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February 9, 2000

FILED³

FEB 10 2000

VIA HAND DELIVERY

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

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 Supplemental Motion for Order Compelling Compliance With Commission's Order and for Sanctions and Reply to SWBT's Response to Covad's Original Motion. The original and fourteen (14) copies of this document will be forwarded by Federal Express for delivery on February 10, 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

FILED³
FEB 10 2000

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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
SUPPLEMENTAL MOTION FOR ORDER COMPELLING COMPLIANCE WITH
COMMISSION'S ORDER AND FOR SANCTIONS AND REPLY TO SWBT'S
RESPONSE TO COVAD'S ORIGINAL MOTION

I. COVAD SEEKS SANCTIONS FOR SWBT'S FAILURE TO PRODUCE DOCUMENTS AS ORDERED BY THE COMMISSION.¹

Covad hereby supplements its Original Motion for Compliance and Sanctions ("Original Motion"), filed February 7, 2000, in order to clarify its position regarding SWBT's most recent document production, which was compelled pursuant to this Commission's Order dated January 25, 2000. Covad's Supplemental Motion specifically focuses on the most egregious examples of SWBT's paltry and partially redacted production and also replies to SWBT's Response To Covad's Original Motion ("Response"), filed February 8, 2000.

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

¹ In its Response, SWBT attempts to distract the Commission's attention away from its insufficient production by dedicating 1/6 of its Response to stating that it provided adequate responses to Data Request Nos. 13 and 14. Both of these Data Requests call for descriptions, not documents. SWBT's initial responses to these two Data Requests were not the focus of (1) Covad's Original Motion or (2) Covad's meet and confer attempts with SWBT's counsel.

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.

In order to preserve its rights and to have this motion decided prior to the conclusion of the depositions and the commencement of the hearing, it was imperative that Covad file its Original Motion as soon as possible.

II. 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. 1² and provided zero (0) additional documents. A Second Supplemental 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 32.³

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

² 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.
- (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.

³ 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.

documents produced pursuant to Data Request 1⁴ 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 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:

⁴ 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.

- (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.⁵ 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

⁵ SWBT likening its extensive redactions to the one document Covad redacted is nothing more than a ploy to detract attention away from its insufficient production. First, SWBT has not been required to fly to California to view Covad's confidential information. SWBT has in fact been provided copies of Covad's confidential information. Second, in a cover letter accompanying the redacted document, Covad informed SWBT that the document was redacted and it explained that the redacted information related to forecasting in cities not relevant to this arbitration and not requested in SWBT's data request. *See* Exhibit H to SWBT's Response. Covad received no such courtesy from SWBT. Finally, to the extent that SWBT thought such redaction was inappropriate it could have contacted Covad to meet and confer. SWBT never availed itself of that opportunity, which speaks volumes about the appropriateness of Covad's redaction.

the governing protective order.⁶

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

⁶ 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 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.

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.

III. SWBT'S BELATED CONTENTION THAT COVAD HAS FAILED TO PRODUCE DOCUMENTS IS WITHOUT MERIT.

In a final attempt to downplay its violation of this Commission's Order, SWBT desperately and misleadingly accuses Covad of failing to supply documents responsive to Data Request No. 5, which requested documents "that support any activity times that Covad believes are representative or work required for loop conditioning and qualification in SWBT's network." See Exhibit I to SWBT's Response. In its response to SWBT's request, Covad stated that (1) it would produce any existing documents and (2) identified responsive documents already in SWBT's possession. Additionally, in a letter to SWBT's Missouri counsel, Covad stated that it would provide documents relied upon by its witnesses at the time testimony is filed. Covad fulfilled all of these obligations and commitments to produce responsive documents. The sufficiency of Covad's response, production and witness testimony attachments is bolstered by the fact that SWBT never raised any concern regarding Data Request 5 *until* Covad contacted SWBT to discuss the insufficiency of its most recent production. Moreover, Covad counsel discussed this very issue with SWBT's counsel and assured them that all responsive documents had been produced and/or identified. SWBT raising this non-issue in its Response to Covad's

Original Motion is not only transparent, but it also does nothing to explain or cure its inadequate production and plain violation of this Commission's Order.

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. Surrebuttal testimony is due on February 10, 2000, and Covad is now unable to address these issues in surrebuttal testimony because of SWBT's abuse of the discovery process and failure to comply with the Commission's Order compelling production.

Respectfully submitted,



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ATTORNEYS FOR DIECA COMMUNICATIONS, INC.
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CERTIFICATE OF SERVICE

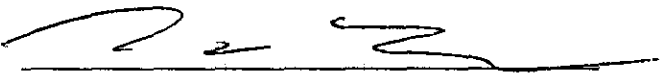
I hereby certify that a true and correct copy of the above and foregoing was transmitted via facsimile and mailed, postage prepaid, this 9th day of February, 2000, to:

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