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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 6th
day of April, 1999.

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

ORDER CLARIFYING ARBITRATION ORDER

On April 23, 1998, the Commission issued an Arbitration Order bearing an effective date of April 24. The Arbitration Order resulted from a petition filed with the Commission by Birch Telecom of Missouri, Inc. (Birch), asking that the Commission arbitrate terms of an interconnection agreement between Birch and Southwestern Bell Telephone Company (SWBT).

The only issue presented for arbitration was 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's Arbitration Order does not make a final decision concerning the nature of the traffic to an ISP. Instead the Commission chose to defer to an anticipated decision by the Federal Communications Commission (FCC) regarding the nature of that traffic. The Commission's order did provide that until the FCC made a ruling on that issue, Birch and SWBT were to compensate each other for traffic to ISPs

"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."

On February 26, 1999, the FCC released a Declaratory Ruling in CC Docket No. 96-98. That ruling declared that traffic delivered to an ISP is primarily interstate in character, thus falling within the primary jurisdiction of the FCC. The FCC did not, however, determine what, if any, reciprocal compensation should be paid for calls to Internet Service Providers and instead issued a notice of proposed rulemaking to deal with that issue.

On April 30, 1998, in response to the Commission's Arbitration Order of April 23, SWBT filed an Application for Rehearing. The Commission issued an order on March 9, 1999, denying SWBT's application for rehearing. In that order the Commission stated that "given the fact that the FCC has now resolved the issue in dispute between the parties, there is no longer any need for this Commission to address that matter." The Commission believed that its March 9 order would resolve the dispute between SWBT and Birch. That was not the case.

On March 8, Birch filed a Compliance Filing and Motion for Clarification. Subsequent to the Commission's order denying SWBT's application for rehearing, on March 12, Birch filed a supplement to its motion for clarification. Birch argues that, while the FCC did determine that calls to Internet Service Providers, when exchanged between two carriers within the same local calling area in a state, are primarily

subject to the FCC's jurisdiction, the FCC did not determine the amount of compensation that should be paid between carriers for the handling of those calls. The FCC also did not overturn prior state decisions in arbitration cases that would require that such compensation be paid. Birch suggests that the Commission's April 23, 1998 arbitration order requires that SWBT and Birch continue to pay reciprocal compensation for ISP bound traffic as if they are local calls until the FCC finally decides the amount of compensation that should be paid for those calls. On March 22, 1999, SWBT filed a response to Birch's Motion for Clarification in which it asserted that the Commission's orders required that no reciprocal compensation be paid for such calls.

Because of the continuing dispute between the parties, the Commission finds that it is necessary to clarify its position. The FCC's Declaratory Ruling in CC Docket No. 96-98 determined that calls made within the same local calling scope to an Internet Service Provider are more interstate than local in nature. That ruling calls into question the Commission's ruling that such calls should be compensated as local calls pending the FCC's ruling.

Ultimately, the FCC should exercise its primary jurisdiction to decide the appropriate amount of reciprocal compensation, if any, that should be paid for ISP-bound traffic. Until the FCC makes that decision, the Commission will not attempt to determine the amount of compensation that should be paid. Because the appropriate amount of compensation has not yet been determined, the parties will not be required to pay reciprocal compensation for ISP-bound traffic at this time. Nevertheless,

it would be inappropriate to order that no compensation be allowed to accrue until the FCC issues its rule. The parties will be directed to continue to track traffic to ISPs as they have been doing under the Internet Service Provider Traffic Tracking Agreement that was filed with the Commission on June 11, 1998. After the FCC makes its final determination on the issue of compensation, the parties will be subject to a true-up to determine what, if any, compensation should be paid for the ISP-bound traffic that is measured up to that time.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. are relieved of any obligation to immediately compensate each other for traffic to Internet Service Providers within a local calling scope that was imposed by the Commission's Arbitration Order of April 23, 1998.

2. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. shall continue to track traffic to Internet Service Providers within a local calling scope as they have been doing under the Internet Service Provider Traffic Tracking Agreement that was filed with the Commission on June 11, 1998.

3. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. are subject to a true-up to determine the amount of compensation that shall be paid for the ISP-bound traffic that is measured pursuant to the Internet Service Provider Traffic Tracking Agreement up to the time that the FCC determines the issue of compensation for that traffic.

4. That this order shall become effective on April 16, 1999.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, somewhat stylized font.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer
and Drainer, CC., concur
Crumpton, C., dissents

Woodruff, Regulatory Law Judge

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