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DISP

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses and	)	
Section 214 Authorizations from	)	CC Docket 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee	)	

ORDER ADOPTING PROTECTIVE ORDER

Adopted: October 2, 1998 **Released: October 2, 1998**

By the Chief, Common Carrier Bureau:

1. On July 24, 1998, SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") filed applications with the Federal Communications Commission (the "Commission") pursuant to Sections 214 and 310 of the Communications Act to transfer control of Ameritech's FCC authorizations to SBC.[1] Responding to the Commission staff's pre-filing requests to allow third parties to review confidential or proprietary documents that SBC and Ameritech may submit at the Commission's request, SBC and Ameritech filed a proposed protective order with the Bureau on July 29, 1998.[2]

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[1] *See Description of Transaction, Public Interest Showing and Related Demonstrations*, filed July 24, 1998 (CC Docket No. 98-141).

[2] Letter from Philip W. Horton, Counsel for SBC, to Magalie Roman Salas, Secretary, FCC (July 29, 1998).

2. On July 30, 1998, the Bureau issued a public notice requesting comments on the proposed protective order by August 6, 1998, and reply comments by August 13, 1998.[3] This Order does not constitute a resolution of the merits concerning whether any confidential information would be released publicly by the Commission upon a proper request under the Freedom of Information Act (FOIA) or otherwise.

3. After reviewing the filings received during this comment period, the Common Carrier Bureau ("Bureau") hereby enters the attached protective order (Exhibit A) to ensure that any confidential or proprietary documents submitted by SBC and Ameritech are afforded adequate protection. The protective order adopted herein applies to any confidential documents provided by SBC and Ameritech in this proceeding.

4. Only two parties to the proceeding, AT&T and MCI, filed comments regarding SBC and Ameritech's proposed protective order.[4] AT&T does not object to the proposed protective order.[5] MCI objects to the disclosure requirements in paragraph 3 of the proposed protective order that would restrict access to documents from in-house economists upon whose expertise MCI plans to rely.[6] MCI believes that SBC and Ameritech have not shown that the information they intend to submit justifies this restriction.[7] Noting that MCI took the opposite position with regard to the issue of in-house economists' access to confidential documents in the *MCI/WorldCom* proceeding, SBC and Ameritech argue in their reply that, since the Commission recently determined in the *MCI/WorldCom* proceeding that in-house economists should not have access to confidential documents, it would be likewise inappropriate to allow such access in the *SBC/Ameritech* proceeding.[8] SBC and Ameritech contend that the documents that will be subject to the protective order will be at least as sensitive as those produced in the *MCI/WorldCom* proceeding because

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[3] *SBC Communications, Inc. and Ameritech Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission Seeks Comment on Proposed Protective Order Filed by SBC and Ameritech*, Public Notice, DA 98-1492 (rel. July 30, 1998).

[4] AT&T and MCI.

[5] AT&T Comments at 1.

[6] MCI Comments at 2.

[7] *Id.* at 4.

[8] SBC/Ameritech Reply at 2-3.

they relate to the companies' future plans and business strategies.[9]

5. As occurred in the *MCI/Worldcom* proceeding, we expect the commenters in this proceeding may seek access to highly sensitive documents, which include valuable information, such as future business plans, customer names, usage patterns, locations, and traffic volumes.[10] In light of the potential competitive harm to MCI and WorldCom from disclosure of such information, the Bureau determined in the *MCI/WorldCom Order Adopting Protective Order* that in-house economists and other in-house staff should not have access to confidential information, because "there is a greater risk of inadvertent disclosure by such individuals that is not justified given the sensitive nature of the information at issue."[11] Because the documents commenters may seek to review in this proceeding pose the same potential competitive harm to SBC and Ameritech and the same risk of inadvertent disclosure, the Bureau declines MCI's request to modify paragraph 3 of the proposed protective order and allow MCI's in-house economists access to the confidential documents SBC and Ameritech provide.

6. MCI also asserts that the *Model Protective Order* (*MPO Order*) that the Commission has recently adopted "ordinarily permits in-house economists to have access."[12] SBC and Ameritech respond that the fact that the Model Protective Order does not contain such a prohibition against in-house economists, is not dispositive as the *MPO Order* was designed for use in comparatively routine matters in which such restrictions would not be necessary.[13] The Bureau notes that the *MPO Order* did not specifically address what access restrictions should be placed on persons in license transfer proceedings. Instead, the *MPO Order* focused on Freedom of Information Act requests and the ability to modify the *MPO Order* to other types of Commission proceedings.[14] In particular, the Commission stated that "[w]hile we believe the MPO

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[9] *Id.* at 3.

