

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
December 7, 1999**

CASE NO: TC-2000-225, TC-2000-294

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

Sincerely,


Dale Hardy/Roberts

Secretary/Chief Regulatory Law Judge

Uncertified Copy:

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 7th
day of December, 1999.

MCI WorldCom Communications, Inc., and)
Brooks Fiber Communications of Missouri,)
Inc.,)

Complainants,)

v.)

Southwestern Bell Telephone Company,)

Respondent.)

Case No. TC-2000-225

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

Complainant,)

v.)

Southwestern Bell Telephone Company,)

Respondent.)

Case No. TC-2000-294

ORDER CONSOLIDATING CASES,
DENYING MOTIONS TO DISMISS, DENYING JOINT MOTION TO STRIKE,
SETTING PREHEARING CONFERENCE, AND
REQUIRING FILING OF PROPOSED PROCEDURAL SCHEDULE

Procedural History:

On September 9, 1999, MCI WorldCom Communications, Inc. (MCI), and Brooks Fiber Communications of Missouri, Inc. (Brooks), each filed a formal complaint against Southwestern Bell Telephone Company (SWBT). Each complaint alleged that SWBT was in breach of an interconnection

agreement with the complainant in that SWBT refused to pay reciprocal compensation to the complainant as called for by the agreement. On September 27, 1999, MCI and Brooks each filed its Motion to Consolidate, pointing out that MCI and Brooks are affiliated companies, that each is represented by the same counsel, that SWBT is the respondent in each case, and that each case involves similar, if not identical, legal and factual issues. On October 5, 1999, SWBT responded to the Complainants' motions, and stated that "SWBT does not oppose WorldCom's and Brooks' Motions to Consolidate." The Commission consolidated the cases by Order on October 14, 1999, and designated Case No. TC-2000-225 as the lead case.

On October 13, 1999, SWBT filed two Motions to Dismiss Or, In The Alternative, Answers, one directed at the Complaint filed by MCI and one directed at the Complaint filed by Brooks. These motions were largely identical. On October 22, 1999, MCI and Brooks filed a joint response to SWBT's motion to dismiss. SWBT replied on November 1, 1999.

On November 12, 1999, MCI and Brooks filed their Joint Motion to Strike, seeking to strike SWBT's reply of November 1, 1999, in its entirety as improper. On the same date, MCI also filed the Affidavits of Gary J. Ball and Edward J. Cadieux. SWBT responded to the Joint Motion to Strike on November 22, 1999.

Meanwhile, on October 21, 1999, BroadSpan Communications, Inc., doing business as Primary Network Communications, Inc. (PNC), filed its formal complaint against SWBT. Its complaint was essentially identical to those filed by MCI and Brooks and was filed

by the same attorney. The Commission issued its Notice of Complaint on October 22, 1999. On October 27, 1999, PNC filed its motion seeking to consolidate Case No. TC-2000-294 with Cases TC-2000-225 and TC-2000-226. SWBT responded on November 5, 1999, and stated that consolidation would be premature as the time for filing its answer had not yet elapsed. On November 22, 1999, SWBT filed its Motion to Dismiss Or, In The Alternative, Answer, on November 22, 1999. SWBT's motion was essentially identical to the motions it had filed on October 13, 1999. PNC filed its response to SWBT's motion on November 29, 1999.

As the foregoing review of the procedural history shows, there are three interrelated yet distinct motions now pending before the Commission: PNC's motion to consolidate, MCI's and Brooks' motion to strike, and SWBT's three largely identical motions to dismiss. Each of these motions is now ripe for decision.

PNC's Motion to Consolidate:

PNC's complaint against SWBT states the same allegations as the complaints of MCI and Brooks and is largely identical to them. For this reason, the Commission consolidated Cases TC-2000-225 and TC-2000-226 on October 14, 1999, and the same reason is sufficient grounds to consolidate Case No. TC-2000-294 as well. A further consideration which strongly supports consolidation is the fact that on April 26, 1999, the Commission approved PNC's adoption under the Telecommunications Act of 1996, 47 U.S.C. Section 252(i), of the portion of the Brooks-SWBT interconnection agreement governing reciprocal compensation. As PNC acknowledges in its response to

SWBT's motion to dismiss, "PNC's Complaint must stand or fall based on the outcome of a hearing on the merits of the Complaint filed by Brooks regarding the same dispute over the same contract provisions that PNC adopted[.]"

