

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED³

JAN 28 2000

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

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Missouri Public
Service Commission

CASE NO. TO-2000-322

REBUTTAL TESTIMONY OF
TERRY L. MURRAY
ON BEHALF 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

DATED: January 28, 2000

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND SUMMARY.....	1
II. SWBT FAILS TO JUSTIFY ITS SHORT-RUN APPROACH TO COSTING AND PRICING LOOP QUALIFICATION.	2
III. SWBT'S PROPOSAL WOULD ALLOW IT TO OVER-RECOVER ITS FORWARD-LOOKING COSTS FOR LOOP "CONDITIONING."	5
IV. SWBT FAILS TO JUSTIFY ITS ANTICOMPETITIVE PRICING PROPOSAL FOR UNBUNDLED ISDN LOOPS.....	10

1 **I. INTRODUCTION AND SUMMARY**

2 **Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS.**

3 A. My name is Terry L. Murray. I am President of the consulting firm Murray &
4 Cratty, LLC. My business address is 227 Palm Drive, Piedmont, CA 94610.

5 **Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS**
6 **PROCEEDING?**

7 A. Yes, I filed direct testimony on January 7, 2000, on behalf of Covad
8 Communications Company ("Covad") concerning economic and policy issues
9 raised by Southwestern Bell Telephone Company, Inc. ("SWBT") in its response
10 to Covad's Petition for Arbitration. My curriculum vita provided as Attachment
11 TLM-1 thereto presents my qualifications and experience as they relate to the
12 issues in this proceeding.

13 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

14 A. My rebuttal testimony addresses the arguments presented in the January 7, 2000,
15 direct testimonies of Jerrod C. Latham and James R. Smallwood.

16 **Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.**

17 A. In the remainder of my rebuttal testimony, I establish the following points:
18

- SWBT's testimony fails to support its proposed costs and prices for loop

19 qualification. In fact, to the limited extent that SWBT's presentation
20 addresses the underlying assumptions in its cost analysis, SWBT's showing
21 supports the criticisms raised in my direct testimony.

- 1 • SWBT's high-level discussion of the basis for its proposed "conditioning"
- 2 prices does not justify SWBT's specific proposal to recover the cost of the
- 3 "conditioning" function in both recurring and nonrecurring charges.
- 4 Moreover, SWBT's own network plans suggest that its proposed treatment of
- 5 competitors is discriminatory.
- 6 • SWBT's testimony appears to accept Covad's conclusion that the SWBT
- 7 proposed unbundled ISDN loop price is anticompetitive. SWBT's reasoning
- 8 in support of an anticompetitive result fails. Instead, SWBT's arguments help
- 9 demonstrate why the Commission should correct SWBT's proposed prices as
- 10 recommended in my direct testimony.

11 **II. SWBT FAILS TO JUSTIFY ITS SHORT-RUN APPROACH TO COSTING**
12 **AND PRICING LOOP QUALIFICATION.**

13 **Q. AT PAGES 5 THROUGH 7 OF HIS DIRECT TESTIMONY, MR.**
14 **LATHAM PROVIDES SWBT'S SUPPORT FOR ITS PROPOSED LOOP**
15 **QUALIFICATION CHARGE. DOES MR. LATHAM'S DISCUSSION**
16 **JUSTIFY SWBT'S PROPOSAL?**

17 **A.** No. Mr. Latham's presentation ignores serious shortcomings in SWBT's
18 analysis, including the fact that SWBT's cost analysis does not fully reflect even
19 the company's short-run mechanization plans. Moreover, Mr. Latham's
20 arguments rely on a mischaracterization of Covad's position. Finally, Mr.
21 Latham's main argument, that the Commission will decide this issue elsewhere,
22 entirely ignores the weight of the evidence that Covad has presented in this
23 proceeding.

