

Service Date: March 9, 1994

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

IN THE MATTER OF the PSC's Investigation) UTILITY DIVISION
of the Regulatory Status of Other Common) DOCKET NO. 94.2.8
Carriers and Contemplated Rulemaking.) ORDER NO. 5778

PROTECTIVE ORDER

The Montana Public Service Commission (PSC or Commission) is initiating Docket No. 94.2.8 for the purpose of investigating the regulatory status of other common carriers and interexchange carriers (IXCs) providing long distance intrastate telecommunications services in Montana, and to consider possible amendments to the current PSC administrative rules governing the regulation of such carriers. (ARM 38.5.3701 et sea.)

The Commission believes that parties will submit information in this Docket which they claim to be proprietary (see e.g. Docket No. 92.11.66, Order Nos. 5664b and 5664c). Section 69-3105(2), MCA, states: "The commission may issue a protective order when necessary to preserve trade secrets, as defined in 3014-402, required to carry out its regulatory function." The Commission considers it appropriate to issue a Protective Order to provide a procedure for balancing the public's right to know against the right to nondisclosure of trade secret information.

This Order affords interested parties an opportunity to challenge the proprietary designation of information. In issuing this Order, the Commission is not deciding or expressing any opinion as to whether the subject information is or is not trade secret information under Montana law. The following Protective Order shall be in effect with respect to information claimed to be of a trade secret nature submitted by any party in Docket No. 94.2.8 (hereinafter "providing party" or "providing parties"):

1. Proprietary Information. All information, documents, studies and other materials submitted in Docket No. 94.2.8, the are claimed to be of a trade secret, privileged or confidential nature shall only be furnished pursuant to the terms of this order, and shall be treated by all persons accorded access thereto pursuant to this order as constituting private, confidential or privileged commercial and financial information (hereinafter referred to as "Proprietary Information") and shall neither be used nor disclosed except in accordance with this order. All material claimed to be Proprietary Information must be marked with an appropriate designation and submitted to the Commission on yellow paper so that it is easily identified for filing purposes .

2. Terms of Disclosure. All Proprietary Information made available pursuant to this order shall be given solely to counsel for the parties, and shall not be used or disclosed except for purposes of this proceeding. Counsel may authorize access to confidential information by that party's experts as follows:

(a) Five (5) days written notice shall be given to the party that produced the Proprietary Information. The notice shall contain the name, title, job description, description of previous positions and experience, and area of expertise of any person to be given access to such information. Any such expert may e.g. employee of a party, provided that such employee's duties

are solely dedicated to regulatory activities on behalf of the party, and such employee's duties are not related to marketing or strategic planning of competitive products or services, including those provided by any party to this proceeding.

(b) It is the good faith position of the party that produced the Proprietary Information that the designated person should not be given access to the information, that party must respond to the notice with a written objection.

(c) If the party that proposed that access be given to the designated person does not receive written objection by the party that produced the Proprietary Information within five (5) days after service of the written notice, counsel for that party shall be authorized to provide access to the information to the designated person.

(d) If the party that produced the Proprietary Information objects to access by the designated person to Proprietary Information, the party that requested such access and the party that produced the information shall attempt to resolve the objection. If these parties are unable to resolve the objection, either of them may apply to the Commission for a ruling as to the access proposed. In that event, access to the information shall not be given to the designated person, pending resolution of the objection by the Commission.

(e) The standard to be applied by the Commission in determining a question of expert access to Proprietary Information shall be whether access by the individual in question would be reasonably likely to jeopardize the confidential nature of the information sought. A party dissatisfied with a decision of the Commission may appeal to the District Court, and, pending appeal, the information shall not be disclosed to the designated person.

(f) Any member of the Public Service Commission, and any members of its staff, the Montana Consumer Counsel (MCC), and any member of his staff, may have access to any Proprietary Information made available pursuant to this Order and shall be bound by the terms of this Order.

Nondisclosure Agreement. Prior to giving access to Proprietary Information as contemplated in Paragraph 2 above, counsel for the party seeking review of the Proprietary Information shall deliver a copy of this order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this order. In connection therewith Proprietary Information shall not be disclosed to any person who has not signed a nondisclosure agreement in the form which is attached hereto and incorporated herein as Exhibit "A." The nondisclosure agreement (Exhibit "A") shall require the person to whom disclosure is to be made to read a copy of this Order and to certify in writing that they have reviewed the same and have consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address, employer and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party and the Commission.

4. Delivery of Documentation. Where feasible, Proprietary Information will be marked as such and delivered to appropriate counsel. In the alternative, the Proprietary Information may be made available for inspection and review by counsel, staff and experts, at a time and place mutually agreed on by the parties, unless otherwise directed by the Public Service Commission.

