

NEWMAN, COMLEY & RUTH

PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW

MONROE BLUFF EXECUTIVE CENTER

601 MONROE STREET, SUITE 301

P.O. BOX 537

JEFFERSON CITY, MISSOURI 65102-0537

www.ncrpc.com

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TELEPHONE: (573) 634-2266

FACSIMILE: (573) 636-3306

ROBERT K. ANGSTEAD
MARK W. COMLEY
CATHLEEN A. MARTIN
STEPHEN G. NEWMAN
JOHN A. RUTH

FILED²

MAR 01 2004

Missouri Public
Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. TO-2004-0207

Dear Judge Roberts:

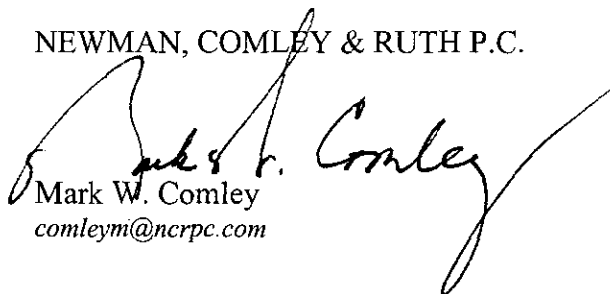
Please find enclosed for filing in the referenced matter the original and five copies of the Rebuttal Testimony of John M. Ivanuska. This testimony is being filed with a facsimile affidavit. The original affidavit will be provided to the Commission just as soon as it is available.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
comleym@ncrpc.com

MWC:ab

Enclosure

cc: Office of Public Counsel
General Counsel's Office
Jason Wakefield
Counsel of record

Exhibit:
Issue(s): Missouri Loop and Transport (Phase III)
Witness: John M. Ivanuska
Type of Exhibit: Rebuttal
Sponsoring Party: Birch Telecom, Inc.
Case No.: TO-2004-0207
Date Testimony Prepared: March 1, 2004

REBUTTAL TESTIMONY

OF

JOHN M. IVANUSKA

Submitted on behalf of
Birch Telecom, Inc.

Case No. TO-2004-0207

March 1, 2004

In the Matter of a Commission Inquiry into the Possibility of Impairment without Unbundled Local Circuit Switching When Serving the Mass Market.

AFFIDAVIT OF JOHN M. IVANUSKA


STATE OF MISSOURI)
COUNTY OF Jackson) ss.

I, John M. Ivanuska, of lawful age, and being duly sworn, do hereby depose and state:

1. My name is John M. Ivanuska. I am presently Vice President of Carrier Relations and Interconnection for Birch Telecom, Inc.

2. Attached hereto and made a part hereof for all purposes is my rebuttal testimony.

3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my personal knowledge, information and belief.


John M. Ivanuska

Subscribed and sworn to before me, a Notary Public, this 1st day of March, 2004.

BARBARA P. FILLINGER
Notary Public-Notary Seal
State Of Missouri
Commissioned In Jackson County
My Commission Expires: June 6, 2004
My Commission expires.

Barbara P. Illinger
Notary Public

June 6, 2004

1 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND**
2 **OCCUPATION.**

3 A. My name is John M. Ivanuska. My business address is 2020 Baltimore Avenue,
4 Kansas City, Missouri 64108. I am the Vice President of Carrier Relations and
5 Interconnection for Birch Telecom, Inc. ("Birch").

6 **Q. WHAT ARE YOUR RESPONSIBILITIES ASSOCIATED WITH YOUR**
7 **CURRENT POSITION?**

8 A. I manage all facets of Birch's interactions between Birch and its major Regional
9 Bell Operating Company ("RBOC") vendors, SBC Communications, Inc.
10 ("SBC") and BellSouth Communications Corporation ("BellSouth"). I help
11 formulate and advocate regulatory policy and help prioritize those regulatory
12 issues in which Birch will engage.

13 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**
14 **RELATED EXPERIENCE.**

15 A. I graduated cum laude from the State University of New York at Buffalo ("SUNY
16 Buffalo") where I received a Bachelor of Science degree in Accounting. I also
17 received a Masters of Business Administration with a concentration in Finance
18 from SUNY Buffalo.

19 From March 1984 through March 2000, I held various positions within the
20 Local, Wireless, Competitive Local Exchange Carrier ("CLEC"), and Corporate
21 Staff organizations of Sprint Corporation, including the positions of Rates and
22 Tariffs Manager, Director of Regulatory – Texas, Director of Federal Regulatory
23 Policy, Director of State Regulatory Policy – Sprint PCS (Sprint Spectrum, L.P. at

1 the time), and Director - Local Markets (Sprint NIS). In these various positions, I
2 was directly involved in a host of telecommunications business matters from both
3 a strategic/policy vantage point, as well as a tactical/operational vantage point.

4 **Q. WERE ANY OF THESE ASSIGNMENTS SPECIFIC TO THE CLEC**
5 **SECTOR OF THE TELECOMMUNICATIONS INDUSTRY?**

6 A. Yes. In my final assignment prior to leaving Sprint, as Director – Local Markets
7 (Sprint NIS), I was responsible for the negotiation, arbitration, and
8 implementation of interconnection agreements with the incumbent local exchange
9 carriers (“ILECs”) GTE and SBC in support of Sprint’s CLEC initiatives. In
10 implementing these interconnection agreements, I was tasked with ensuring that
11 Sprint was to a level of “market entry readiness” that it was sufficiently capable of
12 operating in the CLEC marketplace in a way that did not place the Sprint brand
13 name at risk. Once operational, I managed all interactions with Sprint’s ILEC
14 suppliers for these CLEC initiatives.

15 **Q. HAVE YOU EVER TESTIFIED BEFORE ANY REGULATORY BODIES?**

16 A. Yes. I have previously testified before the state commissions in Texas, Kansas,
17 Missouri, California, Illinois, Indiana, Hawaii, Maine, New Hampshire, New
18 York, Pennsylvania, North Carolina, Florida, Georgia and Puerto Rico. I have
19 also delivered several ex parte presentations to various state commissions and the
20 Federal Communications Commission (“FCC”) on a variety of topics.

21 **Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF BIRCH’S HISTORY**
22 **AND CURRENT OPERATIONS.**

1 A. Headquartered in Kansas City, Missouri and established in 1997, Birch is a multi-
2 regional provider of local and long distance and facilities-based voice and data
3 services, mainly serving both business and residential customers in SBC's
4 traditional Southwestern Bell Telephone Company five state area and BellSouth's
5 nine state region.

6 Currently, Birch and its subsidiaries, including Birch Telecom of
7 Missouri, Inc. and Ionex Communications, Inc., serve over 500,000 local access
8 lines throughout its multi-state territory. Missouri is one of Birch's key markets,
9 with nearly 60,000 access lines, serving small to medium sized businesses and
10 residential customers.

11 In addition, Birch and its subsidiaries have more than 240 active
12 collocation arrangements in various SBC central offices in Missouri, Kansas,
13 Oklahoma and Texas. Birch currently utilizes these collocation arrangements to
14 physically locate equipment that supports the offering of its stand-alone facilities-
15 based data services, primarily high-speed Internet service via DSL (digital
16 subscriber line). These collocation arrangements are interconnected in
17 hierarchical network fashion through the lease of intraoffice and interoffice
18 transmission facilities from SBC, with consolidated connections to Birch's core
19 data network at centralized locations.

