

Service Date: October 24, 1991

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Montana Public)	UTILITY DIVISION
Service Commission's Investigation)	
into the Regulatory Status of Other)	DOCKET NO. 88.11.49
Common Carriers providing Telecom-)	
munications Services.)	ORDER NO. 5548a

FINAL ORDER

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FINAL ORDER

A proposed order was issued in this matter on August 2, 1991. Exceptions and briefs were filed, and oral argument was held on September 23, 1991. Therefore, the Commission adopts the following order as its final order in this matter.

I. PRIOR REDUCED REGULATION DECISIONS INVOLVING AT&T

Current reduced regulation policies for AT&T were established out of two prior dockets. First, in Docket No. 83.11.80 (Order No. 5044d) AT&T applied to revise intrastate service rates. Among a number of issues, the Order addressed AT&T's request for flexible pricing (FOF 53-55). The Commission granted AT&T's Flexible pricing request under the condition that AT&T would assure incremental costs do not exceed reduced prices.

Then, in 1986, and in Docket No. 86.12.67, AT&T applied for authorization to increase revenues, revise prices and reduce the degree of regulation imposed by the Commission. Several parties intervened and testified in this docket. MCI Telecommunications Corporation (MCI) opposed any detariffing for AT&T due to cross-subsidy concerns. Northwest Telephone Systems (NTS) proposed an alternative to AT&T's reduced regulation request which involved price lists.

The Montana Consumer Counsel (MCC) also testified in Docket No. 86.12.67 and opposed reduced regulation for AT&T. In reflecting the Montana Telecommunications Act's (MTA) objective of encouraging competition subject to maintaining universal service, the MCC's "workable competition" model applied, for perhaps the first time, an industrial organization paradigm to analyze the inter-LATA market. The Commission found begging a debate of whether the "least cost" market structure is naturally monopolistic or competitive. Absent easily obtainable market share data, the Commission relied on a market concentration criterion. This criterion revealed a highly concentrated inter-LATA market.

The Commission's decision was critical of the scant empirical data on the extent of competition and, the absence of any debate on the relevant market structure for the inter-LATA telecommunications market (FOF 51-52). The Commission's final order granted part of AT&T's amended application for reduced regulation. Order No. 5274a (November 30, 1987) granted AT&T's petition to flow through access charge changes to maximum allowable rates, but denied AT&T's request to price index maximum allowable

rates. The flow through was to just MTS, WATS and 800 service rates. In a motion, AT&T took a "one-hundred and eighty degree turn" and opposed the Commission's granting of AT&T's own request for flowing through access charges. The Commission's order denied AT&T's "perplexing" motion.

II. **DOCKET NO. 88.11.49 ORDER TO SHOW CAUSE**

As a by-product of the prior reduced regulation docket, Docket No. 88.11.49 began in November, 1988, when the Commission issued an Order to Show Cause initiating an investigation into the regulatory status of other common carriers (OCCs). The Commission listed OCCs that must respond to the show cause order, and cited the relevant statutory authority for the investigation. These OCCs included American Sharecom (AS), Intermountain Digital Network (IDN), MCI, Touch America (TA), U.S. Sprint (USS) and WestMarc Communications, Inc. (WCI). If claiming an exemption from regulation, an OCC was required to provide data on either its purchases of regulated services or its transmission and switching facilities used to provide intrastate services.

On April 16, 1990 the Commission issued a Proposed Procedural Order in Docket No. 88.11.49. AT&T was granted authorization to be a Respondent, in addition to the OCCs already mentioned. AT&T's motion requested that it and OCCs be allowed to file price lists containing prices and terms and conditions of service.

III. PARTIES' DIRECT TESTIMONY

Six parties filed direct testimony in this docket including AT&T, IDN, MCI, USS, TA and WCI. A summary of each witness' testimony follows.

AT&T Direct: Ms. Sydney Wagner

Ms. Sydney Wagner testified on AT&T's behalf, addressing two main issues: why AT&T and OCCs ought to be subject to similar regulatory standards and, that markets are sufficiently competitive to justify Maximum Reduced Regulation (MRR) for all interexchange carriers (IXCs). Ms. Wagner holds that MRR for AT&T and all other IXCs is in the public interest.

First, as regards similar regulatory standards, Ms. Wagner recommends adoption of her MRR proposal for AT&T, and OCCs that own or lease facilities. AT&T revised its initial MRR proposal to include the five (5) proposals listed below. AT&T stated that MRR really only features four (4) unique proposals: if items two through five are implemented, the Commission will have eliminated traditional regulation, as described in item one below (TR Vol II, p. 155).

1. Eliminate traditional rate base/rate of return regulation. In other words, all OCCs deemed to be public utilities would file price lists with the Commission.
2. Detariff all switched services, replacing tariffs with price lists containing standard terms and conditions.
3. Allow changes to price lists on ten days or less notice without any cost support.
4. Allow introduction of new services on ten days notice.

5. End the flow through of access charges to maximum rates.

Ms. Wagner confirmed that AT&T's policy to conditionally commit to maintain geographically uniform statewide rates is unchanged from Docket No. 87.12.67 (TR Vol II, p. 133). Thus, AT&T will seek to geographically deaverage prices only if one of the following three circumstances emerge: 1) access charges are deaveraged; 2) a competitor's price deaveraging requires AT&T to follow suit, or 3) a customer demands deaveraged prices.

Importantly, Ms. Wagner links her MRR proposal to authority granted in the MTA. Ms. Wagner holds the Commission can fulfill its public interest obligations, the MTA's objective of encouraging competition subject to the constraint of maintaining universal service, by means of adopting her MRR proposal. Ms. Wagner also recites the MTA's mandate that providers (OCCs and AT&T) of comparable services ought to be subject to the same regulatory standards.

As a policy matter, Ms. Wagner holds that regulating one type of firm e.g., a reseller, differently from other types runs the risk of being off-base over time due to the gravitation of resellers to facility based systems (FBS). Ms. Wagner adds OCCs will make wrong investment decisions and AT&T will incur "severe injury" if only AT&T is regulated.

Second, Ms. Wagner supplied evidence on the extent of competition in the Montana intrastate market for telecommunications services. Some statistics on the degree of competition follow. At present twelve (12) intrastate firms offer originating switched services. AT&T maintains 77 percent of the minutes of use (MOU) although it

only has 43.5 percent of the available capacity for network use. Last, as of June, 1990, 96.4 percent of the Montana population had alternatives to AT&T's services.

Ms. Wagner provided some nonstatistical data that addressed network capacity, number of carriers, the ubiquity of the services and the quality of services. The major carriers that compete with AT&T, including MCI, USS and Montana Power Company (MPC) are linked to some of the largest companies in the world, and as a result can compete aggressively. OCCs provide competitive services to the intrastate switched services (e.g., MTS, WATs, 800, Reach Out and Software Defined Network) which AT&T provides in Montana. Ms. Wagner adds that on a quality of service basis other carriers placed ahead of AT&T, especially for WATs and 800 services. Ms. Wagner states competition is extending into rural areas.

AT&T Direct: Dr. John Mayo

Dr. John Mayo also testified on AT&T's behalf and addressed: 1) the economic rationale for regulation and the MTA's public interest objective of encouraging competition in the inter-LATA market; 2) deregulation experience in other states, and finally 3) policy recommendations. Dr. Mayo's testimony serves to buttress that of Ms. Wagner's. Each topic is addressed in turn.

As regards the economic rationale for regulation Dr. Mayo holds the classic natural monopoly basis to regulate utilities no longer exists due, in part, to technological and regulatory changes. Dr. Mayo concludes continued regulation is justified for firms that possess significant "market power" i.e., pricing at supra-competitive levels. Such pricing

is inefficient and the associated markets are not effectively competitive. Thus, the presence of market power is the relevant empirical question.

Dr. Mayo proposed methods to discern the presence of market power which include defining the relevant economic market in geographic and product space taking into account supply and demand impacts. Dr. Mayo used the MTA's economic criteria to determine the appropriate extent of regulation that ought to be imposed on AT&T.

Within the relevant market, three criteria establish the presence of market power: 1) competitive supply responses, 2) market shares, and 3) market demands. Dr. Mayo concludes the relevant market includes all inter-LATA switched services in Montana.

First, relevant supply responses can derive from existing or new competitors.

Second, market share data must be critically defined and analyzed. Three market share measures include usage, revenues and capacity. While the latter is economically preferred, Dr. Mayo cautioned against using any market share statistics to draw market power inferences. Dr. Mayo's last market power criteria, market demand, is best proxied by estimates of market growth, demand distribution and consumers switching sources of supply. Dr. Mayo did not favor any one of the three market power criteria. By way of literature references, Dr. Mayo concludes entry barriers are the best estimate of market power. However, the foundation of Dr. Mayo's argument restricts the use of entry barriers to the special case of "constant costs."

Next, Dr. Mayo analyzed the extent to which the Montana inter-LATA telecommunications market is effectively competitive and whether AT&T or any OCC has sufficient market power to control prices in a manner which is adverse to the public interest. As regards the question of whether the market is naturally monopolistic, Dr. Mayo holds the issue is moot: public policy has, right or wrong, sought to increase the degree of competition.

