COMMENTS OF SBC MISSOURI REGARDING CHANGES TO THE COMMISSION'S STANDARD PROTECTIVE ORDER

SBC Missouri welcomes the opportunity to provide its initial comments regarding three versions of a proposed rule containing modifications to the protections afforded "highly confidential" and "proprietary" information under the Commission's current Standard Protective Order. As described below, SBC Missouri does not believe that significant modifications to the Commission's current Standard Protective Order are necessary. The Commission's Standard Protective Order, in its current form, has worked well over many years and needs, at most, only slight modifications, not a major overhaul. In addition to providing these comments, SBC Missouri would welcome the opportunity to further discuss any proposed rule containing changes to the protections afforded highly confidential or proprietary information under the Commission's Standard Protective Order that the Commission Staff believes are appropriate.

The Protections Afforded Highly Confidential and Proprietary Information Under the Provisions of the Commission's Standard Protective Order, in its Current Form, are Necessary and Appropriate and Strike a Proper Balance Between Access to Information and Legitimate Disclosure Concerns

The Commission's Standard Protective Order, which has been issued in numerous cases over the years, has unquestionably stood the test of time as a highly effective tool, which carefully balances the needs of both the parties seeking disclosure of competitively sensitive, company-specific information, and the party producing such information. The provisions contained in the Commission's current Standard Protective Order ensure reasonable access to competitively sensitive information, including cost and marketing information, by an ever-increasing number of competitors who would not otherwise have any right to review such

material, but under conditions that protect the legitimate competitive interests of the producing party.

Contrary to the claims of some parties, the Commission's current Standard Protective Order has not hobbled the regulatory process in Missouri. Rather, it has allowed the regulatory process to work effectively. Over the past few years, a handful of parties have attempted to convince the Commission to scrap its Standard Protective Order, and in particular, the two-tiered structure for maintaining the confidentiality of sensitive business information. The Commission has properly rebuked these efforts. Then as now, there is simply no reason for the Commission to scrap the protections afforded by its Standard Protective Order, which was developed by the Commission over a decade ago and which has proven to be effective in Missouri regulatory proceedings. There can simply be no question that competitive companies participating in regulatory proceedings in Missouri should not be required to hand over their most competitively sensitive business documents to the very companies against which they are aggressively competing in the marketplace, without adequate protections.

It is interesting to note that the Commission's current Standard Protective Order is willingly utilized by parties who have suggested it should be scrapped when it is *their* confidential information that would be subject to disclosure. For example, in Case No. TW-2003-0053, in which the Commission is examining the impact of bankruptcy filings by telecommunications companies, WorldCom sought and received the Standard Protective Order to protect its own highly confidential information. This conduct underscores the usefulness of the Commission's Standard Protective Order in its current form, which reflects the proper balance between the parties producing confidential materials and the use of that material in regulatory proceedings by other parties.

The various "hybrid" protective orders that have been proposed by a few other parties in recent Commission proceedings would simply eliminate the distinction between "highly confidential" and "proprietary" information, as those separate classifications are currently defined in the Commission's Standard Protective Order, by eliminating the highly confidential classification. Among other things, these proposals would have permitted internal employees to copy, fax, and review other parties' highly confidential information (which would be relabeled "confidential information"). The proposal to eliminate the separate highly confidential designation for the most sensitive information flies in the face of competitive reality. The very real distinction between highly confidential and proprietary information, as currently defined in the Commission's Standard Protective Order, has worked extremely well in practice throughout the years and has fostered an environment where parties are more willing to disclose the most competitively sensitive information, subject to the reasonable protections afforded highly confidential information.

