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February 14, 2000

VIA HAND DELIVERY

Mr. Dale Roberts
Executive Secretary
Missouri Public Service Commission
301 West High Street, Suite 530
Jefferson City, Missouri 65101

FILED²
FEB 14 2000
Missouri Public
Service Commission

Re: *In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad
Communications Company for Arbitration of Interconnection Rates, Terms,
Conditions and Related Arrangements With Southwestern Bell Telephone
Company
Case No. TO-2000-322*

Dear Mr. Roberts:

Enclosed for filing with the Commission is DIECA Communications, Inc. d/b/a Covad Communications Company's Petition for Reconsideration or, in the Alternative, Motion for Order Compelling Compliance with Commission's January 25, 2000 Order and for Sanctions. The original and fourteen (14) copies of this document will be forwarded by Federal Express for delivery on February 15, 2000.

Please do not hesitate to contact me if you should have any questions. Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Lisa Creighton /cmw
Lisa C. Creighton

LCC/cmw
Enclosures

cc: Office of Public Counsel
Office of General Counsel

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED²
FEB 14 2000

Missouri Public
Service Commission

IN THE MATTER OF THE PETITION OF)
DIECA COMMUNICATIONS, INC.)
D/B/A COVAD COMMUNICATIONS COMPANY)
FOR ARBITRATION OF INTERCONNECTION)
RATES, TERMS, CONDITIONS AND RELATED)
ARRANGEMENTS WITH SOUTHWESTERN)
BELL TELEPHONE COMPANY)

Case No. TO-2000-322

DIECA COMMUNICATIONS, INC.
D/B/A COVAD COMMUNICATIONS COMPANY'S
PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION FOR
ORDER COMPELLING COMPLIANCE WITH COMMISSION'S JANUARY 25, 2000
ORDER AND FOR SANCTIONS

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), by its undersigned counsel, moves the Commission to reconsider its February 10, 2000 Order denying Covad's Motion for Compliance with the Commission's January 25, 2000 Order and for Sanctions. In the alternative, Covad renews its request for an order holding that Southwestern Bell Telephone Company ("SWBT") has failed to comply the Commission's January 25, 2000 Order and sanctioning SWBT for its abuse of the discovery process. In support of this Motion, Covad states as follows:

1. On January 25, 2000, the Commission issued an Order directing SWBT to respond to Covad's First Set of Data Requests, specifically, Data Request Nos. 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. In issuing this Order, the Commission explicitly rejected the various objections SWBT raised in its attempt to avoid responding to Covad's Data Requests. The Commission expressly held that the information requested in these Data Requests was "relevant to determining the

terms of a just, reasonable, nondiscriminatory interconnection agreement” and directed SWBT to make the requested information available to Covad by February 4, 2000.

2. Prior to February 4, 2000, Covad requested SWBT to provide all non-highly confidential and non-voluminous documents to Covad via federal express on February 4, 2000. Further, Covad notified SWBT that it planned on having four representatives, two attorneys and two experts, in St. Louis to review the highly confidential and voluminous documents on February 7, 2000. Covad scheduled four representatives to travel to St. Louis as Covad expected a substantial document production since several of the data requests sought documents relating to a \$6 billion investment in SWBT’s network. Prior to the departure of the four representatives, Covad made several efforts to ascertain from SWBT the volume of documents that would be produced. SWBT never provided Covad with that information. When the four Covad representatives arrived at the document production on February 7, 2000, SWBT produced to them only 303 pages of documents, 109 pages of which were redacted.

3. In order to preserve its rights and to have the motion decided prior to the conclusion of the depositions, scheduled to begin the following day, and the commencement of the hearing, it was imperative that Covad file its original motion for compliance as soon as possible. On February 7, 2000, Covad filed its original motion. The original motion provided the background leading up to the dispute and a general description of the production of documents. Any lack of clarity or specificity in Covad’s original motion regarding its dissatisfaction with SWBT’s compliance with the Commission’s Order stems from Covad’s desire to draw the Commission’s attention to the inadequate production immediately. Covad essentially had one day to review SWBT’s latest production and prepare for two depositions and the hearing in this matter. After Covad arranged for two attorneys and two experts to fly to St.

Louis to review the production, much of this one day was spent identifying and analyzing the deficiencies of SWBT's production and preparing a second motion to compel the production of the same documents that were subject to Covad's original motion to compel.

4. On February 8, 2000, SWBT filed its response to Covad's motion.

5. On February 9, 2000, Covad supplemented its original motion with several specific details of how SWBT had violated the Commission's January 25, 2000 Order.

6. On February 10, 2000, the Commission denied Covad's motion on the grounds that it did not provide sufficient detail for the Commission to consider. Based on this, Covad believes that the Commission did not consider Covad's supplemental filing which contained a substantial amount of details relating to SWBT's failure to comply with the Commission's January 25, 2000 Order.