In its November 5, 1999, opposition to PNC's motion to consolidate, SWBT stated only that consolidation would be "premature" as it intended to file, but had not yet then filed, a motion to dismiss. That objection was mooted on November 22, 1999, when SWBT filed its motion to dismiss. SWBT made no other objection to the proposed consolidation.

The Commission will grant PNC's motion to consolidate. Case No. TC-2000-225 shall be the lead case and the style shall be "MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and BroadSpan Communications, Inc., doing business as Primary Network Communications, Inc., Complainants, v. Southwestern Bell Telephone Company, Respondent." The parties need no longer file duplicate pleadings.

MCI's and Brooks' Joint Motion to Strike:

Although two of SWBT's three motions to dismiss were filed prior to the joint motion to strike, the latter must be disposed of first because, if granted, SWBT's reply to MCI's and Brooks' response to SWBT's motions to dismiss will not be considered.

In their joint motion to strike, MCI and Brooks assert that SWBT's reply of November 1, 1999, was "improper" in that it argued that the complaints herein should be dismissed because MCI and Brooks had not offered any facts to refute the affidavits attached to SWBT's

motions to dismiss. MCI and Brooks further assert that the reply is "an improper and cumulative restatement" of SWBT's motions to dismiss, repugnant to the Commission's proposed revision of its rule 4 CSR 240-2.080. MCI and Brooks contend that they are not required to offer any evidence at this point under the Commission's procedural rules, and decry what they characterize as SWBT's wrongful accusation that Complainants' counsel has filed false and fraudulent complaints. They offer the Affidavits of Ball and Cadieux as evidence of the factual basis of their complaints. They urge the Commission to strike the affidavits and other supporting documents attached to SWBT's motions as unknown to the Commission's procedures. Finally, they note that SWBT was recently sanctioned in Texas for intentionally submitting misleading material and suggest that the Commission investigate whether SWBT has engaged in such conduct here.

In its response of November 22, 1999, SWBT asserts that its reply is proper under both the Commission's current rules and its proposed rules. SWBT further notes that the Commission's proposed rules are not yet in force. SWBT then asserts that the Commission should grant its motions to dismiss, summarizing the arguments it has previously made in support thereof. SWBT contends that its reply is directly responsive to matter contained in MCI's and Brooks' joint response and that Commission practice traditionally permits a motion, a response, and a reply. SWBT characterizes the joint motion to strike as an improper and untimely supplement of the joint response. SWBT further asserts that the affidavits of Ball and Cadieux are untimely under the Commission's procedural rules because they were

filed more than 10 days after SWBT filed its motions to dismiss. SWBT also states that MCI's and Brooks' joint motion to strike is itself untimely insofar as it is directed at the affidavits and other material attached to SWBT's motions to dismiss. Finally, SWBT denies that it accused MCI's and Brooks' counsel of unethical conduct.

The Commission concludes that the joint motion to strike must be denied, but that MCI and Brooks are correct in their contention that affidavits and other supporting documents may not be considered in determining a motion to dismiss for failure to state a claim.

The Commission has reviewed MCI's and Brooks' joint response and SWBT's reply, and concludes that the reply is indeed directly responsive to matter contained in the joint response. As SWBT's reply was timely and does not violate any of the Commission's procedural rules, the joint motion to strike must fail.

However, MCI and Brooks raise in their joint response an important threshold procedural point.¹ (The Commission's rules are silent with respect to summary judgement. See 4 CSR 240, Chapter 2.) A motion to dismiss a complaint for failure to state a claim upon which relief can be granted must be determined solely on the adequacy of the allegations contained in the complaint, without looking beyond

¹This point is repeated in PNC's response of November 29, 1999, to SWBT's motion to dismiss filed in Case No. TC-2000-294.

the "four corners" of the complaint.² DEVINE, MISSOURI CIVIL PLEADING & PRACTICE, § 20-3 (1986). A complaint is adequate if it "fairly presents for determination some matter which falls within the jurisdiction of the Commission[.]" State ex rel. Kansas City Terminal Railway Co. v. Public Service Commission, 272 S.W. 957, 960 (Mo. 1925). Thus, the Commission may not consider the various affidavits and other materials submitted by the parties herein in attack or defense of the complaints.

SWBT's Motions to Dismiss:

In its three, largely identical motions to dismiss, SWBT denies that any of the agreements in question were made with the intention that calls to Internet Service Providers (ISP) would be subject to local reciprocal compensation. SWBT reviews the pertinent language of each agreement to demonstrate that none of them explicitly define such calls as local calls. SWBT argues that it is already well-settled that the traffic in question is interstate in nature and not subject to local reciprocal compensation. SWBT relies on the Commission's Order in the case 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), and the declaratory ruling of the Federal Communications Commission (FCC), Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,

²Before the Commission, a motion to dismiss cannot be converted into a motion for summary judgment.

