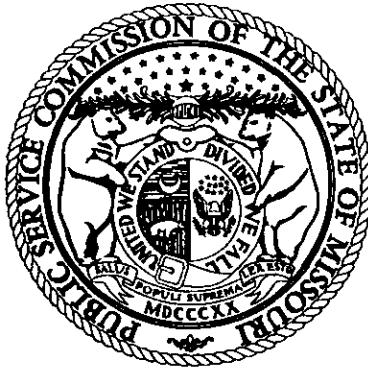


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of the Petition of Birch Telecom of )  
Missouri, Inc. for Arbitration of the Rates, Terms, ) Case No. TO-98-278  
Conditions and Related Arrangements for Intercon- )  
nection With Southwestern Bell Telephone Company. )

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**ARBITRATION ORDER**

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**Issue Date:** April 23, 1998

**Effective Date:** April 24, 1998

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection With Southwestern Bell Telephone Company. )  
 ) Case No. TO-98-278  
 )  
 )

**APPEARANCES**

Mark W. Comley, Newman, Comley & Ruth, 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537,  
and

Albert H. Kramer and Michael C. Casowitz, Dickstein, Shapiro, Morin & Oshinsky LLP, 2101 L Street N.W., Washington, DC 20037-1526, for Birch Telecom of Missouri, Inc.

Paul G. Lane, General Attorney-Missouri, and Anthony K. Conroy, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3510, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

**REGULATORY LAW JUDGE:** Kevin F. Hennessey.

**ARBITRATION ORDER**

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**Procedural History**

On December 31, 1997, Birch Telecom of Missouri, Inc. (Birch) filed a petition with the Commission to arbitrate terms of interconnection between Birch and Southwestern Bell Telephone Company (SWBT) pursuant to

Section 252(b) of the Telecommunications Act of 1996 (the Act). The Commission notified SWBT of the petition for arbitration on January 8, 1998. Birch supplemented its petition on January 15 with a pleading indicating that the only disputed issue concerned whether calls made within the same local calling scope to an Internet service provider (ISP) are local in nature and subject to the payment of reciprocal compensation.

The Commission established a procedural schedule and adopted a protective order on January 27. The Commission directed Birch to file appropriate documentation concerning those issues which had been discussed and resolved by the parties as required by 47 U.S.C. 252(b)(2). Birch filed its response on January 30 which included a copy of the proposed interconnection agreement and appendices agreed to by Birch and SWBT.

SWBT filed a response to Birch's petition for arbitration and a motion to dismiss on February 2. Birch responded with late-filed suggestions in opposition on February 17. The parties filed direct testimony on February 18 and rebuttal testimony on March 4. SWBT replied to Birch's suggestions in opposition on March 4 and also moved to strike the testimony of two Birch witnesses, Gary L. Chesser and Gregory C. Lawhon.

The parties met in a prehearing conference on March 9, at which time SWBT withdrew its motion to dismiss the petition for arbitration. On March 12, the parties reached agreement regarding SWBT's motion to strike. Birch agreed to withdraw the testimony of witnesses Chesser and Lawhon and file a revised version of Mr. Lawhon's testimony on the day of the hearing. SWBT agreed to withdraw its motion to strike and not to oppose the filing of the revised version of Mr. Lawhon's testimony.

The Commission conducted an arbitration hearing on March 16 and 17. The parties filed briefs on April 3.

SWBT submitted late-filed Exhibits 11, 12 and 13 as requested by the Commission on March 24. Birch did not object to these exhibits. On April 14, SWBT submitted a supplement to late-filed Exhibit 11. Birch responded by letter on April 16 stating that the material which SWBT sought to add to Exhibit 11 does not constitute a procedurally proper late-filed exhibit and contains information which is neither new nor helpful to the Commission in resolving this dispute. Birch stated that the "supplemental" constituted a re-argument of SWBT's position.

Birch filed a motion on April 16 seeking the Commission's permission to file as a post-record authority a copy of the Federal Communications Commission's (FCC) Report to Congress on Universal Service Issues, which was released on April 10, 1998. The parties filed a Stipulation on April 21 agreeing that the FCC Report is relevant to the arbitration and is an appropriate subject for official notice.

