

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
January 25, 2000**

CASE NO: TO-2000-322

Office of the Public Counsel

P.O. Box 7800
Jefferson City, MO 65102

**Paul G. Lane/Leo J. Bub
Anthony K. Conroy/Katherine C. Swaller**
Southwestern Bell Telephone Company
One Bell Center, Room 3516
St. Louis, MO 63101

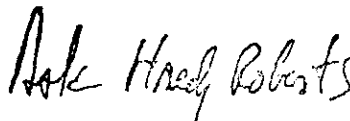
General Counsel

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

Mark P. Johnson/Lisa C. Creighton
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111

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

Sincerely,



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

At a session of the Public Service Commission held at its office in Jefferson City on the 25th day of January, 2000.

ORDER REGARDING MOTION TO COMPEL
RESPONSES TO DATA REQUESTS

The Commission's November 29, 1999, order addressed various matters, including discovery and access to information relevant to this arbitration. The Commission issued its standard protective order at SWBT's

request to protect sensitive information from inappropriate disclosure. The Commission urged the parties to cooperate in providing meaningful access to information and in resolving their differences regarding access to information. However, a dispute has arisen.

On December 22, 1999, COVAD filed its Motion to Compel Responses to Data Requests. On December 30, 1999, SWBT filed its response to the motion to compel. The disputed discovery concerns data requests by Covad numbered 1, 2, 3, 13, 14, 16, 17, 19, 31, 32, 48, 49, 50, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66, 74, 75, 76, 77, 78, 79, 85, and 86.

On January 5, 2000, the parties filed a Joint Issues Statement. The Commission will take into consideration the impact of the Joint Issues Statement on the pending data requests. Obviously, the parties may mutually agree that certain information is no longer necessary if a corresponding issue is resolved.

Discovery Procedures and Scope of Discovery:

The Commission is specifically authorized by statute to "adopt and prescribe" rules of procedure. Section 386.410.1, RSMo Supp. 1998. Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-2.090.1, relating to discovery:

Any party, in any proceeding before the commission, may obtain discovery by one (1) or more of the following methods: depositions upon oral examination or written questions, written interrogatories, requests for production of documents or things and requests for admission upon and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the

¹All references herein to the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 1994.

discovery process or failure to comply with commission orders regarding discovery will be the same as those provided for in the rules of civil procedure.

Commission Rule 4 CSR 240-2.090(2) also provides for discovery through "data requests." A data request is "an informal written request for documents or information[.]"

The scope of discovery is set by Rule 56.01(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"Relevant" evidence, in turn, is that which tends to prove or disprove a fact of consequence to the pending matter. W. Schroeder, 22 Missouri Practice-Missouri Evidence, § 401.1(a) (1992). Relevance must be determined by reference to the pleadings. See St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985).

Discussion:

In this proceeding, COVAD and SWBT are seeking the arbitration of unresolved issues with respect to terms for an interconnection agreement. COVAD intends to offer digital subscriber line (DSL) services nationally. DSL technology permits "always on" high-speed voice, data and video services to be provided over phone lines to residences and businesses. The issues presented in the case primarily relate to the terms for COVAD's

access to network elements, and particularly local loops and pricing for "conditioning" the loops to carry DSL services.

SWBT has a duty under the Act to provide for interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" and to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 USC sec. 251 (2), (3). Information relating to rates, terms, or conditions for interconnection or access or information relating to discrimination in rates, terms, conditions or access is relevant to this arbitration proceeding.

Objections Presented by Southwestern Bell:

SWBT raises an issue as to whether discovery, and in particular, data requests, may be utilized in this proceeding. This matter was reviewed above. Data requests are an authorized means of obtaining discovery in "any proceeding" pending before the Commission. 4 CSR 240-2.090.

SWBT raised the time constraints imposed by the Act as a basis to limit discovery. SWBT has correctly noted that the Act places limits on the time allowed to complete this arbitration process. However, SWBT has also conceded that the issues presented in this arbitration are substantially less complex and less numerous than in other similar arbitration proceedings. In any event, it would seem that the arbitration process would be enlightened and improved by access to relevant information rather than harmed. The parties are well aware of the constraints the Act

places on the arbitration process. The Commission has set a procedural schedule in this case to which the parties have jointly agreed. The onus for evaluating, managing and effectively presenting a great volume of information rests with the parties. Whether the parties are effective is more within their discretion than the Commission's.