20 **Q. CAN YOU DESCRIBE HOW BIRCH CURRENTLY USES DEDICATED**
21 **TRANSPORT?**

22 A. Yes. Birch uses dedicated transport in Missouri in two separate ways. First, for
23 DSL services, Birch uses dedicated transport to connect Birch's collocation

spaces to an aggregation point at the SBC tandem sites. For DS-1 based services, Birch uses dedicated transport as part of an Enhanced Extended Link ("EEL" – a contiguous combination of loop and transport unbundled network elements) from the customer's premise to an aggregation point at the SBC tandem sites. The use of an EEL allows Birch to serve DS-1 customers without the need to collocate in the SBC serving central office. From the SBC tandem site, Birch uses entrance facilities to pass the aggregated DSL and DS-1 traffic to Birch's switch sites.

Q. HAS BIRCH SELF-DEPLOYED ANY LOOP OR TRANSPORT FACILITIES IN MISSOURI?

A. No. Birch has not deployed any loop or transport facilities in Missouri. Any claim to the contrary would be false.

Q. ON THE DEDICATED TRANSPORT ROUTES IDENTIFIED THAT SBC BELIEVES SHOULD BE DE-LISTED, DOES BIRCH USE ANY OTHER TRANSPORT PROVIDER ON THOSE ROUTES, OTHER THAN SBC?

A. No. Birch only utilizes unbundled dedicated transport or special access services from SBC on the routes identified. Birch does utilize a third party for entrance facilities, but it is my understanding that the FCC determined entrance facilities are distinctly different from dedicated transport, and as such has modified FCC Rule 51.319(e) to exclude entrance facilities from its definition of dedicated transport.

Q. DOES IT BENEFIT BIRCH, FROM AN OPERATIONAL PERSPECTIVE, TO USE ONE PROVIDER, VERSUS MULTIPLE PROVIDERS, OF DEDICATED TRANSPORT IN ITS NETWORK DEPLOYMENT?

1 A. Yes. Birch deployed its network facilities in Missouri, consciously choosing to
2 utilize dedicated transport from SBC, in large part due to the operational
3 efficiencies gained from using one supplier. SBC has also developed Operational
4 Support Systems ("OSS") that allow for CLECs to mechanically order and
5 interconnect with SBC. SBC also offers standard intervals for the provision of
6 dedicated transport in an effort to meet its obligations to provide non-
7 discriminatory access to CLECs to SBC's OSS.

8 Birch has spent an enormous amount of time and resource implementing
9 provisioning, testing, and maintenance methods and procedures necessary to
10 utilize SBC as a major supplier. These resources have been dedicated to ensure
11 that Birch is operating as efficiently as possible, from an internal perspective. It
12 would be extremely disruptive -- and inefficient -- to Birch's operations to be
13 forced to implement the provisioning methods and procedures of one or several
14 other transport providers.

15 When multiple vendors are used, the network planning, provisioning,
16 testing and maintenance required to support multiple vendors become much more
17 complex and difficult for a company to manage. When a dedicated transport
18 provider other than SBC is introduced to the process of establishing service, what
19 was a "one stop shop" becomes an effort that requires the coordination of actions
20 of multiple different companies. This is inherently more complex and prone to
21 inefficiency. These areas are even more difficult if each vendor does not have
22 established OSS and processes to support wholesale customers.

1 **Q. MR. FLEMING STATES THAT NO OPERATIONAL ISSUES ARE**
2 **PRESENT THAT WOULD PRECLUDE CLECS FROM USING**
3 **DEDICATED TRANSPORT FROM A THIRD PARTY. DO YOU AGREE**
4 **WITH MR. FLEMING?**

5 **A.** No, I do not agree with Mr. Fleming. There are a number of potential and actual
6 barriers that I will characterize as public policy barriers in the sense that none of
7 the barriers are technological in nature. Based on Birch's prior interface with
8 SBC as the "guardian" of all things that interface with SBC's central office
9 locations, what follows is a list of "must haves" to alleviate impediments to Birch
10 utilizing a transport provider other than SBC.