### **Discussion**

The parties to this case are not only in disagreement about the issues surrounding reciprocal compensation for ISP traffic, but also about the issues in this case. The parties filed a Hearing Memorandum on March 9, in which each party separately stated its understanding of Issues 1 and 2. The only agreement in the Hearing Memorandum was on the wording of Issue 3. This disagreement as to how the issues should be framed is core to the Commission's decision in this case.

Birch phrases Issue 1 as: "Should Internet Service Provider ('ISP') traffic be treated as local traffic for purposes of reciprocal compensation under the Interconnection Agreement?" In contrast, SWBT

states Issue 1 as: "Is a local exchange carrier (LEC) required, under the provisions of the Act, to pay reciprocal local compensation when one of its subscribers places a call to the internet through an Internet Service Provider that receives local exchange service from another LEC?" Birch takes the position that ISP traffic, consisting of calls made within the same local calling scope to an ISP, is local traffic and should be treated as such by this Commission. SWBT takes the position that ISP traffic is jurisdictionally interstate in nature, is not local, and is not terminated on the network facilities of the LEC providing service to the ISP. SWBT believes that, under the Act, reciprocal local compensation is not applicable to such traffic.

Issue 2, as stated by Birch, asks whether, if the Commission determines that the traffic to ISPs should be treated as local traffic for purposes of reciprocal compensation, the rate should be different than for local traffic that is not terminated to ISPs. Birch also asks the Commission to decide whether additional language should be inserted into the Interconnection Agreement already negotiated between the parties to resolve the issue. SWBT states the issue as whether, if the Commission has jurisdiction over traffic to ISPs and reciprocal compensation applies, the parties should be required to negotiate a compensation rate for such traffic other than the rate established in the parties' Interconnection Agreement for local traffic that is not directed to ISPs. Birch argues that the rate for traffic to an ISP should be the same as for traffic terminating to other users. SWBT argues that if the Commission finds that it has jurisdiction and that reciprocal compensation applies, the Commission should not order the parties to pay one another the same rate

for traffic to ISPs as SWBT pays to other local exchange carriers for local traffic.

The parties stipulated that it would be appropriate for the Commission to take official notice of the FCC's Report to Congress in the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, released April 10, 1998. In a footnote included in that Report the FCC stated that it was making no determination on the question of whether LECs that serve ISPs are entitled to reciprocal compensation for terminating Internet traffic. The FCC went on to state that the issue is currently before it and is the subject of public and industry comments. The reader was referred to the Pleading Cycle Established for Comments on Requests by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Public Notice, CCD/CPD 97-30 (released July 2, 1997).<sup>1</sup> The Public Notice referred to is included as Attachment A to this Order and states that the Association for Local Telecommunications has requested clarification that nothing in the FCC's Local Competition Order "requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements" in situations in which local calls to information service providers are exchanged between ILECs and CLECs. The FCC asked for comments on this request to be filed in July of 1997. To date, a decision has not been issued.

The parties' agreed-upon statement of Issue 3 reads: "If the Commission resolves issue 2 above in favor of SWBT, should the parties be directed to implement the interconnection agreement, subject to true up once the compensation rate for ISP traffic is determined?" The Commission

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<sup>1</sup> Report to Congress at Paragraph 106, Footnote 220.

has before it a proposed interconnection agreement between Birch and SWBT filed on January 30. The parties have agreed to each of the terms and conditions of the agreement, and concur that the agreement is substantially similar to agreements previously approved between SWBT and other CLECs. The only area of dispute concerns reciprocal compensation for traffic to ISPs. Birch's position is that language should be added to the agreement that would clarify that reciprocal compensation would be paid by either company to the other when calls to an ISP are terminated within the local calling scope. SWBT's position is that traffic to ISPs should be specifically excluded from reciprocal compensation provisions.

### **Findings of Fact**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all of the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

The Commission finds that no objections were filed to late-filed exhibits 11, 12, and 13 and they should be admitted into evidence. The Commission finds that the material SWBT proffered on April 14 as a supplement to Exhibit 11 is, indeed, a restatement of SWBT's legal arguments to the Commission. However, the letter submitted by Birch on April 16 is not a formal objection in compliance with the Commission's pleading rules. Accordingly, both SWBT's April 14 offering and Birch's April 16 letter will be received into the record and be given the weight they are due.