Parties arguing that the Commission should scrap the two separate levels of protection afforded confidential business information generally claim that the legitimate protection from disclosure to competitors afforded highly confidential information under the Commission's Standard Protective Order somehow restricts their ability to participate in the case, and therefore violates their due process rights. The Commission has appropriately rejected this argument on several occasions. The Commission hit the nail on the head when it stated in its July 8, 2002, Order denying AT&T's Motion to modify the Commission's Standard Protective Order in Case No. TR-2001-65:

> However, so long as AT&T's outside consultants are able to have full access to the cost data and are able to review and analyze it, AT&T is not deprived of due process. That data is designated "High Confidential" because access to it may well confer an unfair competitive advantage upon a competitor. AT&T's desire

to have access to that data for its employees must be balanced against the rights of other parties who have an interest in the data.[1]

As recently as a few weeks ago, in the Sprint competitive classification case, the Commission again appropriately rejected this due process argument.[2]

The facts also belie these due process arguments. In every case in which the Commission's Standard Protective Order has been issued, every party has been subject to the same conditions regarding the disclosure and review of sensitive business information. Each party has had an equal opportunity to produce its own highly confidential and proprietary information, and appropriately designate the information based on the facts. Moreover, to the extent any party wished to review the highly confidential information of another party, its attorneys and outside consultants have had the unfettered ability to review the material. While retaining an outside consultant adds some expense to a party participating in regulatory proceedings, the very sensitive nature of the highly confidential information justifies this limitation.

SBC Missouri urges the Commission and its Staff to carefully consider whether it is appropriate and in the public interest, as well as conducive to efficient regulatory proceedings, to scrap the two tiers of protection currently afforded proprietary and highly confidential information in Missouri regulatory proceedings. Eliminating the two tiers of protection currently available, or weakening the current protections, would no doubt increase the number of disputes, particularly regarding discovery, which the Commission would be required to resolve. Parties will closely review the relevance of discovery requests that seek information that would currently be classified as highly confidential, as this information would not be subject to

[1] Order Regarding Protective Order and Regarding Procedural Schedule, Case No. TR-2001-65, July 8, 2002.
[2] In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint Missouri, Inc., Case No. IO-2003-0281, Order Denying Motion for Entry of a Modified Protective Order and Instead Issuing a Standard Protective Order, p. 3 (March 25, 2003).

adequate protection. If the Commission eliminates the highly confidential classification, the Commission's involvement in resolving discovery disputes will undoubtedly increase. As described above, it cannot be questioned that the protections afforded competitively sensitive information under the Commission's current Standard Protective Order have withstood the test of time in numerous Missouri regulatory proceedings. Moreover, it is not enough to argue that Missouri should scrap the structure that has worked so well simply because some neighboring states might have a different process.

Comments of SBC Missouri Applicable to All Three Versions of a New Commission Rule Containing Proposed Changes to the Commission's Standard Protective Order.

In this section, SBC Missouri provides its comments applicable to all three versions of the proposed new rule containing modifications to the protections currently contained in the Commission's Standard Protective Order, which were recently published on the Commission's website. These three versions of a proposed new Commission rule addressing the protections afforded competitively sensitive information contain varying degrees of changes, ranging from minor modifications (the version labeled "Highly Confidential and Proprietary Information"), a middle ground version that maintains two levels of protection for confidential business information (the version labeled "HC Modification Option"), and a third version which eliminates the availability of the highly confidential designation currently contained in the Commission's Standard Protective Order (labeled the "Single Tier Option"). In subsequent sections of these comments, SBC Missouri will address the specific concerns it has regarding each of these versions of the proposed new rule. In this initial section, however, SBC Missouri provides its comments applicable to all three versions of the proposed Commission rule containing changes to the protections afforded in the Commission's Standard Protective Order.

