing-Resale

Appendix DA-Resale

Appendix OS-Resale

Appendix White Pages (WP)-Resale
Attachment 2: Ordering and Provisioning-Resale
Attachment 3: Maintenance-Resale
Attachment 4: Connectivity Billing-Resale
Attachment 5: Provision of Customer Usage Data-Resale

Unbundled Network Elements

Attachment 6: Unbundled Network Elements (UNE)
 Appendix Pricing-UNE
 Appendix Pricing-UNE Schedule of Prices
Attachment 7: Ordering and Provisioning-UNE
Attachment 8: Maintenance-UNE
Attachment 9: Billing-Other
Attachment 10: Provision of Customer Usage Data-UNE

Network Interconnection Architecture and Compensation

| | |
|---|--------------|
| Attachment 11: Network Interconnection Architecture | Amended 3/99 |
| Appendix Interconnection Trunking Requirement (ITR) | Amended 3/99 |
| Appendix Network Interconnection Methods (NIM) | |
| Appendix SS7 Interconnection | |
| Appendix DCO | Added 3/99 |
| Attachment 12: Compensation | Amended 3/99 |
| Appendix Wireless | Amended 3/99 |
| Appendix FGA | |
| Schedule OCA | Added 3/99 |

Ancillary Functions

Attachment 13: Ancillary Functions
 Appendix Collocation
 Appendix Poles, Conduit, ROW

Other Requirements

Attachment 14: Interim Number Portability
Attachment 15: E911
Attachment 16: Network Security and Law Enforcement
Attachment 17: Failure to Meet Performance Criteria
Attachment 18: Mutual Exchange of Directory Listing Information
Attachment 19: White Pages-Other (WP-O)
Attachment 20: Clearinghouse
Attachment 21: Numbering
Attachment 22: DA-Facilities Based
Attachment 23: OS-Facilities Based
Attachment 24: Recording-Facilities Based
Attachment 25: Host
Attachment 26: Billing, Collecting, & Remitting

**THE FOLLOWING LANGUAGE WAS INSERTED IN PLACE OF SECTION 4.1
IN THE GENERAL TERMS AND CONDITIONS:**

This Agreement will become effective as of the Effective Date stated above and, except as provided in section 4.4 below, will expire on November 5, 2000, subject to two one-year extensions, unless written Notice of Non Renewal and Request for Negotiation (Non Renewal Notice) is provided by either Party in accordance with the provisions of this Section. Any such Non Renewal Notice must be provided not later than 180 days before the day this Agreement would otherwise renew for an additional year. The noticing Party will delineate the items desired to be negotiated. Not later than 30 days from receipt of said notice, the receiving Party will notify the sending Party of additional items desired to be negotiated, if any. Not later than 135 days from the receipt of the Non Renewal Notice, both parties will commence negotiations.

**THE FOLLOWING LANGUAGE WAS INSERTED AS SECTION 4.4 IN
THE GENERAL TERMS AND CONDITIONS:**

The rates, terms and conditions set forth in Attachment 11: Network Interconnection Architecture, Appendix Interconnection Trunking Requirement, Appendix DCO, Attachment 12: Compensation, Appendix Wireless, and Schedule OCA ("the adopted Brooks provisions") were adopted pursuant to Section 52 of this Agreement from an Interconnection Agreement between Brooks Fiber Communications of Missouri, Inc., and SWBT signed February 10, 1997, which ran for a stated term continuing through December 31, 1998. The adopted Brooks provisions shall continue without interruption, except as otherwise provided by law, the Brooks Agreement or this Agreement, until: (a) a new interconnection agreement becomes effective between BroadSpan or Brooks and SWBT, or (b) the Missouri PSC determines that interconnection shall be by tariff rather than contract and both SWBT and BroadSpan have in place effective interconnection tariffs. By mutual agreement, SWBT and BroadSpan may amend this Agreement to modify the term of the adopted Brooks provisions.

**THE LIST OF ATTACHMENTS AT THE END OF THE GENERAL
TERMS AND CONDITIONS WAS AMENDED TO MATCH THE
CHANGES IN THE TABLE OF CONTENTS SET FORTH ABOVE.**

**THE FOLLOWING LANGUAGE WAS INSERTED AT THE BEGINNING
OF EACH OF THE ATTACHMENTS/APPENDICES HEREBY ADDED
TO THE AGREEMENT:**

The rates, terms and conditions set forth in this Attachment/Appendix were adopted pursuant to Section 52 of this Agreement from an Interconnection Agreement between Brooks Fiber Communications of Missouri, Inc., and SWBT signed February 10, 1997, which ran for a stated term continuing through December 31, 1998. This Attachment/Appendix shall continue without interruption, except as otherwise provided by law, the Brooks Agreement or this Agreement, until: (a) a new interconnection agreement becomes effective between BroadSpan or Brooks and SWBT, or (b) the

Missouri PSC determines that interconnection shall be by tariff rather than contract and both SWBT and BroadSpan have in place effective interconnection tariffs. By mutual agreement, SWBT and BroadSpan ("CLEC" or "LSP") may amend this Agreement to modify the term of this Attachment/Appendix.

