

Katherine C. Swaller
Senior Counsel

Southwestern Bell Telephone
One Bell Center
Room 3556
St. Louis, Missouri 63101
Phone 314 235-4099
Fax 314 247-0014



November 23, 1999

FILED

NOV 24 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, MO 65101

Dear Judge Roberts:

Re: Case No. TO-2000-322

Enclosed for filing with the Commission in the above-referenced case are an original and fourteen (14) copies of Southwestern Bell Telephone Company's Suggestions in Opposition to Motion for Protective Order.

Also enclosed is an additional copy to be file stamped and returned to us in the enclosed self-addressed, stamped envelope.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "K. Swaller", written in dark ink.

Enclosures

cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
NOV 24 1999
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

**SOUTHWESTERN BELL TELEPHONE COMPANY'S
SUGGESTIONS IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER**

COMES NOW Southwestern Bell Telephone Company (Southwestern Bell) and
for its Suggestions in Opposition to Motion for Protective Order states as follows:

1. According to the Commission's records, Covad filed its Motion for a
Protective Order on November 9, 1999, seeking major modifications to the
Commission's standard protective order which would eliminate most of the "protection"
that comes with such an order. Southwestern Bell received a copy of Covad's Motion on
November 17, 1999 and requests the Commission to accept this response out-of-time, in
light of the extensive delay in receiving the service copy.¹ The parties have agreed that
all future filings will be served by overnight mail to insure timely service.

2. The Commission's arbitration procedures do not include provisions for
discovery because arbitrations are preceded by lengthy negotiation where each party's
positions are fully developed and because the short time frames under the Act make
conducting or responding to extensive discovery during the arbitration process
burdensome and subject to abuse. See Exhibit A.

¹ Covad's Motion does not contain a certificate of service so it is impossible to tell what day it was actually
mailed to Southwestern Bell.

3. Notwithstanding the fact that the Commission's procedures do not contemplate discovery, Southwestern Bell is not opposed to reasonable discovery and in fact has agreed with Covad to use the standard time frames in the Commissions Rules to object to and respond to such discovery. The Company cannot agree, however, to completely eliminate the protection for highly confidential and voluminous materials as Covad is seeking in its motion and thus supports and requests issuance of the standard protective order, a copy of which is attached hereto as Exhibit B.

4. The Commission's standard protective order (the "Order"), which was prepared by the Commission with the input of diverse parties in TO-89-14, Staff of the Missouri Public Service Commission vs. Southwestern Bell, and was successfully used in the original "cost" docket, (TO-89-56), has stood the test of time as an effective tool which carefully balances the needs of both the party seeking production and the producing party. The Commission in issuing the Order stated: "The Commission has reviewed SWB's proposed order and MCI's and Staff's objections and proposals and determined it will develop its own protective order to meet the needs of all parties." Order Establishing Protective Order, September 2, 1988, at p. 2. The Order, in similar format to that in use today, was employed as early as 1983. See Re: Southwestern Bell Telephone Company, Case No. TR-83-253, 26 Mo.P.S.C. (N.S.) 344, 347 (November 22, 1983); Staff v. GTE North, Case No. TR-89-182, 30 Mo. P.S.C. (N.S.) 88, 89 (February 9, 1990). The Order insures reasonable access to highly sensitive cost and marketing information to competitors who would not otherwise have a right to review such material, but under conditions which protect the competitive interests of the producing party. This standard order has been successfully used in all Missouri arbitrations in which

Southwestern Bell was a party, including AT&T, MCI, MFS, BroadSpan, Birch Telcom and Sprint. In those cases there were no unresolved discovery disputes concerning the use of the standard protective order.

5. The standard protective order allows a party to designate sensitive material, such as employee sensitive information, marketing analysis relating to services in competition with others, including cost data, as highly confidential. Material so designated may only be viewed by external consultants, who have signed a nondisclosure agreement, and attorneys. Such material must be viewed on the premises of the producing party and only limited notes may be taken. The Order provides that: "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 of competition or any other purpose other than the purpose of preparation and conduct of this proceeding and then solely as contemplated herein."

Another category deemed "proprietary," exists for other sensitive material, including, trade secrets and confidential financial or business information. Such information can be produced on the requesting party's premises, but like highly confidential material, can only be used for the case in which it is produced. A party dissatisfied with the classification of material as highly confidential may seek reclassification (as proprietary) or declassification. See Exhibit B, at paragraph, M.

