BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Determination of Prices of Certain Unbundled Network Elements.	))	Case No. TO-2002-397

SOUTHWESTERN BELL TELEPHONE COMPANY'S
REPLY TO COMMISSION QUESTIONS

Southwestern Bell Telephone Company[1] pursuant to the Missouri Public Service Commission's May 28, 2002 Order Directing Filing,[2] respectfully submits this Reply to the Responses to Commission Questions filed by AT&T Communications of the Southwest, Inc., IP Communications of the Southwest, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, and Sprint Communications Company, L.P. ("CLEC Parties").

> **Commission Question No. 2. IP suggests that its hybrid protective order should be used instead of the Commission's standard protective order. IP claims that the "primary change" with regard to its hybrid protective order "is that instead of highly confidential and proprietary information designations, there is a single confidential designation." How else is the hybrid order different from the Commission's standard protective order? Are these additional changes necessary, and if so, why? Explain why the Commission's standard protective order should be replaced instead of simply modified to adopt a single confidential designation scheme. Which provisions of the Commission's standard protective order would need to be modified to change from a three-tier scheme of highly confidential, proprietary, and non-proprietary, to a two-tier scheme of confidential and public information?**

Additional Material Changes in the "Hybrid Protective Order." In its Response, IP continues to maintain that "all of IP's proposed changes relate to the single issue of moving to a

[1] Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company, will be referred to in this pleading as "Southwestern Bell" or "SWBT."
[2] In the Matter of the Determination of Prices of Certain Unbundled Network Elements, Case No. TO-2002-397, Order Directing Filing, issued May 28, 2002.

two-tier classification of information . . ." and that "the only changes proposed by IP were to effectuate the moving to the two-tiered system."[3] IP and AT&T, however, fails to disclose to the Commission the fact that their proposed "hybrid protective order" contains other material changes to the Commission's Standard Protective Order in addition to simply eliminating the Highly Confidential classification.

IP and AT&T omitted the fact that their proposed "hybrid protective order" would also require parties producing "Confidential Information" during the course of discovery to file copies of the material with the Filing Clerk of the Commission and to the Regulatory Law Judges.[4] The "hybrid protective order" would also require parties seeking to designate material as "Confidential Information" would now be required to file with the Commission "a written explanation of the claimed exemption" under which the "confidential designation" is sought and that such explanation "may be accompanied by affidavits providing appropriate factual support for any claimed exemption."[5]

IP's "hybrid protective order" also requires all material claimed to be "Confidential Information" to be provided to the other parties in the proceeding (provided that they merely agree in writing to treat the material as confidential information). It allows the receiving parties to be able to make limited copies of the "Confidential Information" and permits those parties to fax it (with the only copy of that being that "It shall be the responsibility of the party transmitting documents by fax to ensure that the documents are only received by individuals authorized to receive the applicable information)."[6]

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[3] IP Response, p. 3.
[4] IP Hybrid Protective Order, para. C(1).
[5] Id.
[6] Id., para. C(2).

These provisions would not only eliminate the heightened protection currently given to Highly Confidential information, they would also require such information to be broadcasted to all parties in a case (who may then fax it among themselves with virtually no safeguards) -- and not just to parties that specifically requesting it in discovery.

With such changes the Commission can be assured that no party will be comfortable turning over its own Highly Confidential information in the context of a Commission proceeding (although it was certainly clear that the CLEC Parties had no problems suggesting such lax standards for use in this case when Southwestern Bell will be the one producing Highly Confidential information).

The "Hybrid Protective Orders" Two-tier Classification. The "hybrid protective order" proposed by IP essentially treats all information as proprietary and inappropriately ignores the fact that information can differ in sensitivity. A monthly revenue report (which in many cases is merely proprietary) is of a very different nature than marketing plans, maps showing the specific location of customers, reports containing the number of business customers per wire center, cost studies and contracts with vendors. To disregard the difference in sensitivity of these materials ignores the potential harm that could be caused by the release or disclosure of each.

The Commission's Standard Protective Order, on the other hand, appropriately recognizes that there are two very different categories of confidential business information: Highly Confidential[7] and Proprietary,[8] and sets out appropriate safeguards for the production and

[7] The Commission's Standard Protective Order defines Highly Confidential information as: "Information concerning (1) material or documents that contain information relating directly to specific customers; (2) employee sensitive information; (3) marketing analysis or other market-specific information relating to services offered in competition with others; (4) reports, workpapers 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.

[8] The Commission's Standard Protective Order defines Proprietary information as: "Information concerning trade secrets, as well as confidential or private technical, financial and business information."

handling of each type of information. Obviously, the Commission in developing the Standard Protective Order contemplated that different types of information would be produced in different types of cases. With the different classifications and heightened safeguards for Highly Confidential information, parties before the Commission were assured that appropriate protection would be given to such data when produced during a Commission proceeding.

For example, in a costing proceeding like this case, Southwestern Bell expects that the various parties in this case will be seeking Southwestern Bell's cost study information. Southwestern Bell considers this data Highly Confidential as it provides information relating to Southwestern Bell's cost of providing service (which would be very valuable to competitors in setting prices for their services sold in competition with Southwestern Bell) as well Southwestern Bell's proprietary methods and practices for determining these costs. This data is not publicly available and is closely protected within Southwestern Bell. Such data would also assist a competitor in deciding whether to enter a specific sector of the telecommunications market. And by providing valuable insight into Southwestern Bell's cost structure, this information would assist other carriers in determining whether they could be competitive with Southwestern Bell for particular service or in particular markets.

Uncontrolled access to Southwestern Bell's proprietary cost models and costing processes would permit competitors to gain an insight into Southwestern Bell's business costing systems and how it manages them. Access to this information would help competitors develop their own costing processes or improve their existing costing processes. Southwestern Bell has expended significant amounts of money, management time and other resources to develop these internal business costing systems. These proprietary systems and processes would be difficult for competitors to duplicate without a similar expenditure of resources.

