

Exhibit No.:
Issues: Reciprocal Compensation
Witness: S. Blake Ashby
Sponsoring Party: BroadSpan Communications, Inc.
d/b/a Primary Network Communications, Inc.
Type of Exhibit: Surrebuttal Testimony
Case No.: TC-2000-225, et al.

BROADSPAN COMMUNICATIONS, INC.
d/b/a PRIMARY NETWORK COMMUNICATIONS, INC.

SURREBUTTAL TESTIMONY

OF

S. BLAKE ASHBY

CASE NO. TC-2000-225, et al.

FILED

JUN 28 2000

**Missouri Public
Service Commission**

St. Louis, Missouri
June 28, 2000

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS) SS.

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

MCI WorldCom Communications, Inc.,)	
Brooks Fiber Communications of)	
Missouri, Inc., and BroadSpan Communications,)	
Inc., d/b/a Primary Network)	
Communications, Inc.,)	
)	
Complainants,)	Case No. TC-2000-225, et al.
)	
vs.)	
)	
Southwestern Bell Telephone Company,)	
)	
Respondent.)	

AFFIDAVIT OF S. BLAKE ASHBY

S. Blake Ashby, of lawful age, sound of mind and being first duly sworn, deposes and states:

1. My name is S. Blake Ashby. I am Vice-President for BroadSpan Communications, Inc. d/b/a Primary Network Communications, Inc.

2. Attached hereto and made a part hereof for all purposes is my surrebuttal testimony in the above-referenced case.

3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.


S. Blake Ashby

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 19th day of June, 2000.

Madonna J. Laws
Notary Public

My Commission Expire

"NOTARY SEAL"
MADONNA J. LAWS, NOTARY PUBLIC
ST. LOUIS COUNTY, STATE OF MISSOURI
MY COMMISSION EXPIRES 8/20/2002

Surrebuttal Testimony of S. Blake Ashby

1 **Q. Please identify yourself.**

2 A. My name is S. Blake Ashby. I have previously submitted direct testimony in this case.

3

4 **Q. What is the purpose of your surrebuttal testimony?**

5 A. I respond to the rebuttal testimony of Michael Brosler and Thomas F. Hughes.

6

7 **Q. Mr. Brosler and Mr. Hughes discuss the initial reciprocal compensation provisions**
8 **that PNC adopted from the AT&T/SWBT interconnection agreement. Do you have**
9 **any comments regarding this testimony?**

10 A. Yes. Contrary to Mr. Brosler's and Mr. Hughes' testimony, as indicated in my direct
11 testimony, the language of the AT&T/SWBT interconnection agreement regarding
12 reciprocal compensation that was initially adopted by PNC provides that all local traffic,
13 including calls to ISP end users, is subject to reciprocal compensation. I quoted the
14 applicable language and explained its meaning in my direct testimony. Mr. Brosler and
15 Mr. Hughes suggest that they are not aware of any CLEC claims that the AT&T
16 agreement provides for reciprocal compensation on ISP traffic. Of course, I cannot speak
17 to the scope of their knowledge, and certainly there may be companies out there that do
18 not have ISP customers or are not concerned about this issue for other reasons. However,
19 I do know that PNC believed that the agreement provided for such compensation.
20 Further, as is obvious from the other direct testimony in this case, Brooks and MCIWC
21 believed that similar language in their agreements provided for such compensation.
22 Additionally, in its brief in Case No. TO-98-278, Birch Telecom indicated that it believed

1 that the language of its agreement, which was the same as the AT&T language (minus the
2 arbitrated provision about the MCA calling scope shown as item (iii) in the AT&T
3 language), could enable it to receive such compensation. A copy of the pertinent pages
4 of the Birch agreement and brief are attached hereto as Ashby Schedule 4 and the original
5 documents are on file with the Commission. Of course, Birch was forced to seek
6 additional clarifying language given that the issue was under arbitration. Hence, while
7 Mr. Brosler and Mr. Hughes may not be aware of such matters (although they do profess
8 some familiarity with the Birch proceeding), their attempt to make a point fails.

9
10 **Q. Mr. Brosler states (and Mr. Hughes reiterates) that SWBT advised PNC when it**
11 **was adopting the AT&T agreement that SWBT contended that it did not have to**
12 **pay reciprocal compensation on ISP-bound traffic under that agreement. How do**
13 **you respond?**

14 **A.** Just as was the case later when PNC was adopting the Brooks reciprocal compensation
15 provisions, the parties disagreed about the meaning of the AT&T language concerning
16 reciprocal compensation and its applicability to calls to ISP end users. Both sides
17 expressed their positions. Both sides agreed that they could not unilaterally change the
18 wording or meaning of the agreements in the course of the adoption process, but rather
19 that they would have to live with the ultimate interpretation of the language by the
20 Commission and the courts.