Dr. Mayo also used his three competitive criteria discussed above to analyze the market. Dr. Mayo concludes supply-side entry barriers are mitigated, evident by over a dozen inter-LATA competitive firms in Montana. Given AT&T's rough capacity market share estimate of 43.5 percent, Dr. Mayo holds firms can mitigate any AT&T effort to exercise market power. Thus, the question of transmission bottlenecks is answered: they do not exist. Dr. Mayo further holds resellers, wholesalers and facility-based carriers (FBC) all serve as a check on the ability of AT&T to exercise market power, and that resellers and FBCs are "economically indistinguishable." Dr. Mayo discounts the fact that, based on usage, AT&T is the major inter-LATA market competitor, stating OCCs have segmented the market and focused their marketing efforts on urban markets.

Dr. Mayo's direct testimony also provided anecdotal evidence of relaxed regulation from other states. By way of reference, Dr. Mayo finds compelling the evidence that states allowing price flexibility type reduced regulation resulted in no price escalation.

Finally, Dr. Mayo's policy prescriptions turn on his conclusion that effective competition exists in Montana. His main prescription is "MRR" for all carriers in the inter-

LATA market. Rate of return regulation would cease as we now know it. Dr. Mayo predicts the impact on the public interest of MRR to include: 1) enhanced competition, 2) expansion of new services, and 3) enhanced universal service (TR Vol II, p. 35).

IDN Direct: Mr. Michael Meldahl

Mr. Michael Meldahl testified on IDN's behalf addressing several points including IDN's corporate structure, the facilities used to provide services, its competitors and why IDN is not a regulated utility under the MTA. Corporately, IDN is part of MPC's Entech Division, which is a subsidiary of MPC. Second, many of the facilities required to provide services include towers, antennas and buildings, the latter containing various types of equipment not limited to channel banks and multiplexors.

Third, IDN holds it only provides "point-to-point" (PTP) service. IDN defines PTP to be an unswitched dedicated service that benefits one customer exclusively but which carries voice and other information. PTP is analogous to private line and foreign exchange services. Under one example of PTP service a customer in Butte would connect to a Billings number using U S West Communications' (USWC) local loops, central office and carrier access facilities. Since PTP service is not two-way switched voice-grade service, per the MTA, IDN holds it is not a public utility. Twenty-five percent of IDN's customers are individual businesses. Among its stiff competitors IDN lists MCI, USS and AT&T.

MCI Direct: Ms. Rebecca Bennett

Ms. Rebecca Bennett filed initial and revised direct testimony on MCI's behalf that describes MCI's network, services, how calls are handled and why MCI ought not be held to the same regulatory standards as traditional monopoly providers. First, MCI's new Montana digital radio network includes: 1) three points of presence (POP), one in Billings and two leased (Helena and Missoula) from WTCI, and 2) two routes, one from Billings to Denver, and another route from Billings to Spokane. To provide inter-LATA and interstate calls MCI resells access services from USWC, NTS, and transport services from USWC and Western Tele-Communications, Inc. (WTCI). The WTCI contract is a long-term ten year sale-lease back, part of which is subleased back to WTCI.

Second, although inter-LATA calls are switched to Denver prior to their final Montana destination, substitutes to MCI's services are readily available. Thus, all of MCI's Montana intrastate services face effective competition. MCI admitted it largely serves equal access areas (TR Vol I, p. 62). Thus, MCI indirectly supported AT&T's suggestion that OCC's segment the market.

Third, notwithstanding a Commission finding that MCI is a public utility subject to its regulatory jurisdiction, relaxed regulation should be granted, as IXCs provide no monopoly services. MCI adds it is a captive customer of USWC's monopoly bottleneck access facilities. Thus the viability of MCI depends, in part, on USWC's and other LEC's market power in pricing bottleneck access services.

TA Direct: Mr. Michael Meldahl

Mr. Michael Meldahl testified on TA's behalf describing TA's corporate structure, services provided and explaining why it should not be regulated. First, TA is a division of Telecommunications Resources, Inc. (TRI) a subsidiary of Entech. Second, TA resells inter- and intra-state long-distance services including those of USS. Transmission circuit capacity is leased from facility-based carriers, as is a switch, computer and other facilities. These circuits appear to funnel traffic from Local Exchange Carriers (LECs) to TA's Helena switch. Some of the many providers of such circuits include IDN and WTCI, and USS and MCI. TA also holds it only originates calls.

Third, TA holds it does not provide regulated services for several reasons. Foremost among TA's reasons is the assertion that it does not provide two-way switched service. In addition, TA holds it adds no value to any service and is a reseller.

USS Direct: Mr. Michael Boyd

Mr. Michael Boyd testified on USS's behalf and covered USS's corporate lineage, services offered, why AT&T is the dominate carrier with market power, and why USS ought not be subject to traditional rate base, rate of return regulation. Mr. Boyd makes no mention of Dr. Mayo's "effective competition" construct. First, USS is a limited partnership held by GTE (19.9%) and United Telecom (80.1%).

Second, USS offers a full range of switched and special access services in Montana including Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS), to name two. USS's network is an all-fiber optic

system which spans Montana. USS's POPs are in Billings, Helena and Kalispell, and all traffic is switched in Seattle.

Third, because other firms supply services it provides, which involve no monopoly services, USS holds it is a "non-dominant" carrier and should receive relaxed regulatory treatment. In fact, specific costs are irrelevant to pricing as USS must price below AT&T, the dominant carrier. Thus, appropriate regulation for USS only requires filing of price lists, which the Commission would not approve. In contrast, because AT&T does not operate in the same market, it is not comparable to OCCs and should continue to be regulated.

USS holds AT&T is the dominant carrier. AT&T's market power is evident by its continued ability to charge higher prices while maintaining market share. An indicator of AT&T's dominance and monopoly power is the price insensitivity of many, if not most, of AT&T's customers. AT&T's dominance allows it to finance price reductions for competitive services e.g., Software Define Network (SDN), ProWats and Megacom with price increases for price insensitive customers.

WestMarc (WCI) Direct: Mr. Christopher Thomas

Mr. Christopher Thomas testified on WCI's behalf. While WCI provides no direct service in Montana two subsidiaries, WTCI and Western Information Systems (WIS), provide service over WCI's facilities. Neither WTCI nor WIS have switching facilities in Montana, but they do switch traffic through either Kansas City or Sacramento switches. WTCI will lease transport facilities from MCI. WTCI and WIS provide dedicated PTP, interstate PRIMELINE, Cable T.V., and Video Uplink services. Neither WTCI nor WIS provides service to the general public, as both are "carriers' carriers."

IV. PARTIES' REBUTTAL TESTIMONY

Six parties filed rebuttal testimony in this docket including AT&T, IDN, MCC, USS, TA and WCI.

AT&T Rebuttal: Ms. Sydney Wagner

A summary of Ms. Wagner's revised rebuttal (filed August 24, 1990) follows. Ms. Wagner's rebuttal addressed which OCCs in Montana qualify as "public utilities" and ought, as a result, be subject to regulation. Ms. Wagner also supplied evidence that warrants reduced regulation for all OCCs.

First, Ms. Wagner's rebuttal addresses various issues raised in the direct testimony of USS, MCI, TA and WCI. Ms. Wagner holds USS's contention that it is not authorized to provide intrastate Montana service is not correct. As evidence Ms. Wagner notes USS appears on equal access ballots and that USS's claimed 100 percent interstate

usage (PIU) is obviously erred due to at least one bill for intrastate service. Ms. Wagner rebuts MCI's contention that it is a reseller as it resells nonregulated services, and is facility-based. Ms. Wagner rebutted TA's contention that it does not provide two-way switched services, is a reseller per MTA and does not add value. Since AS purchases or leases some facilities from other than regulated providers, Ms. Wagner concludes AS must be regulated by this Commission. Ms. Wagner holds IDN and WCI (and its subsidiaries) do not qualify to be regulated as neither provides two-way switched services.

Second, while the actual statistics are proprietary, Ms. Wagner provided indicators on the competitive status of the intrastate telecommunications market. Aside from the actual statistics, Ms. Wagner's critical measure of the status of competition relied on switched MOU data. Ms. Wagner rebuts Mr. Boyd's contention that AT&T's customers are price insensitive because every Montana customer has a choice of carriers and AT&T's market share, assumably minutes of use, have declined. For example, MCI and TA will originate or terminate service from any exchange in Montana.

AT&T Rebuttal: Dr. John Mayo

Dr. Mayo's rebuttal testimony is entirely devoted to rebutting Mr. Boyd's (for USS) direct testimony. Because of alleged errors in theory, analysis and facts, Dr. Mayo recommends ignoring Mr. Boyd's testimony: his testimony simply attempts to handicap AT&T. First, Dr. Mayo holds AT&T's services are subject to "effective competition" just as Mr. Boyd argues is the case for USS's own services. In fact, Dr. Mayo holds effective competition exists for all inter-LATA toll services. Dr. Mayo restates that neither AT&T or USS control bottleneck facilities. Second, Dr. Mayo holds Mr. Boyd's arguments for asymmetric regulation that are without merit include: 1) the charge that AT&T is the dominant carrier evidenced by its market share and higher prices, and 2) AT&T is the price leader. Third, Dr. Mayo rebutted Mr. Boyd's price insensitivity argument and imputed a price elasticity of demand to its "long distance consumers" of 6.5, which reflects a high elasticity of demand (TR Vol III, p. 96).

