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September 2, 1999

FILED

SEP 3 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. TO-2000-92

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, Or In The Alternative, Hold In Abeyance And Response.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Leo J. Bub".

Leo J. Bub

Enclosure

cc: Attorneys of Record

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

FILED

SEP 3 1999

Missouri Public
Service Commission

In the Matter of Physical Collocation Completion)
Intervals under the Interconnection Agreement)
between BroadSpan Communications, Inc. d/b/a)
Primary Network Communications, Inc. and)
and Southwestern Bell Telephone Company.)

Case No. TO-2000-92

**SOUTHWESTERN BELL TELEPHONE COMPANY'S
MOTION TO DISMISS, OR IN THE ALTERNATIVE, HOLD IN ABEYANCE
AND RESPONSE**

Southwestern Bell Telephone Company respectfully submits that the Missouri Public Service Commission need not become involved at this time in the present dealings between BroadSpan Communications, Inc. d/b/a/ Primary Network Communications, Inc. (PNC) and Southwestern Bell concerning PNC's request for cageless physical collocation arrangements within Southwestern Bell central offices.

While PNC was dissatisfied with the installation intervals Southwestern Bell initially quoted for PNC's cageless physical collocation requests, these intervals have been substantially reduced and have in principle been mutually agreed to by the parties. The initial longer intervals resulted from the specifics of PNC's initial request, primarily the amount of electric power it sought at each office. Subsequent to filing its complaint, PNC revised its cageless physical collocation requests, primarily reducing its request for power. Based on these revisions, Southwestern Bell re-engineered PNC's cageless physical collocation requests and, working with PNC, was able to reach mutually acceptable installation intervals.

All that remains to be negotiated is an amendment to the parties' existing Interconnection Agreement to provide for this new form of collocation which was not covered in the existing Collocation Appendix. Southwestern Bell understands that PNC is still reviewing the revised draft contract amendment that Southwestern Bell submitted to PNC on August 24, 1999.

Accordingly, and as more specifically set out below, Southwestern Bell respectfully requests the Commission to dismiss PNC's application, or, in the alternative, to issue an order holding PNC's application in abeyance to permit the parties to conclude their negotiations on cageless physical collocation. If such negotiations are not successful, the Commission, upon being so notified, should direct the parties to arbitrate under the Federal Telecommunications Act any remaining differences over the terms of providing this new form of collocation.

**MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
TO HOLD IN ABEYANCE**

1. Despite the lack of any agreement providing for cageless physical collocation, Southwestern Bell willingly processed PNC's application for cageless physical collocation with the understanding that the existing Collocation Appendix to the Interconnection Agreement between the parties would need to be amended to provide for cageless physical collocation. Southwestern Bell commenced both of these efforts simultaneously in an effort to avoid any operational delay in the provision of service to PNC.

2. Even before PNC filed its application on August 4, 1999, Southwestern Bell communicated the difficulties it was encountering on the operational side in providing cageless physical collocation arrangements to PNC at certain Southwestern Bell central offices. These difficulties focused primarily on the exhaustion of central office power plants that would be caused by the amount of electric power requested by PNC and physical space limitations in certain offices.

3. Shortly after filing its application, PNC revised its request for cageless physical collocation. After SWBT advised PNC that its power requirements necessitated time intervals in excess of 90 days, PNC significantly reduced its request for power.

4. In an attempt to meet its customer's needs, Southwestern Bell worked with PNC's reduced requests for power and re-engineered each of PNC's cageless physical collocation requests. Based on PNC's revisions, Southwestern Bell was able to reduce the installation interval to the 90-day timeframe sought by PNC on the vast majority of central offices at issue. The only exception were three central offices in which space limitations existed. In those cases, Southwestern Bell, working with PNC, was able to reduce the installation interval to a little over 100 days, which Southwestern Bell understands is acceptable to PNC.

5. Before the requested cageless physical collocation arrangements can be delivered to PNC, all that remains to be accomplished is the amendment of the existing Interconnection Agreement between the parties because the current Collocation Appendix does not provide for this new form of collocation. To this end, Southwestern Bell has, in good faith, sought to negotiate a revised collocation appendix to provide for cageless physical collocation. First, Southwestern Bell proposed its new generic Collocation Appendix that includes cageless physical collocation. PNC objected to using this new generic appendix even though numerous CLECs had already accepted and signed it. Since PNC objected to replacing the current Collocation Appendix with the new generic, Southwestern Bell prepared and provided on August 24, 1999 for PNC's review, a proposed redline revision of the parties' current Collocation Appendix to specifically provide for the new form of collection.

