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FILED

FEB 18 1999

February 18, 1999

Missouri Public
Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

Re: Case No. T0-99-227

Dear Judge Roberts:

Enclosed, for filing in the above-captioned case, are an original and fourteen copies of Southwestern Bell Telephone Company Motion to Compel Birch Telecom of Missouri, Inc.'s Response to Data Request.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

A handwritten signature in cursive script that reads "Anthony K. Conroy tm".

Anthony K. Conroy

Enclosure

cc: All Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
FEB 18 1999
Missouri Public
Service Commission

Application of Southwestern Bell Telephone)
Company to Provide Notice of Intent to File)
an Application for Authorization to Provide)
In-Region InterLATA Services Originating)
in Missouri Pursuant to Section 271 of the)
Telecommunications Act of 1996)

Case No. TO-99-227

**SOUTHWESTERN BELL TELEPHONE COMPANY'S
MOTION TO COMPEL BIRCH TELECOM OF MISSOURI, INC'S
RESPONSE TO DATA REQUEST**

COMES NOW Southwestern Bell Telephone Company (SWBT) and for its
Motion to Compel Birch Telecom of Missouri, Inc.'s (Birch's) Response to SWBT's Data
Request, states to the Missouri Public Service Commission (Commission) as follows:

1. On February 1, 1999, SWBT served the following data request on counsel
for Birch:

Case No. TO-99-227

**SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 1**

Requested From: Birch Telecom of Missouri

Date Requested: February 1, 1999

Information Requested:

In reference to the direct (sic) testimony of David E. Scott,
pages 5 of 9 through 9 of 9 please provide the following
information:

- a. On what date did Birch begin allowing other
carriers to collocate at its switch in the Oak Tower
Building in Kansas City, Missouri?

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- b. List all companies who are currently collocated or requested to collocate at Birch's switch in the Oak tower building.
- c. For each company listed in b. above please provide the following information:
 - 1. The date the collocation work was completed for each company or projected dates for completion for requested collocations, a description of the collocation work and its cost (or projected cost).
 - 2. The equipment that is collocated for each of the companies (or that will be collocated for requested collocations).
 - 3. By company, whether the collocation is caged or otherwise separated from Birch's switch and the manner in which it is separated.
 - 4. A copy of the interconnection agreements that Birch has with the collocated companies.
- d. Please describe the procedures Birch employs that govern the access of non Birch employees to the collocated equipment at Birch's switch and produce a copy of written guidelines or instructions provided to collocating companies.

2. On February 15, 1999, SWBT received Birch's objection to subsection (c)(4) of SWBT's Data Request No. 1. Birch objects to producing interconnection agreements it has with other companies pursuant to which such companies are permitted to collocate at Birch's switch in the Oak Tower Building in Kansas City, Missouri. Birch claims such interconnection agreements are irrelevant and inadmissible, and their production would not reasonably be calculated to lead to the discovery of admissible evidence. Birch also objects to producing the requested information on the basis that

these agreements are "proprietary" and "contains information of a sensitive and competitive nature."

3. With regard to the portion of the data request to which Birch objects, the objection is neither timely nor substantively meritorious. Pursuant to 4 CSR 240-2.090, the recipient of a data request is required to serve its objections thereto or its reason for its inability to answer, in writing, upon the requesting party ten (10) days after receipt of the data request. 4 CSR 240-2.090(2). Here, Birch received SWBT's data request on February 1, 1999. Pursuant to the Commission's rule, Birch was requested to communicate any objections to SWBT's data request on counsel for SWBT, in writing, no later than February 11, 1999. Birch did not serve a timely objection on SWBT. Instead, counsel for SWBT did not receive Birch's objection until February 15, 1999.

4. Time is obviously of the essence in this proceeding, as the Commission has implemented an expedited procedural schedule, including a hearing commencing on March 1, 1999. The Commission's rules provide that "[S]anctions for abuse of the 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." 4 CSR 240-2.090(1). Because Birch's objection to SWBT's data request was not timely, the Commission should order Birch to produce the requested information.

5. Birch's objection is also substantively without merit. In his Rebuttal Testimony, Birch's President and CEO, David Scott, singles out the issue of collocation and attacks the reasonableness of SWBT's collocation practices. (Scott Rebuttal, pp. 3-9). Specifically, Mr. Scott ridicules SWBT's collocation charges as being excessive when

compared to what Birch charges other carriers to collocate at its switch. (Scott Rebuttal, pp. 4-7).

6. Presumably, Birch considers the testimony of its President and CEO to be relevant to its position in this case. If so, Birch's objection to producing its interconnection agreements with other companies it is permitting to collocate at its switch is extremely difficult to fathom. Certainly, SWBT is entitled to explore the factual basis of Birch's contention that its own collocation charges somehow prove that SWBT's charges are unreasonable, and to review the agreements to understand the similarities and differences between Birch's charges and SWBT's charges and the services upon which these charges are based. Birch must believe collocation agreements are relevant to its case - - Mr. Scott attached SWBT's physical collocation agreement to his rebuttal testimony! Birch's refusal to produce the corresponding Birch agreements has no basis and should be overruled. If Birch is not willing to produce these agreements, one can only assume that they do not support his rebuttal testimony. However, under Missouri law, the fact that a company's internal documents are inconsistent with the CEO's sworn testimony is not a valid objection to producing those documents.

7. Birch also appears to contend that it should not have to produce its collocation agreements with other companies because these agreements are "proprietary" and contain information of a "sensitive and competitive nature." As the Commission is aware, this is not a valid objection to producing the requested information. The Commission issued its standard protective order in this case on December 9, 1998. This protective order contains numerous provisions which protect "Highly Confidential" or "Proprietary" information, as defined in the protective order, from being publicly

disclosed. The protective order does not, however, provide an independent basis to object to the production of Highly Confidential or Proprietary information. Rather, the protective order requires the production of such information, and requires the party receiving such information to comply with the protective measures contained therein. It is this very type of information that the protective order was designed to protect from public disclosure, not production. SWBT is entitled to this information and if it is Highly Confidential or Proprietary, will comply with the terms of the protective order issued in this case regarding its disclosure.

WHEREFORE, SWBT respectfully requests the Commission to overrule Birch's objection to the production of interconnection agreements. SWBT requests the Commission to order Birch to produce all responsive information and documents within twenty-four hours of the Commission's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by first-class postage prepaid, U.S. Mail on February 18, 1999.

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