21
22 **Q. Mr. Hughes makes reference at page 12 of his rebuttal to some materials regarding**
23 **AT&T's views. How do you respond?**

1 A. The AT&T comments in the FCC proceeding that are attached to Mr. Hughes' rebuttal
2 testimony as Schedule 6 address different issues from the issue prescribed in this case.
3 However, in its comments, AT&T recognized that ISPs are end users that purchase local
4 services under current FCC policy (Schedule 6, Comments, p. 3, 5, 30); that such ISPs
5 are using the traditional local network (p. 5); and that ISPs currently use basic
6 telecommunications services (p. 7). AT&T's comments do not discuss its views
7 regarding reciprocal compensation under its interconnection agreements.

8
9 **Q. Mr. Brosler then discusses PNC's abandoned efforts to adopt the reciprocal**
10 **compensation provisions of the Birch/SWBT agreement. How do you respond?**

11 A. As I indicated in my direct testimony, we abandoned our efforts to adopt the higher Birch
12 reciprocal compensation rates because it became clear to us that as a result of the
13 Commission's actions in the Birch proceedings we might not be able to collect reciprocal
14 compensation on calls to ISP end users under that agreement. The Commission has
15 discussed the implications of its decision in the Birch proceeding in its December 7, 1999
16 Order Denying SWBT's Motion to Dismiss this case, which I incorporate herein by
17 reference. The Commission did not determine that ISP traffic was interstate for purposes
18 of intercompany compensation, as Mr. Brosler implies. I would again note that Birch
19 would apparently have been satisfied with the standard language but for the fact that it
20 had been forced into an arbitration in which SWBT proposed exclusionary language, as
21 reflected in Ashby Schedule 4.

22 **Q. Mr. Brosler next discusses PNC's adoption of the Brooks reciprocal compensation**
23 **provisions. How do you respond to that testimony?**

1 A. As I indicated in my direct testimony, and above in this testimony, there is no dispute that
2 SWBT and PNC disagreed as to the meaning of the language in the AT&T agreement
3 and in the Brooks agreement. Both parties documented that disagreement. Both parties
4 knew that they would have to live with the Commission's interpretation of the Brooks
5 reciprocal compensation provisions.

6
7 The critical point is that, as the direct evidence shows, it was not until four months after
8 SWBT signed the Brooks agreement that it changed its mind about being willing to pay
9 reciprocal compensation on calls to ISP end users. That change in position cannot affect
10 SWBT's obligations under the Brooks agreement, either to Brooks or to PNC after its
11 adoption of the Brooks reciprocal compensation provisions.

12
13 **Q. Does this conclude your surrebuttal testimony?**

14 A. Yes. I do not think it is necessary for me to duplicate surrebuttal being provided by the
15 witnesses for Brooks.

FILED

APR 03 1998

MISSOURI
PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF OF BIRCH TELECOM OF MISSOURI, INC.

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

In the Matter of the Petition of Birch Telecom of)	
Missouri, Inc. for Arbitration of the Rates, Terms,)	
Conditions and Related Arrangements for)	Case No. TO-98-278
Interconnection With Southwestern Bell Telephone)	
Company)	

POST-HEARING BRIEF OF BIRCH TELECOM OF MISSOURI, INC.

Background

Birch Telecom of Missouri, Inc. ("Birch") is a competitive local exchange carrier ("CLEC") that seeks to interconnect with Southwestern Bell Telephone Company ("SWBT") in order to offer local exchange service to business and residential customers in Missouri. In 1997, Birch and SWBT reached agreement on all terms of an interconnection agreement, except for the issue of reciprocal compensation for the termination of calls originated on one local exchange carrier's ("LEC") network to end user Internet service providers ("ISPs") served by the other LEC within the same local calling area.¹

Birch sought to be treated the same as SWBT had treated Birch's competitors, namely, that the interconnection agreement state the reciprocal compensation to be paid for the termination of local calls and there be no further language regarding either the Internet or calls to end users ISPs. In this way, whatever policy decision is ultimately

¹ The Agreement as reached by Birch and SWBT has been tendered to the Commission and is a part of the record in this proceeding.

reached, Birch will receive the same compensation as its competitors for calls to end user ISPs, and thus will be neither advantaged nor disadvantaged.