6. Once negotiations on this revised appendix are complete and the amendment signed by the parties, Southwestern Bell will deliver the cageless physical collocation arrangements to PNC within the timeframes to which Southwestern Bell has committed.

7. At this point, however, Southwestern Bell understands that PNC is in the process of reviewing the proposed contract amendment Southwestern Bell submitted. Thus, there is no dispute between the parties needing Commission action at this time.

WHEREFORE, Southwestern Bell respectfully requests the Commission to dismiss PNC's application for lack of a justiciable controversy. Alternatively, Southwestern Bell requests the Commission to issue an order holding PNC's application in abeyance to permit the parties sufficient time to complete their negotiations on cageless physical collocation.

If such negotiations are not successful, the Commission, upon being so notified should direct the parties to arbitrate, pursuant to the procedural and substantive requirements of the Federal Telecommunications Act, any remaining differences over the terms of providing this new form of collocation.

SOUTHWESTERN BELL'S RESPONSE TO PNC'S APPLICATION

1. Southwestern Bell is without sufficient information with respect to PNC's corporate status or its authority to provide services under the jurisdiction of the FCC. Southwestern Bell, however, acknowledges that PNC has been authorized by the Commission to provide intrastate interexchange and local exchange telecommunications services in Missouri and that it is both a telecommunications carrier and a competitive local exchange carrier.

2. Southwestern Bell acknowledges the information contained in paragraph 2.

3. Southwestern Bell admits that it is a Missouri corporation authorized to operate as a telecommunications company providing, among other things, basic local and local exchange telecommunications services in Missouri and that it is a public utility, a telecommunications carrier, a local exchange carrier, an incumbent LEC and a Bell Operating Company as those terms are defined under the state and federal laws cited in PNC's complaint.

4. Southwestern Bell admits that it is a party to an Interconnection Agreement with PNC approved by the Commission on August 12, 1998 in Case No. TO-98-518, and that the Agreement includes a Collocation Appendix that PNC adopted from Southwestern Bell's Commission-approved Interconnection Agreement with AT&T Communications of the Southwest, Inc.

5. Southwestern Bell concurs that the parties current Collocation Appendix on p. 1 states it "sets forth the terms and conditions applicable to the Parties' rights and obligations pertaining to physical collocation" and that the Appendix in Sections 3.2 and 3.3.3 provides an interval for providing a price quotation and refers to a completion interval for preparing the collocation space. Southwestern Bell, however, notes that this Appendix does not contemplate the provision of cageless physical collocation. Rather, at the time it was negotiated and approved by the Commission, the only form of physical collocation envisioned was caged collocation. Thus, this Appendix and its terms have no application to the new form of collocation requested by the PNC.

6. Southwestern Bell concurs that the current Collocation Appendix to the parties' existing Interconnection Agreement in Section 4.12 requires Southwestern Bell to exercise due diligence to prepare the collocated space in a reasonable time period, not to exceed three months from PNC's acceptance of Southwestern Bell's price quotation, unless otherwise mutually agreed to in writing. Southwestern Bell, however, notes that this Appendix does not contemplate the provision of cageless physical collocation. Rather, at the time it was negotiated and approved by the Commission, the only form of physical collocation envisioned was caged collocation. Thus, this Appendix and its terms have no application to the new form of collocation requested by the PNC.

7. Southwestern Bell concurs that the three month space preparation period set out in Section 4.12 arose from the Commission's December 11, 1996 order in the arbitration between AT&T, MCI and Southwestern Bell, Case Nos. TO-97-40/TO-97-67 (AT&T/MCI Arbitration Order). Southwestern Bell, however, notes that neither this Appendix nor the Commission's AT&T/MCI Arbitration Order contemplated the provision of cageless collocation. Rather, the only form of physical collocation envisioned was caged collocation. Thus, neither this Appendix nor the Commission's AT&T/MCI Arbitration Order has any application to the new form of collocation requested by PNC.