THE FOLLOWING ADDITIONS/DELETIONS OF AN ATTACHMENT/ APPENDIX WERE MADE TO THE AGREEMENT:

- BroadSpan's Attachment 11: Network Interconnection Architecture was deleted
- Brooks' General Terms and Conditions Section II: Network Interconnection Architecture was added as Attachment 11: Network Interconnection Architecture
- BroadSpan's Appendix Interconnection Trunking Requirement was deleted
- Brooks' Appendix Interconnection Trunking Requirement was added
- Brooks' Appendix DCO was added
- BroadSpan's Attachment 12: Compensation was deleted
- Brooks' General Terms and Conditions, Section III, was added as Attachment 12: Compensation
- BroadSpan's Appendix Cellular was deleted
- Brooks' Appendix Wireless was added as Appendix Wireless
- Brooks' Schedule OCA was added

(2) This Amendment shall not modify or extend the Effective Date or Term of the underlying Agreement.

(3) EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT, and such terms are hereby incorporated by reference and the Parties hereby reaffirm the terms and provisions thereof.

(4) This Amendment shall be filed with and is subject to approval by the Public Service Commission of the State of Missouri ("PSC") and shall become effective ten (10) days following approval by such PSC.

IN WITNESS WHEREOF, this Amendment No. 2 to the Agreement was executed and exchanged in duplicate on the last date set forth below, by SWBT, signing by and through its duly authorized representative, and BroadSpan Communications, Inc., signing by and through its duly authorized representative.

BroadSpan Communications, Inc.¹

Southwestern Bell Telephone Company²

By: [Signature]

By: [Signature]

Title: PRESIDENT

Title: President-Industry Markets

Name: Reimer Spence
(Print or Type)

Name: Larry B. Cooper
(Print or Type)

Date: 3/23/99

Date: 3/26/99

The Parties acknowledge that on January 25, 1999, the United States Supreme Court issued its opinion in *AT&T Corp. v. Iowa Utilities Bd.*, 1999 WL 24568 (U.S.). The Parties further acknowledge and agree that by executing this Amendment, neither Party waives any of its rights, remedies, or arguments with respect to such decision, including its rights under the intervening law clause of this Agreement, and any legal or equitable rights of review (including court reconsideration).

¹ BroadSpan makes the following unilateral statement in conjunction with its execution of this Agreement: On February 25, 1999, the Federal Communications Commission adopted an order declaring that existing agreements regarding the application of reciprocal compensation to ISP-bound traffic shall remain enforceable. The FCC also declared that state commissions may construe such agreements as applying such compensation to such traffic and in the absence of agreement may order the application of such compensation (or another compensation mechanism). BroadSpan has always maintained that ISP-bound traffic is subject to reciprocal compensation, under the original provisions of this Agreement and under the provisions added by this Amendment. Importantly, BroadSpan did not agree during negotiations (and does not presently agree) that the Parties would terminate ISP-bound traffic for each other without compensation under the rates, terms and conditions of this Agreement regarding reciprocal compensation.

² SWBT makes the following unilateral statement in conjunction with its execution of this Agreement: On February 25, 1999, the Federal Communications Commission adopted an order declaring that calls placed to a Internet Service Provider (ISP) do not terminate at the ISP's local server. The FCC also declared that such calls are jurisdictionally interstate. SWBT has always maintained that traffic originated by and passed to ISPs is not local and not subject to local reciprocal compensation. Importantly, SWBT did not agree during negotiations (and does not presently agree) that the local reciprocal compensation rates, terms, and conditions contained in this Agreement require reciprocal compensation for ISP traffic.

Southwestern Bell

June 9, 1997

Mr. Edward Cadieux
Director, Regulatory Affairs - Central Region
Brooks Fiber Properties
425 Wanda Hill Road South,
Suite 300
Tomb and County, MO 63017

RE: Local Terminating Compensation for Delivery of Intra-area Service Provider Traffic

Dear Mr. Cadieux:

The purpose of this letter is to address local terminating compensation for the delivery of traffic destined for Intra-area 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 intra-exchange 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 Letters for Investigation* in CC Docket No. 84-180, released April 22, 1989, 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 subsequent termination that must be used to jurisdictionalize a call. In the *NABDC vs. FCC* decision issued October 26, 1994, (746 F.2d 1497), 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 intra-area calls (and to terminate toll-free 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 intra-area traffic transported over those services to the ISP's premises. In other words, this originating intra-area 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. Edw. Radieux
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 23 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

cc: Mr. Bailey
Mr. Lane

RUDLOFF 3;



SBC

January 20, 1998

D. Jeanne Fry
Director
Federal Regulatory

SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
Phone 202 328-8894
Fax 202 408-4808

Exhibit 4

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

BT Samuels

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on November 19, 1999.



Anthony K. Conroy

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