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JAN 28 1998 BEFORE THE PUBLIC SERVICE COMMISSION

COMMISSION COUNSEL  
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. )  
)

**ORDER ADOPTING PROCEDURAL SCHEDULE**  
**AND PROTECTIVE ORDER**

On December 31, 1997, Birch Telecom of Missouri, Inc. (Birch) filed a petition with the Commission to arbitrate the 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. Subsequently, Birch supplemented its petition with a pleading indicating there are two issues to be arbitrated. First, should Internet traffic be treated as local or toll and how much intercompany compensation should be paid? Second, should a limit be placed on intercompany compensation for local calls?

Section 252(b)(2) requires the petitioner to provide to the Commission all relevant documentation concerning any unresolved issues, the position of each of the parties with respect to those issues, and any other issue discussed and resolved by the parties at the same time as it submits the petition. As Birch has notified the Commission of only two unresolved issues, this arbitration proceeding will be limited to the consideration of those two issues. Additionally, the Commission will consider those issues raised by SWBT in its response due on February 2 to the petition as

required by Section 252(b)(4)(A) of the Act. Further, the Commission will require Birch to file no later than January 30 all appropriate documentation concerning those issues which have been discussed and resolved by the parties. See 47 U.S.C. § 252(b)(2)(A)(iii).

The Act requires the Commission to decide this case before April 25. Because of the short time period in which the Commission must act, the Commission finds it has good cause to establish an expedited procedural schedule. The following conditions will apply:

A. The Commission will require the prefiling of testimony in compliance with the requirements of 4 CSR 240-2.130, including the filing of testimony on line-numbered pages. The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays in the proceedings caused by allegations of unfair surprise at the hearing.

B. Testimony and schedules shall not be filed under seal and treated as proprietary or highly confidential unless a protective order has first been established by the Commission. To expedite the proceeding the Commission will adopt the standard Arbitration Protective Order set forth in Attachment A.

C. The Commission will schedule a prehearing conference to allow the parties the opportunity to resolve substantive issues as well as to consider those matters described in 4 CSR 240-2.090(6). The parties shall also use the prehearing conference to eliminate issues which can be resolved through updating of a party's case, clarification of misunderstandings, explanation of an issue's interrelationship with other issues, and correction of clerical or arithmetic errors.

( D. The parties shall file a hearing memorandum setting out the issues to be heard and the witnesses to appear on each day of the hearing, definitions of terms used in describing those issues, and each party's position on those issues. The hearing memorandum will set forth the issues that are to be heard and decided by the Commission. Any issue not contained in the hearing memorandum will be viewed as uncontested and not requiring resolution by the Commission. The briefs to be submitted by the parties shall follow the same format established in the hearing memorandum. Initial briefs must set forth and cite the proper portions of the record concerning the remaining unresolved issues that are to be decided by the Commission.

( The Commission Staff will be responsible for preparing and filing the hearing memorandum. The Commission wishes to emphasize the importance of the deadline for filing the hearing memorandum. Unless the Commission orders otherwise, the hearing memorandum shall be filed on the date set. Each party is expected to provide Staff with its position on each unresolved issue at least two business days before the due date. If a party fails to provide its position by that date, the Staff is not obligated to include that party's position in the hearing memorandum.

E. The Commission's general policy provides for the filing of the transcript within two weeks after the conclusion of the hearing. However, because of the time considerations in this case, the transcript will expedited.

( F. Briefs shall be limited to 30 pages. All pleadings, briefs and amendments shall be filed in accordance with 4 CSR 240-2.080(7).

**THEREFORE, IT IS ORDERED:**

1. That the issues in this arbitration shall be limited to those two issues set forth in the petition as discussed above and any others raised by Southwestern Bell Telephone Company's response to the petition for arbitration pursuant to 47 U.S.C. Section 252(b)(4)(A), unless otherwise ordered by the Commission.

2. That Birch Telecom of Missouri, Inc., shall file all appropriate documentation concerning those issues which have been discussed and resolved by the parties no later than January 30, 1998. See 47 U.S.C. § 252(b)(2)(A)(iii).