IDN and TA Rebuttal: Mr. Michael Meldahl

Mr. Meldahl's rebuttal testimony serves to express IDN's and TA's joint concerns. Both firms oppose AT&T's request for MRR holding AT&T is the dominant carrier in the long distance market and competition, whether you call it effective or workable (AT&T holds the two are interchangeable concepts at TR Vol II, p. 21), does not exist. Mr. Meldahl holds both firms must underprice AT&T in order to crack AT&T's established customer base. Mr. Meldahl rebuts the importance Dr. Mayo placed on the capacity market share: capacity in and of itself does not attract customers. Mr. Meldahl holds regulation of AT&T should only end after three to five firms are well established and market entry is reasonably free. As regards IDN's services, Mr. Meldahl rebuts AT&T's assertion that IDN provides any service other than unswitched private line. Last, Mr. Meldahl corrects AT&T's assertion that IDN has 21 DS-3s of capacity: the correct amount is 3 DS-3s. For several reasons Mr. Meldahl asserts entry by firms into the marketplace is hampered by AT&T's dominance.

MCC Rebuttal: Mr. Allen Buckalew

Mr. Buckalew's (hereafter MCC) testimony rebuts AT&T's testimony that the market is already competitive. MCC holds until workable competition exists OCCs should be regulated the same as AT&T is "currently" regulated. MCC holds its policy proposals favor a competitive market, but that evidence does not exist to support the assertion the market is competitive.

MCC recommends certain filing requirements for OCCs. The absence of information prevents an analysis of the extent of competition. The only reliable information shows the market is not competitive. Data should be filed on revenues, expenses, MOUs and calls. Furthermore, the Commission should regulate OCCs by tariff just like AT&T. In this regard, MCC holds it should not be AT&T's sole burden to supply market data, but rather the responsibility of all OCCs.

WestMarc Rebuttal: Mr. Christopher Thomas

Mr. Thomas also filed rebuttal testimony on WCI's (and its subsidiaries' WIS and WTCI) behalf. Mr. Thomas corrected the "mischaracterizations" AT&T made of both WTCI's capacity and its operations. For many reasons Mr. Thomas holds regulation of AT&T should not be reduced. One key reason is AT&T's ubiquitous capacity presence in Montana compared to that of its competitors (USS, MCI and WTCI's) which are limited in geographic scope. Mr. Thomas also asserts that entry barriers hamper any new competitors' attempt to challenge AT&T in the telecommunications market.

V. ANALYSIS AND DECISIONS

A. Commission Jurisdiction, Public Utility Status

The first major issue for Commission decision in this case is the applicability of Commission jurisdiction to: WCI, MCI, USS, TA, AS and IDN. See PSC Order to Show Cause, November 9, 1988. The basis for Commission jurisdiction over firms providing telecommunications services lies in Title 69 of the Montana Code. See § 69-3-102, MCA. "Public Utility" is defined as follows:

(1) The term "public utility", within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal:

* * *

(f) regulated telecommunications service.

§ 69-3-101, MCA.

"Regulated Telecommunications Service" as used in § 69-3-101(f), MCA, is defined as:

Two-way switched, voice-grade access and transport of communications originating and terminating in this state and nonvoice-grade access and transport if intended to be converted to or from voice-grade access and transport. Regulated telecommunications service does not include the provision of terminal equipment used to originate or terminate such service, private telecommunications service, resale of telecommunications service, one-way transmission of television signals, cellular communication, or provision of radio paging or mobile radio services.

§ 69-3-803(3), MCA.

"Private telecommunications service" and "resale of telecommunications service" are further defined by statute. §§ 69-3-804 and 69-3-803(4), MCA. The Administrative Rules of Montana, adopted by the Public Service Commission, also provide that: "all telecommunications service is presumed to be regulated telecommunications service except the services listed in 69-3-803(3), MCA" and "the Commission shall have primary jurisdiction to determine if a telecommunications service is regulated." ARM 38.5.2704 and 38.5.2707. These statutes and rules must be applied to the facts of this case to determine whether or not the Respondents (other than AT&T) are "public utilities" under Montana law and therefore subject to PSC regulatory jurisdiction.¹

Based on the separate testimonies of AT&T and MCC the Commission finds that four OCCs qualify as public utilities. These four OCCs include: American Sharecom, MCI, U S Sprint and Touch America. This list is only as exhaustive as the record evidence in this docket. Thus, OCCs other than those listed may

¹ AT&T's status as a "public utility" under Montana law is not an issue in this proceeding. AT&T has been regulated as a public utility by the PSC for many years and neither AT&T nor any other party in this proceeding contends that AT&T is not a public utility. exist, before or since the time of this docket, that would qualify as regulated "public utilities."

The chief reason for finding that these OCCs are public utilities rests with their having met Montana laws' criteria (§ § 69-3-101 and 69-3-803, MCA). Among the

statutory criteria is the use of and control OCCs exercise over nonregulated facilities used in the provision of telecommunications services. In lieu of reciting the testimony of AT&T and MCC in defense of this decision, the Commission would refer the interested reader to these parties' testimony.

The Commission would note TA's challenge to its being portrayed as a public utility. Like MCC the Commission finds "tortured" TA's argument that it does not provide two-way switched service: if TA does not provide two-way switched, nor does AT&T or any OCC. Yet, at least one OCC, USS, admits to qualifying as a regulated OCC. USS and TA provide at least one similar service: MTS. The Commission finds that MTS is an example of two-way switched service.

MCI

MCI owns telecommunications transmission capacity within the state of Montana. It also leases transmission capacity in the state from WTCL. It owns telecommunications switches in Denver, Colorado and Salt Lake City, Utah. MCI owns a "Point of Presence" (POP or terminal) in Billings and leases one from WTCL in Helena. As of December 31, 1990, MCI leases another POP from WTCL in Missoula. These facilities are utilized to provide intrastate telecommunications services to Montana customers. MCI offers Montana customers a wide variety of telecommunications services.

US Sprint

US Sprint owns telecommunications transmission capacity within the state of Montana. Its fiber route crosses Montana east to west from Wibaux -- through Billings, Elliston and Missoula -- to Cabinet Gorge Reservoir. It owns a telecommunications switch in Seattle, Washington. It owns "Points of Presence" in Billings and Helena, and leases a POP from Pacific Telecom in Kalispell. These facilities are utilized to provide intrastate telecommunications services to Montana customers. US Sprint offers Montana customers a wide variety of telecommunications services.

Touch America

Touch America leases telecommunications capacity within Montana from various firms. It also leases a telecommunications switch, located in Helena, from DSC Leasing. At the end of the lease period (approximately two more years), TA will own the switch. These facilities are utilized to provide intrastate telecommunications services to Montana customers. TA offers Montana customers a variety of telecommunications services.

American Sharecom

American Sharecom leases telecommunications transmission facilities within the state of Montana. AS also owns two telecommunications switches in Montana, in Billings and Helena. These facilities are utilized to provide intrastate telecommunications services to Montana customers. AS offers Montana customers a variety of telecommunications services.

Intermountain Digital Network (IDN)

IDN does not own or lease any telecommunications switches. IDN only provides unswitched "point-to-point" or private line facilities to other telecommunications firms. Therefore, IDN appears at this time to be only a "carrier's carrier" (a wholesale supplier of telecommunications services) which does not provide switched intrastate telecommunications service to end users in Montana.

WestMarc Communication, Inc.

WCI and its subsidiaries (WTCI/WIS) only provide bulk interstate transport capacity (including POPs) to other interexchange carriers in Montana. These entities therefore do not provide intrastate telecommunications service to end users in Montana.

B. Market Analysis

The Commission's decision in this Order is to apply a type of regulation to AT&T which is somewhat different than the type of regulation imposed upon MCI, US Sprint, Touch America and American Sharecom.

The 1985 Montana Telecommunications Act contains the following provision:

All providers of comparable regulated telecommunications services within a market area must be subject to the same standards of regulation. For purposes of this section, regulated telecommunications services are comparable to the extent alternative providers can make functionally equivalent substitutes or substitute services readily available.

§ 69-3-807(6), MCA.

The Montana statutes and rules governing public utilities must also be interpreted in light of their underlying policies, purposes and intent. A basic rationale for the regulation of public utilities lies in the need to control the market power of some companies due to the existence of natural monopoly or other market imperfections. However, if the traditional economic or public safeguard reasons for protective government oversight are less compelling or not present, a reduced form of regulatory control may be more appropriate, even though a company's operations fall within the definition of "public utility" under Montana law.

The above principle is explicitly recognized in the 1985 Montana Telecommunications Act (recently amended by the 1991 Legislature):

To the extent that it is consistent with maintaining universal service, it is further the policy of this state to encourage competition in the telecommunications industry, thereby allowing access by the public to resulting rapid advances in telecommunications technology. It is the purpose of this part to provide a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment.