7. Covad moves the Commission for reconsideration of its February 10, 2000 decision, and requests that the Commission consider Covad's supplemental filing made on February 9, 2000. The effect of failing to consider Covad's supplemental filing is SWBT will benefit from raising unjustified objections to discovery and then, subsequently failing to provide compelled information when time was, and remains, of the essence.

8. If the Commission will not consider Covad's supplemental filing on reconsideration, then, in the alternative, Covad requests that the Commission treat this motion as a renewed Motion for Compliance with the Commission's January 25, 2000 Order and for Sanctions.

I. SWBT FAILED TO PRODUCE DOCUMENTS AS ORDERED.

SWBT did not adequately produce documents responsive to Data Requests 1, 2, 31, 32, 54, 55, 58 and 59. SWBT has violated this Commission's Order by failing to produce responsive documents at all, producing incomplete copies of documents and/or inappropriately redacting portions of documents.

A. SWBT Failed to Produce Any Documents Responsive to Data Requests 31 and 32 that Relate to SWBT's Retail DSL Data.

Data Requests 31 and 32 respectively query and request:

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. (additional emphasis added)*

In SWBT's original response to these requests asking for retail information and supporting documents, SWBT responded that it no longer provides retail xDSL services and provided zero (0) documents. In its Second Supplemental Response to Data Request 31 (attached to its Response), SWBT states only that "ASI [SWBT's retail affiliate] is not currently planning to offer any xDSL services types other than those identified in SWBT's response to Data Request No. 1¹ and provided zero (0) additional documents. A Second Supplemental

¹ Data Request 1 requests the following information:

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.

Response relating to Data Request 32 was not attached to SWBT's Response to Covad's Original Motion. Therefore, SWBT provided absolutely no documents whatsoever responsive to Data Request 31 and 32.²

SWBT and ASI's cross-reference to SWBT's response to Data Request 1 does not sufficiently respond to Data Requests 31 and 32. Simply identifying the Project Pronto documents produced pursuant to Data Request 1³ does not "*provide a copy of all documentation relating to SWBT's planning effort*" as requested by Covad and as ordered by this Commission.

This Commission has already stated the information requested in Data Request 31 and 32 "is relevant to determining the terms of a just, reasonable, nondiscriminatory interconnection agreement." (Commission Order at 8-9). Moreover, the Commission expressly stated that "information that demonstrates that SWBT *or affiliated entities* intend to invest significant sums

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- (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 customers served by its target network architecture.

² It is important to note that in the Instruction/Definition section of Covad's data requests, "document" is defined to mean, "without limitation, any written, typed, printed, recorded, or graphic matter, however preserved, produced or reproduced, of any type or description, regardless of origin or location, *in your actual or constructive possession, custody or control, or the existence of which you have knowledge, and wherever prepared, published or released by you or by any other person . . .*" Moreover, under Rule 58.01 of the Missouri Rules of Civil Procedure, SWBT had an affirmative duty to produce all responsive documents that were in SWBT's possession, custody or control. SWBT certainly has actual or constructive possession, custody or control of documents relating to Project Pronto. Despite this, SWBT failed to produce responsive documents.

³ Incidentally, in response to Data Request 1, SWBT produced only 8 documents and referenced one additional document that had been previously produced in response to another Data Request. Two of the 9 documents relate to engineering practices implemented prior to Project Pronto and are undeniably nonresponsive. Of the 7 documents that actually address Project Pronto, 4 of them total only 8 pages. The other 3 documents total approximately 70 pages. Additionally, at least one of the documents is missing attachments.

of money and effort to 'rearchitect' its telecommunications network to provide similar DSL services in a competitive market . . . would necessarily . . . affect rates, terms, or conditions for interconnection or access – or – could relate to discrimination in rates, terms, conditions or access.” (Commission Order at 4 (emphasis added)). The Commission also recognized that “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.” (Commission Order at 5 (emphasis added)). Despite the Commission’s Order compelling production and extensive discussion of the relevancy of the information requested, SWBT has failed to produce all documents responsive to Data Request 31 and 32.

B. SWBT Produced Insufficient Documents Responsive to Data Request 2.

Data Request No. 2 requested that SWBT

“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.*

In response to Data Request 2, SWBT produced only 4 documents totaling approximately 220 pages. Moreover, as discussed below, approximately 40 of these pages were redacted. Three of the 4 Project Pronto documents produced were business cases, but 2 of the business cases are notably and inexplicably incomplete (pages are missing).

It is well known that Project Pronto is a \$6 **billion** initiative targeted at transforming SWBT and its parent, SBC Communications, into the largest single provider of advanced broadband services. As noted in Covad's original motion to compel, SWBT claims that the \$6 **billion** dedicated to Project Pronto will "[d]ramatically reduce its network cost structure. Expenses and capital savings alone are expected to offset the cost of the entire initiative. See Attachment A to Covad's Original Motion to Compel, "SBC Launches \$6 Billion Initiative to Transform it into America's Largest Single Provider of Broadband Services." It is inconceivable to Covad that there are only 4 documents that explain or support SWBT's contentions regarding how SBC's network plans associated with Project Pronto will or will not reduce its network cost structure.