3. That the following procedural schedule is adopted for this proceeding, subject to the conditions discussed above:

All Parties' Direct Testimony	February 13, 1998 3:00 p.m.
All Parties' Rebuttal Testimony	February 27, 1998 3:00 p.m.
Prehearing Conference	March 2, 1998 9:00 a.m.
Hearing Memorandum	March 9, 1998 5:00 p.m.
Evidentiary Hearing	March 16, 1998 8:30 a.m.
All Parties' Briefs	March 30, 1998 5:00 p.m.

4. That the prehearing conference will be held at the Commission's offices in Conference Room 3 on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri. Anyone wishing to attend who has special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public

( Service Commission at least ten (10) days before the hearing at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

5. That the evidentiary hearing will be held in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri. Anyone wishing to attend who has special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days before the hearing at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

6. That the Protective Order set forth in Attachment A to this order is adopted.

7. That the transcript of the evidentiary hearing shall be expedited for delivery within 24 hours.

( 8. That this order shall be effective on January 27, 1998.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

(S E A L)

Kevin F. Hennessey, Regulatory Law  
Judge, by delegation of authority  
pursuant to 4 CSR 240-2.120(1)  
(November 30, 1995) and  
Section 386.240, RSMo 1994.

( Dated at Jefferson City, Missouri,  
on this 27th day of January, 1998.

## **ARBITRATION PROTECTIVE ORDER**

- A. The following definitions shall apply to information which a party claims should not be made public.

HIGHLY CONFIDENTIAL: Information concerning (1) material or documents that contain information relating directly to specific customers; (2) employee-sensitive information; (3) marketing analyses or other market-specific information relating to services offered in competition with others; (4) reports, work papers or other documentation related to work produced by internal or external auditors or consultants; (5) strategies employed, to be employed, or under consideration in contract negotiations.

PROPRIETARY: Information concerning trade secrets, as well as confidential or private technical, financial and business information.

- B. During the course of discovery a party may designate information as HIGHLY CONFIDENTIAL or PROPRIETARY (hereinafter, "designated information") and shall make such designated information available to the party seeking discovery, if such information is not objectionable on any other ground, under the restrictions set out in paragraphs C and D. The party designating the information as HIGHLY CONFIDENTIAL or PROPRIETARY shall provide to counsel for the requesting party, at the time the designation is made, the ground or grounds for the designation. The requesting party may then file a motion challenging the designation. The party designating the information confidential shall have five (5) days after the filing of the challenge to file a response. No other filings are authorized.

- C. Materials or information designated as HIGHLY CONFIDENTIAL may at the option of the furnishing party, be made available only on the furnishing party's premises and may be reviewed only by attorneys or outside experts who have been retained for the purpose of this case, unless good cause can be shown for disclosure of the information off-premises and the designated information is delivered to the custody of the requesting party's attorney. Outside expert witnesses shall not be employees, officers or directors of any of the parties in this proceeding. No copies of such material or information shall be made and only limited notes may be taken, and such notes shall be treated as the HIGHLY CONFIDENTIAL information from which notes were taken.
- D. Disclosure of PROPRIETARY information shall be made only to attorneys, and to such employees who are working as consultants to such attorney or intend to file testimony in these proceedings, or to persons designated by a party as outside experts. Employees to whom such disclosure is to be made must be identified to the other party by name, title and job classification prior to disclosure. Information designated as PROPRIETARY shall be served on the attorney(s) for the requesting party. On-premises inspection shall not be required for PROPRIETARY information, except in the case of voluminous documents (see paragraph K). Any employees of the party who wish to review such PROPRIETARY materials shall first read this order and certify in writing that (s)he has reviewed same and consented to its terms. The acknowledgement so executed shall contain the signatory's full name, permanent address, title or position, date signed, and an affirmation that the signer is acting on behalf of his/her employer. Such acknowledgement shall be

delivered to counsel for the party furnishing the information or documents before disclosure is made.