SWBT also presents a general concern that the objectives for the data requests relate to marketing decisions and strategies of SWBT rather than to matters necessary to determine interconnection and access issues. SWBT suggests that this information is being obtained for a purpose unrelated to an interconnection agreement and that this sensitive information will be used outside the arbitration process. Essentially this is an objection to the relevance of the information requested and an argument that Covad is abusing the arbitration and discovery process to obtain competitive advantage.

SWBT's arguments fail. First, the Commission has entered its standard protective order to limit the access and use of sensitive information presented in this arbitration proceeding. Sensitive information necessary to proceedings before the Commission has always been protected from inappropriate disclosure in this manner. Secondly, the information requested is relevant to these proceedings. Covad has presented information that demonstrates that SWBT or affiliated entities intend to invest significant sums of money and effort to "rearchitect" its telecommunications network to provide similar DSL services in a competitive market. Many of Covad's data requests concern this activity. While both SWBT and Covad have legitimate motives to obtain or keep a competitive

advantage, this information would necessarily also affect rates, terms, or conditions for interconnection or access -- or -- could relate to discrimination in rates, terms, conditions or access.

Whether local loops require conditioning and the costs of conditioning impact a local exchange carrier that desires to market DSL services, whether an ILEC or a CLEC. These costs also impact consumers of DSL services. SWBT's imminent network upgrades have obvious implications. A consumer or carrier may willingly bear relatively high costs and pricing for access to network elements and conditioning of local loops if DSL services would not otherwise be available for a year or more, or if timely availability is uncertain. On the other hand, a LEC or consumer would be foolish to pay high access or conditioning costs when new network architecture that could lower these costs significantly is only a few weeks or months away.

SWBT and its affiliates could use scheduling discretion and knowledge of scheduling of the proposed network upgrades to obtain a discriminatory market advantage in provisioning DSL services, or to place competing carriers at a disadvantage. Network upgrades will also affect or eliminate many costs and affect other terms and conditions related to the offering of DSL services. Information concerning the network upgrades, if available, will affect the terms of the interconnection agreement from one or both parties' perspective.

It is possible that nondiscriminatory access to information concerning the network upgrades would provide a basis for compromise for various terms of the interconnection agreement. For example, the amount

of line conditioning charges may present less contentious issues if each party to the agreement has sufficient information to manage risks associated with these costs. The timing and availability of network upgrades affect these risks.

Thus, the information requested is relevant to the matters presented for arbitration even though the same information may also relate to marketing and competitive strategies.

SWBT also raised general concerns about the number and breadth of the data requests and notes that it has already provided over "nine thousand" pages of documents in response to Covad's data requests. Whether in drafting a data request or in responding to a data request, it appears that both parties are posturing for advantage, rather than cutting to the merits of the issues. Truly the stakes are high and the future is uncertain. The Commission suggests to the parties that a lack of cooperation and contentiousness over process and form to the detriment of direct discussion and information sharing will serve only to increase the uncertainty in both the market and in the regulatory process - increasing the risks for all. In any event, if a data request poses an undue burden for SWBT, SWBT may apply for a protective order or move for an alternative method of production that lowers or shifts the research and compilation burden.

The Commission also notes that posturing or tactics by any party that lack merit and that result in an unfair advantage or delay in this arbitration proceeding present concerns of professional ethics.

Review of Each Data Request at Issue:

Data Request No. 1.

Relative to SWBT's recent announcements concerning "Project Pronto" that it plans to "rearchitect its network," please provide the following documentation:

(a) A summary of the specific changes planned relative to SWBT's current engineering methods and procedures.

(b) A copy of any existing analysis concerning the affect of its design changes on the cost analysis it has previously performed for unbundled loops.

(c) Whatever documentation is available within SBC Communications, Inc. identifying how SWBT plans to provide access to unbundled DSL-capable loops in the "neighborhood broadband gateways."