1 **Q. HOW DOES MR. LATHAM'S DIRECT TESTIMONY IGNORE THE**
2 **SHORT-RUN NATURE OF SWBT'S COST ANALYSIS?**

3 A. Mr. Latham's comments ignore that fact that SWBT has already planned changes
4 to its mechanized loop qualification processes that should be nearly in effect by
5 the time the Commission adopts a decision in this arbitration. Therefore, in
6 contrast to Mr. Latham's portrayal of SWBT's analysis as long-run, it barely
7 qualifies as a short-run analysis. Moreover, significant portions of SWBT's
8 reported costs are already backward-looking as they pertain to spectrum
9 management functions that SWBT has agreed it will not need to perform at all.
10 SWBT's proposed price therefore overstates its forward-looking cost. Adopting
11 SWBT's proposal would, in effect, lock Covad into a price reflecting antiquated
12 processes for the duration of its new contract.

13 **Q. HOW HAS MR. LATHAM MISCHARACTERIZED COVAD'S**
14 **POSITION?**

15 A. At the bottom of page 5 and top of page 6, Mr. Latham suggests that Covad is
16 demanding that SWBT be required to "mechanize" its loop qualification data.
17 Based on that characterization, Mr. Latham then asserts that "the FCC specifically
18 rejected Covad's request that ILECs be required to mechanize their loop
19 qualification information." Covad is not, however, asking the Commission to
20 order SWBT to "mechanize" access to any data that are not already contained in
21 SWBT's existing electronic databases. Instead, in this arbitration, Covad is
22 asking for access to SWBT data that is already "mechanized." Mr. Latham's
23 argument therefore mischaracterizes Covad's position. Instead of asking for

1 mechanization of something new, Covad's position is based on the fact that, for
2 electronic access to data that SWBT should already have mechanized, a
3 reasonable estimate of a nonrecurring TELRIC is at or near \$0.

4 **Q. DOES SWBT'S DESCRIPTION OF THE BASIS FOR ITS REPORTED**
5 **COSTS CONFIRM THE ADJUSTMENTS THAT YOU PROPOSED IN**
6 **YOUR DIRECT TESTIMONY UNDER THE ASSUMPTION THAT THE**
7 **COMMISSION DOES ALLOW SWBT TO RECOVER COSTS FOR**
8 **MANUAL LOOP QUALIFICATION ACTIVITIES?**

9 A. Yes. The cost study descriptive material that Mr. Smallwood made public as the
10 part of his recent testimony in Kansas¹ confirms that a drafting clerk can gather
11 the data that is required for an engineer to assess a loop's qualification for DSL-
12 based services. As Covad's own engineers will need to assess the loop's
13 suitability relative to Covad's range of service options, it makes no sense to
14 require Covad to pay SWBT to have a SWBT engineer perform a duplicative, but
15 less meaningful, analysis. Therefore, if the Commission allows SWBT to recover
16 costs for manual qualification, it should include only the cost for a drafting clerk
17 to gather the relevant data and eliminate the cost for activities that would have
18 been performed by SWBT's engineer, as I proposed in my direct testimony.

19 **Q. AT PAGE 6, MR. LATHAM ALSO ASSERTS THAT THE AGREEMENT**
20 **BETWEEN SWBT AND SBC ADVANCED SOLUTIONS, INC. ("ASI") ON**

¹ Direct Testimony of James R. Smallwood at Schedule 2 at page 3, filed January 7, 2000, with the State Corporation Commission of the State of Kansas, Docket No. 00-DCIT-389-ARB.

**A \$15 LOOP QUALIFICATION PRICE PROVES THAT THE \$15 PRICE
IS NON-DISCRIMINATORY. IS MR. LATHAM CORRECT?**

A. No. Payments that flow between SWBT and ASI remain within SBC and, therefore, mean little. If SWBT's forward-looking cost for loop qualification is, for example, \$0.10,² the SWBT and ASI agreement to transfer \$15 on paper does not make it one bit less discriminatory for SWBT to charge competitors \$14.90 more than the cost-based price allowable under the Telecommunications Act of 1996 ("the Act"). Moreover, if ASI's prices are not subject to an imputation test, then the level of its transfer payment to SWBT has no effect in constraining discriminatory pricing behavior at all.

**III. SWBT'S PROPOSAL WOULD ALLOW IT TO OVER-RECOVER ITS
FORWARD-LOOKING COSTS FOR LOOP "CONDITIONING."**

**Q. AT PAGES 8 AND 9 OF HIS DIRECT TESTIMONY, MR. LATHAM
PROVIDES QUOTATIONS FROM FCC ORDERS THAT SUPPOSEDLY
SUPPORT SWBT'S PROPOSED DSL LOOP "CONDITIONING"
CHARGES. DOES MR. LATHAM'S DISCUSSION ACTUALLY
SUPPORT THE SWBT PROPOSAL?**

A. No. At the high level of generality that characterizes Mr. Latham's testimony, I do not believe that Covad and SWBT disagree. SWBT is entitled to TELRIC-based compensation for unbundled DSL-capable loops. The meaningful difference between the SWBT and Covad positions is related to how a TELRIC

² \$0.10 is the interim price for a competitor to electronically access SWBT loop qualification data as established for SWBT in Texas by Arbitration Award, Public Utility Commission of Texas, November 30, 1999, in Docket No. 20226 and 20272, at 103.

1 analysis should reflect “conditioning” costs. As Mr. Donovan and I demonstrated
2 in our direct testimonies, SWBT will recover the relevant costs for providing
3 DSL-capable loops as part of recurring prices that are designed to cover its
4 TELRIC. The FCC findings that Mr. Latham cites do nothing to support SWBT’s
5 desire to recover costs for the same loop functionality as part of both its recurring
6 and non-recurring prices. Instead, the FCC’s TELRIC requirements dictate that
7 prices should be based on the most efficient network design considering all costs
8 — both recurring and nonrecurring — as part of a complete forward-looking
9 network design.

10 Finally, even if Mr. Latham were correct in characterizing the FCC’s
11 current position, the FCC currently has before it a petition for reconsideration of
12 the *UNE Remand Order* on precisely this issue. The Commission should be
13 prepared to reverse any ruling in favor of SWBT’s proposed “conditioning”
14 charges if and when the FCC clarifies and reaffirms that “conditioning” charges
15 are subject to the same TELRIC standards as are all other charges for unbundled
16 network elements and interconnection.

17 **Q. AT PAGES 9 AND 10, MR. LATHAM ARGUES THAT THE**
18 **COMMISSION NEED NOT BE CONCERNED ABOUT SWBT’S**
19 **PROPOSED “CONDITIONING” CHARGES BECAUSE COVAD WILL**
20 **ALWAYS HAVE THE OPTION TO NOT ORDER “CONDITIONING”**
21 **AND THEREFORE CAN AVOID THOSE CHARGES. IS THAT**
22 **ARGUMENT REASONABLE?**

1 A. No. If the loop that serves a given prospective DSL customer requires
2 "conditioning," then Covad's "option" is either to have SWBT "condition" the
3 loop or not to provide the end-user customer DSL-based service. The latter
4 choice is essentially an "option" not to enter portions of the Missouri market.
5 This "option" is particularly unreasonable given that Covad is already agreeing to
6 pay a recurring price that corresponds to the full TELRIC of establishing a new
7 "conditioned" loop. Mr. Latham's reasoning supports a scenario in which
8 SWBT's competitors' only real option is to limit their service offerings to
9 customers that SWBT (or its affiliate) is also ready to serve.

10 Such an approach eliminates one of the key methods by which Covad and
11 other competitors can distinguish their DSL-based services from those of SWBT
12 (or its affiliate) — the offering of service to a greater range of customers. This
13 distinction might be of importance, for example, to an Internet Service Provider
14 looking for a partner to provide DSL-based connections to its network. Hence,
15 SWBT's so-called optional approach to "conditioning" does not encourage full
16 and open competition. Furthermore, SWBT's take-it-or-leave-it approach makes
17 it less likely that customers in rural and remote areas of Missouri will have any
18 DSL-based services available to them at all.

