

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of a Commission Inquiry into)	
the Possibility of Impairment without)	Case No. TO-2004-0207
Unbundled Local Circuit Switching When)	
Serving the Mass Market.)	

REPLY TO SBC RESPONSE TO
MOTION FOR CLARIFICATION OF PROTECTIVE ORDER

Come Now Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access, Transmission Services, LLC, Intermedia Communications, Inc., Dieca Communications, Inc., d/b/a Covad Communications Company, Big River Telephone Company, LLC, XO Missouri, Inc., and Socket Telecom, LLC and for their Reply to SBC's Response to their Motion to Clarify the Protective Order in this matter state to the Commission as follows:

1. There is no basis for SBC's assertion that a clarified Protective Order would impact parties' responsiveness to discovery. Parties must respond to legitimate discovery and the protective order prohibits misuse of confidential information. There is no difference between producing a response to one party versus other or all parties - especially given that the information can be shared now any time that one party unilaterally chooses to put another party's discovery response in testimony.
2. The distinctions SBC attempts to make are illusory. There is no reason for a party to be concerned about attorneys, outside experts and in limited circumstances appropriate inside experts seeing confidential information that has been produced to another party, when that other party can already share such information simply by including it in testimony. Either way, the protective order would apply and prevent

misuse of the information. "Freely sharing" is an erroneous description of the circumstances, given the restrictions of the protective order. Undisclosed review is not an issue, for only attorneys of record and signatories of nondisclosure agreements would have access to the information, and all are identified in the case record and all must return or destroy protected information at the end of the proceedings.

3. There is nothing radical about a request to eliminate unnecessary restrictions on the ability of attorneys and outside experts to work together to assist the Commission in reaching the best decision possible in a case. It is SBC's insistence upon hampering the ability of parties to a case to make such an effort, which is extreme.

4. Obviously, if a party has retained highly confidential information on premises, it will have retained control over access to that information and the motion would have no impact. This is a separate area of concern that has been raised in other motions, but it is not a subject of the pending motion. The pending motion only concerns HC and P information that has been released to at least one party through discovery under the Protective Order or information that has been brought to the hearing.

5. Contrary to SBC's assertions, the Protective Order not only addresses the initial delivery of protected information, but also subsequent review. As indicated in the Motion, the Protective Order provides that highly confidential information may be reviewed by any "attorneys or outside experts who have been retained for the purpose of this case". See Section C. It provides that proprietary information may be reviewed by any "attorneys ... employees who are working as consultants to such attorney or intend to file testimony ... or ... outside experts." See Section D. It does not say that information

can only be reviewed by those affiliated with the first party to obtain the information. Certainly once information makes its way into testimony that would not be true.

6. The Motion does not seek any change regarding information produced to Staff or Public Counsel outside the scope of litigation discovery. The case cited by SBC (TO-97-397) is not on point, as the information in question was obtained by OPC outside of discovery and had not already been classified as HC or P by SBC under the protective order in the case. See 6 MoPSC3d 493 (1997).

7. As indicated in the Motion, there is no reason to impose the artificially restrictive interpretation that SBC advocates. The other parties could ultimately obtain the information directly from the source, but requiring all parties to propound the same discovery on each other, and then to respond to duplicative requests from multiple parties would be unduly burdensome and without benefit. It would also inject unnecessary delay into the examination and evaluation of evidence and potential evidence. For example, in this case MCI asked an identical question in discovery as NuVox had posed earlier and proposed that SBC simply indicate the response was the same rather than recopy all the documents - SBC agreed but added the restriction that MCI could not act as if it had received the response until the actual response due date many days later - to what end but artificial interference with work on the case?

8. As indicated in the Motion, there is no provision in the Protective Order that needs to be changed to accomplish the requested clarification. The provisions regarding signature of acknowledgements do not impose any such restriction. See Sections D and L. The provisions of section F should only be read as applying to information that has not previously been classified as HC or P in a discovery response, as

there is no reason to read it as requiring duplicative classifications (again TO-97-397 is not on point). Sections J and Q already allow disclosure to any person authorized under the Order, without regard to party affiliation. Section S applies to all persons regardless of party affiliation.

9. There was nothing lax about two expert witnesses employed by the same firm and subject to the Protective Order working together. There was no reason for them to believe that the Order did not permit such collaboration in the hearing room. Again, the Protective Order does not need to be re-written. The recent interpretation of the order simply needs to be clarified.

10. As indicated in the Motion, the civil rules of procedure, incorporated by the Commission's rules, require direct service of interrogatories and answers thereto upon all parties. See Rule 57.01. Hence, to the extent information is obtained through such formal measures, SBC's restrictive interpretation of the Protective Order would be in direct conflict with the discovery rules. There is no reason to make information obtained by data request less available to other parties, particularly given the intended informality of the procedures, for the reasons stated above. See 4 CSR 240-2.090. Indeed, it would make sense to simply require contemporaneous service of DR responses, thereby eliminating the burden on all parties of dealing with it later.

WHEREFORE, Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access, Transmission Services, LLC, Intermedia Communications, Inc., Dieca Communications, Inc., d/b/a Covad Communications Company, Big River Telephone Company, LLC, XO Missouri, Inc., and Socket Telecom, LLC request the Commission to clarify its Protective Order in order to make it clear that

persons who have obtained protected information subject to the Order may discuss and review that information with anyone else that is subject to the Protective Order in connection with the proceedings.

Respectfully submitted,

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Certificate of Service

A true and correct copy of the foregoing was served as required by Commission Order in this case on this 26th day of February, 2004 by e-mail transmission.

/s/ Carl J. Lumley