

Service Date: December 23, 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 Petition of)	UTILITY DIVISION
MCI TELECOMMUNICATIONS CORPORATION)	DOCKET NO. 92.11.65
to Repeal ARM 38.5.3345)	ORDER NO. 5683

FINAL ORDER

I. Background.

ARM 38.5.3345 was first adopted on December 27, 1991. This rule was intended to curb the problems created by the unauthorized switching of a customer's choice of long distance carrier, a practice otherwise known as "slamming." The rule requires that before a long distance carrier, also referred to as an interexchange carrier (IXC), can request a local exchange carrier (LEC) to change a customer's choice of IXC, the requesting IXC has to first obtain a written authorization from the customer.

On January 24, 1992 MCI Telecommunications Corporation (MCI) and US Sprint (Sprint) jointly filed a petition to modify ARM 38.5.3345. AT&T Communications (AT&T) subsequently filed a similar petition. The petitioners argued that steps were being taken within the industry to curb the problem of slamming and that the FCC had already preempted state regulation. The petitioners submitted that the rule should either be repealed or be brought into conformity with FCC guidelines. In response the Commission modified the rule, but rather than changing the substance of the rule the Commission gave it an effective date of January 1, 1993.

The stated purpose of delaying the effective date was to allow the Commission to fully evaluate the effectiveness of the industry measures and the FCC's guidelines.

On November 6, 1992 MCI filed a petition to repeal ARM 38.5.3345 and a motion to refrain from enforcement proceedings pending resolution of the petition. On November 13, 1992, at a properly noticed work session, the petition was denied by virtue of a split vote (2-2 with Commissioner Mercer absent). On November 23, 1992 MCI filed a motion to reconsider in which it was alleged that there was neither record evidence to support the rule nor the Commission's decision not to repeal. AT&T Sprint filed comments in support of the motion.

II. Discussion.

Section 2-4-315, MCA, provides that within 60 days after submission of a rulemaking petition an agency either shall deny the petition in writing or initiate rulemaking proceedings. Since MCI's motion for reconsideration was based on the Commission's action in denying its petition, the Commission has yet to issue an order on its denial of the petition. Therefore, the Commission will use this occasion to address both the petition and the motion for reconsideration.

A. Petition to Repeal.

MCI offers four arguments in support of its petition: 1) There is little or no concrete evidence which reveals a significant problem with current Presubscribed Interexchange Carrier (PIC) selection procedures and ARM 38.5.3345 is therefore an unjust attempt to regulate these procedures; 2) ARM 38.5.3345 is an unreasonable attempt to regulate PIC selection procedures which are already affected by extensive FCC procedural safeguards that effectively control the problem alleged to exist in Montana; 3) ARM 38.5.3345 is inconsistent with the interests of consumers because it fails to promote vigorous competition, decreases consumer choice and will ultimately increase the cost of telecommunications services in Montana; and 4) by adopting ARM 38.5.3345 the Commission failed to recognize the FCC's pervasive regulation of PIC selection procedures and, more specifically, the FCC's repeated rejection of a written letter of authorization procedure as the solitary means of verifying PIC changes.

The first argument questions whether there was evidence to support the Commission's decision to adopt ARM 38.5.3345. Specifically, MCI maintained that the adoption was contrary to the evidence submitted by MCI and other IXC's and is not supported by substantial record evidence. This argument is essentially inapplicable to the rulemaking proceeding that governed the adoption of ARM 38.5.3345. MCI has confused the evidentiary standards of a contested case proceeding with the requirements for valid rulemaking. An agency decision in a contested case proceeding admittedly must be consistent with the reliable, probative, and substantial evidence contained in the record. Section 2-4-704(2)(a)(v), MCA. However, no such evidentiary requirement applies to rulemaking.

The requirements for valid rulemaking are set forth in Sections 2-4-302 through 305, MCA. In addition to proper notice and the opportunity for a public hearing (Section 2-4-302, MCA), a rule must be within an agency's scope of authority, be consistent and not in conflict with its empowering statute, and must be reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(5)-(6), MCA. The agency must of course fully consider written and oral submissions before adopting a rule, and must issue a concise statement of its principal reasons for and against the adoption of the rule as well as the reasons for overruling the considerations urged against its adoption. Section 2-4-305(1), MCA. The Commission could find no evidence

nor was any presented indicating that the rule was improperly adopted. The Commission has general rulemaking authority under Section 69-3-103, MCA, and specific rulemaking authority for telecommunications services under Section 69-3-822, MCA. The rule appears reasonably necessary to the supervision and regulation of a public utility. Section 69-3-102, MCA. Of importance to MCI's argument here, MCI and US Sprint did submit considerations against the adoption of ARM 38.5.3345. However, the Commission properly reviewed these considerations and issued a statement containing its reasons for overruling them. Therefore, MCI argument that the rule should be repealed on a lack of evidence or improper procedure is rejected.

The second and fourth arguments presented by MCI both go to possible FCC preemption. These same arguments were made before the rule was adopted and again in conjunction with the January 24th petition to modify. However, as was determined during both these proceedings there is no clear answer to the preemption question. While there is federal regulation in this area, it is only in the form of guidelines and there has been no statement of intent to preempt. In the absence of any specific rules or statement of intent to preempt the Commission cannot conclude that the rule is preempted and should be repealed. In fact, a reasonable argument exists that the rule represents a proper exercise of Commission jurisdiction in that it restricts when a Commission-regulated LEC can switch a Montana customer's choice of long distance service.

MCI's third argument alleges that the rule inhibits competition and consumer choice while increasing the cost of telecommunications service. Specifically, MCI claims that requiring customers to execute a written authorization means that they will be less likely to switch over from AT&T, the dominant carrier; and that the processing of written authorization will mean higher administrative costs and, consequently, higher rates for long distance service. These same arguments were rejected by the Commission when ARM 38.5.3345 was first adopted. See generally, Montana Administrative Register, 1991 Issue No. 24, pp. 2631-33 (December 26, 1991). The Commission still believes that the rule is not unduly burdensome given the administrative and social costs associated with the slamming problem; and that the rule will actually promote competition by ensuring that IXC's do not lose customers to fraudulent trade practices.

Based on the foregoing, the petition to repeal ARM 38.5.3345 was denied on November 13, 1992 by virtue of 2-2 vote.

B. Motion for Reconsideration.

MCI's motion for reconsideration essentially reiterates the arguments contained in the petition with one significant exception: MCI further alleges that the evidence relied upon by the Commission in denying its petition is incorrect and misleading. Indeed, during deliberations on both the petition and the motion for reconsideration there appeared to be some question as to the accuracy of the slamming statistics supplied by US West Communications (USWC). Specifically, MCI alleges that the USWC figures were based on "PIC-Change" inquiries and did not clearly indicate how many of these inquiries were actual slamming complaints. While the uncertainty about these figures does not convince the Commission that the rule should be repealed, fairness does dictate that the Commission review more complete statistics before allowing the rule to go into effect.

Therefore, for the period January 1, 1993 to July 1, 1992 requests USWC to collect and provide the Commission with de tailed statistics that will indicate the number and type of slamming complaints it receives. Enforcement of ARM 38.3.3345 is stayed until such time as the Commission has considered this new data.

Done and Dated this 21st day of December, 1992 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DANNY OBERG, Chairman

BOB ANDERSON, Commissioner

TED C. MACY, Commissioner

ATTEST:

Kathlene M. Anderson
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.