- E. Attorneys, in-house experts or outside experts who have been provided access to material or information designated HIGHLY CONFIDENTIAL or PROPRIETARY shall be subject to the nondisclosure requirements set forth in paragraphs C or D, whichever is applicable, and S.
- F. If material or information to be disclosed in response to a data request contains material or information concerning another party which the other party has indicated is confidential, the furnishing party shall notify the other party of the intent to disclose the information. The other party may then choose to designate the material or information as HIGHLY CONFIDENTIAL or PROPRIETARY under the provisions of this Protective Order.
- G. Any party may use material or information designated as HIGHLY CONFIDENTIAL or PROPRIETARY in prefiled or oral testimony at hearing provided that the same level of confidentiality assigned by the furnishing party is maintained, unless otherwise classified by the Commission. In filing testimony all parties shall designate as HIGHLY CONFIDENTIAL or PROPRIETARY only those portions of their testimony which contain information so designated by the furnishing party. If any party plans to use information and testimony which has been obtained outside this proceeding, it must ascertain from the furnishing party if any of such information is claimed to be HIGHLY CONFIDENTIAL or PROPRIETARY prior to filing.
- H. A party may designate prefiled or live testimony, or portions thereof, submitted in this case as HIGHLY CONFIDENTIAL or PROPRIETARY (hereinafter, "designated testimony"). Prefiled testimony designated



as HIGHLY CONFIDENTIAL or PROPRIETARY shall be filed under seal and served upon all attorneys of record. Only those portions of the prefiled testimony designated as HIGHLY CONFIDENTIAL or PROPRIETARY should be filed under seal, and should be marked in a manner which clearly indicates which materials are considered HIGHLY CONFIDENTIAL and which are considered PROPRIETARY.

- I. Within five days of the filing of designated testimony, the party asserting the claim shall file with the Commission the specific ground or grounds for each claim. Such filing shall show the nature of the information sought to be protected, and specifically state the alleged harm of disclosure. Such filing shall be filed under seal only if it contains either PROPRIETARY or HIGHLY CONFIDENTIAL information and shall be served upon all attorneys of record.
- J. Attorneys upon whom prefiled testimony designated HIGHLY CONFIDENTIAL or PROPRIETARY has been served shall make such testimony available only to those persons authorized to review such testimony under the restrictions in Paragraphs C or D, whichever is applicable.
- K. If a response to a discovery request requires the duplication of voluminous material or material not easily copied because of its binding or size, the furnishing party may require the voluminous material be reviewed on its own premises. Voluminous material shall mean a single document, book or paper which consists of more than 150 pages.
- L. Attorneys of record in this case shall require that the in-house or outside expert read this Protective Order and certify in a written nondisclosure agreement that the person has reviewed the Protective Order and consented to be bound by its terms. The nondisclosure

agreement shall contain the signatory's full name, permanent address, employer and the name of the party with whom the signatory is associated. Such agreement shall be filed with the Commission. Attached hereto as Appendix "A" and incorporated by reference herein is a form for use in complying with the terms of this paragraph.

- M. In the event a witness discloses the contents of designated prefiled testimony in his or her own prefiled testimony, such testimony shall also be designated in the same manner as the designated prefiled testimony and handled in accordance with this order.
- N. Unless good cause is shown, challenges to the confidential nature of prefiled designated testimony shall be filed with the Commission no later than ten (10) days after the grounds supporting the designations are filed or at the hearing, whichever occurs first. The party making the designation shall have five (5) days to respond to the challenge or may respond at the hearing, whichever occurs first.
- O. The Commission or Regulatory Law Judge may rule on the challenge to the designations prior to the hearing, or at the hearings.
- P. In the event no party challenges prefiled designated testimony, or in the event the Commission or its Regulatory Law Judge rules that testimony was properly designated, then such testimony shall be received into evidence, subject to any other objections being made and ruled upon, and kept under seal.
- Q. In addition, all live testimony, including cross-examination and oral argument which reveals the content of prefiled designated testimony or which is otherwise held to be confidential, including any argument as to whether certain testimony is properly designated, shall be made

only after the hearing room is cleared of all persons besides the Commission, its Regulatory Law Judges, court reporters, attorneys of record and witnesses to whom the designated information is available pursuant to the terms of this Protective Order. The transcript of such live testimony or oral argument shall be kept under seal and copies shall only be provided to the Commission, its Regulatory Law Judges, and attorneys of record. Such attorneys shall not disclose the contents of such transcripts to anyone other than those who may have access to the designated information under the terms of this Protective Order. Persons who have access to the designated information under the terms of this Protective Order shall treat the contents of such transcript as any other designated information under the terms of this Protective Order.