[10] *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order Adopting Protective Order, DA 98-1072 (rel. June 5, 1998) (*MCI/WorldCom Order Adopting Protective Order*) at para. 5.

[11] *Id.* para. 6. *See also MCI/Worldcom Order Adopting Protective Order* at para. 5 (discussing scope of in-house counsel provision).

[12] MCI Comments at 2-3. *See also In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, GC Docket No. 96-55 (rel. Aug. 4, 1998) (*MPO Order*).

[13] SBC/Ameritech Reply at 4.

[14] *MPO Order* paras. 21-22.

will prove appropriate in most instances where protective orders are appropriate, the Bureaus will retain the authority to use a different or modified protective order where they determine it is warranted."[15] The specific paragraph that MCI cites as support for its position states that the Commission will consider limiting access to documents to outside counsel and experts "when specific future business plans are involved . . . so as to minimize the potential for inadvertent misuse of such information."[16] With regard to the documents SBC and Ameritech will provide, the Bureau believes that specific future business plans may be involved and, as stated above, the Bureau believes that the risk of inadvertent misuse or disclosure of information justifies the limited access restrictions in paragraph 3 of the attached protective order.

7. MCI additionally requests that the Commission give parties an opportunity to comment on the particular issues that any new requests for protection may raise, since MCI asserts that the July 29, 1998 letter to the Commission limited the application of the proposed protective order to the initial Hart-Scott-Rodino submissions to the Department of Justice ("DOJ"), including the Item 4(c) documents.[17] We decline MCI's request, because we conclude that the language of the attached protective order encompasses all information requested by the Commission in connection with the proceeding. Therefore, the protective order applies to all documents, without specific limitation to Hart-Scott Rodino or Item 4(c) documents.

8. SBC shall make available for review the documents subject to this protective order at the offices of SBC's outside counsel, Arnold & Porter, 333 Twelfth St., N.W., Washington, DC 20004-1206. Ameritech shall make available for review the documents subject to this protective order at the offices of Ameritech's outside counsel, Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Ave., NW, Washington, DC 20005-2111. Parties reviewing these documents will be provided the following alternatives: 1) parties will be provided adequate opportunity to inspect the documents on site; 2) parties may inspect the documents on site with the ability to request copies, at cost, of all or some of the documents, other than those marked as "Copying Prohibited;" or 3) parties may request a complete set of the documents at cost, allowing two days after the request is made for receipt of the copies. If a complete set of documents will be requested, parties are encouraged to make such request at the time they submit the Acknowledgment of Confidentiality. This will allow parties the opportunity to begin reviewing the documents at the end of the five-day period referenced in paragraph 5 of the protective order. All documents that are removed from the Arnold & Porter or Skadden offices will bear an original

[15] *Id.* para. 23.

[16] *Id.* para. 26.

[17] MCI Comments at 4-5.

confidential stamp and must be returned in accordance with the terms of the protective order.

9. Any party seeking access to confidential documents subject to this protective order shall request access pursuant to paragraph 5 of the protective order.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn C. Brown
Chief, Common Carrier Bureau

EXHIBIT A

PROTECTIVE ORDER

1. On July 24, 1998, SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") filed applications with the Federal Communications Commission (the "Commission") pursuant to Sections 214 and 310 of the Communications Act to transfer control of Ameritech's FCC authorizations to SBC. The Commission anticipates that it may seek documents in this proceeding from SBC and Ameritech (individually or collectively, the "Submitting Party") that contain proprietary or confidential information, and, therefore, should be made available pursuant to a protective order. Consequently, the Bureau enters this Protective Order to ensure that the documents considered by the Submitting Party to be confidential and proprietary are afforded protection. This Order does not constitute a resolution of the merits concerning whether any confidential information would be released publicly by the Commission upon a proper request under the Freedom of Information Act (FOIA) or otherwise.

2. *Non-Disclosure of Stamped Confidential Documents.* Except with the prior written consent of the Submitting Party, or as hereinafter provided under this Order, neither a Stamped Confidential Document nor the contents thereof may be disclosed by a reviewing party to any person. A "Stamped Confidential Document" shall mean any document that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN CC Docket No. 98-141 before the Federal Communications Commission" to signify that it contains information that the Submitting Party believes should be subject to protection under FOIA and the Commission's implementing rules unless the Commission determines, *sua sponte* or by petition, pursuant to sections 0.459 or 0.461 of its rules that any such document is not entitled to confidential treatment. For purposes of this order, the term "document" means all written, recorded, electronically stored, or graphic material, whether produced or created by a party or another person.