How SBC's/SWBT's network plan will or will not reduce its cost structure is directly relevant to the costing issues in this arbitration. SWBT has now denied Covad access to this crucial information not once, but twice—in direct violation of the Commission's Order.

C. SWBT Inappropriately Redacted Its Responses To Data Requests 2, 54, 55, 58 and 59.

Pursuant to the protective order in this matter, documents that SWBT designates "highly confidential" will only be produced on a SWBT site. Covad is not allowed to have its own copies and has been required to fly its attorneys and experts to both Kansas City and St. Louis in order to view the documents. (Both times the Covad attorneys and experts were greeted with inadequate productions.) SWBT has stated that such measures are needed to protect its highly confidential information. Covad is, therefore, at a loss as to why approximately a third of the highly confidential documents most recently produced contain redactions.

Preliminarily, SWBT never provided Covad with prior notification that any of the documents would be redacted, let alone explained why these redactions were being made. At

this point, Covad has no way of knowing if SWBT's redactions are legitimate. If SWBT's concern is related to protecting the allegedly confidential nature of the documents, Covad responds that these documents have already been afforded the highest level of protection through the governing protective order.⁴

As noted above, SWBT redacted documents responsive to Data Request 2. All 3 of the business cases provided contained redactions that may have disabled Covad from reviewing specific sources of cost savings, which would be directly responsive to the data request. Covad should be afforded the opportunity to examine these documents in their entirety.

Similarly, in Data Requests 54, 55, 58 and 59, Covad asked for information regarding the supporting details for specific input costs and prices relating to electronics. In response to Data Request 54, SWBT provided only 9 pages and indicated that the original "source contract or similar supporting documentation is unknown." In response to Data Request 55, SWBT redacted pricing information. In fact, SWBT redacted portions of 61 of the 65 pages produced in response to Data Request 5. It is impossible for Covad to evaluate what the price list means let alone determine whether it is accurate in the absence of source information and in the face of SWBT's redactions. For the same reasons, Covad cannot determine what the terms of the contract are, if volume discounts would apply and/or whether package deals exist(ed) that involve tradeoffs in pricing for different equipment items. It is also impossible for Covad to determine the veracity of SWBT's contention in its Response that it redacted only information regarding equipment not addressed in the data request. SWBT should produce the "unknown" source documents and

⁴ Indeed, SWBT's earlier claim to be withholding information that was too highly confidential proved to be false. In response to Data Request 50, SWBT initially claimed that the information sought was too market sensitive to release and further, SWBT claimed to be contractually prohibited for releasing the information. After SWBT was compelled to provide a response, it informed Covad that the information was already provided in response to Data

Covad should be able to review the pricing information in its entirety in order to enable it to meaningfully analyze the price list.

SWBT employed the same crippling tactics with respect to Data Requests 58 and 59, which also request electronics pricing information and the corresponding supporting documents. SWBT only produced 4 redacted pages in response to both of these requests. In addition to concerns that SWBT did not even provide source documents that relate to each and every one of prices for which a source would be required, Covad is doubly concerned that the pages that were actually produced blacked out information that would enable Covad to do even a minimal cost/price analysis.

Clearly, SWBT has not provided the information that its was ordered to by this Commission. As SWBT knows, time is of the essence and in light of that, there is a chance it will not be required to comply with the Commission's Order. This Commission should not sanction such tactics. SWBT should be order to comply with the Commission January 25, 2000 Order and bring all documents to the hearing scheduled to begin on February 15, 2000. Further, SWBT should be sanctioned.

II. REQUEST FOR SANCTIONS

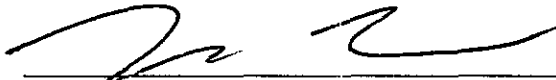
The Commission is empowered to sanction SWBT's conduct in the manner provided in Rule 61.01 of the Missouri Rules of Civil Procedure. See 4 C.S.R. 240-2.090. Covad respectfully requests that SWBT be ordered to pay the reasonable expenses, including attorney's fees, caused by SWBT's abuse of the discovery process and failure to comply with the Commission's Order. Covad further requests that the Commission strike SWBT's direct,

Request 22 (which was not subject to Covad's Motion to Compel). Clearly, the responsive information could not have been too highly confidential if Covad already it.

rebuttal, and surrebuttal testimony on issues where it has failed to fully and completely answer Covad's Data Requests.

WHEREFORE, DIECA Communications, Inc. d/b/a Covad Communications Company, respectfully requests the Commission issue an Order compelling SWBT to fully and completely comply with the Commission's Order of January 25, 2000 and sanctioning SWBT for its abuse of the discovery process. Covad further requests the opportunity to conduct direct examination of Covad's witnesses at the hearing on any issue that may be addressed in the documents that SWBT has failed to produce.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was transmitted via facsimile and mailed, postage prepaid, this 14th day of February, 2000, to:

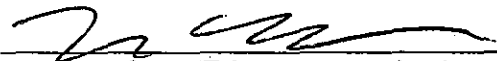
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