- 11 • CLECs must be able to commingle special access, unbundled network
12 element ("UNE") elements, and another carrier's network components
13 and/or facilities.
- 14 • CLECs must have the ability to order a UNE or special access loop from
15 SBC and SBC must be required to terminate the loop to another carrier's
16 collocation space Additional Point of Termination ("APOT") or
17 Connecting Facility Assignment ("CFA") through the use of a Letter of
18 Agency ("LOA").
- 19 • CLECs begin with a tremendous cost disadvantage due to the inflated
20 price associated with an SBC provided "cross connect" between
21 collocated carriers' APOTs. This price must reflect SBC's actual forward
22 looking costs.

- 1 • The cost must be reduced and the interval for implementation of dedicated
- 2 connections between CLEC collocation arrangements in an SBC office
- 3 must be improved.
- 4 • CLECs must have the unrestricted ability to order UNE facilities to
- 5 another common carrier's physical or virtual collocation arrangement in an
- 6 SBC central office.
- 7 • CLECs must have the unrestricted ability to install a dedicated connection
- 8 between all types of collocation arrangements, including physical-caged;
- 9 physical-cageless; and virtual, including connections to third parties
- 10 collocation arrangements (with) the appropriate LOA.

11 As of the date of this filing, Birch has received no information or assurances from
12 SBC that SBC will refrain from imposing these impediments on CLECs in a post-
13 UNE transport environment.

14 **Q. HAS BIRCH EXPERIENCED ANY OF THE ABOVE BARRIERS IN THE**
15 **EXISTING ENVIRONMENT?**

16 A. Yes. In a recent attempt to connect unbundled dedicated transport purchased
17 from SBC to a virtual collocation arrangement of a third party in SBC's St. Louis
18 Ladue central office, Birch encountered an artificial policy barrier erected by SBC
19 that precluded Birch from connecting UNEs to the third party's collocation. SBC
20 argued that the virtual collocation tariff did not specifically state that this type of
21 connection could be made. Since the virtual collocation tariff did not
22 affirmatively state that SBC was required to allow this type of connection (despite
23 the fact that the physical collocation tariff requires SBC to allow this type of

1 connection), SBC made the public policy decision to reject Birch's order that
2 requested such a connection.

3 Despite providing SBC with an LOA from the carrier to which Birch was
4 requesting the facility be terminated, the only action that Birch could take to force
5 SBC's hand in this situation was an executive escalation that culminated in a call
6 from Birch's Chief Executive Officer ("CEO") to SBC's CEO's, Ed Whitacre's,
7 office. This was an extreme escalation to force SBC to do what it is required to
8 do under the law. Birch was ultimately successful in having SBC provision the
9 connection it had requested in this instance, but in the process of resolving this
10 escalation, Birch management was told that this was a "one time thing" and that
11 SBC maintained that it is not required, pursuant to the virtual collocation tariff, to
12 provision an order of this type in the future. These actions lead me to believe that
13 SBC has a desire to thwart CLECs' attempts to interconnect with non-SBC
14 carriers, which is at the heart of the debate over the use of alternative transport
15 providers. Before this Commission can take comfort that alternate providers to
16 SBC are available for use by CLECs and dedicated transport routes can be de-
17 listed, this and other potential operational barriers must be resolved.

18 **Q. WHAT POLICY GOALS DOES SBC ATTRIBUTE TO THE FCC?**

19 A. On page 16 of SBC witness Mr. Smith's direct testimony on transport issues, SBC
20 attributes the following policy goal to the FCC: "[T]hat its methods are intended
21 to identify [routes] where ... 'carriers have the ability to use alternatives to the
22 incumbent LEC's network.'" Similarly, on pages 9-10 of his direct testimony on

1 loop issues, Mr. Smith states that the FCC directed parties to examine “evidence
2 of alternative loop deployment.”