The Commission finds that it has jurisdiction over the issue because the federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151 et seq., establishes jurisdiction in the Commission to arbitrate disputes between interconnecting local exchange carriers. See 47 U.S.C. § 252(b)(4). The Commission acknowledges that in the recent past the FCC has treated a call from an end user to an ISP within the local calling scope as local traffic. However, the Commission has been advised by the parties and takes official notice that, as to the crucial issue in this case, i.e. reciprocal compensation under this type of scenario, the FCC has requested comments and taken the matter under advisement in Docket No. 97-30. The record presented by the parties is not sufficiently persuasive to move this Commission to make a final decision on the reciprocal compensation issue in light of the FCC's pending proceeding on the same issue.

Moreover, because the parties presented the issue of whether such traffic constitutes local traffic only "for purposes of reciprocal compensation under the Interconnection Agreement,"<sup>2</sup> the Commission finds that it would not be appropriate to determine whether the traffic to ISPs constitutes local traffic until the issue of compensation is resolved by the FCC. The Commission will direct the parties to file a notice with the Commission within ten days after the FCC makes its determination on the reciprocal compensation issue.

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<sup>2</sup> This was the manner in which Birch stated the issue. See Issue 1, Birch's Separate Statement of The Issue, Hearing Memorandum filed March 9, p. 2. SWBT did not raise the issue of whether such traffic constitutes local traffic in the abstract, except in order to challenge the Commission's jurisdiction to decide the appropriate rate. See Issue 1, SWBT's Separate Statement of the Issue, Hearing Memorandum filed March 9, p. 3.



While the record is not sufficient for the Commission to make a final decision concerning the nature of the traffic and the appropriate compensation for it, the record does make clear that neither SWBT nor Birch can accurately distinguish calls to ISPs from calls to other end users at this time. For this reason, the Commission finds that calls to ISPs should be treated and compensated as if they are local calls by the parties pending the FCC's final determination of the issue.

Pending an FCC determination on the issue of reciprocal compensation, the Commission finds that an executed copy of the agreement should be filed for approval without any language that specifically addresses reciprocal compensation for traffic to ISPs. The language appearing on page 12 of the General Terms and Conditions of the agreement submitted on January 30, following Section 5.1.2, should not be included in the executed agreement.<sup>3</sup>

The evidence presented to the Commission was insufficient for the Commission to determine whether it will be possible for the parties to track the traffic at issue. Therefore, the Commission finds that Birch and SWBT should submit a proposed tracking plan and implementation schedule for such plan within 30 days after this Report and Order takes effect.

If a method for tracking traffic to ISPs can be developed and approved by the Commission, the Commission finds that a true-up procedure should be established following the FCC's determination of the issue to ensure that the parties compensate or refund one another, as appropriate, for the traffic exchanged during the period of time between the

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<sup>3</sup> This language provides: "The Parties disagree as to whether reciprocal compensation should apply to ISP traffic and what language, if any, should address that issue."

implementation of their Interconnection Agreement and the end of the true-up period.

### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

The parties to this case are public utilities subject to the jurisdiction of the Missouri Public Service Commission under Chapters 386 and 392, Revised Statutes of Missouri 1994 and the 1997 Supplement.

The Commission has jurisdiction to resolve this case by means of arbitration under Section 252 of the federal Telecommunications Act of 1996. The Commission must conclude the resolution of the issues no later than nine months after the date on which the local exchange carrier received the request for interconnection, in this case no later than April 25, 1998. § 252(b)(4)(C). The Commission must resolve the disputed issues and ensure that the arbitrated agreement meets the requirements of Section 251 of the Act.

Based upon its findings of fact, the Commission determines that the proposed interconnection agreement submitted by Birch and SWBT meets the requirements of Section 251 and an executed copy should be submitted with the change described above for approval.