6. Covad alleges that Southwestern Bell has impeded its ability to review cost information by insisting on on-site review and therefore should be required to provide copies of such sensitive material for review by its internal experts. In fact,

during the negotiations, Southwestern Bell provided Covad with a copy of cost data, which included the overview, methodology and results of DSL related cost studies.

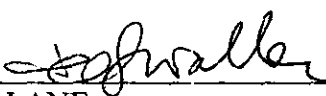
7. Covad has not cited a valid reason for gutting the standard protective order. It is not reasonable to allow Covad's internal experts to review highly sensitive competitive information on their own premises. Such a practice could lead to significant competitive harm to the producing party. The only remaining basis for Covad's objections is the inconvenience of coming to Missouri to review highly confidential materials. Although Southwestern Bell does not understand why Covad finds it advantageous to compete in Missouri, but not to try cases in Missouri, Southwestern Bell has sought to accommodate Covad's concerns without destroying the protection provided by the Order. Southwestern Bell has offered to make highly confidential and voluminous materials available for review in Southwestern Bell's offices in Kansas City (Covad's attorney's office is located in Kansas City), and further agreed that Covad could review the same type materials for the identical arbitration which Covad filed simultaneously in Kansas at the same time and location. That way Covad could make only one pre-trial trip to the Midwest from their west coast location.

8. Southwestern Bell supports reasonable discovery and reasonable access to highly sensitive marketing and cost information. Accordingly, Southwestern Bell supports issuance of the Commission standard protective order in that it properly balances the needs of the producing party and the party requesting production.

WHEREFORE, Southwestern Bell urges the Commission to reject the protective order proposed by Covad and instead to issue the standard protective order attached hereto as Exhibit B.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

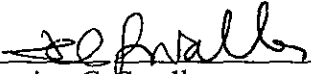
By 
PAUL G. LANE #27011
LEO J. BUB #34326
ANTHONY K. CONROY #35199
KATHERINE C. SWALLER #34271

Attorneys for Southwestern Bell Telephone Company
One Bell Center, Room 3536
St. Louis, Missouri 63101
(314) 235-4099 (Telephone)
(314) 331-2193 (Facsimile)

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 November 23, 1999.

federal express



Katherine C. Swaller

LISA C. CREIGHTON
MARK P. JOHNSON
SONNENSCHN, NATH & ROSENTHAL
4520 MAIN STREET, SUITE 1100
KANSAS CITY, MO 64111



Commissioners

KARL ZOBRIST
Chair

KENNETH McCLURE

DUNCAN E. KINCHELOE

HAROLD CRUMPTON

M. DIANNE DRAINER
Vice Chair

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
573-526-5695 (TT)

DAVID L. RAUCH
Executive Secretary

SAM GOLDAMMER
Director, Utility Operations

GORDON L. PERSINGER
Director, Policy & Planning

KENNETH J. RADEMAN
Director, Utility Services

DANIEL S. ROSS
Director, Administration

CECIL I. WRIGHT
Chief Administrative Law Judge

ROBERT J. HACK
General Counsel

June 17, 1996

To Whom It May Concern:

The Commission has adopted procedures for the arbitration of interconnection agreements under the federal Telecommunications Act of 1996. These procedures are enclosed for your information. The procedures will provide companies negotiating interconnection agreements the information necessary to request arbitration with the Missouri Public Service Commission, and information on how the arbitration process will be conducted. The Commission has reserved some of the specific issues, such as intervention and discovery, until it has a specific case situation in which to address those questions.

If any person has questions concerning these procedures, feel free to contact the Chief Administrative Law Judge, Cecil Wright, at (573) 751-7497.

Very truly yours,

A handwritten signature in cursive script that reads "David L. Rauch".

