BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

RESPONSE OF SBC MISSOURI TO
BROOKS FIBER COMMUNICATIONS
MOTION FOR CLARIFICATION OF PROTECTIVE ORDER

COMES NOW, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its response to the Motion for Clarification of Protective Order and Response to Staff's Motion for Clarification ("Motion for Clarification") filed by Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access, Transmission Service, 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., (collectively "CLECs") states as follows:

1. The CLECs' Motion for Clarification is mislabeled. Rather than a "clarification," the Motion would in fact work a substantial and inappropriate change in the use of discovery under the standard Protective Order issued by the Commission in this and many other cases. It would result in substantially decreased flow of information in response to discovery requests and would substantially increase the issues which would be brought to the Commission for resolution in the dozens of telecommunications cases (as well as many non-telecommunication cases where the Protective Order is used). The Commission should reject the purported Motion For Clarification and continue to apply the Protective Order as it has been implemented since it was first adopted by the Commission.

2. The CLECs' Motion for Clarification purports to "clarify" that parties receiving proprietary or highly confidential information from another party in discovery may freely share that information with other parties that are outside experts and employees of other parties to the case. This is directly contrary to how the Protective Order has been applied and this radical change should not be adopted by the Commission.

3. It is the theory of the CLECs' Motion for Clarification that the standard Protective Order permits discovery produced to one party to be made available by that party to others in this case. That is not what the Protective Order provides. Paragraph B of the Protective Order states that a party from whom highly confidential and proprietary information has been requested during discovery "shall make such designated information available to the party seeking discovery." (emphasis added). Paragraph C of the standard Protective Order provides that highly confidential information is to 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 purposes of this case." Paragraph D of the Protective Order provides that "information designated as proprietary shall be served on the attorneys for the requesting party." (emphasis added). There is nothing in the Protective Order that contemplates the ability of the party receiving proprietary or highly confidential information to make the unilateral decision to provide that information to other parties in the case.

4. If the Commission were to "clarify" that a party receiving discovery may unilaterally decide whether to provide that information to other parties in the case, several adverse consequences would follow. First, a company would be far less willing to provide such information to the Staff and Public Counsel if the information could be passed to the company's competitors, apparently without the producing company even becoming aware of it. Today,

companies provide information to Staff and Office of Public Counsel knowing that the provisions of Section 386.480 RSMo 2000 and the standard Protective Order ensure that the information will not be sent to the company's competitors. The Commission is well served by the free flow of information to its Staff, and should not permit the "sharing" of proprietary and highly confidential information, as parties will not be as willing to provide such information to the Staff and Public Counsel if it is not protected. A rule permitting parties to "share" proprietary and highly confidential discovery would also impact discovery between companies, as parties would no longer be willing to resolve disputes if providing information to one party meant that all parties could review it, even without the knowledge of the producing party. The producing company could not take steps to enforce the terms of the Protective Order when it does not even know that another party has been given access to proprietary or highly confidential information. Second, parties from which highly confidential information is requested would never be willing to waive the provisions of Paragraph C of the Protective Order which provides that Highly Confidential information is to be reviewed only on the producing party's premises. Today, that provision is occasionally waived in an effort to accommodate the requesting party, but would most certainly not be waived if the information were subject to being provided by the requesting party to other parties. Third, parties would be far more likely to object to requests for proprietary and highly confidential information if that information were allowed to be freely shared by the requesting party, without the knowledge or consent of the producing party. This would cause the Commission to be required to resolve discovery disputes much more frequently than occurs today.

5. The CLECs' Motion for Clarification apparently contends that proprietary or highly confidential information could not be included in prefiled testimony if the requesting

party is not free to distribute it to all other parties to the case. That is not correct. Paragraph G of the standard Protective Order specifically provides that such information may be included in prefiled testimony if the same level of confidentiality is maintained. And Paragraph J specifically provides that Highly Confidential or Proprietary information included in prefiled testimony may be made available to persons authorized under Paragraphs C and D of the Protective Order.

6. Some parties have apparently been very lax in following the provisions of the Protective Order, at least when dealing with proprietary or highly confidential information of SBC Missouri. In the Phase 1 hearings in this case, it became apparent that an expert witness was freely sharing information that he had received under the Protective Order with another witness, without the knowledge or approval of SBC Missouri. In considering this, the Regulatory Law judge made clear that "it would be a misreading of the Protective Order" for the receiving party to provide highly confidential information to other parties to the case. T. 786. As noted by the Regulatory Law Judge, "that is not the way it's intended to work." T. 787. Later, an issue arose as to whether in-house expert employed by another party reviewed Highly Confidential information which had been introduced into evidence during the hearing. T. 820-822. At that time, the Regulatory Law Judge appropriately expressed the unequivocal view that there was "a somewhat uninformed, if not casual and lackadaisical attitude toward highly confidential and proprietary information" which is wholly inappropriate. The Regulatory Law Judge was correct, and it is wholly inappropriate for parties to attempt to condone these actions under the guise of a motion for "clarification."

7. The Commission has considered the sanctity of proprietary and highly confidential information in Case No. TO-97-397. In that case, the Office of Public Counsel

obtained information filed by SBC Missouri with the Commission pursuant to Section 386.480. OPC subsequently provided that information to MCI in response to a data request without ever even informing SBC Missouri. The Commission made it abundantly clear that the Office of Public Counsel had no authority to reveal proprietary or highly confidential information to another party to the case, even though, like here, MCI's witness had executed a nondisclosure agreement under the Protective Order:

> The Commission finds that the actions of OPC did not comport with the requirements of Section 386.480, RSMo 1994. The Commission also finds that OPC violated the terms of the Protective Order issued in this case. (Report and Order, Case No. TO-97-397, September 16, 1997, p. 13.)

8. As the level of competition in all phases of telecommunications continues to accelerate, it is critical that the Commission not take actions that impede its ability to have access to the information necessary to make an informed decision. The Motion for Clarification would have precisely such an effect, as parties would be unable to rely on the Protective Order to safeguard critical competitive information, but would instead be subject to unilateral decisions by attorneys and experts for its competitors regarding disclosure.

9. It is critical to the free flow of information that proprietary and highly confidential information be utilized in strict compliance with the terms of the Commission's standard Protective Order. A party conducting discovery is entitled to utilize that discovery consistent with the terms of the Protective Order in presenting its position on outstanding issues to the Commission, but it is not permitted to make the unilateral decision to share such confidential or proprietary information with other parties to the case. The Commission has appropriately enforced the terms of the Protective Order in the past to prevent such disclosures, and should not revise the Protective Order in this case under the guise of "clarification" as proposed by the CLECs.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to deny the Motion for Clarification filed by the various CLECs in this case and for such other and further relief that the Commission deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document was served to all parties by e-mail on February 20, 2004.

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