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, No. FCC 99-38 (February 28, 1999).

In their also largely identical responses to SWBT's motions, MCI, Brooks and PNC, in addition to the procedural argument already referenced, point out that the FCC has expressly declared that the interstate jurisdictional nature of ISP traffic does not govern whether or not reciprocal compensation may be paid on such traffic. According to Complainants, the FCC stated the pre-existing agreements providing for reciprocal compensation ought to be enforced and that such disputes should be resolved by the state commissions. Complainants rely on the very same FCC decision cited by SWBT. Complainants also deny that the Birch Telecom decision relied on by SWBT, Case No. TO-98-278, has any relevance to this matter. Complainants assert that their complaints have sufficiently pleaded factual questions, to be determined after an evidentiary hearing, and that the issue presented for resolution is within the jurisdiction of the Commission.

SWBT has devoted most of its effort in this matter to an attempt to show that reciprocal compensation on ISP traffic is barred as a matter of law. The Complainants have refuted that theory. The FCC has ruled that pre-existing agreements to pay reciprocal compensation on ISP traffic must be enforced. In Birch Telecom, this Commission merely stated that it would wait for the FCC's final rulemaking to determine the issue. That rulemaking, so far as this record shows, is not yet completed.

The Complainants have also correctly enunciated the standard by which their complaints must be judged on SWBT's motion to dismiss for failure to state a claim upon which relief may be granted. The Commission has reviewed the complaints filed herein and concludes that the allegations contained in each of them "fairly presents for determination [a] matter which falls within the jurisdiction of the Commission[.]" Kansas City Terminal Railway Co., 272 S.W. at 960. SWBT's motions must be denied.

Prehearing Conference and Proposed Procedural Schedule:

This matter is now at issue and a prehearing conference and procedural schedule are appropriate to ensure its prompt resolution. At the prehearing conference, the parties' representatives should be prepared to discuss the nature of any discovery each will conduct and the interval necessary for its completion; the number of witnesses each expects to call at hearing; the number and nature of any exhibits each expects to offer at hearing; and the anticipated length of the hearing. The parties' representatives should also be prepared to discuss the current status of settlement negotiations. It is expected that the prehearing conference will provide an opportunity for the parties to further pursue settlement discussions.

The parties shall jointly file a proposed procedural schedule. The proposed procedural schedule shall establish dates for the prefiling of direct, rebuttal and surrebuttal testimony according to Commission rule, as well as dates for the filing of a list of issues and the position statements of the parties on the issues. The

proposed procedural schedule shall also establish dates for the hearing of this matter.

IT IS THEREFORE ORDERED:

1. That Cases TC-2000-225 and TC-2000-294 are hereby consolidated for all purposes. Case TC-2000-225 shall be the lead case and the style shall be "MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and BroadSpan Communications, Inc., doing business as Primary Network Communications, Inc., Complainants, v. Southwestern Bell Telephone Company, Respondent."

2. That the Joint Motion to Strike filed by MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Missouri, Inc., on November 12, 1999, is denied.

3. That the Motions to Dismiss filed by Southwestern Bell Telephone Company on October 13, 1999, and on November 22, 1999, are denied.

4. That a prehearing conference shall be held on December 28, 1999, beginning at 10:00 a.m. The prehearing conference shall be held at the Commission's offices on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri. Anyone wishing to attend who has special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days before the prehearing conference at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

5. That the parties shall jointly prepare and file a proposed procedural schedule no later than January 4, 2000.

6. That this order shall become effective on December 17,
1999.

BY THE COMMISSION

A handwritten signature in dark ink, reading "Dale Hardy Roberts". The signature is written in a cursive style with a large, stylized "D" and "R".

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Drainer, Murray and
Schemenauer, CC., concur.
Crompton, C., not participating.

Thompson, Deputy Chief Regulatory Law Judge

Atty/Sec'y:

Thompson Poye

Date Circulated

12-2

CASE NOS.
TC-2000-225 and
TC-2000-294

Lumpke, Chair

ACE - NP

Crumpton, Commissioner

Murray, Commissioner

Schlenker, Commissioner

Draiser, Vice-Chair

Agenda Date

12-7

Action taken:

OS 4-0 AS

Must Vote Not Later Than

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

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

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

WITNESS my hand and seal of the Public Service Commission, at Jefferson
City, Missouri, this 7th day of December 1999.

Dale Hardy Roberts

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