3 **Q. DO THE FCC’S POLICY GOALS ASSUME THAT CLECS CAN**
4 **TRANSITION TO “ALTERNATIVES TO THE INCUMBENT LEC’S**
5 **NETWORK” OR “ALTERNATIVE LOOP[S]”?**

6 A. Yes. Indeed, the FCC requires state commissions to implement transition plans,
7 stating as follows in Paragraph 339 of the Triennial Review Order: “We expect
8 that states will require an appropriate period for competitive LECs to transition
9 from any unbundled loops that the state finds should no longer be unbundled.”
10 The Triennial Review Order makes an identical statement for transport in
11 Paragraph 417.

12 **Q. DOES SBC PROVIDE ANY SPECIFICS ON ANY PLAN FOR CLECS TO**
13 **TRANSITION TO ALTERNATIVE FACILITIES?**

14 A. No.

15 **Q. WHAT IS THE IMPORTANCE OF A TRANSITION PLAN?**

16 A. Without a workable transition plan, the Commission and parties cannot
17 accomplish SBC witness Mr. Smith’s stated policy goal of ensuring that “carriers
18 have the ability to use alternatives to the incumbent LEC’s network.” If the
19 Commission authorizes SBC to stop providing certain loops or transport routes as
20 UNEs, CLECs should be able to clearly understand and logistically be able to
21 transition their customers to alternative loops or transport routes. The importance
22 of a Commission-directed transition period cannot be stressed enough.

1 As I described earlier in my testimony, moving from an environment with
2 one vendor that has established systems and procedures to an environment where
3 Birch will need to utilize multiple vendors that may or may not have established
4 systems and procedures introduces vast amounts of complexity into Birch's
5 operations. In addition to the need to find third party vendors and enter into
6 contractual agreements, a significant amount of time will be required to plan and
7 implement the operational changes to validate a CLEC's ability to provide quality
8 services to its new and existing customers.

9 Finally, despite requests by Birch directly to SBC, SBC has not provided
10 Birch with any details in the way of rates, terms, conditions, ordering,
11 provisioning, methods, or procedures that would apply in the event transport
12 routes were de-listed as SBC has proposed. Adopting a transition plan that
13 required SBC to provide such detail so that it can be examined and approved by
14 the Commission would blunt the potential negative financial and operational
15 impacts that could occur.

16 **Q. GIVEN THESE CONCERNS, WHAT TYPE OF TRANSITION PLAN DO**
17 **YOU RECOMMEND?**

18 **A.** First, as part of a comprehensive transition plan that includes documented
19 operational and methodological detail sufficient to successfully operate in a post-
20 UNE environment, SBC should be required to provide access to "delisted" UNEs
21 at "just and reasonable" rates under Section 271 of the Act. SBC should submit
22 proposed rates to the Commission, which the Commission would then review and

1 either approve or disapprove under the “just and reasonable” standard set forth in
2 Sections 201 and 202 of the FCC’s rules.

3 Operationally, the steps required to successfully order and provision in a
4 post-UNE environment must remain identical to that which exists today when
5 transport routes are available as UNEs.

6 With respect to the actual transition away from UNE transport to either
7 alternative suppliers or to market-based transport, I recommend that the
8 Commission develop a multi-tiered transition process similar to the one applicable
9 to mass-market switching. First, there should be a transition period during which
10 CLECs may order transport and loops as existing UNEs for locations and routes
11 in cases where the commission finds a trigger is met. This period should be a
12 minimum of nine months in order to enable a CLEC to continue to offer
13 competitive service to new customers while it explores alternatives available to it.
14 Second, CLECs should have a transition period for existing facilities similar to
15 that applied to existing customers served via line sharing and mass-market
16 switching. The three year transition process established for customers served by
17 line sharing arrangements may provide a useful model, with the loop and
18 transport equivalent of one-third of the customers to be transitioned within 13
19 months, and another one-third transitioned within 20 months. All loop and
20 transport UNEs made available during these transition periods should continue to
21 be made available at existing UNE rates until migrated.

22 **Q. HAS SBC PROPOSED A TRANSITION OR ALTERNATE PLAN WITH**
23 **BIRCH ON A COMPANY-TO-COMPANY BASIS?**

1 A. No. SBC has not proposed any such transition plan in this proceeding. Further,
2 Birch asked SBC outside the scope of this proceeding for a dedicated transport
3 proposal for the possible scenario where routes are de-listed for unbundled
4 dedicated transport. SBC declined Birch's request and stated that products for
5 possible de-listed services are still under development. I have attached as Exhibit
6 1 the e-mail dialogue that depicts Birch's requests and SBC Industry Market's
7 responses.

8 **Q. DOES SBC'S PAST HISTORY WITH CLECS SUGGEST THAT SBC**
9 **WILL PROVIDE A REASONABLE TRANSITION PLAN TO CLECS IF**
10 **THE COMMISSION MAKES FINDINGS OF NONIMPAIRMENT IN**
11 **THIS DOCKET?**

12 A. No. SBC has historically treated competitors in a discriminatory and
13 unreasonable fashion. SBC has exhibited a patterned lack of concern for the
14 operational stability of its wholesale customers when SBC has mandated
15 operational transitions because of SBC's self-declared mandates to new wholesale
16 products. If SBC is left to its own discretion in determining how to transition
17 CLECs from UNE loops or transport, history shows that SBC will implement the
18 transition in a manner that harms CLECs and does not allow for a smooth
19 transition to third party providers.

20 **Q. WHAT IS THE IMPACT ON CLECS IF THEY ARE UNABLE TO**
21 **TRANSITION DELISTED LOOPS OR TRANSPORT ROUTES TO**
22 **ALTERNATE FACILITIES?**

1 A. CLECs will be unable to meet SBC's stated policy goal of ensuring that "carriers
2 have the ability to use alternatives to the incumbent LEC's network." If CLECs
3 are unable to transition delisted loops or transport routes to alternative facilities,
4 CLECs will be encumbered in serving customers in those geographic locations or
5 areas. For loops, CLECs could potentially lose any access to the customer. For
6 transport routes, CLECs could potentially lose access to geographic areas, or be
7 forced to pay SBC the yet-to-be-defined "market rate" for de-listed transport.
8 Clearly, CLECs face the real prospect of significant barriers to entry absent a
9 Commission requirement for specific oversight and guidance by the Commission
10 pursuant to a Commission-ordered transition plan.

11 **Q. WHAT IS THE RELEVANCE OF THESE SIGNIFICANT BARRIERS TO**
12 **ENTRY?**

13 A. Under Paragraph 411 of the Triennial Review Order, the Commission may
14 petition the FCC for a waiver of a trigger finding if the Commission finds that
15 "some significant barrier to entry exists" to deployment of transport facilities.
16 Paragraph 336 contains similar language for loops, referring to "the existence of a
17 barrier to further competitive facilities deployment at that location." If CLECs
18 are unable to transition their loops or transport facilities to alternative facilities, I
19 recommend that the Commission exercise its authority to petition the FCC for a
20 waiver of the trigger finding. I *also* recommend that the Commission proactively
21 address the potential for transition problems throughout the implementation of the
22 transition plan, as authorized by Paragraphs 339 and 417 of the Triennial Review
23 Order. Specifically, I respectfully urge the Commission to "stop the clock" of any

1 transition plan if CLECs can document problems that they are encountering in
2 transitioning to alternative facilities or services, particularly if those problems are
3 related to SBC. The clock should not start running again until SBC has fully
4 rectified the problems and the CLEC again has a reasonable opportunity to
5 transition to the alternative facilities or services.

6 **Q. DO YOU AGREE WITH SBC THAT TRANSPORT TRIGGERS HAVE**
7 **BEEN MET?**

8 A. Because I do not have access to the trigger candidate data submitted by SBC
9 because it was filed with a "highly confidential" designation, I cannot agree or
10 disagree with SBC's transport trigger analysis.

11 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

12 A. Yes.