Birch would be at a competitive disadvantage with respect to its competitors if it does not have the same language that SWBT has agreed to with most other CLECs in Missouri. Their agreements are silent on the issue of reciprocal compensation for ISP calls. SWBT sought to include in the Birch agreement language that barred reciprocal compensation for calls to end user ISPs within the same local calling area, regardless of whatever regulatory decision is made. This would ensure that Birch would not receive reciprocal compensation for such calls within any relevant time frame, no matter what happens at the FCC or this Commission. In the event of a ruling unfavorable to CLECs on ISP compensation, Birch would be in the same position as its competitors. But, without the language SWBT agreed to with other CLECs, Birch would be in a much less favorable position in the event of a favorable ruling for CLECs. While Birch's competitors would immediately be entitled to reciprocal compensation as contained in each of their respective agreements with SWBT, Birch would have to begin negotiating with SWBT for the level of compensation. If there was no agreement, Birch would have to seek *de novo* arbitration of the same issue as it is now arbitrating.

Birch already faces formidable obstacles as a new entrant against SWBT. It is inconceivable to Birch to compound that disadvantage by putting itself at a competitive

disadvantage to its competitors in its interconnection agreement with SWBT. That is unacceptable.²

Therefore, Birch believed it had no alternative but to arbitrate. Now that the hearing is complete, the Commission can quickly dispose of this matter by simply inserting in Section 5.1.2 of the interconnection agreement, between the words "end user" and "will be", the following phrase: ", including but not limited to traffic delivered to Internet service providers,". There would be no need for further delay in this proceeding. Birch believes this approach is the appropriate way to resolve the proceeding consistent with principles of law, sound public policy, and the accumulated wisdom of 14 state commissions that have addressed this issue. This solution would resolve the dispute by addressing it directly and in a narrow fashion, leaving the Commission with flexibility to proceed as it sees fit while bringing this proceeding to a timely end and allowing Birch to begin providing service as soon as possible.³

The foremost reason that led Birch to seek arbitration was the need for a quick resolution of this dispute. Birch is committed to providing facilities-based service for

² Lawhon, Transcript at 43, Lines 22-25; 44, Lines 1-8; 51, Lines 11-18; 67, Lines 5-18.

³ If the Commission requires reciprocal compensation for ISP traffic in the agreement between Birch and SWBT, as proposed in the text accompanying this note, and a generic proceeding of either this Commission or the FCC subsequently held that reciprocal compensation does not apply to ISP traffic, the Commission's general rulemaking could supersede the specific case determination. See Questions by Commissioner Murray, Transcript at 66, Lines 10-16; 432, Lines 20-25; 433, Line 1.

**INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND
252 OF THE TELECOMMUNICATIONS ACT OF 1996**

by and between

SOUTHWESTERN BELL TELEPHONE COMPANY

and

BIRCH TELECOM OF MISSOURI, INC.

000001

SWBT will negotiate a mutual and reciprocal charge for provision of Summary Usage Data Records.

5.6.10 Errors may be discovered by Birch, the IXC or SWBT. Both SWBT and Birch agree to provide the other Party with notification of any discovered errors within two (2) business days of the discovery.

5.6.11 In the event of a loss of data, both Parties shall cooperate to reconstruct the lost data within sixty (60) days of notification and if such reconstruction is not possible, shall accept a reasonable estimate of the lost data, based upon no more than three (3) to twelve (12) months of prior usage data, if available.

5.7 Billing Arrangements for Compensation for Termination of IntraLATA, Local, Transit, and Optional Calling Area Traffic

5.7.1 Other than for traffic described in sub-section 5.6 above, each Party shall deliver monthly settlement statements for terminating the other Party's traffic based on the following:

5.7.1.1 Each Party shall, unless otherwise agreed, adhere to the detailed technical descriptions and requirements for the recording, record exchange, and billing of traffic using the guidelines as set forth in the Technical Exhibit Settlement Procedures (TESP), previously provided by SWBT to Birch. Reference to this technical publication is included in Appendix TP.

- (a) Where Birch has direct/high usage trunks to a SWBT end office with overflow trunking through a SWBT tandem, billing for the Tandem Traffic will be calculated as follows:

Total Originating MOUs Recorded By Birch Less Direct End Office Terminating MOUs Recorded By SWBT Equals Total MOUs To Be Compensated As Tandem Traffic.

- (b) Where Birch has direct/high usage trunks to a third party with overflow trunking through a SWBT tandem, Birch must differentiate the originating MOU records for the Parties to ascertain how many MOUs should be compensated as Transit Traffic. If Birch is unable to so differentiate the originating MOU records, the Parties shall mutually agree upon a surrogate method for calculating Transit Traffic charges owed to SWBT.

5.7.1.2 On a monthly basis, each Party will record its originating MOU including identification of the originating and terminating NXX for all intercompany calls.