### **IT IS THEREFORE ORDERED:**

1. That late-filed Exhibits 11, 12, and 13 are received into evidence.

2. That the supplement to Exhibit 11 offered by Southwestern Bell Telephone Company on April 14, 1998 and the letter submitted by Birch Telecom of Missouri, Inc. on April 16, 1998 will be received into the

record and given the weight they are due. Birch Telecom's letter will be marked late-filed Exhibit 14.

3. That the Commission takes official notice of the Federal Communications Commission's Report to Congress, FCC 98-67, CC Docket No. 96-45 (released April 10, 1998).

4. That an executed copy of the interconnection agreement between Birch Telecom of Missouri, Inc. and Southwestern Bell Telephone Company submitted on January 30, 1998, modified as described in this order, shall be filed with the Commission for approval no later than May 25, 1998.

5. That the parties shall file a notice with the Commission within ten days after the Federal Communication Commission renders a decision in Docket No. 97-30.

6. That prior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to ISPs within a local calling scope, the parties shall compensate one another for such traffic in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue if it becomes possible to implement a Commission approved tracking plan in the interim.

7. That the parties shall file a proposed tracking plan and implementation schedule for such plan no later than May 25, 1998.

8. That this Report and Order shall become effective on April 24, 1998.

BY THE COMMISSION



Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

( S E A L )

Lumpe, Ch., Drainer and Murray,  
CC., concur.  
Crumpton, C., dissents, with  
Dissenting Opinion to follow.  
Schemenauer, C., not participating.

Dated at Jefferson City, Missouri,  
on this 23rd day of April, 1998.

**PUBLIC NOTICE  
FEDERAL COMMUNICATIONS COMMISSION  
1919 M STREET, N.W.  
WASHINGTON, D.C. 20554DA 97-1399**

News media information 202/418-0500  
<http://www.fcc.gov> <ftp.fcc.gov>

Fax-On-Demand 202/418-2830

Internet:

**PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST BY ALTS FOR  
CLARIFICATION OF THE COMMISSION'S RULES REGARDING RECIPROCAL  
COMPENSATION FOR INFORMATION SERVICE PROVIDER TRAFFIC**

CCB/CPD 97-30

Released: July 2, 1997

Comment Date: July 17, 1997

Reply Date: July 24, 1997

On June 20, 1997, the Association for Local Telecommunications (ALTS) filed a letter with the Common Carrier Bureau requesting expedited clarification of the Commission's rules regarding the rights of a competitive local exchange carrier (CLEC) to receive reciprocal compensation pursuant to section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), for the transport and termination of traffic to CLEC subscribers that are information service providers. Section 251(b)(5) of the Act requires all local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 51.701(a) of the Commission's rules limits this obligation to "local telecommunications traffic." Section 51.701(b)(1), in instances of traffic exchange between LECs and non-CMRS providers, defines "local telecommunications traffic" as traffic that "originates and terminates within a local service area established by the state commission."

Specifically, ALTS requests clarification that nothing in the Local Competition Order requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements in situations in which local calls to information service providers are exchanged between incumbent local exchange carriers and CLECs. We ask for comment on ALTS's request both with regard to information service providers, and, more specifically, with regard to enhanced service providers (ESPs).

Interested parties may file comments on these letters on or before July 17, 1997, and reply comments on or before July 24, 1997, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference CPD 97-30. An original and four (4) copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. 1.51(c). Additionally, two (2) copies should also be sent to Wanda Harris, Common Carrier Bureau, FCC, Room 518, 1919 M Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Parties wishing to view the above-referenced letter may do so in the Common Carrier Bureau Reference Room, Room 575, 2000 M Street, N.W., Washington, D.C. Copies can also

be obtained from ITS at (202) 857-3800. Additionally, a copy of the letters have been filed in CC Docket No. 96-98. Finally, the ALTS letter is also available on the Commission Internet site at <[http://www.fcc.gov/Common\\_Carrier/Public\\_Notices/1997/da971399.pdf](http://www.fcc.gov/Common_Carrier/Public_Notices/1997/da971399.pdf)>.

We will treat this proceeding as permit-but-disclose for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. 1.1200-1.1206. For further information on this proceeding, please contact Edward B. Krachmer, Competitive Pricing Division, at (202) 418-0198.

- FCC -