§ 69-3-802, MCA (1985) (emphasis added)

More specifically, § 69-3-807, MCA, permits the Commission to impose a variety of regulatory regimes, based upon the level of competition in the relevant market, and therefore, the market power exerted by various firms. Subsection 69-3-807(6), MCA, quoted above, must be read in conjunction with the remainder of that Section:

(1) As to that telecommunications service that is provided under regulation, the commission may establish specific rates, tariffs, or fares for the provision of the service to the public. The rates, tariffs, or fares must be just, reasonable, and nondiscriminatory.

(2) Alternatively, the commission may authorize the provision of regulated telecommunications service under terms and conditions that best serve the declared policy of this state. For a service detariffed under this subsection, the provider shall maintain a current price list on file with the commission and shall provide notice of changes in the price list as prescribed by the commission. The commission is not required to fix and determine specific rates, tariffs, or fares for the service and in lieu thereof may:

- (a) totally detariff the service;
- (b) detariff rates for the service but retain tariffs for service standards and requirements;
- (c) establish only maximum rates, only minimum rates, or permissible price ranges as long as the minimum rate is cost compensatory; or
- (d) provide such other rate or service regulation as will promote the purposes of this part.

(3) Except as provided in subsection (4), in determining applications under subsection (2), the commission shall consider the following factors:

(a) the number, size, and distribution of alternative providers of service;

(b) the extent to which services are available from alternative providers in the relevant market;

(c) the ability of alternative providers to make functionally equivalent or substitute services readily available;

(d) the overall impact of the proposed terms and conditions on the continued availability of existing services at just and reasonable rates; and

(e) other factors that the commission may prescribe through rulemaking that are appropriate to fulfill the purposes of this part.

(4) Notwithstanding the provisions of subsection (3), the commission may exercise its power under subsection (2)(c) with respect to any services of a telecommunications provider if the commission finds that action consistent with the provisions of 69-3-802 and with the public interest. Non-competitive local exchange access to end-users and carrier access services may not be detariffed.

(5) A provider of regulated message telecommunications service and related services shall average its service rates on its routes of similar distance within the state unless otherwise authorized by the commission. Nothing contained in this subsection may be construed to prohibit volume discounts, discounts in promotional offerings,

or other discounts as long as the discounts are not offered in a discriminatory manner.

§ 69-3-807, MCA.

In order to fulfill the MTA's declared policy objective, the Commission finds that it will only make minor changes to the current level of regulation imposed on AT&T or those OCCs which are public utilities. The Commission finds that the record in this docket largely supports the maintenance of existing regulatory policies: AT&T shall be regulated differently than the OCCs. As noted earlier, OCCs that are public utilities include: USS, MCI, TA, and AS. The Commission's reasons for the changes it will make follow later in this order.

An initial policy question involves the options and degrees of regulation the Commission may choose for these five carriers. Some options follow:

1. STATUS QUO REGULATION: In other words regulate AT&T and OCCs as currently regulated.
2. MAXIMUM REDUCED REGULATION (MRR) FOR ALL CARRIERS: This was AT&T's proposal which generally features those five items mentioned earlier in this order. Actually, this is MRR only in the context of this docket. If one reached outside the bounds of this docket, one could redefine MRR to include total deregulation.
3. MAXIMUM REGULATION FOR ALL CARRIERS: With this option the Commission would regulate OCCs as AT&T is currently regulated. This is MCC's proposal, and TA's if the Commission would otherwise deregulate AT&T.

The Commission finds that it will not significantly relax the degree of regulation imposed on AT&T nor significantly increase the degree of regulation of OCCs.

The reasons for this decision are provided in the balance of this order.

The MTA's Declared Public Policy Objective

The Montana legislature's declared public policy objective, as embodied in the MTA, is to encourage competition subject to the constraint that basic service is universally maintained at affordable rates. This objective (and constraint) reflects the legislature's public interest concerns. Thus, the fundamental issue before the Commission involves what regulatory policies best serve the public interest as declared by the Montana legislature. In turn, the central question the Commission must address is why it finds regulating AT&T differently than the OCCs best serves the legislature's declared policy objectives.

In order to achieve its overall public interest concerns, the legislature included in the MTA explicit, albeit general, criteria to consider when analyzing the merit of changed regulatory policies on telecommunications markets. At least two parties, MCC and AT&T, proposed analyzing the telecommunications market using market models. Other parties, in addition to AT&T and MCC, testified on the relevance of AT&T's market power and market dominance.

Prior to divestiture of AT&T, Montana's intrastate long distance market was provided by AT&T as a sole provider. With the absence of competition full rate base rate of return regulation was accepted as the preferable method to protect the consuming public from unreasonable rates and monopoly pricing.

In considering the emerging competitive telephone marketplace the PSC is charged with considering the level of regulation necessary to protect the public from monopoly prices. In addition to end user protection of assuring reasonable rates and

service, the Commission concludes that the MTA also expands the Commission's historic responsibility to include effects on the market place. That is, will the regulatory framework serve to promote a market place with competitive and diversified service providers?

As a matter of policy the Commission believes that in a perfectly competitive marketplace regulation would be unnecessary. While the Commission will give significant weight to market power, it finds that a determination of regulatory oversight for AT&T and OCC's must consider a variety of factors. They include:

- A) The level of regulation needed to insure carriers are unable to increase prices to monopoly levels. Is the market sufficiently competitive to insure restraint from pricing abuse by any carrier.
- B) Does any carrier have the ability to engage in predatory pricing that may thwart the development of increased competition in the marketplace?
- C) Do consumers have the ability to make choices or are there segments of the population due to technical restrictions (lack of access) or marketing strategies that leave end users without choices? What regulatory scheme is needed to protect consumers?
- D) What level of regulation is necessary to insure that consumers have the ability to make informed choices?
- E) What level of regulation will encourage the introduction of new services needed or desired by customers yet retain regulatory oversight for potential abuse in price or service conditions?

In summary, the preceding factors, the MTA and a market analysis are all factors the Commission must use to determine a proper regulatory framework that balances the needs of customers and providers alike.

Relevant Criteria To Assert Regulation

In arriving at its decision to regulate AT&T differently from the OCCs, the Commission will rely on the market power testimony and the MTA's criteria to analyze markets. While not intended as a complete reiteration of the MTA's contents, one section lists factors (criteria) the Commission finds relevant in considering alternative forms of regulation. After reviewing the market power testimony, the Commission will render its findings on relevant aspects of the MTA.

The Commission finds relevant the consideration of market power in its decision to regulate AT&T and the OCCs differently. MCI states that market power includes the ability to raise prices substantially above costs in some or all markets. AT&T defines market power as the ability to raise and maintain prices at supra-competitive levels. As a working definition the Commission defines market power as the situation whereby a firm possesses some degree of power over price. This definition generalizes MCI's and AT&T's definitions.

The reasons for considering market power are several. Some parties in this docket hold AT&T's market power justifies dissimilar regulatory treatment for AT&T than for OCCs. The legal basis for considering market power can be found elsewhere in this order. The Commission also finds that the MTA's criteria (69-3-807(3), MCA) for analyzing

telecommunications markets to support a market power assessment. Thus, for reasons given below the Commission finds that AT&T's relative market power warrants different regulation for it than for the OCCs.

The Commission will now use the MTA's criteria to analyze the inter-LATA telecommunications market. This analysis provides, in part, the Commission's reason to regulate AT&T and the OCCs differently. While the MTA's criteria conforms to a market model analysis, for organizational reasons, the Commission chooses to follow the format of section 69-3-807(3), MCA. Thus, the Commission will restate each relevant criteria in the MTA in the form of a question, followed by an answer which comprises the Commission's findings.

Question 69-3-807(3)(a), MCA

What is the number, size and distribution of alternative providers of service?

The Commission will address each of the three measures in this question. First, as regards the "number" of providers, AT&T holds there are 13 interexchange carriers (AT&T Exh. SLW-1). The Commission does not dispute this figure. However, the Commission does not believe resellers provide the same competitive pressures as facility-based carriers (FBCs). Thus, the Commission will focus on those four FBCs that qualify as public utilities.

Second, as regards the "size" of FBCs the Commission again would turn to AT&T's proxy measures and evidence in this docket. Aside from the alleged irrelevancy

in a market analysis, AT&T listed several proxy measures for size including: MOU, revenues and capacity.

As regards MOU, AT&T retains 77 percent of the inter-LATA market. As regards capacity AT&T's market share is about 43.5 percent (TR Vol I, p. 65). Certain parties, however, challenged AT&T's capacity estimates (see TR Vol II, pp. 112, 120, 125, and Vol III, p. 8). These challenges were on empirical and practical grounds.

