

K
1/18/00

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Petition of BroadSpan Communications,)
Inc., for Arbitration of Unresolved)
Interconnection Issues Regarding) Case No. TO-2000-384
Collocation with Southwestern Bell)
Telephone Company.)

ORDER ADOPTING PROCEDURAL SCHEDULE, ADOPTING PROTECTIVE ORDER
AND ORDERING DISCOVERY

On December 23, 1999, BroadSpan Communications, Inc. d/b/a Primary Network Communications (BroadSpan) filed a petition with the Commission to arbitrate unresolved interconnection issues regarding collocation with Southwestern Bell Telephone Company (SWBT). BroadSpan's petition is based on the requirements of Section 252(b) of the Telecommunications Act of 1996 (the Act). Section 252(b)(3) of the Act provides that SWBT shall have 25 days after the Commission receives the petition in which to file its response to the petition, along with any other information it wishes to submit. A copy of BroadSpan's petition was served on SWBT on December 22. Therefore, SWBT shall file its answer no later than January 18, 2000.

Along with its petition for arbitration, BroadSpan requested that the Commission issue a protective order and allow immediate discovery. The Commission finds that there is a need to protect confidential information and that the request for a protective order is reasonable.

The Commission has previously recognized the need to protect confidential information and the issuance of protective orders has helped to minimize disputes in past cases. Therefore, a protective order will be granted. The Commission will also allow for discovery to commence immediately.

Section 252(b)(4)(C) of the Act requires that the Commission complete the arbitration procedure no later than nine months after the date on which SWBT received BroadSpan's request to negotiate these matters. BroadSpan's petition for arbitration does not indicate the date when SWBT received BroadSpan's request for negotiation. However, the petition does state that the deadline for filing the request for arbitration was December 24, 1999. Section 252(b)(1) of the Act provides that a petition for arbitration must be filed between the 135th and 160th day (inclusive) after the request for negotiation. Counting back 160 days from December 24 results in a date of July 17. In order that a procedural schedule may be established as soon as possible, the Commission will utilize the July 17 date for determining the date upon which it must complete this arbitration. If the parties wish to argue that some other date should be used, they shall do so in an appropriate pleading.

If the July 17, 1999 date is accepted as the date upon which the request for negotiation was received by SWBT, the Commission must issue its arbitration order no later than April 17, 2000. Therefore, an expedited procedural schedule will be established.

The Commission will apply the conditions set out below to the procedural schedule in this case.

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 the Commission has first established a protective order. The party that considers information to be proprietary or highly confidential must request a protective order and indicate the material's proper classification at the time of filing. Any testimony or schedule filed without a protective order first being established, or its classification clearly indicated, shall be considered public information.

C. The parties shall jointly file a hearing memorandum setting out the issues to be heard and the witnesses to appear on each day of the hearing and the order in which they shall be called, an appendix containing definitions of technical terms, each party's position on the disputed issues, and the order of cross-examination. The hearing memorandum shall set forth the issues that are to be heard and decided by the Commission. The Commission will view any issue not contained in the hearing memorandum as uncontested and not requiring resolution.

D. The Commission emphasizes the importance of the deadline for filing the hearing memorandum. The parties will cooperate in preparing and filing the hearing memorandum, and, unless the Commission orders otherwise, the hearing memorandum shall be filed on or before the date set.

E. Any party wishing to offer a prefiled exhibit into evidence must bring to the hearing three copies of the exhibit for the court reporter. If the exhibit has not been prefiled, the proponent must also bring six copies for the Commissioners and regulatory law judge, and copies for opposing counsel.

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

G. The briefs to be submitted by the parties shall follow the 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. All pleadings, briefs and amendments shall be filed in accordance with 4 CSR 240-2.080(7).

IT IS THEREFORE ORDERED:

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

<u>Date</u>	<u>Event</u>
February 8, 2000, 3:00 p.m.	Direct Testimony by both parties
February 15, 2000, 3:00 p.m.	Rebuttal Testimony by both parties

February 24, 2000, 10:00 a.m. Prehearing Conference
March 2, 2000, 3:00 p.m. Hearing Memorandum
March 13, 2000, 8:30 a.m. Hearing
March 27, 2000, 3:00 p.m. Initial Briefs
April 3, 2000, 3:00 p.m. Reply Briefs

2. That the protective order attached to this order (Attachment A) is adopted.

3. That discovery between the parties may commence immediately.

4. That the prehearing conference and the evidentiary hearing will be held in the Commission's office 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 prehearing conference at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

5. That this order shall become effective on January 13, 2000.

BY THE COMMISSION

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive style with a large initial "D".

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Morris L. Woodruff, 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 3rd day of January, 2000.

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 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. 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 Regulatory Law Judge 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 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.

RECEIVED
JAN 03 2003
COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION