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September 9, 1999

FILED³

SEP 09 1999

Missouri Public
Service Commission

Dale Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Truman State Office Building, 5th Floor
301 West High Street
Jefferson City, Missouri 65101-1517

Re: Case No. TO-2000-92

Dear Mr. Roberts:

Enclosed please find for filing with the Commission an original and fifteen copies of BroadSpan Communications, Inc. d/b/a Primary Network Communications, Inc.'s Response to SWBT's Motion to Dismiss or Hold in Abeyance. Upon your receipt, please file stamp the extra copy received and return to our courier. If you have any questions, please do not hesitate to contact us.

Very truly yours,


Carl J. Lumley

CJL:dn

Enclosures

cc. General Counsel (W/Enclosures)
Public Counsel (W/Enclosures)
Paul Lane (W/Enclosures)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION SEP 09 1999

In the Matter of Physical Collocation Completion Intervals)	Missouri Public
under the Interconnection Agreement between)	Service Commission
BroadSpan Communications, Inc. d/b/a Primary)	Case No. TO-2000-92
Network Communications and Southwestern Bell)	
Telephone Company.)	

**PNC'S RESPONSE TO SWBT'S MOTION TO DISMISS
OR HOLD IN ABEYANCE**

Comes now BroadSpan Communications, Inc. dba Primary Network Communications (PNC) and for its Response to SWBT's Motion to Dismiss or Hold in Abeyance states to the Commission:

PNC remains in need of Commission action in this dispute. Without such intervention, PNC will not receive physical collocation from SWBT in a timely manner and will not be able to meet its business plans. PNC requests the Commission to order the parties to attend a prehearing conference immediately in order to establish an expedited procedural schedule that will allow Commission action before October 26, 1999 (the first due date for SWBT to provision the requested physical collocation), as well as discuss potential settlement of this dispute.

Contrary to SWBT's assertions, the Commission still needs to resolve this dispute and require SWBT to provision physical collocation to PNC by the applicable deadlines. Under the Interconnection Agreement (Section 4.12), and more specifically pursuant to an arbitration decision of the Commission (TO-97-40), SWBT is required to provision physical collocation to PNC within three months of acceptance of price quotations. Under FCC rules (51.323(k)), with which the Agreement requires strict compliance (Section 11.1), SWBT's physical collocation offering must include cageless physical collocation. PNC developed its business plan based on these requirements and requested cageless physical collocation arrangements at a number of

locations with the expectation that it would be able to occupy those locations in just under five months (35 business days for SWBT to provide price quote and three months after acceptance thereof to provision the collocation space). Since this Case was commenced, the parties have negotiated due dates, some still as early as PNC's original anticipated first due date of October 26, 1999. However, as SWBT admits in its pleading, SWBT will refuse to meet these negotiated due dates if PNC has not by then acquiesced to the unnecessary and prejudicial amendments to the Agreement that SWBT still demands. Absent immediate intervention by the Commission in this proceeding, PNC has no assurance whatsoever that SWBT will provision the requested physical collocation by the dates required by prior Commission order, the Agreement, the negotiations of the parties, and PNC's business plan.

With regard to the numbered paragraphs of SWBT's Motion, PNC states:

1. There is no "lack of agreement." PNC and SWBT are party to an Interconnection Agreement that includes an Appendix Collocation (Exhibit A to the Application) that "sets forth terms and conditions applicable to the Parties' rights and obligations pertaining to physical collocation." The Appendix Collocation does not purport to apply to only caged physical collocation. The FCC has decided in very detailed rules that SWBT's physical collocation offering must include cages, shared cages, cageless, and adjacent space arrangements. (47 CFR 51.323(k)). The Appendix Collocation anticipated such rulemaking and requires strict compliance by SWBT (Section 11.1). Appendix Collocation does not excuse SWBT from such strict compliance until an amendment is negotiated, but rather specifically requires such strict compliance immediately upon the rules becoming effective (in this case, June 1, 1999). Furthermore, no amendment is necessary and there has never been any understanding or agreement between the parties that an amendment was necessary. Appendix Collocation and the

FCC rules required SWBT to "willingly process PNC's application", and further require SWBT to meet provisioning deadlines to avoid the operational delays that SWBT recognizes would be damaging to PNC.

2. While SWBT did communicate that it would not be able to meet the provisioning intervals required under the Appendix Collocation due to power and space problems, that did not excuse it from meeting those required intervals.

3. Nonetheless, PNC revised its requests for physical collocation in an attempt to settle this dispute and obtain that collocation in the required time.

4. The parties have reached agreement on due dates for SWBT to provision physical collocation pursuant to PNC's applications, including a due date as early as the original first due date of October 26, 1999 for some locations.

5. Appendix Collocation does provide for any and all forms of physical collocation, including cageless collocation. The Appendix does not permit SWBT to withhold provisioning of such arrangements until it is able to extract an unnecessary amendment from PNC to implement self-executing FCC rules. For purposes of settlement, PNC has discussed and will continue (even after conclusion of this proceeding) to discuss a potential amendment and to that end is developing a counter-proposal to SWBT's August 24, 1999 document. However, PNC will not acquiesce to SWBT's improper attempts to dilute the requirements of the FCC's rules or to dilute the previously negotiated/arbitrated and approved provisions of the existing Appendix Collocation. Further, such settlement discussions do not excuse SWBT from meeting its contractual and regulatory obligations.

6. SWBT does not have the right to withhold physical collocation arrangements based on its demand for an unnecessary amendment to the Appendix Collocation. It must meet the established due dates.

7. SWBT's proposed contract amendment is not acceptable. PNC is developing a counter-proposal for purposes of settlement. However, PNC has no assurance the parties will be able to reach agreement. PNC has no obligation to seek arbitration of an amendment to the Interconnection Agreement that only SWBT contends is necessary, nor does SWBT have a right under the Act to seek such an arbitration. Further, pursuit of such an arbitration would effectively sanction SWBT's improper efforts to postpone delivery of physical collocation to a competitor. SWBT's demand for an amendment does not support its anticipatory refusal to meet the established due dates for provisioning physical collocation. Given SWBT's anticipatory refusal, a dispute remains for Commission resolution. PNC is entitled to delivery of the collocation arrangements by the agreed due dates. SWBT's proposal to dismiss or abate this proceeding would preclude PNC from receiving such timely delivery of physical collocation.

8. Except as otherwise specifically addressed herein, PNC denies the averments of SWBT's Motion. PNC is not required to reply to SWBT's Response to the Application, but to the extent this pleading is somehow construed as such a response, PNC reasserts the averments of its Application and except as otherwise specifically addressed herein denies SWBT's Response to the extent it contradicts or departs from the Application.

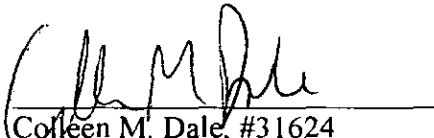
WHEREFORE, PNC respectfully requests the Commission to deny SWBT's Motion to Dismiss or Hold in Abeyance, order the parties to attend an immediate prehearing conference to discuss settlement and to develop a schedule that will permit Commission action before October 26, 1999, and to grant such other and further relief as to the Commission seems meet and proper.

Respectfully submitted,

CURTIS, OETTING, HEINZ,
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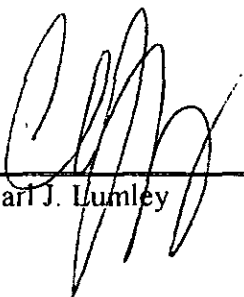
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed, U.S. Mail, postage paid, this 9th day of September, 19 99, to:

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