A final measure of size involves revenues. USWC provided a percentage breakdown of total intrastate switched access usage revenue for the 12 months ending June of 1990. These percents are:

AT&T	
MCI	(See Appendix A for
AS	proprietary data.)
TA	
USS	

As a final comment, the Commission feels obliged to review AT&T's positions on market share measures in this docket. In this docket Dr. Mayo discounts the value of MOU market share data, but Ms. Wagner uses the same data (MOU) to buttress her case. For an illustration of this inconsistency see Dr. Mayo's direct (p. 12) and Ms. Wagner's Revised Rebuttal (pp. 16-18). The Commission finds that AT&T's inconsistent positions simply point out the subjectivity in measuring the extent of competition. Like AT&T, the Commission is not sold on the use of MOU. Like AT&T the Commission also will use MOU as a measure of competition: both MOU and revenue data suggest a highly concentrated inter-LATA market.

Third, little data exists on the "distribution" of alternative providers of service. The Commission believes that more information is needed in this area. The reporting requirements section of this order seeks such information.

The Commission finds that AT&T is not the sole provider of service for most people in the state. However, it is clear that AT&T is a dominant carrier with a commanding market share. The presence of competition should seek to restrain AT&T's ability to price well above cost or a competitor would use the opportunity to increase its own market share. The number of facility based carriers and resellers would indicate that most customers have choices and are not captive. The Montana Telecommunications Act is designed to promote competition through the development of equitable regulation. The Commission finds that it is a reasonable step in this transitory process to alter the current regulation to recognize this emerging competitive environment. Given one dominant provider and several smaller carriers it is clear total deregulation or MRR would be inappropriate. It is also apparent that this uneven distribution of market share calls for different regulatory oversight for the dominant carrier (who has the potential to price monopolistically or anticompetitively) than for the smaller carriers who are price followers. At the very least the Commission must monitor through observation and utility reporting the effects of alternative regulation pricing, service, and market concentration, to protect the public interest.

Question 69-3-807(3)(b), MCA

To what extent are services available from alternative providers in the relevant market?

There are two aspects to this question on which the Commission will comment. A third aspect, involving entry barriers, will be discussed later in this order. First, there is a relation between the aspect of this question involving the availability of services and the above question involving the distribution of alternative providers. Again, the record evidence by OCC and on a product by product basis is limited. AT&T presented evidence indicating that 96.4 percent of the population of Montana has access to an alternative interexchange carrier (ie. other than AT&T). See TR Vol. I, p. 66 and Direct Testimony of Sydney L. Wagner, Updated Exhibit SLW-15 (AT&T Exh. No. 10). Due to the error by AT&T in the population of Montana, the accuracy and credibility of the 96.4 percent figure is in doubt. See TR Vol. II, pp. 163-164. In the absence of better data it appears that while alternative providers may be ubiquitously present in the state, the same providers may not market their products with the same fervor in rural areas as in urban areas. MCI for one admits focusing its marketing in urban areas.

The second part of this question involves the concept of a "market," as mentioned here and elsewhere in the MTA. Up to section 69-3-807(3), MCA, the term "market" arises once and, importantly, in contrast to the term "geographic area." Then, in part 69-3-807(3), MCA, the MTA talks of a "relevant market" and in part 69-3-807(5) a "market area." Thus, the MTA uses the term "market" in at least two different contexts.

The Commission's comments on the concept of a "market" include several contexts. One context derives from the MTA. The MTA accords the Commission latitude equivalent to the complexity of the telecommunications industry in defining the concept of a market. Thus, the Commission finds that the MTA purposely allows one to define the concept in ways that are not limited by the physical bounds of the state of Montana.

Thus, there are many different "market" contexts. Some dimensions of the term "market" include: physical (e.g., geographic area), product (e.g., MTS, WATs, 800), temporal (e.g., day time, weekend) and end-user (e.g., commercial versus residential). Thus, while there is a Commission regulated telecommunications market, defined by the state's boundaries, there exists a multitude of markets within the physical bounds of the state.

The Commission concludes that for a majority of Montanans there are providers who can provide alternative service. However, there is compelling evidence not all customers may have access to alternative carriers due to technical constraints or marketing strategies of alternative providers. Given this situation the Commission finds that if regulation is to be relaxed on a statewide basis, mitigating requirements must be placed on the dominant carrier to protect the public interest in markets where no competition exists. Therefore, the Commission finds that AT&T must remain as the carrier of last resort and all carriers must maintain geographically uniform rates.

Question 69-3-807(3)(c), MCA

Are alternative providers able to make functionally equivalent or substitute services readily available?

Once more the Commission's response to this question has more than one context. The Commission will address, in turn, the availability of functionally equivalent substitutes on a supply and then on a demand-side basis. Both contexts are relevant and are also related. The later demand-side context was raised by OCCs in their "customer loyalty" arguments. A final comment regards entry barriers.

Supply Side

The Commission finds both evidence and logic to support a finding that alternative providers cannot make functionally equivalent substitute services readily available, on the supply side. Two examples are illustrative.

First, there is the absence of "1 Plus" dialing parity in Montana. In fact, this may explain, in part, why MCI focuses its marketing efforts in urban areas. The degree to which other common carriers limit the availability of their services is unknown.

Furthermore, customers living in unequal access areas represent at least 39 percent of the relevant customer base (TR Vol II, pp. 68 and 162-164). In unequal access areas, customers must dial an inordinate number of digits in order to subscribe to a carrier other than AT&T. The Commission finds adequate evidence to support this finding (e.g, TR Vol I, p. 29).

See Appendix A for this proprietary finding of fact.

Demand Side

The Commission finds that the parties who allege customers have "loyalty" to AT&T have raised a relevant demand-side argument: consumers do not believe OCCs offer functionally equivalent substitutes to AT&T's services. That is, not until consumers find OCC's products to be equivalent substitutes are they in fact substitutes.

USS, for one, appears to appreciate the above demand-side distinction. On one hand, USS holds it can offer functionally equivalent services to AT&T offerings (TR Vol III, p. 70). On the other hand, USS holds that there are market segments in which it cannot effectively compete with AT&T, due to non-price considerations (TR VOL III, pp. 56 and 70). USS was not the only OCC that raised customer loyalty concerns.

To summarize the above supply and demand-side discussion, the Commission finds that on the supply side alone the ability of OCCs to provide functionally equivalent substitutes will not exist until all customers have "1 plus" dialing parity. If, however, tariffs were unbundled on an equal versus unequal access basis, it would appear that OCCs could provide functionally equivalent substitutes in the sub-market with equal access offices. Yet, even in the same offices customers' loyalty to AT&T would remain. While it is unclear on the demand side how long AT&T will continue to have a customer loyalty advantage over OCCs, the Commission will monitor MOU and revenue data as indicators.

The fact that there is not complete statewide completion of equal access conversion and equality of end office connections should not necessarily preclude relaxed regulatory oversight of AT&T, but clearly justifies continued oversight for the protection of monopoly customers. The record indicates in many markets AT&T is a sole provider and retains technical advantages over competitors. Given this situation, the Commission finds that there remains a need to protect at least part of the market from AT&T's potential to price monopolistically.

Market Barriers

The Commission finds merit in a brief discussion on market barriers. Naturally, this discussion overlaps other findings in this decision. Market barriers of many kinds exist in theory. Entry barriers for FBCs did not prevent MCI, TA or USS from making long-term capital investments and contractual commitments. The opportunity for continued FBC market entry may be limited: there are only so many "static lines" and railroad rights of way. On this count, the Commission doubts additional FBCs will enter the inter-LATA market. Thus, the likely structure of the industry is established: absent mergers we have about five FBCs (AT&T and the four OCCs).

The Commission has not found convincing evidence on whether capacity is a barrier or encouragement to entry. On one hand, AT&T holds out its 40 percent plus market share as evidence of a competitive market. On the other hand, AT&T's excess capacity may be a barrier to entry. The relevancy of capacity as a proxy for market size is suspect.

The Commission finds that, in any case, the amount of capacity at least raises some interesting questions. If one looks at the pre-existing 63 DS-3s of capacity compared to AT&T's projection of 240 DS-3s of capacity, one computes a 280 percent increase in capacity (see Ms. Wagner Exh-5a, p. 1). Also, given AT&T's remark that the capacity of fiber is "practically infinite," the 280 percent increase understates AT&T's and USS's potential capacity. The Montana market will not likely absorb AT&T's conservative 280 percent increase in capacity, at recent inter-LATA annual MOU growth rates, for over half a century. Intrastate MOU growth from 1987 to the present was 17 percent (Ms. Wagner Revised Rebuttal, p. 16). Thus, AT&T's 240 DS-3s of capacity must exist for reasons other than just inter-LATA Montana traffic. In turn, if capacity exists for reasons other than carrying inter-LATA Montana traffic, its validity as a measure of the degree of competition in the inter-LATA Montana market is suspect. AT&T's testimony, that the Commission's regulation caused OCCs to make inefficient investments, is also suspect (see TR Vol I, p. 11).

A last comment on entry barriers involves resellers. Although resellers can readily enter the market they do not necessarily provide effective competition, in the Commission's estimation. Resellers can be price squeezed by suppliers and their relative cost advantage is minimal as evidenced by AT&T's state ment that WATs resellers use the most expensive method of competing in the inter-LATA market (Ms. Wagner direct, p. 11).

Question 69-3-807(3)(d), MCA

What is the overall impact of the proposed terms and conditions on the continued availability of existing services at just and reasonable rates?