- R. References to designated testimony, whether prefiled or live and transcribed, in any pleadings before the Commission, shall be by citation only and not by quotation. Subject to the jurisdiction of any reviewing court, references to designated testimony in pleadings or oral arguments made to such reviewing court shall also be by citation only.
- S. All persons who are afforded access to information under the terms of this Protective Order shall neither use nor disclose such information for purposes of business or competition or any other purpose other than the purpose of preparation for and conduct of this proceeding and then solely as contemplated herein, and shall keep the information secure and in accordance with the purposes and intent of this order.

- T. Subject to the jurisdiction of any reviewing court, designated testimony constituting part of the record before the Commission shall be delivered to any reviewing court under seal upon service of the appropriate writ of review.
- U. The Commission may modify this order on motion of a party or on its own motion upon reasonable notice to the parties and opportunity for hearing.
- V. Within ninety (90) days after the completion of this proceeding, including judicial review thereof, all designated information, testimony, exhibits, transcripts or briefs in the possession of any party other than Staff or the Public Counsel shall be returned to the party claiming a confidential interest in such information and any notes pertaining to such information shall be destroyed.
- W. The provisions of paragraph C, D, J and L of this Protective Order do not apply to Staff or Public Counsel. Staff and Public Counsel are subject to the nondisclosure provisions of Section 386.480, RSMo 1994. Staff and Public Counsel shall provide a list of the names of their employees who will have access to the designated information.
- X. Outside experts of Staff or Public Counsel who have been contracted to be witnesses in this proceeding shall have access to designated information and testimony on the same basis as Staff and Public Counsel except the outside expert shall read this order and sign the nondisclosure agreement attached as Appendix "A" hereto.
- Y. Outside experts of Staff and Public Counsel who have not been contracted to be witnesses in this proceeding are subject to the provisions of this Protective Order.

- Z. Prefiled testimony and exhibits, whether filed or offered at the hearing, shall be prepared in the manner described in Appendix "B".

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

**NONDISCLOSURE AGREEMENT**

I, \_\_\_\_\_, have been presented  
a copy of this Protective Order issued in Case No. \_\_\_\_\_ on the  
\_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

I have requested review of the confidential information produced  
in Case No. \_\_\_\_\_ on behalf of \_\_\_\_\_  
\_\_\_\_\_.

I hereby certify that I have read the above-mentioned Protective  
Order and agree to abide by its terms and conditions.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Signature and Title

\_\_\_\_\_  
Employer

\_\_\_\_\_  
Party

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone

1. If prefiled testimony contains parts which are classified as Proprietary or Highly Confidential, it shall be filed with the Commission's Secretary/Chief Regulatory Law Judge's Office as follows:
  - A. One (1) Original of prefiled testimony with the Proprietary or Highly Confidential portions obliterated or removed shall be filed.
  - B. One (1) copy of those pages which contain information which has been designated as Proprietary, with any Highly Confidential portions obliterated or removed, shall be filed in a separate envelope. The portions which are Proprietary shall be indicated as described in D, below.
  - C. One (1) copy of those pages which have been designated as Highly Confidential shall be filed in a separate envelope. The portions which are Highly Confidential shall be indicated as described in D, below.
  - D. Eight (8) copies of the complete prefiled testimony shall be filed under seal for the Regulatory Law Judge, Commissioners and the Commission's arbitration advisory staff. The Proprietary pages shall be stamped "P" and the Proprietary information indicated by two asterisks before and after the information, \*\*Proprietary\*\*. The Highly Confidential pages shall be stamped "HC" with the Highly Confidential information

indicated by two asterisks and underlining before and after the Highly Confidential information, \*\*Highly Confidential\*\*. Any deviations from this format must be approved by the Regulatory Law Judge.

2. Three (3) copies of exhibits, whether testimony or other, shall be filed at the hearing with the information separated as described in 1.A, 1.B and 1.C above with each copy of the Proprietary and Highly Confidential portions placed into separate envelopes to be marked as Exhibit \_\_, Exhibit \_\_P and Exhibit \_\_HC.