(d) A description of what forms of "conditioning" (e.g., removal of load coils and bridge tap) SWBT believes may be required to provide DSL-based services to customer served by its target network architecture.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement. The proposed network changes could affect costs and charges and whether costs should be charged. With respect to 1(b), SWBT's counsel appears to state that such studies do not exist. If this is correct, SWBT need not provide nonexistent information. The motion to compel responses to data requests 1(a), (c) and (d) will be granted.

Data Request No. 2.

Please confirm or deny that SWBT has claimed that the network plans associated with "Project Pronto" will reduce its network cost structure. If SWBT has claimed that its network cost structure will be reduced, please provide the following:

(a) A copy of all analyses SWBT has performed to support that assertion.

(b) A copy of any analysis or statements that identify the specific source of the related savings.

(c) A copy of any analysis or statements that estimate the specific magnitude of the related short or long term savings.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request No. 3.

Please provide a detailed description of the "neighborhood broadband gateways" that SWBT plans to deploy as part of "Project Pronto" including a description of the specific equipment that will be deployed and how that equipment will provide ISDN and DSL services.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request No. 13.

Please describe each type of line conditions (e.g., removing load coils or bridge tap, adding or removing repeaters, rearranging outside plant facilities) that SWBT will undertake (in any circumstance) in order to satisfy a request for its retail ADSL service and/or retail ISDN service. If SWBT claims that it will only condition lines in order to provide its own retail ADSL and/or ISDN services in limited cases, please provide a complete description of each such limitation.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement. Terms set by SWBT for retail offerings do provide a basis to compare the proposed terms of an interconnection agreement to determine whether those terms are just, reasonable and nondiscriminatory.

Data Request No. 14.

For each type of line conditioning (e.g., rearranging outside plant facilities) that SWBT might choose to perform in order to satisfy a request for its retail ADSL service and /or retail ISDN service, please describe specifically how SWBT plans to recover any cost associated with

that activity. Please also provide a citation to any language in SWBT's retail tariff(s) that supports its proposed method of cost recovery.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request No. 16.

Please provide a detailed description of how operating expenses associated with outside plant rearrangements are reflected in SWBT's books. In responding to this request, please use the widest possible definition of "rearrangement" (i.e., include activities such as pair swaps due to repair calls, maintenance grooming of facilities, pair swaps triggered by service order activity, larger scale rearrangement to re-home facilities for new fiber placement, etc.). If SWBT accounts for the costs associated with different types of rearrangement differently, please provide a complete answer for each different scenario.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request No. 17.

For each category of cost that SWBT identified in response to the previous request, please provide:

(a) A detailed description of how that category of costs is considered in the study that developed SWBT's most recently adopted cost for an unbundled loop.

(b) The total annual dollars included in SWBT's unbundled element cost study and the total amount reported in SWBT's books of account each of the last 5 years.

SWBT objected to 17(b) because SWBT believes that data preceding the Telecommunications Act of 1996 would not be relevant and also because DSL conditioning is a recent activity. The activities described have to do with network elements and appear to have enough similarities to the issues presented to provide relevant information. Thus, this information

is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request 19.

Has SWBT done any analysis to establish that the combined cost study results for recurring and non-recurring costs for all loop types it provides represents a least-cost, most efficient plant design? If so, please provide a complete copy of that analysis.

SWBT's response did not specifically address this data request.

Covad's motion to compel and Covad's communications to SWBT described Covad's understanding of SWBT's position. Covad's motion provided additional information as to why this information would be relevant if it exists. This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Requests 31 and 32.

31. Is SWBT currently analyzing the possibility or does it have any plans regarding expanding the variety of xDSL service types it will make available on a retail basis? If so, please provide a copy of all documentation relating to SWBT's planning effort.

32. Is SWBT currently analyzing the possibility or does it have any plans to expand the range of customers it can reach with its retail DSL service types offerings? If so please provide a copy of all documentation relating to SWBT's planning effort.