This question raises market conduct and performance issues in general, efficiency and equity issues in particular and, is linked to the earlier mentioned constraint in the legislature's declared telecommunications policy.

The Commission finds necessary a comment that addresses an inconsistency in AT&T's actual pricing behavior relative to its testimony. First, AT&T is currently allowed to lower prices below maximum allowable rates for MTS and certain other services, as it chooses, so long as the prices exceed incremental costs. In theory, AT&T has an incentive to lower prices if demand is elastic. AT&T provided an empirical elasticity estimate. AT&T testified that the elasticity of demand is 6.5. An elasticity of 6.5 reflects highly elastic demand. Given Dr. Mayo's testimony, this value applies to MTS.

AT&T's demand elasticity of 6.5, combined with AT&T's decision to not discount MTS prices as currently allowed, imply that either the 6.5 demand elasticity figure is not credible, AT&T's Montana operation is managed to maximize something besides revenues or AT&T's incremental costs already equal or exceed its prices. Only the first implication seems reasonable.

Thus, the Commission expects the terms and conditions of AT&T's MRR proposal would result in increased telecommunications prices for services characterized as having inelastic demand. Whether these increases are fitting with the MTA's declared

policy to maintain basic telecommunications service at affordable (just and reasonable) rates is a Commission concern.

In various parts of this order the Commission has noted that there is an emerging competitive telecommunications marketplace. As envisioned by divestiture, many Montanan's now have choices for long distance telephone services. Given these changes and the declaration of the Commission that four facility based carriers will also be subject to regulatory scrutiny, the task of the Commission is to now decide on the level of regulation appropriate for the marketplace. The Commission operates under the assumption that regulation should not be unduly burdensome or more heavy handed than necessary to protect the public interest by insuring quality service and reasonable rates.

Given the view of the interLATA telecommunications market that emerges in this docket, the Commission finds it appropriate to adopt a transitory form of regulation that relaxes the level of regulation for all carriers, moves significantly toward the even playing field described in the MTA and preserves the Commission's ability to guard against monopoly price increases or predatory prices. The Commission seeks not to protect any particular common carrier but develop a regulatory scheme that encourages the development of a competitive marketplace as directed by the MTA while still fulfilling the Commission's broad historic and statutory responsibility to guarantee reasonable rates and adequate service.

Therefore, the Commission concludes it is appropriate at this time to depart from its traditional rate of return rate based regulation for interLATA long distance carriers

for a three year experimental program (the OCCs have not been previously regulated in any manner by the PSC). During this time the Commission will monitor the marketplace and can on its own motion or when presented with a complaint alter the relaxed regulation for all carriers.

Given the market domination of AT&T we find it impossible to conclude that the marketplace is sufficiently competitive to insure rates will remain reasonable and service acceptable without continued oversight. However, it also seems unreasonable given the emerging competitive marketplace to retain traditional regulation that was designed to regulate a sole monopoly provider. Therefore, until November 1, 1994 the Commission will regulate all interexchange carriers (AT&T and the OCCs) under the alternative regulatory treatment described in this order. A key element of this plan will be the filing of annual reports which will allow the Commission and others to monitor the marketplace to determine if the alternative plan continues to be in the public interest. At the end of this experiment the Commission will then revisit this issue to determine the appropriate level of regulation at that time. Given the desire to foster competition and lessen regulatory costs and impediments unless necessary, the Commission concludes that the three year Experimental Alternative Regulatory plan balances fair regulation for the industry with the need to protect telephone users from the possibility of unreasonable rates given the current market structure.

Maximum Allowable Rates

As noted earlier, under the status quo only AT&T is subject to maximum allowable rate (MAR) regulation. The Commission finds at this time that only AT&T needs to be subject to maximum rate regulation, due to its greater relative market power. However, AT&T's MARs are subject to carrier access charge flow throughs.

Carrier Access Charge Flow Through

As noted earlier, only AT&T is impacted by the current Commission policy of carrier access charge (CAC) flow through to MARs. This order does not change this regulatory requirement which was initially granted AT&T based on its own request. That is, since OCCs are not price cap regulated, and are allowed pricing flexibility out of this order, it makes no sense to require OCCs to flow through CAC charges. For the OCCs price caps are implicitly those prices AT&T charges.

Incremental Cost-Based Floor Prices

Once again, only AT&T has been subjected to an explicit regulatory decision that prices exceed incremental costs. And again, since the time this regulatory requirement was established there has occurred no allegation that AT&T's prices are exceeded by the same service's incremental costs. This is not to mean the Commission could not have ordered AT&T to perform cost analyses for all services: the Commission could have but has chosen to not do so.

OCCs were not subjected to the incremental cost floor finding when established for AT&T in 1983. Out of this order this policy will change for regulated OCCs. That is, the Commission would hear a complaint that a regulated OCC priced below cost.

Price Lists

Although detailed in the ordering paragraphs, the Commission finds AT&T and the regulated OCCs must file price lists with the Commission. Such price lists must specify the prices charged for intrastate services provided by AT&T and each OCC. Deviations from prices in the price lists will be allowed via a relaxed forbearance application process (see order paragraph 9).

Data Filing Requirements

The Commission finds that AT&T and each OCC should supply certain types of data to the Commission on a recurring basis.

The Commission intends these data reporting requirements to augment, and not duplicate, existing reporting requirements including those in existing Annual Reports. The data required stems in part from MCC's testimony, but includes other data the Commission desires.

The data the Commission seeks will be specified following industry meetings with staff. The following is provided as a starting point for discussions. First, MOU data would be required. Such inter-LATA data would have to be broken out by product (MTS,

WATS, SDN, 800 etc) using AT&T's calling periods (i.e., weekday, evening and night and weekend) and for equal and unequal access offices. As the above is for all regulated services, the Commission would request AT&T and each OCC to list each customer to which a direct connect from a POP exists and the total MOU for all such customers. To the extent interstate data is combined with any of the above data the Commission would request each carrier to explain the sources of their data.

Second, the Commission would seek revenues in the same detail as the above MOU breakdown.

Third, the Commission would seek a breakdown of carrier access charges in the same level of detail as the above MOU and revenue breakdown.

Fourth, the Commission would seek AT&T and each OCC to provide the following capacity data: a map showing each and every transmission leg, switch and POP. For each transmission leg, the capacity in terms of DS-3s and in terms of actual total MOU regardless of origin or destination i.e., intra- and interstate traffic. And, each switch's capacity. For each POP, the identity of the services provided (MTS, WATS, 800, SDN etc.).

C. Comments on Exceptions

Background

The Proposed Order was served on August 2, 1991. Exceptions were filed by AT&T, MCI, USS, AS and TA. Reply Exceptions/Comments were filed by USS and TA. TA requested oral argument, which was held on September 23, 1991.

TA's Regulatory Status, Resellers, etc.

Touch America contests the Commission's finding that it is a public utility under Montana law, due to its provision of "regulated telecommunications service." §§ 69-3-101 and 69-3-803, MCA. The Commission will not change the ruling in its Proposed Order.

With respect to the switch, it is uncontested that TA controls (leasing to buy) a telecommunications switch which is capable of switching two-way voice grade telecommunications. The evidence in this docket does not reveal any functional difference between TA's switch and the switches of other inter exchange carriers. TA's switch undoubtedly constitutes "plant or equipment" as used in § 69-3-101, MCA.

TA argues that if the lease or ownership of a switch, alone, makes one a public utility, then no company could ever qualify under the reseller exemption of § 69-3-803(4), MCA. TA further states that the Commission must identify specifically in this Order "how one becomes a reseller." The PSC finds that the record is insufficient in this Docket to fully analyze and define the scope of the reseller exemption in Montana law. There may be firms such as "aggregators," "switchless resellers" and others which would be

considered a reseller, and therefore exempt from regulation under Montana law. But, no such firms were respondents in this Docket. And therefore, the Commission is unable to answer TA's inquiry at this time. The answer must await the presentation of additional evidence in another proceeding. Notwithstanding the above, though, the PSC can state, based on this record, that TA is a public utility and does not qualify as a reseller. The Commission's conclusion is based upon two grounds (the switch and transmission capacity) each of which would be a sufficient independent basis for its decision.

With respect to transmission capacity, TA argues that lease of transmission capacity does not constitute the ownership, operation or control of plant or equipment. The most obvious point in this regard is the affiliate relationship between TA and IDN. IDN does own, operate and control telecommunications transmission facilities. IDN is a wholly-owned subsidiary of Telecommunications Resources, Inc. (TRI); and TA is a "Division" of TRI. TRI is owned by Entech, Inc., which is owned by Montana Power Company. Thus, TA is part of a corporation which owns, operates and controls IDN; and IDN owns, operates and controls telecommunications transmission capacity. This affiliate relationship between TA and IDN renders TA's arguments regarding transmission moot. IDN has been found not to be a public utility in this docket. However, IDN's transmission facilities, used in combination with TA's switch, unquestionably result in the provision of intrastate telecommunications services which are subject to regulation by this Commission.