- Under each of the proposals, written certification is required before employees or outside experts may review highly confidential, confidential or proprietary information. Under each of the proposals, the individual that wishes to review the sensitive information must first certify in writing that he or she will comply with the requirements of the new Commission rule. The party seeking review of the sensitive information must provide a copy of the certificate to the disclosing party before the employee is permitted to review the information. Although each of the proposals provide that the party seeking review of the sensitive information must provide a copy of the certificate to the disclosing party before disclosure is made, the proposals provide that the certificate need not be filed with the Commission. Each of the proposals also provide that a form for use in complying with the requirements of this proposal is "available from the Commission." SBC Missouri believes that if the Commission is going to provide a form certificate for compliance with these provisions, it should be attached to or specifically included in any rule the Commission adopts. SBC Missouri also believes that the Commission should make the use of this form mandatory for all parties. Including the form in the rule and making its use mandatory will preclude disputes among parties regarding the sufficiency of certification forms for individuals wishing to review sensitive business information.
- Each of the proposals also contain provisions regarding the disclosure of sensitive business information from third parties. The proposals provide:

> If information that must be disclosed in response to a data request is information concerning a third party who has indicated that the information is confidential, the disclosing party must notify the third party of its intent to disclose the information. If the third party informs the disclosing party that it wishes to protect the material or information, the disclosing party must designate the material or information as highly confidential or proprietary [or "confidential"] under the provisions of this rule.

SBC Missouri agrees that any rule should address the protections necessary relating to the disclosure of sensitive information from third parties who are not parties to a particular case. However, SBC Missouri does not believe the proposed provisions regarding third party information go far enough to protect the interests of these third parties. SBC Missouri believes that this section of the proposed rule should provide for additional notice to any third party, where a party seeks to declassify the information from a third party which the disclosing party has identified as highly confidential, proprietary, or confidential. The rule should provide that the third parties whose sensitive business information is being disclosed have a reasonable opportunity to object to any motion to declassify their information. At a minimum, the proposed rule should include the following language:

> Where any party seeks to declassify or challenge the designation of third-party information, the moving party must notify the third party, and the third party shall have ten (10) days to respond to any motion to declassify of challenge the designation of its information.

- Each of the three proposals also provide:

> Any party may use [confidential], highly confidential or proprietary information in prefiled testimony, or at hearing, if the same level of confidentiality assigned by the disclosing party, or the Commission, is maintained. Before including information that it has obtained outside this proceeding in its testimony, a party must ascertain from the source of the information whether that information is claimed to be [confidential], highly confidential or proprietary.

SBC Missouri believes that this provision should be modified to make clear that it refers to highly confidential, proprietary or confidential information obtained in discovery in the same proceeding. This proposal should also be clarified to provide that a party obtaining highly confidential, proprietary or confidential information in one proceeding may not

use such information in another proceeding without prior written consent of the producing party.

- Each of the proposals provide:

> Not later than five days after testimony is filed that contains information designated as highly confidential or proprietary [or confidential], the party asserting that the information is highly confidential or proprietary [or confidential] - even if the asserting party did not file the testimony - must file a pleading establishing the specific nature of the information that it seeks to protect and establishing the harm that may occur if that information is disclosed to the public.

SBC Missouri does not believe that five days is a sufficient period of time if the party asserting protection for the highly confidential, proprietary or confidential information contained in testimony is not the same party that filed the testimony. It is common in current practice to not receive mailed service copies of testimony for several days after the testimony is filed with the Commission. A requirement that a party raise an issue with respect to the classification of sensitive information in another party's testimony within five days after that testimony is filed will not permit parties a reasonable opportunity to protect their sensitive information which might be included in another party's testimony. This proposal should be changed to a minimum of 10 days where a party asserts that information contained in another party's testimony is highly confidential or proprietary.

- Each of the proposals also provide:

> If prefiled testimony includes information that has previously been designated as highly confidential or proprietary [or confidential] in another witness' prefiled testimony, that information must again be designated as highly confidential or proprietary.

As above, SBC Missouri believes it would be appropriate to include in this provision a restriction on its applicability to the current proceeding. Parties are not today permitted

to use highly confidential, proprietary or confidential information from one proceeding in another proceeding without the written permission of the party that produced the information in the first proceeding. No changes in this restriction should be made.