5. Challenge to Confidentiality. This order establishes a procedure for the expeditious handling of information that the providing parties claim is confidential; but it shall not be construed as an agreement or ruling on the confidentiality of any such information. Any party to this proceeding or other interested party or entity with proper standing, or the Commission upon its own motion, may challenge a providing party's claim of confidentiality at any time. Any such Petition or Motion must be served upon the appropriate providing party or parties, and the providing party may then file a response or objection within 14 days thereafter. The providing party's response may also request a hearing or oral argument before the Commission, including its grounds for such request.

(a) In the event that the parties are unable to agree that certain documents, data, information, studies or other matters constitute private, confidential or privileged commercial and financial information, the entity objecting to the proprietary claim shall forthwith submit the matter to the Commission for its review. When the Commission rules on the question of whether any documents, data, information, studies or other matters are Proprietary Information, the Commission will enter an order resolving the issue.

(b) Any party or appropriate person or entity (as described above) may seek by appropriate pleading to have documents that have been designated as Proprietary Information in accordance with this order, removed from the protective requirements of this order and placed in the public record. If the confidential nature of this information is so challenged, resolution of the issue shall be made by a Hearing Examiner and/or the Commission after consideration of briefs and/or proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such Proprietary Information shall be present. The record of any such in camera hearing shall be marked "CONFIDENTIAL- -SUBJECT TO A PROTECTIVE ORDER IN DOCKET NO. 94.2.8." It shall be transcribed only upon agreement of all participating parties, or by order of the Hearing Examiner or the Commission; and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this order, unless and until released from the restrictions of this order through agreement of the parties or pursuant to an order of the Hearing Examiner or the Commission. The Court Reporter shall also be required to sign an Exhibit "A." In the event that the Hearing Examiner or the Commission should rule in response to such a pleading that any information should be removed from the protective requirements of this order, the parties shall not disclose such information or use it in the public record for a period of seven (7) business days thereafter, so that the providing party shall be afforded a reasonable opportunity to seek a stay or other appropriate relief.

6. Seal. While in the custody of the PSC and MCC, materials subject to this order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 94.2.8," and due to their private nature shall not be considered as records in the possession or retained by the PSC or MCC within the meaning of the open meetings or public records statutes.

7. Use in Pleadings, Briefs, etc. Where reference to Proprietary Information is required in pleadings, briefs, argument or motions, it shall be by citation to title or some other nonconfidential description. Any further use or substantive reference to Proprietary Information shall be placed in a separate section of the pleading or brief and submitted to the Commission under seal. This sealed section shall be served only upon counsel (one copy each) who have signed an Exhibit "A." All the

protections afforded in this order apply to materials prepared and distributed pursuant to this paragraph.

8. (a) Use in Commission Orders. The Hearing Examiner or the Commission attempt to refer to Proprietary Information in only a general or conclusionary form, and to the greatest extent possible, will avoid reproduction of Proprietary Information in any decision or ruling. If it is necessary to discuss Proprietary Information in greater detail, it shall be placed in a separate section of the order under seal. This sealed section shall be served only on counsel (one copy each) who have signed an Exhibit "A." Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission after signing an Exhibit "A."

(b) Summary for Record If deemed necessary by the Commission the providing parties shall prepare a written summary of the Proprietary Information referred to in a decision or order, for placement on the public record.

9. The PSC and its counsel and staff, and the MCC and its counsel and staff, shall be bound by the terms of this Order.

10. Segregation of Files. All Proprietary Information filed with the Commission shall be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this order, unless such Proprietary Information is released from the restrictions of this order either through agreement of the parties, an order of the Commission, or an order of a Court having competent jurisdiction. All written Proprietary Information coming into the possession of the MCC under this order may be retained by him in his office files, but shall be withheld from inspection by others, except for his staff and his counsel, unless released by agreement, an order of the Commission and/or an order of a court.

11. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Proprietary Information by reason of this order shall neither use nor disclose the Proprietary Information for purposes of business or competitor, or any purpose other than those described in Paragraph 2 above, and then solely as contemplated herein, and shall take reasonable precautions to keep the Proprietary Information secure and in accordance with, the purpose and intent of this order.

12. Reservation of Rights. The persons hereto affected by the terms of this Protective Order retain the right to question, challenge, and object to the admissibility (in any proceeding before the PSC or other appropriate body) of any information furnished under the terms of this Protective Order, on the grounds of relevancy of materiality.

This order shall in no way constitute any waiver of the rights of any interested party to contest any assertion or the right of privacy, confidentiality or privilege, and to appeal any such determination of the Commission.

13. Amendment or Modification. The Commission retains jurisdiction of this matter and may alter or amend the provisions hereof as it deems appropriate upon its own motion or the motion of a party, after reasonable notice.

Done and Dated this 7th day of March, 1994 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

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