3. *Permissible Disclosure.* Subject to the requirements of paragraph 5, Stamped Confidential Documents may be reviewed by outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making, *i.e.*, counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor. Subject to the requirements of paragraph 5 and subject to the obligation

to secure the confidentiality of Stamped Confidential Documents in accordance with the terms of this order, such counsel may disclose Stamped Confidential Documents to: (i) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; ii) Commission officials involved in this proceeding; (iii) outside consultants or experts retained for the purpose of assisting counsel in these proceedings and who are not involved in the analysis underlying the business decisions and who do not participate directly in the business decisions of any competitor of any Submitting Party; (iv) employees of such counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with this proceeding; and (v) employees of third-party contractors performing one or more of these functions. The Submitting Party shall make available for review the Stamped Confidential Documents at the offices of SBC's outside counsel, Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004; and Ameritech's outside counsel, Skadden Arps Slate Meagher & Flom, LLP, 1440 New York Avenue, N.W., Washington, DC 20005-2111.

4. *Access to Confidential Documents.* Counsel described in paragraph 3 shall have the obligation to ensure that access to Stamped Confidential Documents is strictly limited as prescribed in this order. Such counsel shall further have the obligation to ensure (i) that Stamped Confidential Documents are used only as provided in this order; and (ii) that Stamped Confidential Documents are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 7.

5. *Procedures for Obtaining Access to Confidential Documents.* In all cases where access to Stamped Confidential Documents is permitted pursuant to paragraph 3, and before reviewing or having access to any Stamped Confidential Documents, each person seeking such access shall execute the Acknowledgment of Confidentiality to the Commission and to each Submitting Party so that it is received by each Submitting Party five business days prior to such person's reviewing or having access to any such Stamped Confidential Documents. Each Submitting Party shall have an opportunity to object to the disclosure of Stamped Confidential Documents to any such persons. Any objection must be filed at the Commission and served on counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment of Confidentiality. Until any such objection is resolved by the Commission and any court of competent jurisdiction prior to any disclosure, and unless that objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Stamped Confidential Documents.

6. *Requests for Additional Disclosure.* If any person requests disclosure of Stamped Confidential Documents outside the terms of this protective order, such

requests will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.

7. *Use of Confidential Information.* Counsel described in paragraph 3 may, in any documents that they file in this proceeding, reference information found in Stamped Confidential Documents or derived therefrom (hereinafter, "Confidential Information"), but only if they comply with the following procedure:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, CC Docket No. 98-141;" and

d. The confidential portion(s) of the pleading shall be served upon the Secretary of the Commission and each Submitting Party. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File. A party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. Parties may provide courtesy copies under seal of pleadings containing Confidential Information to Commission staff.

8. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing parties, by viewing these material: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information by a Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

9. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of Stamped Confidential Documents or Confidential Information that a party has obtained under terms of this order, such party shall promptly notify each Submitting party of the pendency of such subpoena or order. Consistent with the independent authority of any court or administrative agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the

production or disclosure of any Stamped Confidential Document or Confidential Information.

10. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Confidential Documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not disclose Stamped Confidential Documents or Confidential Information.

11. *Violations of Protective Order.* Persons obtaining access to Stamped Confidential Documents or Confidential Information under this order shall use the information solely for preparation and the conduct of this proceeding as delimited in paragraphs 4, 7, and 10, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such information for any other purpose, including business, governmental, commercial, or other administrative, regulatory or judicial proceedings. Parties will be permitted to use these materials in connection with communications and submissions to the Department of Justice as they pertain to that agency's review of the antitrust aspects of the proposed merger of SBC and Ameritech. Should a party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that party shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order.

12. *Prohibited Copying.* If, in the judgment of the Submitting Party, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such document, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to counsel for the Submitting Party.

13. *Termination of Proceeding.* The provisions of this order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding (which includes any administrative or judicial review), Stamped Confidential Documents and all copies of same shall be returned to the Submitting Party. No material whatsoever derived from Stamped Confidential Documents may be retained by any person having access thereto, except counsel to a party in this proceeding (as described in paragraph 3) may retain, under the continuing strictures of this order, two copies of pleadings containing confidential information prepared on

behalf of that party. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the Submitting Party not more than three weeks after conclusion of this proceeding.

14. *Authority*. This Order is issued pursuant to Section 4(i), 214(a), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214(a), and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn C. Brown
Chief, Common Carrier Bureau

Appendix A

ACKNOWLEDGEMENT OF CONFIDENTIALITY

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding and I understand it. I agree that I am bound by this Order and that I shall not disclose or use documents or information designated as "CONFIDENTIAL INFORMATION" or any information gained therefrom except as allowed by the Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as counsel to a party or other person described in paragraph 3 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the order.

Executed at _____ this __ day of _____, 199_.

_____
Signature

_____
Title