- Finally, the final paragraph of each proposed rule contains separate provisions applicable to outside experts appearing on behalf of the Commission Staff and the Office of the Public Counsel. SBC Missouri believes that any Commission rule addressing the disclosure of highly confidential, proprietary or confidential information should include provisions that are applicable to all outside experts, whether retained by private parties, the Commission Staff, or the Office of the Public Counsel. There is no legitimate reason for outside experts retained by the Commission Staff or by the Office of the Public Counsel to not be subject to the same restrictions on disclosure of information that are applicable to all other parties' outside experts and internal witnesses.

SBC Missouri's Comments Regarding the Proposed Rule Containing Slightly Modified Provisions Regarding Highly Confidential and Proprietary Information

SBC Missouri submits the following comments on the version of the proposed Commission rule addressing highly confidential and proprietary information that contains slight modifications from the protections afforded such information under the Commission's Standard Protective Order.

- SBC Missouri believes that if the Commission wishes to incorporate the provisions affording protection to sensitive business information from its Standard Protective Order into a new Commission rule, the version of the proposed rule that maintains the distinction between highly confidential and proprietary information, and that contains only minor modifications from the Commission's current Standard Protective Order, is

most appropriate. As described above, these provisions, which closely mirror the provisions contained in the Commission's current Standard Protective Order, have proved workable and efficient over many years of practice at the Commission and should be maintained.

- This version of the proposed rule, which would continue to afford separate protections to highly confidential and proprietary information, would require that a party disclosing highly confidential information must file a motion with the Commission asking that the highly confidential information be made available only at its own premises. Under the Commission's current Standard Protective Order, a party disclosing highly confidential information may limit other parties' review of such information to its own premises. See, Standard Protective Order, para. C. Under the Commission's current Standard Protective Order, any party that wishes to have its attorneys or outside experts review another party's highly confidential information at a location other than the disclosing party's premises may file a motion with the Commission to establish "good cause" to disclose the information at a location other than the premises of the disclosing party. There is good reason for this limitation. The very nature of the type of information that can be designated as highly confidential requires that if any party wishes to view this information at a location other than the premises of the disclosing party, the party seeking review of the information must establish an exception to the rule. Under this version of the proposed rule, however, the burden is shifted to the party seeking to protect its own highly confidential information to limit disclosure at its own premises. Any rule addressing the disclosure of highly confidential information to a limited group, i.e., outside consultants and attorneys, should provide that such disclosure may be made at the

premises of the disclosing party, unless the Commission determines that there is good cause for disclosure at another location, in limited circumstances.

- This version of the proposed rule also provides that a person reviewing highly confidential information "may not make copies of such material but may make notes about the information." This proposed provision varies from the comparable provision contained in the Commission's current Standard Protective Order, which provides that "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." See, Standard Protective Order, para. C. SBC Missouri believes that the same provisions regarding the taking of notes that appear in the Commission's current Standard Protective Order should also appear in any new Commission rule regarding the protections afforded highly confidential information. If unlimited notes are permitted to be taken from highly confidential information, these notes become, in effect, a copy of such material. Moreover, these notes should be treated in the same manner as the underlying information from which they are obtained, i.e., highly confidential.

SBC Missouri's Comments Regarding the Proposed HC Modification Option

As described above, SBC Missouri believes that any Commission rule intended to afford protections to highly confidential and proprietary information should closely mirror the provisions contained in the Commission's current Standard Protective Order. The "HC Modification Option" proposal retains the two-tiered classification for highly confidential and proprietary information, but contains additional provisions that SBC Missouri believes are

inappropriate and unreasonably water down the legitimate protections afforded in the Commission's current Standard Protective Order.

