

Service Date: March 4, 1992

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. 5548b

ORDER ON RECONSIDERATION

FINDINGS

BACKGROUND

On October 21, 1991 the Montana Public Service Commission (PSC or Commission) issued a Final Order (No. 5548a) in Docket No. 88.11.49. On October 25, 1991 AT&T filed a motion requesting an extension of time until November 14, 1991 for all parties to file motions for reconsideration. On October 28, 1991 the Commission granted said motion. On November 15, 1991 AT&T and Touch America (TA) filed motions for reconsideration of certain portions of Order No. 5548a.

AT&T's motion contends that the Commission lacks the legal authority to impose unequal regulatory standards upon AT&T which are more stringent than the Other Common Carriers (OCCs), based upon the language of § 69-3-807(6), MCA. The cited part of the Montana Telecommunications Act (MTA) requires that all providers of comparable regulated telecommunications services within a market area must be

subject to the same standards of regulation. Services are comparable to the extent OCCs can make readily available functionally equivalent substitutes.

Touch America's motion requests action by the Commission regarding the other carriers not a part of this docket, which provide services in the same manner as TA and American Sharecom. TA also requests clarification of the incremental cost requirement.

COMMISSION DECISION

This decision on motions is organized as follows. First, the Commission will state its reasons for granting AT&T's motion. This part is followed by findings that set forth the Commission's decisions on how the OCCs and AT&T will be regulated "equally," or the "same," based upon the language of § 69-3-807(6), MCA. Second, the Commission will then turn to and respond to TA's two motions.

The Commission reaffirms the market power and economic analysis contained in its original final order in this docket. (Order No. 5548a.) The Commission reaffirms its previous conclusions regarding the disproportionate market power which continues to be held by AT&T in this market. The reasons for considering market power are several, all of which were contained in Order No. 5548a (see especially FOF No. 71). However, upon careful consideration of AT&T's motion for reconsideration and a reexamination of the evidence in the record, the Commission has determined that the services offered by AT&T and the OCCs are comparable from a strictly functional and engineering perspective. That is, the functions performed and purposes served by the various telecommunications services offered by AT&T and the OCCs, from the customer's perspective, are comparable.

In the Commission's view, however, it finds incorrect AT&T's definitions of comparable and functionally equivalent that underlie its motion for reconsideration. AT&T's definition of these terms is simply that an OCC's service is comparable to AT&T's if the OCC's service originates and terminates by means of Feature Group A or B access (see AT&T Data Response Nos. PSC-155 and 156). This definition of

AT&T's is overly simplistic and ignores AT&T's relative market power advantages (See Finding of Fact Nos. 71 and 87 through 100 of Order No. 5548a) and lack of 1+ dialing.

AT&T and the OCCs offer a similar menu/variety of services to end users. Therefore, although not substantiated by either market power or policy arguments (as explained in Order No. 5548a) the Commission will impose the same standards of regulation on AT&T and the OCCs in this Order on Reconsideration pursuant to the requirement of § 69-3-807(6), MCA (see Ordering paragraphs below for details).

One important functional difference which remains between the services offered in Montana by AT&T and the OCCs deserves additional comment. Namely, the additional digits which must be dialed by customers living in areas without equal access, in order to access any long distance carrier other than AT&T. See Order No. 5548a, Findings of Fact No. 91. In those areas, the Commission continues to believe that services are not comparable or similar. However, even though it would be legally acceptable, it appears to be impractical at this time to impose different regulatory standards on AT&T only in certain areas of the state (Approximately 61 percent of Montana customers are served by interLATA equal access offices).

The Commission will now state its findings on how the OCCs and AT&T will be regulated. This part will focus on changed regulatory policies necessary to achieve the regulatory standard of equality based on the MTA and AT&T's motion. Thus, those aspects of regulation not explicitly discussed in the following remain as established by Order No. 5548a.

The Commission finds that to achieve equality it prefers to increase to a degree of regulation imposed on the OCCs rather than reduce the degree imposed on AT&T. Thus, the OCCs will be regulated no less stringently than AT&T (see FOF No. 2 above). With this as background, the significant changes are in the area of maximum allowable rates and carrier access charge flow through.

The OCCs must file maximum allowable rates (MARs) for each regulated service on which prices have been filed. The OCCs may select the MARs they wish to

have tariffed. The MARs for any particular OCC are not related, of necessity, to either AT&T's or any other carrier's MARs.

The next significant change in policy, due to AT&T's brief, required to achieve equal standards of regulation involves carrier access charge (CAC) pass through. At present and out of Order No. 5548a only AT&T was required to flow through changes in costs, due to changes in CAC expenses, to its MARs. The Commission finds that the OCCs must also flow through CACs to their respective MARs.

The Commission's prior order (No. 5548a) imposed equal standards of regulation in other areas. Moreover, the Commission has found no reason to revise these findings. The areas to which the Commission refers includes the filing of price lists, terms and conditions, price flexibility, cost floors, forbearance, and service rules. Relevant reporting requirements on market data, that emerge from the industry meetings, will be established at a later date. The parties to those meetings will have to take into consideration the import of equal regulatory standards.