The requested information in data requests 31 and 32 is clearly very sensitive. However, this information is subject to the Commission's protective order entered in this case. This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Requests Nos. 48, 49, 50.

48. Please provide a detailed description of how each of the following costs are treated in SWBT's recurring cost study of the unbundled loop. Please include in each description confirmation of whether or not SWBT included each cost in the recurring loop cost and the basis for developing each cost.
- a) The cross-connection between the drop and the end user's NID.
 - b) The cross-connection between SWBT distribution network and the end-user's drop.
 - c) The cross-connection between SWBT feeder and distribution facilities.
 - d) The connection from SWBT's feeder facilities and its MDF.
49. In SWBT's study of the unbundled loop element, what criteria does SWBT use to determine when fiber and Digital Loop Carrier ("DLC") feeder systems would be used instead of copper feeder? Please provide whatever supporting analysis SWBT relies on to support its analysis.
50. Please provide a detailed description of the overall plant design that is assumed in SWBT's recurring UNE loop study for loops serviced by fiber feeder and DLC systems (e.g., describe the specific type of DLC (manufacturer and model) the study assumed, the sizing and design of associated fiber, any additional assumptions regarding materials and labor used to connect the DLC system to copper distribution, etc.).

The requested information in data requests 48, 49 and 50 is detailed and in some cases sensitive. However, this information is subject to the Commission's protective order entered in this case. This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request No. 54.

Please provide complete supporting detail for the specific input cost(s) used in SWBT's unbundled loop study for the electronics described in the previous response. Please include a copy of SWBT's source of contract, catalog or other similar document.

The information requested is relevant to establishing costs. The information requested is subject to the Commission's protective order and will not be improperly disclosed or used.

Data Request No. 55.

Please provide the most recent price that SWBT actually paid for the specific electronics described in the previous response. Please include a copy of SWBT's source purchase order or other similar documents.

The information requested is relevant to establishing costs. The information requested is subject to the Commission's protective order and will not be improperly disclosed or used. Covad's interest in whether prices may have changed since SWBT's cost studies were performed is also relevant to this proceeding.

Data Request No. 56.

For each type of line card/electronics that SWBT has deployed within the last 10 years to provision ISDN services over fiber feeder facilities, please identify the average cost per line of ISDN-BRI service provisioned in each year (i.e., show the cost per line trend of the electronics that SWBT uses to provide ISDN-BRI by showing the cost of that equipment on a per line basis in each of the last 10 years or as far back as data is available).

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement. The 1996 Act does not create a cutoff to relevant information. To the extent that this information exists, SWBT must provide it.

Data Request No. 57.

Please describe the specific feeder electronics that SWBT assumes for digital (ISDN-BRI) loops in its cost unbundled loops that are served by copper feeder (if any). Please ensure that SWBT's description includes the manufacturer, product name, capacity and any other significant features of the electronics.

The information requested is relevant to establishing costs. The information requested is subject to the Commission's protective order and will not be improperly disclosed or used.

Data Request No. 58.

Please provide complete supporting detail for the specific input cost(s) used in SWBT's unbundled loop study for the electronics described in the previous response. Please include a copy of SWBT's source contract, catalog or other similar document.

The information requested is relevant to establishing costs. The information requested is subject to the Commission's protective order and will not be improperly disclosed or used.

Data Request No. 59.

Please provide the most recent price that SWBT actually paid for the specific electronics described in the previous response. Please include a copy of SWBT's source purchase order or other similar document.

The information requested is relevant to establishing costs. The information requested is subject to the Commission's protective order and will not be improperly disclosed or used. This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Requests Nos. 60-62.

60. Please describe the specific feeder electronics that SWBT actually deploys in its network today (if necessary) in order

to deliver ISDN-BRI to a customer served by a long copper feeder. Please ensure that SWBT's description includes the manufacturer, product name, capacity and any other significant features of the electronics.

61. Please provide a complete supporting detail for the specific input cost(s) used in SWBT's unbundled loop study for the electronics described in the previous response. Please include a copy of SWBT's source contract, catalog or other similar document.
62. Please provide the most recent price the SWBT actually paid for the specific electronics described in the previous response. Please include a copy of SWBT's source purchase order or other similar document.

The information requested is relevant to establishing costs. The information requested is subject to the Commission's protective order and will not be improperly disclosed or used. This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Request No. 63.

63. For each type of electronics that SWBT has deployed within the last 10 years to provision ISDN services over long copper feeder facilities, please identify the average cost per line of ISDN-BRI service provisioned in each year (i.e., show the cost per line trend of the electronics that SWBT uses to provide ISDN-BRI by showing the cost of that equipment on a per line basis in each of the last 10 years or as far back as data is available).

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement. The 1996 Act does not create a cutoff to relevant information. To the extent that this information exists SWBT should provide it.

Data Request No. 66.

66. Please provide a complete copy of all internal documentation related to plans to mechanize any portion of SWBT's systems and processes to qualify loops for its retail ASDL services(s).

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement.

Data Requests Nos. 74, 75, 76, 78, and 79.

74. Please provide a detailed description of generally how and in what specific accounts SWBT records costs associated with maintaining its current databases and OSS. Please provide the total dollars reported for SWBT's regulated state operations in each such account for each of the last 5 years.
75. Please provide a detailed description of how costs associated with maintaining its current databases and OSS are treated in SWBT's study of the recurring cost of unbundled elements. Please ensure that, at a minimum, SWBT's reply identifies the specific source of the cost input data used in its study, and includes a discussion of any adjustment made to that input data and a detailed description regarding how those costs are assigned to specific unbundled elements.
76. Please provide a detailed description of generally how and in what specific accounts SWBT records costs associated with maintaining the accuracy of records in its current databases and OSS. Please provide the total dollars reported for SWBT's regulated state operations in each such account for each of the last 5 years.
77. Please provide a detailed description of how costs associated with maintaining the accuracy of records in SWBT's current databases and OSS are treated in its study of the recurring cost of unbundled elements. Please ensure that, at a minimum, SWBT's reply identifies the specific source of the cost input data used in its study, and includes a discussion of any adjustment made to that input data and a detailed description regarding how those costs are assigned to specific unbundled elements.
78. Please provide a detailed description of generally how and in what specific accounts SWBT records costs associated with expanding/improving/updating its current databases and OSS.

Please provide the total dollars reported for SWBT's regulated state operations in each such account for each of the last 5 years.

79. Please provide a detailed description of how costs associated with expanding/improving/updating SWBT's current databases and OSS are treated in its study of the recurring cost of unbundled element. Please ensure that, at a minimum, SWBT's reply identifies the specific source of the cost input data used in its study, and includes a discussion of any adjustment made to that input data and a detailed description regarding how those costs are assigned to specific unbundled elements.

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement. The information relates to the issues presented.

Data Requests Nos. 85, 86.

85. Since August 1, 1999, how many xDSL loops has SWBT provisioned for its own retail services?
86. Since August 1, 1999, how many ISDN loops has SWBT provisioned for its own retail services?

This information is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement. Furthermore, the information remains relevant to determine the terms of a just, reasonable, nondiscriminatory interconnection agreement even if SWBT discontinues its retail ADSL offering.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company is directed to respond to each of the disputed data requests presented and make the requested information available by February 4, 2000.

2. That this order shall become effective on February 4, 2000.

BY THE COMMISSION

A handwritten signature in dark ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, somewhat stylized script.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Drainer and Schemenauer,
CC., concur.
Murray, C., dissents.
Crumpton, C., absent.

Keith Thornburg, Regulatory Law Judge

~~FILED IN PUBLIC SERVICE COMMISSION~~
 AL/Secy: Therbury Pope
 1-14
 Date Circulated
 Reemulated for
 Agenda § 1-18
 TO-2000-322
 CASE NO.
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 Lunpe, Chair
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 Crumpton, Commissioner
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 Murray, Commissioner
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 Schemenauer, Commissioner
1-14
 Drainer, Vice-Chair
1-14
 Agenda: 1-25
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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 25TH day of January 2000.

Dale Hardy Roberts

Dale Hardy Roberts
 Secretary/Chief Regulatory Law Judge