Additionally, Southwestern Bell's cost studies contain information that is Highly Confidential to many third-party entities that provide services, equipment and materials to Southwestern Bell. These vendors consider their information to also be Highly Confidential in that it represents the product of negotiated arrangements between them and Southwestern Bell. The material that will be produced in this case is of such a highly sensitive nature that improper disclosure would expose Southwestern Bell and its vendors to an unreasonable risk of harm from their competitors.

Both the federal and state law recognize the important property interests in maintaining the confidentiality of a party's private business data. U.S. Const. Amend. XIV; Ruckelshaus v. Monsanto, 467 US 986, 81 LEd.2nd 815, 831 (1989); see also, Mo. Const. Article I, Section 10. In Missouri, the Commission has traditionally employed its Standard Protective Order, which was developed by the Missouri telecommunications industry, to balance a party's property interest in its private business data against the need for the disclosure and use of that information during regulatory proceedings.

In reviewing the need for such protections, the Missouri Court has ruled that by making the "Highly Confidential" data available for use by the Commission and all parties to a case, there is no public interest or benefit to the regulatory process in the public disclosure of a party's private financial business information. Southwestern Bell Telephone Company, et al. v. McClure, Case No. CV193-502CC, Findings of Fact and Conclusions of Law and Judgment, Cole County Circuit Court, issued June 21, 1993, p. 10. The CLEC Parties desire for more lax procedures is no justification for jettisoning protective measures previously found appropriate by the Commission and successfully used by the telecommunications industry in Missouri for years.

Commission Question No. 3

If the Commission adopts a hybrid protective order, similar to the ones suggested by IP, should that hybrid protective order be used in all Commission cases or just in this case? Explain your reasoning.

Commission Question No. 4

What are the advantages and disadvantages of the Commission adopting the standard protective order but granting exceptions to it on a case-by-case basis, in order to allow specific internal experts access to certain highly confidential information?

In response to these questions, the CLECs in this case all urge the Commission to adopt IP's proposed "hybrid protective order" going forward in all cases where a protective order is issued. To support their requests, they all generally argue that their approach would avoid additional litigation. They assert that a case-by-case approach would be burdensome in that it would require parties to request exceptions in each case.[9]

Contrary to the CLECs' claims, it is IP's "hybrid protective order" that would lead to substantial litigation if it was made the new Commission standard -- and not only in the telecommunications field, but in other utility fields regulated by the Commission as well. As the Commission will realize from reading the CLEC Parties Responses, they are viewing this issue only from the perspective of companies seeking to gain access to the Highly Confidential information belonging to other companies.

Materially changing the Standard Protective Order simply because a few parties in one case do not like the Commission's standard language will potentially result in disruption of regulatory proceedings in other cases both within the telecommunications field and other areas regulated by the Commission. Parties from the various utility fields that a practice before it have employed the Commission's Standard Protective Order in thousands of cases over the years to

[9] See, e.g., AT&T Response, p. 1; IP Response, p. 4; WorldCom Response, p. 2.

ensure that information can be disclosed in regulatory proceedings in a way that protects a legitimate business interest of a party and allows the Commission to make appropriate decisions.

The "Highly Confidential" and "Proprietary" designations contained in the Commission's Standard Protective Order carefully balances the needs of both the party seeking production of sensitive information and the party producing such information. Compliance with the standards accorded these two classifications of information has been critical to the proper functioning of the Commission, as the parties before the Commission will not willingly part with Highly Confidential information if they are not assured that the heightened protection of the Commission is recognized and its Standard Protective Order will be followed. As the Commission has recognized in previous cases, there is a true need to protect companies' confidential information and the issuance of its Standard Protective Order has helped minimize disputes in past cases.[10]

The CLECs appear to infer that there will be significant litigation over protective order issues if the Commission does not adopt IP's "hybrid protective order" as the new standard going forward. The Commission, however, should measure this claim against its own experience. As the Commission is aware, there has been relatively little litigation over the terms of the Standard Protective Order since it was adopted by the Commission. That fact, in itself, is testament to its efficacy and the value it continues to bring to regulatory proceedings.

As the Commission is also aware, where discovery disputes have arisen, the vast majority are generally resolved without Commission involvement. For example, in response to certain CLEC's requests, Southwestern Bell has agreed to permit a small group of internal CLEC regulatory employees review Highly Confidential cost study data during UNE cost proceedings.

[10] See, e.g., Case No. TO-2001-440, Order Adopting Protective Order, issued April 5, 2001 at p. 1.

However, this was permitted only with regard to employees who could certify that they were not involved in retail marking, pricing, procurement or strategic analysis or planning. To make this accommodation, Southwestern Bell entered into a separate, supplemental nondisclosure agreement with the CLEC to put appropriate safeguards in place to support this limited access to highly confidential cost study information.

It is surprising that AT&T is now criticizing this supplemental nondisclosure agreement, as it was developed by AT&T and Southwestern Bell to resolve disputes over access to highly confidential cost information. This agreement was negotiated and used without issue in the third AT&T arbitration, Case No. TO-2001-455. It was also used without incident in subsequent UNE pricing proceedings such as Case Nos. TO-2001-438 (which was the largest generic UNE pricing proceeding to date) and TO-2001-439 (Southwestern Bell has also indicated that it is willing to do so -- and in fact has such an agreement already with one party -- in Case No. TO-2001-65).

As Southwestern Bell is willing to make the same arrangements in this case as appropriate, there is simply no need to jettison the Commission's Standard Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail and first-class, postage prepaid, U.S. Mail or via hand-delivery on June 10, 2002.

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