19 **Q. HAS SWBT PROVIDED NEW CONFIRMATION THAT ITS PROPOSED**
20 **NONRECURRING CHARGES FOR "CONDITIONING" ARE**
21 **OVERSTATED?**

22 A. Yes. In deposition testimony, SWBT's expert witness, Mr. Lube, has confirmed
23 that SWBT did not consider any nonrecurring cost associated with either

1 removing ISDN repeaters to restore basic exchange service or of removing load
2 coils to "condition" a line to provide ISDN service. Moreover, it is highly
3 unlikely that SWBT would charge its retail customers a nonrecurring charge for
4 those activities.³ Both findings confirm that SWBT typically recovers such costs
5 through its recurring charges and that imposing parallel costs on competitors on a
6 nonrecurring basis would be discriminatory.

7 **Q. MR. LATHAM'S FINAL ARGUMENT SUPPORTING SWBT'S**
8 **"CONDITIONING" PROPOSAL IS THAT THE COMMISSION OR**
9 **OTHER PARTIES HAVE ACCEPTED THE SAME PROPOSED PRICES**
10 **PREVIOUSLY. IS THAT A REASONABLE BASIS FOR ADOPTING**
11 **SWBT'S PROPOSED PRICES?**

12 **A.** No. As I discussed in detail in my direct testimony, customers in Missouri are
13 entitled to the full benefits of competition that the Act made possible. To deliver
14 those benefits, competitors such as Covad must obtain access to unbundled
15 elements at the forward-looking, cost-based prices contemplated by the Act. For
16 the reasons I discussed in my direct testimony, that will not occur if the
17 Commission adopts SWBT's proposed nonrecurring "conditioning" charges.
18 Instead, the Commission should review the evidence that Mr. Donovan and I have
19 presented. On that basis, this Commission should now conclude, as did the
20 Public Service Commission of Utah, that

21 A TELRIC model (or a forward-looking, efficient provider) would
22 not design a network that required loops to be conditioned or
23 groomed before services today's customers expect could be

³ Deposition of John P. Lube, January 18, 2000, at 129-137.

1 provided. It follows, and we so conclude, that the buyer of an
2 unbundled loop should not have to pay for any such upgrading:
3 the price of the loop presupposes sufficient quality, by which is
4 meant a loop capable of meeting not just current demands but
5 demands for advanced services as well. Accordingly, we disallow
6 charges for line conditioning or grooming. A similar rationale and
7 conclusion applies to line extension charges.⁴

8 **Q. IS SWBT'S DIRECT CASE REGARDING ITS PROPOSED**
9 **"CONDITIONING" CHARGES DEFICIENT IN OTHER WAYS?**

10 A. Yes. In our direct testimonies, Mr. Donovan and I both highlighted numerous
11 specific problems with SWBT's claims. In particular, my direct testimony
12 focused on SWBT's failure to consider efficient practices even relative to its
13 embedded plant. SWBT has dramatically overstated costs by failing to properly
14 assign "conditioning" costs across all loops that might benefit from
15 "conditioning" — including those that SWBT or its affiliate may use for DSL-
16 based services or for ISDN.

17 Beyond the issues highlighted in Covad's direct case, the Commission can
18 also verify that SWBT's proposal is discriminatory and is not based on forward-
19 looking cost analysis by comparing it with SWBT's planned actions relative to its
20 own network. As the Commission has noted, "SWBT or affiliated entities intend
21 to invest significant sums of money and effort to 'rearchitect' its
22 telecommunications network to provide similar DSL services in a competitive
23 market."⁵ As I understand it, SWBT's proposed 'rearchitecture' of its network

⁴ Public Service Commission of Utah, Docket No. 94-999-01, Phase III Part C, Report and Order, issued June 2, 1999, at 13 (footnote omitted).

⁵ Order Regarding Motion to Compel Responses to Data Requests, January 26, 2000, at 4.