SBC Missouri submits the following comments regarding the HC Modification Option, which are in addition to SBC Missouri's general comments applicable to all three versions of the proposed new Commission rule regarding highly confidential and proprietary information, as described above:

- SBC Missouri has concerns regarding the procedure for establishing the highly confidential designation of information as set forth in paragraph 3 of this proposal. Under this proposal, a party responding to a discovery request seeking highly confidential information must file a motion with the Commission specifying the nature of the information for which protection is sought, and explaining the harm that would result from disclosure of the highly confidential information without any protection. This proposed process would substantially increase the burdens on parties participating in regulatory proceedings and would substantially increase the burden on the Commission, as it would be required to consider and rule on each of these motions. This process would also deprive, or at a minimum unnecessarily delay, the requesting party's access to documents that the disclosing party seeks to designate as highly confidential, while the Commission determines the status of those documents pursuant to the disclosing party's motion. Moreover, this provision would require the Commission to become involved in <u>every</u> situation where a party seeks to protect from public disclosure highly confidential information. The Commission's workload would increase substantially, because under the provisions contained in the Commission's current Standard Protective Order, the

Commission is only required to resolve disputes -- which in practice are isolated -- regarding classification that the parties cannot resolve on their own.

- In addition, as with the preceding proposal, SBC Missouri has concerns regarding the proposed provisions in paragraph 4 of the HC Modification Option, regarding the location where highly confidential information may be reviewed by opposing parties. SBC Missouri is concerned that requiring a party to file a motion with the Commission asking that highly confidential information be made available at the location of the disclosing party improperly shifts the burden of establishing an appropriate location to review sensitive business information to the party disclosing the information. Moreover, SBC Missouri believes that requiring a motion in this circumstance increases the burden on all parties and the Commission, without any corresponding benefit. As described above, this proposed provision also eliminates the negotiation and discussion process that exists under the Commission's current Standard Protective Order, and which has worked well in practice to resolve many discovery disputes without Commission intervention.

SBC Missouri's Comments Regarding the Single Tier Option

Finally, SBC Missouri has serious concerns with the drastic reduction in the legitimate protection of sensitive business information that would result if the Commission were to adopt a rule based on the Single Tier Option proposal. This proposal eliminates the availability of the highly confidential classification for the most competitively sensitive business information, and replaces the two tiers of protection contained in the current Standard Protective Order with a single "confidential" classification. Under the Single Tier Option, any employee of an opposing party could view all confidential information produced by a disclosing party, so long as the employee was acting as a "consultant" to an attorney in the case. In practice, any employee,

including marketing and sales employees, would have full access to the most competitively sensitive information of its competitors, simply by designating themselves as a consultant in the case. This is clearly not acceptable and would without question result in a chilling effect on the amount of information disclosed by competing parties in contested cases. Moreover, although this version of the proposed rule would require a party to disclose the identity of any employee who will review confidential information prior to disclosing the confidential information to that person, this version contains no waiting period to permit the disclosing party to object to the disclosure and seek relief from the Commission. Moreover, the limited protection afforded by an employee signing a nondisclosure form simply does not provide adequate protection for the party disclosing its most confidential and sensitive business information to a competitor's employees. Once a competitor's employees have access to a competitor's most sensitive business information, the fact that an individual employee has signed a nondisclosure agreement does not protect the employee from utilizing that information to the direct benefit of his or her employer, and to the direct harm of the competitor. Clearly, employees of companies that directly compete with each other should not and need not have access to the most sensitive competitive information of their competitors solely as a result of participating in a Commission proceeding.

The Commission's Standard Protective Order, which includes provisions containing more stringent protection for the most sensitive competitive information and a lesser degree of protection for other confidential business information, is an appropriate model to safeguard companies' private business information, while at the same time permitting all parties to participate on a meaningful basis in regulatory proceedings in Missouri. The Single Tier Option proposal would in effect scrap the Commission's Standard Protective Order, which as described above has worked well in practice for many, many years, and replace it with a watered down rule

containing a "one size fits all" confidential classification that would offer inadequate protection for competitors' most sensitive business information.

Conclusion

As described above, SBC Missouri appreciates the opportunity to provide informal comments regarding the benefits of maintaining the separate "highly confidential" and "proprietary" classifications available under the Commission's current Standard Protective Order, as well as the opportunity to point out, on an informal basis, its specific comments regarding each of the three proposals for a new Commission rule regarding highly confidential and proprietary information. SBC Missouri stands ready to discuss its comments with the Commission Staff at its convenience.