8. Southwestern Bell concurs that the FCC issued new collocation rules requiring incumbent LECs to offer additional forms of collocation, including cageless collocation, and that the new rules took effect June 1, 1999.

9. Southwestern Bell concurs that Section 11.1 of the current Collocation Appendix to the existing Interconnection Agreement between the parties requires them to observe and abide by "any statutory and/or regulatory requirements in effect at the execution of this agreement or that subsequently become effective and then when effective." Southwestern Bell, however, affirmatively notes that it has complied with this section of the Interconnection Agreement by endeavoring to amend the parties' current Collocation Appendix to include the new form of collocation as recently mandated by the FCC.

10. Southwestern Bell concurs that on or about June 2, 1999, PNC delivered to Southwestern Bell applications for cageless physical collocation for the Mehlville, Chesterfield, Parkview and Kirkwood central offices in the metropolitan St. Louis area and that such requests are contemplated by the FCC's new collocation rules. Southwestern Bell denies, however, that these requests were pursuant to the current Collocation Appendix to the parties' existing

Interconnection Agreement since that Appendix does not currently provide for cageless physical collocation. Southwestern Bell, however, affirmatively states that despite the lack of contractual provision for this new form of collocation, Southwestern Bell willingly accepted these applications from PNC and proceeded to process them while, on a separate track, it sought to negotiate a new Collocation Appendix that specifically provided for this new form of collocation. Southwestern Bell proceeded in this fashion in an attempt to avoid any operational delay in providing the requested services to PNC.

11. Southwestern Bell concurs that on July 22 and 23, 1999 it provided to PNC quotations for the requested physical collocation arrangements for the Mehlville, Chesterfield, Parkview and Kirkwood central offices and that these quotations contained completion intervals of 180 days. Southwestern Bell, however, affirmatively states that these extended completion intervals were necessitated by the amount of power PNC requested at each central office and/or current space limitations in those offices. Subsequent to filing its complaint, PNC revised its cageless physical collocation requests, significantly reducing the amount of power requested. Based on these revisions to PNC's requests, Southwestern Bell re-engineered the requested collocation arrangements and, working with PNC, arrived at mutually acceptable delivery intervals.

12. Southwestern Bell concurs that on or about July 26, 1999, PNC accepted the price quotations for the Mehlville, Chesterfield, Parkview and Kirkwood central offices subject to Commission review of the prices, made an initial 50% payment, and that PNC found the quoted completion interval unacceptable. Southwestern Bell, however, denies that the completion interval initially quoted violated any term of the parties' Collocation Appendix to their Interconnection Agreement or any provision of the Commission's AT&T/MCI Arbitration

Order. Rather, the form of collocation PNC sought was not addressed or even anticipated in either the current Collocation Appendix or the Commission's AT&T/MCI Arbitration Order.

13. Southwestern Bell concurs that on August 2, 1999, Southwestern Bell provided additional quotes for cageless physical collocation arrangements for the Mission, Chestnut and Harvester central offices, that these quotes also included completion intervals of 180 days, that PNC found those completion intervals unacceptable, that PNC accepted the price quotes subject to reviewed by the Commission, and that PNC made an initial 50% payment. Southwestern Bell, however, denies that the completion interval initially quoted violated any term of the parties' Collocation Appendix to their Interconnection Agreement or any provision of the Commission's AT&T/MCI Arbitration Order. Rather, the form of collocation PNC sought was not addressed or even anticipated in either the current Collocation Appendix or the Commission's AT&T/MCI Arbitration Order.

14. Southwestern Bell concurs that PNC has not agreed that the completion intervals for the seven cageless physical collocation requests at issue in this proceeding could exceed three months, as the parties have reached no agreement whatsoever on the appropriate installation interval (or on any other terms) for this new form of collocation. Southwestern Bell, however, denies that there is any requirement to deliver cageless physical collocation within three months or that Southwestern Bell has "refused to change its position." Rather, the facts demonstrate that Southwestern Bell has been willing to work with PNC in good faith to provide the requested arrangements within the reasonable limits of its technical and physical ability and that through the parties' mutual efforts, they have reached agreement on acceptable intervals on all seven of the requests at issue here (and on 26 other requests PNC also submitted). For three of the

arrangements (out of a total of 33), the parties have agreed on installation intervals that exceed three months (a little over 100 days).

15. Southwestern Bell concurs that PNC has other applications for cageless physical collocation arrangements pending (the 26 requests referenced in paragraph 14, above). Southwestern Bell, however, is without sufficient information to admit or deny the other allegations contained in paragraph 15 of PNC's application. But Southwestern Bell affirmatively states that it has been working with PNC on these other applications and believes it has reached mutually acceptable delivery intervals on them as well.

16. Southwestern Bell concurs that Section 4.12 of the current Collocation Appendix of its Interconnection Agreement and page 18 from the Commission's AT&T/MCI Arbitration Order provide for Commission resolution of disputes regarding physical collocation completion intervals. Southwestern Bell, however, affirmatively notes that neither the current Collocation Appendix nor the Commission's AT&T/MCI Arbitration Order provide for or even contemplate cageless physical collocation.

17. Southwestern Bell concurs that the Commission has jurisdiction to resolve disputes submitted by agreement of the parties and to investigate compliance with its orders, but notes that Southwestern Bell does not agree that the Commission has jurisdiction under the sections of Chapter 386 RSMo cited by PNC both in its application and in the supplement it filed August 12, 1999 (see, e.g., PNC's Supplement at paras. 9, 11 and 12). Southwestern Bell disagrees with PNC's view of the source of Commission authority to resolve disputes pertaining to interconnection agreements negotiated and approved under the Federal Telecommunications Act. The Commission's authority in this area arises not from state law, but from the Federal

Telecommunications Act itself. (See, Iowa Utilities Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997)).

18. Southwestern Bell concurs that Section 252 of the Federal Telecommunications Act authorizes the Commission to resolve disputes regarding the provisions of arbitrated and approved agreements under the Act.

19. Southwestern Bell concurs that in Case No. TO-99-227 Southwestern Bell acknowledged the Commission's AT&T/MCI Arbitration Order, the 90-day interval for provision of physical collocation space, and that the Commission's AT&T/MCI Arbitration Order at page 18 stated "if a completion date outside the three month period is not agreed to by the parties, the issue may be presented to the Commission for determination." Southwestern Bell also concurs that it indicated that through December of 1998 it had provided 40 physical collocations arrangements to CLECs in Missouri, that 27 of these arrangements were completed in 1998, all by the agreed due date. Southwestern Bell also concurs that it indicated that its average completion interval for initial cage build out was 94 days and its average build out for modifications to exceeding cage arrangements was 84 days. Southwestern Bell however, affirmatively notes that none of these collocation arrangements were cageless physical collocation arrangements.

20. Southwestern Bell concurs that its testimony about its performance concerning physical collocation completion intervals solely addressed physical collocation, at the time there was no requirement to offer cageless physical collocation, and that Southwestern Bell opposed providing it. Southwestern Bell, however, affirmatively notes that following the FCC's requirement that ILEC's offer cageless physical collocation, Southwestern Bell has complied with that requirement. Here, the facts will demonstrate that Southwestern Bell has, in good faith,

sought to negotiate a new Collocation Appendix with PNC that would provide for the new form of collocation as mandated by the FCC. And, from an operational standpoint, Southwestern Bell has gone to great lengths to reach an acceptable arrangement with PNC for the delivery of cageless physical collocation, subject to the parties' reaching agreement on an amendment to their existing Collocation Appendix that would provide for this new form of collocation.

21. Southwestern Bell concurs that on March 31, 1999, the FCC issued new rules requiring ILECs to offer cageless physical collocation. Southwestern Bell, however, denies that there were inherent provisioning delays in the caged collocation process. Southwestern Bell would also affirmatively note that following the FCC's promulgation of new rules concerning cageless physical collocation, Southwestern Bell complied with those rules.

22. Southwestern Bell denies that its initial proposed 180 day completion interval for PNC's cageless physical collocation requests at the Mehlville, Chesterfield, Parkview, Kirkwood, Mission, Chestnut and Harvester central offices had anything to do with their being requests for cageless physical collocation arrangements. Rather, the longer completion intervals were necessitated by the exhaustion of central office power plants that would be caused by the level of power requested by PNC and by physical space limitations in some offices. As noted above, after PNC revised its requests, Southwestern Bell re-engineered PNC's requests and, working with PNC, was able to reach a mutually acceptable completion interval.

23. Southwestern Bell denies that its initial proposed 180 day completion interval for PNC's cageless physical collocation requests at the Mehlville, Chesterfield, Parkview, Kirkwood, Mission, Chestnut and Harvester central offices had anything to do with their being requests for cageless physical collocation arrangements. Rather, the longer completion intervals were necessitated by the exhaustion of central office power plants that would be caused by the

level of power requested by PNC and physical space limitations in some offices. As noted above, after PNC revised its requests, Southwestern Bell re-engineered PNC's requests and, working with PNC, was able to reach a mutually acceptable completion interval.

24. Southwestern Bell denies that it is intentionally delaying delivery of cageless collocation arrangements to PNC to impede competition and the other allegations PNC makes in paragraph 24 of its application. Rather, as explained above, the longer initial installation intervals Southwestern Bell quoted to PNC for the Mehlville, Chesterfield, Parkview, Kirkwood, Mission, Chestnut and Harvester central offices were necessitated by the exhaustion of central office power plants that would be caused by the level of power requested by PNC and physical space limitations in some offices. As noted above, after PNC revised its requests, Southwestern Bell re-engineered PNC's requests and, working with PNC, was able to reach a mutually acceptable completion interval.

25. Southwestern Bell denies that it has delayed provisioning cageless physical collocation to PNC in an effort to coerce PNC into accepting revisions to the current Collocation Appendix and the other allegations contained in paragraph 25 of PNC's application. To the contrary, Southwestern Bell sought to avoid any unnecessary delays by accepting and processing PNC's applications for cageless physical collocation arrangements despite the fact that the current Collocation Appendix did not provide for such arrangements, and, about the same time, proposing a revised generic Collocation Appendix that did provide for cageless physical collocation. Southwestern Bell has shown much flexibility in working with PNC to reach mutually acceptable installation intervals and negotiating revisions to the parties' current Collocation Appendix.

26. Southwestern Bell denies that the Commission should require the completion of requested arrangements for cageless physical collocation within three months of a CLEC's acceptance of a price quotation. As noted above, neither the current Collocation Appendix nor the Commission's AT&T/MCI Arbitration Order provide for cageless physical collocation arrangements. Rather, the terms under which this new form of collocation is to be provisioned, including completion intervals, should be left to the negotiations of the parties under the Federal Telecommunications Act.

27. Southwestern Bell denies PNC's assertion that the Commission should withhold its recommendation in Case No. TO-99-227 for interLATA authority for Southwestern Bell until Southwestern Bell demonstrates that it is providing cageless collocation arrangements within 45 days of a CLEC's acceptance of price quotes. Issues relating to Case No. TO-99-227 have no relevance to the issues that PNC has raised in this docket. Moreover, Southwestern Bell's actions in this case do not demonstrate an intransigence to the development of competition. Rather, they reflect Southwestern Bell's willingness to work with its CLEC customers to provide requested services within its reasonable technical and physical ability. From an operational standpoint, Southwestern Bell has gone to great lengths to reach a mutually acceptable set of completion intervals for PNC's cageless physical collocation arrangements. And on the contractual side, Southwestern Bell is endeavoring, in good faith, to reach mutually acceptable terms upon which the parties' current Collocation Appendix can be amended to provide for this new form of collocation.

28. Southwestern Bell denies that there is a need to adopt an expedited procedural schedule in this case. As outlined above, Southwestern Bell and PNC have reached mutually acceptable completion intervals for the delivery of the cageless physical collocation

arrangements PNC has requested. In addition, the parties are currently negotiating in good faith necessary revisions to their Collocation Appendix to provide for this new form of collocation. Rather than set this matter for immediate hearings, Southwestern Bell requests the Commission to either dismiss PNC's application or hold it in abeyance to permit the parties to complete their negotiations of terms under which this new form of collocation is to be provided.

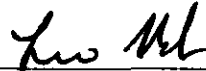
29. Southwestern Bell has attempted to respond to each and every allegation contained in PNC's application and in the supplement to its application it filed on August 12, 1999. To the extent any of these allegations have not been specifically answered or addressed in this Response, Southwestern Bell expressly denies them.

WHEREFORE, Southwestern Bell respectfully requests the Commission to deny PNC's application.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY



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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 September 2, 1999.



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