David L. Rauch
Executive Secretary

DLR:CIW:jp

Enclosure

Exhibit A



Commissioners

KARL ZOBRIST
Chair

KENNETH McCLURE

DUNCAN E. KINCHELOE

HAROLD CRUMPTON

M. DIANNE DRAINER
Vice Chair

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
573-526-5695 (TT)

DAVID L. RAUCH
Executive Secretary

SAM GOLDAMMER
Director, Utility Operations

GORDON L. PERSINGER
Director, Policy & Planning

KENNETH J. RADEMAN
Director, Utility Services

DANIEL S. ROSS
Director, Administration

CECIL L. WRIGHT
Chief Administrative Law Judge

ROBERT J. HACK
General Counsel

Arbitration Procedures

Under the Telecommunications Act of 1996 ("the Act"), Section 252, the Missouri Public Service Commission ("the Commission") is authorized to arbitrate disputes between companies concerning interconnection agreements, services and network elements. The Commission also has authority to arbitrate controversies between regulated utilities under Missouri law. Section 386.230, RSMo 1994. The Act provides for the resolution of issues through compulsory arbitration. Between the 135th and 160th day after negotiations begin between the parties, either party may petition the Commission to arbitrate the remaining unresolved issues. The arbitration described here pertains to the arbitration of interconnection agreements, services and network elements, as required by the Act.

The arbitration process is initiated by a party by filing a petition for arbitration with the Commission. The petitioning party should attach to its petition:

- (1) relevant documentation concerning the unresolved issues;
- (2) relevant documentation concerning the position of each of the parties with respect to the unresolved issues;
- (3) relevant documentation concerning any other issue discussed and resolved by the parties; and
- (4) any other information the petitioning party believes the Commission may require in making its decision.

Copies of all petitions and documents are to be served on the nonpetitioning party and the Office of the Public Counsel (OPC) on the same day they are filed with the Commission. The Commission Staff and OPC are bound by the provisions of Section 386.480, RSMo 1994, with regard to the information obtained through this arbitration process.

When an arbitration petition is received, the Commission will assign the petition a case number, and will send notice to the nonpetitioning party that arbitration has been requested. The nonpetitioning party has 25 days from the date on which the Commission receives the petition to file a response to the petition and to file whatever additional information it wishes. Confidential information should be filed pursuant to the Commission's standard protective order, which will be adopted for the case.

Exhibit A

Although the Commission has the authority under the Act to request whatever information it deems necessary for it to make its decision, parties are encouraged to err on the side of providing too much information rather than too little. Because there is a very short time within which the Commission must render a decision, requests for information to the parties from the Commission will include a response date. If parties fail to respond in a timely manner, the Commission will, under the Act, be forced to decide the issues upon the best information available to it from whatever source derived.

The arbitration will be conducted by an ALJ under procedures similar to current contested case procedures. Whether additional discovery or intervention is allowed will be determined on a case-by-case basis. A scheduling conference will be held for the purpose of establishing a procedural schedule. The procedural schedule will include dates for: (1) parties' filing of additional information; (2) the ALJ's or Commissioners' request(s) for additional information; (3) responses to the ALJs' and Commissioners' data requests; (4) a hearing; (5) briefing if necessary; and (6) the order to be issued.

Since this process must be completed by the 270th day after negotiations are requested, the hearing date will be set no later than the 210th day. The parties will be served with a copy of the written decision by the 270th day. If the parties accept the Commission decision, they will incorporate the decision into an interconnection agreement to be filed with the Commission. If a party does not agree with the decision, it may appeal to an appropriate federal district court.

The Commission will transcribe the arbitration hearing. Commission Staff will be utilized in an advisory role to the Commission and will not participate as a party in the arbitration. Those Staff members who act as advisors to the Commission in an arbitration proceeding will be subject to the same *ex parte* restrictions as Commissioners and ALJs.

Dated at Jefferson City, Missouri,
on this 17th day of June, 1996.

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 acknowledgment 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 acknowledgment 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 (5) 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 hearing examiner 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 hearing examiner 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 hearing examiners, 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 hearing examiners, 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. 1986. 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".

Appendix A

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
NONDISCLOSURE AGREEMENT

I, _____, have been
presented a copy of this Protective Order issued in Case No. _____ on this _____
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

Appendix B

1. If prefiled testimony contains parts which are classified as Proprietary or Highly Confidential, it shall be filed with the Commission's Executive Secretary's Office as follows:

- A. An original plus eight (8) copies 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. Six (6) copies of the complete prefiled testimony to be filed under seal for the Hearing Examiner and Commissioners. 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 Hearing Examiner.

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.