All information required in this Order shall be filed in the traditional paper form with the Commission. The form of the paper filings shall be as follows: the initial and subsequent filings of price lists, MARs and terms and conditions shall be filed on sequentially numbered pages. A thorough and very explanatory index must be provided which shows the individual page numbers where current rates, price lists, MARs and terms and conditions are displayed. In addition, the carriers must file a short schedule (1 or 2 pages) which contains information about rates which the general public would request on a regular basis. Subsequent filings of any of the required information will continue the subsequent numbering of pages. Each filing shall result in the preparation of a revised current index. Each filing which contains any change to the single page schedule noted above will require a revised copy of that schedule to be filed. The use of sequential numbering will assist the carriers and the Commission to efficiently process the required information.

Carriers in this Docket in addition to filing with the Commission will simultaneously file all of the information required in this Order with each of the other carriers in this Docket. As a result of the simultaneous filing of all information on each of the other carriers, the industry will be continuously informed of the status of the market. The Commission is concerned, however, that the general public also be kept apprised of rate changes, pursuant to Section 69-3-807, MCA. Accordingly, it will commence a rulemaking at an early date so as to define the more complete requirements that the carriers have to provide information, which may supplant the simultaneous filings.

By seeing that each company makes its filings both with the Commission and the other carriers, the information needs of the industry are well met. However, the Commission is concerned about how this information will be communicated to the public. After due consideration, the Commission finds that having the information in paper form in the Commission offices, while comforting to the industry, fails to satisfy the needs of today's customers who are participants in the electronic information age. Accordingly, in addition to the traditional paper filings (see Paragraph 14 above) the Commission directs the carriers to file their tariffs, MARs, price lists, indexes and terms and conditions on 3 1/2 inch diskettes. The above-mentioned information shall be stored on the diskettes through the use of WordPerfect version 5.1 for IBM and compatible computers. A "go to" function shall be included which will allow a user to specify the page to which he or she would like to access, and which will transfer the user to that page. Each time changes are made to any of the above listed information, a complete set of diskettes shall be filed. A paper letter of transmittal will identify the diskettes and the changes.

In addition to the requirements in this Order, the provisions of the Montana Telecommunications Act will continue to provide additional rate protection for those consumers living in exchanges without interLATA equal access offices (largely rural areas). As one important example, § 69-3-807(5), MCA, requires every provider of regulated toll (MTS and related) services to "average its service rates on its routes of similar distance within the state unless otherwise authorized by the commission." The term "average" as used in this statute and in the telecommunications industry, means the same rates for calls of the same distance (within each company, by mile or mileage band). Nothing in this order shall be construed to authorize any exception to this statutory requirement. All rates by AT&T and the OCCs in Montana must be "averaged" statewide as that term is understood and applied in the industry.

Order No. 5548a also requires AT&T to be the "carrier of last resort." FOF 86, p. 36. Upon further consideration, the Commission has determined that there is insufficient evidence in the record to address this issue in this Docket. Therefore, the Commission expresses no opinion on this issue here. The Commission notes,

however, that there is a long tradition of AT&T service in Montana, and AT&T has in practice been considered the carrier of last resort. The Commission therefore reserves the right to examine this issue and affirm such a requirement by Commission order if appropriate, in a future proceeding.

In response to Part I of TA's motion regarding other carriers, the Commission agrees with the basic understanding expressed by TA of the Montana Telecommunications Act and the Commission's rules. TA Motion, p. 2, see also § 69-3-805, MCA, and ARM 38.5.2704 and 38.5.2705. Nevertheless, with one exception, no other carriers have come forward under said statute and rules either filing tariffs or requesting a determination regarding regulatory status.¹ Furthermore, under basic principles

¹ See PSC Docket No. 91.6.27, RE: One Call Communications, Inc., dba OPTICOM.

of administrative law and due process, the Commission's order in this Docket can only effect the Respondent parties. However, on reconsideration the Commission recognizes TA's concern and will therefore initiate a rulemaking in the near future to impose specific regulatory requirements upon all similarly situated firms operating in the intrastate interLATA interexchange market, consistent with this order. This will also address the comments on exceptions filed by American Sharecom. TA and the other parties in this case are requested to provide pertinent information to Commission staff regarding the identity of firms which may be subject to such rules and other relevant information.

The Commission reaffirms its earlier decision on the relevance of incremental costs in this Docket (see FOF Nos. 137-138, Order No. 5548a). TA's motion states that "The Commission must explain, simply and directly incremental costs." Given the lack of clarity in this motion, the Commission can only address some possible interpretations. First, however, the Commission reaffirms its earlier findings

that the purpose of Docket No. 88.11.49 was not to define or establish a method to compute incremental costs. If TA truly believes the Commission must do so, it should petition the Commission to open a new docket or proceeding. Second, as with AT&T the Commission has not set forth a recipe that OCCs must follow in computing incremental costs. When the need arises to flush out how incremental costs are computed, the Commission will do so.