Second, § 69-3-803(4), MCA, provides:

"Resale of telecommunications service" means the resale of regulated telecommunications service, with or without adding value, provided any value added would not otherwise be subject to regulation. (emphasis added)

The record in this case reveals that TA resells the unregulated transmission capacity of a number of firms: including IDN, U.S. West, and USS. (See TR, Vol. I, pp. 145-146.) It would not be consistent with the resale statute to find that TA's resale of unregulated transmission exempts it from regulation.

The above factors (FOF 125 and 126), together with the fact that TA clearly provides telecommunications services to "end-users" distinguishes this case from the Commission's Declaratory Ruling in Docket No. 90.1.1.

The Commission also finds the Utah PSC decision cited by TA to be distinguishable. First of all, that decision was based upon an interpretation of distinct Utah laws, which were not fully resolved in that case. See 72 P.U.R.4th at 406-407 (>> 8-10) Furthermore, the cellular provider (New Vector) serving as the basis for the reseller's operations was regulated itself. See 72 P.U.R.4th at 404 and fn. 2. Third, there was no evidence that the reseller owned or controlled its own facilities, unlike TA's switch and IDN's capacity in this case.

Regulation of AT&T Versus OCCs

AT&T objects to the Commission's decision applying somewhat different levels of regulation upon AT&T and the OCCs, based upon § 69-3-807(6), MCA (1991). AS, USS and TA also filed comments on this subject, but in support of the Commission decision. First, it should be noted that in the majority of respects, AT&T's regulatory treatment will be the same as the OCCs. See Order >>5-13. Only in a few minor respects will the level of regulation be different. The Commission will not change its decisions in these areas. The differences which remain in the regulatory treatment of AT&T and the OCCs are fully justified by differences in market power and the status of the market structure evidenced in the record and explained elsewhere in this Order. The legal basis for the distinction is further explained in the next paragraph.

The overriding public policy purposes of the Montana Telecommunications Act are explicitly stated in § 69-3-802, MCA; and include maintaining the universal availability of telecommunications service and the encouragement of competition. These fundamental policy goals have been carefully weighed and considered in reaching the decisions found in this Order. The Commission's consideration of market power and market structure is inherent in the consideration of these policy goals. Further, the MTA describes in detail some of the economic criteria the Commission can utilize in assessing the level of competition in telecommunications markets. § 69-3-807(3), MCA (1991). The use of economic criteria is also implicit in the basic boundaries of the Commission's jurisdiction. Although not expressly stated in § 69-3-101, MCA, the historic basis for economic utility regulation is the potential for abuse of market or monopoly power. It is with

these explicit and implicit principles in mind that the Commission has reached its decisions herein.

Forbearance

U.S. Sprint objects to the Commission's equal application of a relaxed forbearance process upon AT&T and the OCCs. Proposed Order, p. 53, >9. USS suggests that either the OCCs should be exempt from this process or that all individual customer contracts should be prohibited. Montana law clearly permits telecommunications providers to apply for forbearance of regulation for individual customer contracts. § 69-3-808, MCA (1991). The Commission has relaxed the procedural requirements for this process, equally, for AT&T and the OCCs, based upon the evidence in this Docket. The Commission believes that the relaxed requirements are reasonable and will not be burdensome. The Commission will revisit this issue in three years when it reviews the market's performance under this Order.

USS also objects to the Commission's decision that the forbearance requirement must be satisfied before a firm negotiates or makes an offer (different than a tariff or price list) to a customer or potential customer. The forbearance statute appears to address this issue:

(5) Upon approval of the application, the provider of telecommunications service may negotiate with a person or entity for the provision of the service without regard to its tariffs of price lists on file with the commission. § 69-3-808, MCA (1991). (emphasis added)

This statute appears to forbid the relief sought by USS.

New Services

USS also seeks a Commission decision that the "new service" and "withdrawal of service" provisions of the 1991 amendments to the Montana Telecommunications Act (House Bill No. 610, codified in § 69-3-810, MCA), do not apply to USS and the other OCCs. The provisions of the new law are clear and the OCCs must comply with its requirements. There is no express provision in this new statute which allows the Commission to waive its requirements. There is no basis, either in the evidence in the record, or a legal justification propounded by a party, upon which the Commission can rely to suggest that a waiver of these requirements would be appropriate.

Other OCCs

American Sharecom comments that the PSC should identify criteria for the imposition of regulation on "other OCCs" which are not Respondents in this Docket (including "aggregators" and "rebillers") by rulemaking and/or certification. First, it should be noted that Montana law does not require certification of telecommunications firms, as that term is normally understood. See § 69-3-805, MCA. The PSC is sensitive to the rationales underlying AS's comment. However, any decision in this area would be well beyond the scope of this Docket. This Commission's decision and application of law is limited to the Respondents in this Docket; and any broader application of the principles enunciated in this Order must await the development of another administrative record where those other issues and firms can be properly analyzed. This might be done through rulemaking, contested case, or other form of administrative proceeding. The Commission is aware of the issues raised by AS, but has determined that it is unnecessary and inappropriate to comment on a possible future proceeding at this time.

Data Reporting Requirements and Evaluation of the Three-Year Experiment

Upon review of the exceptions in this docket, the Commission finds merit in relaxing its data filing requirements noted in the Proposed Order (FOF 115-120) and in the ordering paragraphs. The Commission finds merit in the parties' recommendations to involve the Commission staff in an industry task force that discusses the content of acceptable reporting requirements. Until these discussions are concluded and the Commission has been advised by its staff of relevant data filing requirements, the Commission chooses to hold in abeyance specific reporting requirements. In fairness to the parties, these discussions should begin as soon as possible so that a track record of relevant data can be established. As to the participants, the Commission finds that any interested party should be allowed to participate. Due to the critical role of local exchange carriers, the Commission would note that while their participation is voluntary, nonvoluntary reporting requirements may emerge from the discussions. Their participation is strongly encouraged.

The Commission will not establish the multi-attribute decision making criteria it will use three years hence to evaluate the three-year experiment. Some candidates, however, include the market share data discussed in this order, the data reporting requirements that have yet-to-emerge from the round-table discussions and price changes to name a few. At the conclusion of the experiment, parties will have an opportunity to advise the Commission on the results of the experiment. This opportunity may occur in a contested case proceeding or some other forum.

Incremental Costs

Two parties submitted incremental cost related comments on exceptions to the Order. First, TA requested the PSC to define incremental costs. The Commission will not do so due, in large part, to the misinterpreted intent of the OCC docket. This Docket was not established to define or develop incremental costs. Notwithstanding TA's request, the Commission would point to TA's own testimony wherein it states it can compute incremental costs (TR Vol. I, p. 166).

Second, the Commission denies USS's comment in exceptions that the Commission ought not require each IXC's price listed rates to exceed incremental costs (see Ordering paragraph 6.E). The Commission finds that this is just one more example that the order has largely treated AT&T and the OCCs symmetrically.

Procedural and Other Comments on Exceptions

A number of parties' exceptions requested procedural changes of one type or another. First, the Commission finds merit in and amends the ordering paragraph that only allowed 30 days to file price lists. Per TA's request all parties are granted 60 days.

Second, TA's request to strike "MPC" from FOF 97 is granted. In place of "MPC" the order should have said "TA."

Third, the Commission denies AT&T's request to extend the annual reporting requirement date to April 15, from its current March 15 date. This date is fixed by statute and cannot be changed by the Commission.

CONCLUSIONS OF LAW

AT&T, U. S. Sprint, MCI, Touch America and American Sharecom are public utilities offering regulated telecommunications services in the State of Montana. §§ 69-3-101 and 69-3-803, MCA.

The Commission has the authority to supervise, regulate and control public utilities. § 69-3-102, MCA. The Commission properly exercises jurisdiction over the Montana operations of AT&T, U. S. Sprint, MCI, Touch America and American Sharecom.

Intermountain Digital Network, WestMarc Communications, Western Telecommunications, Inc. and Western Information Systems are not public utilities and do not offer regulated telecommunications services in the State of Montana. §§ 69-3-101 and 69-3-803, MCA.

The Commission has provided adequate public notice of all proceedings herein and an opportunity to be heard to all interested parties in this Docket. Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

The Commission has properly initiated and conducted this proceeding pursuant to the Montana Administrative Procedure Act and its regulatory powers. §§ 69-3-103 and 69-3-324, MCA and ARM 38.5.2711(2).

The Commission has determined that it is appropriate to impose the form and type of regulation on MCI, US Sprint, Touch America, and American Sharecom as specified in this Order. Title 69, MCA and ARM 38.5.2712.

The Commission has determined that it is appropriate to modify the form and type of regulation imposed upon AT&T as specified in this Order. Title 69, MCA and ARM 38.5.2712.

It is appropriate and necessary to impose a somewhat different form and type of regulation upon AT&T as is imposed upon MCI, US Sprint, Touch America, and American Sharecom. §§ 69-3-102, 69-3-103, 69-3-301, 60-3-802, and 69-3-807, MCA and ARM 38.5.2712.

The Commission has determined that it is reasonable and appropriate to impose a relaxed form of forbearance for individual customer contracts upon AT&T, MCI, US Sprint, Touch America and American Sharecom. §§ 69-3-808, 69-3-802 and 69-3-807, MCA and ARM 38.5.2715.

