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December 3, 1999

FILED

DEC 6 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-2000-294

Dear Judge Roberts:

Enclosed for filing with the Missouri Public Service Commission in the above-referenced case is an original and 14 copies of Reply of Southwestern Bell Telephone Company.

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,

A handwritten signature in cursive script that reads "Anthony K. Conroy".

Anthony K. Conroy

Enclosure

cc: Attorneys of Record

FILED

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

DEC 6 1999

Missouri Public
Service Commission

BroadSpan Communications, Inc. d/b/a)
Primary Network Communications, Inc.)

Complainant,)

Case No. TC-2000-294

v.)

Southwestern Bell Telephone Company)

Respondent.)

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

COMES NOW Southwestern Bell Telephone Company (SWBT), and for its Reply to the Response of BroadSpan Communications, Inc. d/b/a/ Primary Network Communications, Inc., (BroadSpan) states to the Missouri Public Service Commission (Commission) as follows:

In its Response, BroadSpan attempts to divert the Commission's attention from the central holding of the FCC's February 26, 1999, Internet Declaratory Ruling¹ and the Commission's subsequent final order in the Birch Telecom² case. BroadSpan's obvious avoidance of these two critical decisions is perhaps understandable, inasmuch as both the FCC's Internet Declaratory Ruling and this Commission's Birch Telecom decision point to the inescapable conclusion that Internet traffic is now and always has been interstate access traffic subject to the jurisdiction of the FCC, and not local traffic subject to reciprocal local compensation.

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in 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).

² 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).

BroadSpan cannot seriously question that in its Internet Declaratory Ruling, the FCC made clear that it had jurisdiction over Internet traffic. In that decision, the FCC stated:

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 . . . do not govern inter-carrier compensation for this traffic.³

The FCC's Internet Declaratory Ruling also could not be more clear and unambiguous that since 1983, the FCC has considered Internet traffic to be jurisdictionally interstate access traffic.

The Commission's Birch Telecom decision -- issued approximately six weeks after the FCC's Internet Declaratory Ruling -- is completely consistent with and recognizes that the FCC has jurisdiction over interstate Internet traffic. In its April 6, 1999, Birch Telecom decision, the Commission specifically determined that until the FCC determines "the appropriate amount of reciprocal compensation, if any, that should be paid for ISP-bound traffic," the Commission "will not attempt to determine the amount of compensation that should be paid." (Birch Telecom, p. 3). The Commission went on to state that Birch and SWBT were not required to pay reciprocal local compensation for Internet traffic under the following language contained in the SWBT-Birch interconnection agreement approved by the Commission:

5.1.2 Calls originated by one Party's end user and terminated to the other Party's end user will 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 that share a common mandatory local calling area, e.g., mandatory Extended Area Service (EAS), mandatory Extended Local Calling Service (ELCS), or other like types of mandatory expanded calling scopes.

In this case, however, BroadSpan (along with Brooks Fiber and MCI WorldCom in companion cases) asks the Commission to reach a completely opposite result -- and order SWBT to pay BroadSpan reciprocal local compensation on Internet traffic -- pursuant to the following

³ Internet Declaratory Ruling, ¶26, note 87.

language (adopted from the SWBT/Brooks interconnection agreement) currently contained in BroadSpan's interconnection agreement with SWBT:

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 short, the language upon which Broadspan relies to claim reciprocal local compensation for Internet traffic is nearly identical to the language from the SWBT/Birch Telecom interconnection agreement, which the Commission has already determined does not require the payment of reciprocal local compensation for Internet traffic!

The Commission should recognize that BroadSpan's Complaint is nothing more than a thinly veiled attempt to avoid the FCC's Internet Declaratory Ruling and collaterally attack and overturn the Commission's Birch Telecom decision.⁴ A complaint with unsubstantiated and false assertions of SWBT's intent, however, is not an appropriate forum to relitigate the Commission's Birch Telecom decision. The Commission should not be required to embark on an arduous hearing process and waste scarce Commission resources to allow BroadSpan to try to get the Commission to reconsider its Birch Telecom decision in the context of a complaint case. If BroadSpan (and Brooks Fiber and MCI WorldCom) succeeds, the Commission would perversely hand these companies millions of dollars in reciprocal local compensation payments under language which is nearly identical to that which the Commission approved in the Birch

⁴ BroadSpan admits as much in footnote 9 of its Joint Response, when it states:

The Commission's decision not to act [in the Birch Telecom case], however, seems to be based on a misinterpretation of the FCC's Notice of Proposed Rulemaking.

Telecom interconnection agreement, which as described above, this Commission has already determined does not require payment of reciprocal local compensation for Internet traffic.

Contrary to BroadSpan's assertion, the Commission has not "suspended" its Birch Telecom decision. Rather, in Birch Telecom the Commission appropriately deferred to the jurisdiction of the FCC over interstate Internet traffic, and should continue to do so here. There is no evidence SWBT ever agreed to pay reciprocal local compensation for Internet traffic, and under the undisputed facts of this situation, the Commission is clearly empowered to dismiss BroadSpan's Complaint pursuant to 4 CSR 240-2.070(6).

WHEREFORE, respectfully requests that the Commission enter an Order dismissing BroadSpan's Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on December 3, 1999.


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