CONCLUSIONS OF LAW

AT&T, U.S. Sprint, MCI, Touch American 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.

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, U.S. 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.

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, U.S. Sprint, Touch America and American Sharecom. §§ 69-3-808, 69-3-802 and 69-3-807, MCA and ARM 38.5.2715.

ORDER

The Commission's Order No. 5548a is hereby amended as follows:

AT&T, MCI, U.S. Sprint, Touch America and American Sharecom (hereinafter "regulated carriers" or "carriers") 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) the regulated carriers' rates shall not be set according to traditional rate base/rate of return regulatory methods. This will constitute a three year experiment in alternative regulation. This experiment is subject to review and/or amendment by the PSC at any time

either on the Commission's own motion or upon complaint by an interested party.

- B. The regulated carriers must maintain tariffs (schedules) on file with the Commission pursuant to Title 69, Chapter 3, Part 3, MCA. The rates in the carriers' tariffs constitute "Maximum Allowable Rates." See PSC Order No. 5044d (Docket No. 83.11.80) and AT&T Telecommunications Services Tariff Section 2.L. The tariffs must also contain complete descriptions, terms and conditions of all services offered. See § 69-3-301, MCA.
- C. The other regulated carriers are granted pricing flexibility in the same manner as approved for AT&T in previous Commission orders. See PSC Order Nos. 5044d and 5274a. In addition to tariffs, the carriers must maintain price lists on file with the Commission which contain the actual rates charged for all regulated intrastate services. The rates in the price lists shall be the only rates which may be lawfully charged, unless otherwise specifically provided by law or Commission order. The price lists can be changed on seven (7) day's notice without Commission approval. 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 e.g. AT&T Telecommunications Services Tariff Section 2.L. At a minimum, "notice" (as used above) requires a filing with the

Commission; however, the Commission may prescribe additional notice requirements at a later date. The rate in a carrier's price list cannot exceed the Maximum Allowable Rate in the carrier's tariff. Price lists are not required to contain complete descriptions, terms and conditions of services, since this information must be contained in the tariffs.

- D. Deviation from price list rates are permitted for individual customer contracts duly filed with the Commission, following compliance with the forbearance procedure set forth in Paragraph 3 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.
- E. The carriers' rates are required to be above incremental costs. See also, PSC Order No. 5044d, >>54 and 55.
- F. The carriers are required to flow through changes to local exchange carrier access charges to their Maximum Allowable Rates, as previously required for AT&T in PSC Order No. 5274a, >>49, 66 and 67 (Docket No. 86.12.67). Anytime a Montana local exchange carrier's carrier access charges change (increase or decrease), all carriers must seek a concomitant change in their Maximum Allowable Rates on file with the Commission. Carriers must file a request for said flow through in a timely

manner, so that the revised Maximum Allowable Rates go into effect no later than sixty (60) days after the carrier access charge change.

MCI, U.S. Sprint, Touch America and American Sharecom are required to file tariffs with the Commission within thirty (30) days after the service date of this Order. Said tariffs are required to contain descriptions, terms, conditions and a Maximum Allowable Rate for each and every regulated intrastate telecommunications service provided or offered within the state of Montana. See Paragraph 1.B above. The Maximum Allowable Rate in the tariff is the maximum rate that can be charged for a service pursuant to the duly filed price list (see Paragraph 1.C above). AT&T already has such tariffs on file. Following the submission of said tariffs by the other carriers, the Commission will consider them for approval as a compliance filing.

The carriers are 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 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 and 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 and 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 § 69-3-811, MCA.

The carriers 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 the carriers 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.

The carriers will be required to file with the Commission, certain market data information or or before March 15th of each year, based upon the immediately preceding calendar year (static information as of December 31st); for 1992, however this deadline is slipped six months. The Commission staff will conduct meetings with representative of AT&T, MCI, U.S. Sprint, TA and American Sharecom 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 interLATA 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 interLATA 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 interLATA 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, interLATA and interstate). Provide the capacity of each switch. Identify the types of services provided or available at each point of presence.

Unless otherwise provided herein or by subsequent Commission order, the carriers must comply with all regulatory requirements imposed by relevant Montana state laws, rules and previous Commission orders. The carriers are 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.) and the procedural requirements for deregulation or detariffing of services (ARM 38.5.2701 et seq.), unless otherwise specifically provided in this Order. The carriers are also required to fully 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 1991 amendments thereto (1991 Montana House Bill 610).

The carriers 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 HB 610, Section 5, § 69-3-810, MCA).

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, 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.

Unless specifically amended in this Order on Reconsideration, all findings, decisions and orders in Order No. 5548a remain in full force and effect.

Done and Dated this 21st day of February, 1992 by a vote of 4 - 0.

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: You may be entitled to judicial review in this matter.
Judicial review may be obtained by filing a petition for review within thirty (30)
days of the service of this order. Section 2-4-702, MCA.