The Commission has the authority to require public utilities to provide information about their business, including annual reports. §§ 69-3-106, 69-3-202, 69-3-203 and 69-3-821, MCA. The Commission has lawfully and properly adopted a Telecommunications Annual Report Form, and may revise said form in the future. § 69-3-203, MCA, and PSC Notice of Commission Action, Service date: March 10, 1989.

ORDER

NOW THEREFORE IT IS ORDERED as follows:

U.S. Sprint, MCI, Touch America and American Sharecom are regulated public utilities and are required to comply with all laws, rules and policies applicable to Montana public utilities unless specifically modified in this order or by subsequent Commission action. These companies are henceforth subject to the full regulatory jurisdiction of the Montana Public Service Commission.

AT&T's status as a regulated public utility is modified as specified herein.

Intermountain Digital Network is not a regulated public utility.

WestMarc Communications, Inc. (including Western Telecommunications, Inc. and Western Information Systems) are not regulated public utilities. The Motion by these parties to be dismissed from this proceeding is hereby granted.

AT&T shall be hereafter subject to the following regulatory requirements:

- A. From the date of this order until November 1, 1994 (unless otherwise ordered as provided below) AT&T's rates shall not be set according to traditional rate base/rate of return regulatory methods. This will constitute a three year experiment in alternative regulatory treatment for AT&T. This experiment is subject to review and/or amendment by the PSC at any time either on the Commission's own motion or upon a complaint by an interested party. AT&T is required to maintain its current method of accounting systems.
- B. Except as otherwise provided herein (with respect to forbearance and annual reports) AT&T must continue to comply with all regulatory requirements

imposed by Montana state laws, rules and previous Commission orders.

These requirements include, but are not limited to, the following:

- (1) The filing of tariffs (schedules) pursuant to Title 69, Chapter 3, Part 3, MCA. The AT&T tariffs constitute Maximum Allowable Rates as provided in PSC Order No. 5044d (Docket No. 83.11.80) and AT&T Telecommunications Services Tariff Section 2.L.
- (2) The pricing flexibility approved for AT&T in previous Commission orders remains unchanged. To summarize, in addition to tariffs (described above) AT&T must also file price lists which contain the actual rates charged for intrastate services. The AT&T price lists can be changed on seven (7) days notice without Commission approval. The rate in an AT&T price list cannot exceed the Maximum Allowable Rate found in the AT&T tariff. Tariff Section 2.L. The AT&T price lists do not contain descriptions, terms and conditions of services, since these are found in the tariffs.
- (3) AT&T's rates are required to be above incremental costs. See Order No. 5044d, >>54 and 55.
- (4) AT&T is required to flow through changes to local exchange carrier access charges (within 60 days) as previously required in PSC Order No. 5274a, >>49, 66 and 67 (Docket No. 86.12.67).

MCI, U.S. Sprint, Touch America and American Sharecom shall be hereafter subject to the following regulatory requirements:

- A. Within sixty (60) days after the service date of this Order, price lists must be filed containing the rates, descriptions, terms and conditions of each and every intrastate telecommunications service provided or offered within the state of Montana. The rates contained in the price lists shall be the only rates which may be lawfully charged, unless otherwise specifically provided by law or Commission order. Deviation from the price lists will be permitted for individual customer contracts duly filed with the Commission, following compliance with the forbearance procedure set forth in Paragraph 9 below. Price lists are not required to be filed for the specific services deregulated by the 1985 Montana Telecommunications Act or by previous Commission order, including private line, cable T.V., cellular communication, radio paging and mobile radio services.
- B. Price flexibility is allowed in exactly the same manner as provided for AT&T (See Paragraph 5.B.(2) above). That is, notice of proposed price list changes must be filed with the Commission at least seven (7) days prior to the proposed effective date, and thereafter become automatically effective without Commission approval. See AT&T Telecommunications Services Tariff Section 2.L. However, tariffs (with maximum allowable rates) are not required.
- C. Changes in local exchange carrier access rates are not required to be flowed through to price list rates.
- D. Rates shall not be set by traditional rate base/rate of return methods.

- E. Price list rates are required to be above incremental costs.

AT&T, MCI, U.S. Sprint, Touch America, and American Sharecom shall be required to comply with all Montana administrative rules applicable to telecommunications utilities, including but not limited to the Telecommunications Service Standards (ARM 38.5.3301 et seq.), unless otherwise specifically provided in this order.

AT&T, MCI, U.S. Sprint, Touch America, and American Sharecom shall be required to fully and properly comply with all provisions of the Montana Telecommunications Act (§ 69-3-801 et seq. MCA), unless otherwise specifically provided in this order, including but not limited to the requirements in the 1991 amendments thereto (1991 Montana House Bill 610).

AT&T, MCI, U.S. Sprint, Touch America and American Sharecom shall be required to satisfy a relaxed forbearance application process (§ 69-3-808, MCA) before negotiating or offering individual customer contracts containing rates which differ from the authorized price list rate. The required process is as follows:

- A. The regulated carrier shall file an application with the Commission of its intention to negotiate or offer an individual customer contract. Said application shall include the following:
- (1) the name and address of the forbearance applicant;
 - (2) the name and address of the customer;
 - (3) the telecommunications service(s) to be offered the customer, including references to the appropriate tariff or price list sections; and

- (4) the name of the firm(s) which offer or provide similar service to Montana customers.

One (1) day after such application is filed in sufficient and complete form with the Commission, it shall be deemed automatically granted without the necessity of formal Commission action.

- B. Within ten (10) days after the conclusion of the negotiations with the customer, the applicant must file with the Commission the final contract or other evidence of the service(s) provided thereunder, including the charges and other conditions of the service(s). For the term of the contract, the applicant may provide the service(s) to the customer without regard to its tariffs or price lists.
- C. The Commission retains the power to investigate any such contracts either on its own motion or upon the complaint of an interested party, and thereafter amend the terms of the contract and order other relief as appropriate. The Commission reserves the right to analyze the merits of forbearance contract prices in subsequent proceedings. No economic cost studies were examined or approved in this docket. If the Commission subsequently determines that a price is below incremental costs, it may ensure that shareholders and not ratepayers are responsible for any costs not recovered through prices. See 1991 Montana HB610, Section 7.

AT&T, MCI, U.S. Sprint, Touch America and American Sharecom are required to file annual reports each year, in a form prescribed by the Commission, as

required by § 69-3-203, MCA. The Commission staff will meet with representatives of these firms to study and discuss possible revisions to the current PSC Telecommunications Annual Report Form. The Commission will await the outcome of these meetings before considering formal revisions to the existing Form.

AT&T, MCI, U.S. Sprint, Touch America and American Sharecom will be required to file with the Commission, certain market data information on or before March 15th of each year, based upon the immediately preceding calendar year (static information as of December 31st). The Commission staff will conduct meetings with representatives of AT&T, MCI, USS, TA and AS to discuss the appropriate market data filing requirements. Representatives of the local exchange companies in the state are strongly encouraged to attend. The Commission will await a report from staff before ruling on specific requirements. The following list is provided as a starting point for discussions:

- A. Intrastate inter-LATA access MOU for each service type (MTS, WATS, SDN, 800, etc.) and for each calling period (utilizing AT&T's calling periods: weekday, evening, and night/weekend). The above access MOU data must be reported for equal access offices and other ("nonequal access") offices.
- B. A list of all customers/businesses for which a direct point of presence connection exists and the total access minutes of use by those customers.
- C. Intrastate inter-LATA revenue for each service type and for each calling period as described above. The annual revenues from bypass customers.

The annual revenues must be separately reported for equal access offices and other offices.

- D. Intrastate inter-LATA carrier access (including Special Access) charges paid for each service type and calling period, as described above. The carrier access charges paid must be broken down for equal access offices and other offices.
- E. Capacity data: A Montana map showing each and every transmission leg, switch and point of presence. For each transmission leg provide the capacity by DS-3 (or other appropriate measure) and actual total access MOU (intrastate, inter-LATA and interstate). Provide the capacity of each switch. Identify the types of services provided or available at each point of presence.

AT&T, MCI, U.S. Sprint, Touch America and American Sharecom must file for the introduction or withdrawal of services as required by the Montana Code: either in the traditional manner (See § 69-3-301, et seq., MCA and the Montana Administrative Procedure Act) or as provided in the amended Montana Telecommunications Act (1991 HB610, Section 5). These procedures are not required for the initial price list filing required in Paragraph 6.A. above.

On May 1, 1994 (unless otherwise ordered by the Commission), AT&T, MCI, U.S. Sprint, Touch America and American Sharecom shall file a report with the Commission regarding the industry's experience under the provisions of this Order during

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the previous two and one-half years, including developments in the level of competition and market structure, and recommendations for any needed or desirable changes to the regulatory status of AT&T and the OCCs. The Montana Consumer Counsel and other interested parties may file responsive comments 45 days thereafter.

Done and Dated this 21st day of October, 1991 by a vote of 4-0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

DANNY OBERG, Vice Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.