1 basically equates to actually building out in an accelerated manner the forward-
2 looking network design reflected in SWBT's adopted recurring cost studies.
3 When that work is done, SWBT's new embedded cost will in effect equal the
4 forward-looking cost that the Commission previously adopted and *all of the cost*
5 *of the forward-looking DSL functionality that SWBT plans to deploy will be part*
6 *of its recurring cost structure.* SWBT has certainly not announced plans to roll
7 out new nonrecurring charges on its Missouri customers as part of its
8 'rearchitecture' plan. Therefore, SWBT's own planned practices again reflect its
9 intent to discriminate between its treatment of its own operations and its provision
10 of facilities for competitors. Unfortunately, because SWBT did not provide the
11 information requested by Covad regarding its plans in time for this testimony, I
12 am unable to provide additional analysis of those plans at this time.

13 **IV. SWBT FAILS TO JUSTIFY ITS ANTICOMPETITIVE PRICING**
14 **PROPOSAL FOR UNBUNDLED ISDN LOOPS.**

15 **Q. AT PAGE 13 OF HIS DIRECT TESTIMONY, MR. LATHAM ARGUES**
16 **THAT COVAD'S DEMONSTRATION THAT SWBT'S PROPOSED ISDN**
17 **LOOP PRICES PRECLUDE UNE-BASED COMPETITION FOR ISDN**
18 **SERVICE IS IRRELEVANT BECAUSE IT IS IMPROPER TO COMPARE**
19 **UNE PRICES AND RETAIL PRICES. IS MR. LATHAM'S ARGUMENT**
20 **CORRECT?**

21 **A.** No. As an initial matter, it is significant to note that Mr. Latham does not even
22 attempt to deny Covad's claim — that SWBT's proposed ISDN unbundled loop
23 prices effectively preclude competition relative to SWBT's retail ISDN prices.

1 Instead, Mr. Latham argues that competitors can use resale service. Therefore,
2 the Commission can only credit SWBT's position at all if it holds (as SWBT
3 seems to) that it is in accord with the Act if competition does not work in some
4 markets and if the unbundled element path to facilities-based competition is not a
5 real alternative (at least for some services).

6 Beyond such basic flaws, Mr. Latham's approach also ignores the fact that
7 the Act, in addition to establishing cost-based pricing regulations, prohibits
8 discriminatory and anticompetitive pricing behaviors. Therefore, regulators must
9 continue to provide oversight that insures that SWBT does not use its monopoly
10 power to squeeze emerging competition. Where a price squeeze exists, regulators
11 have as much of an obligation as ever to take action. In a situation such as
12 appears to exist relative to SWBT's pricing proposal, *i.e.*, that SWBT's
13 supposedly cost-based price for a loop alone precludes competition with its own
14 retail product, a number of solutions are possible. For example, depending on the
15 underlying facts, it might be necessary to make a previously implicit subsidy
16 explicit and portable, or it might be necessary to adjust SWBT's retail pricing. In
17 this case, the answer is much easier. As I demonstrated in my direct testimony,
18 the Commission need merely correct SWBT's overstated forward-looking cost
19 and price for the underlying unbundled ISDN loop.

20 **Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY AT THIS**
21 **TIME?**

22 **A.** Yes, it does. I reserve the right to supplement this testimony, however, to reflect
23 information obtained through depositions and the additional data responses that

1 the Commission has directed SWBT to produce in response to Covad's Motion to
2 Compel.

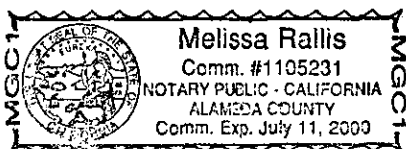
VERIFICATION

[illegible]

Comes now Terry L. Murray, being of lawful age and duly sworn, who states that she is the witness who has provided the foregoing testimony, that she has prepared and read the foregoing testimony, and that the information contained therein is true and accurate to the best of her knowledge and belief.

Serry L Murran

Subscribed and sworn to before me on this 26th day of January, 2000.



Melissa Hahn
Notary Public

My commission expires:

s: July, 11, 2000