

Service Date: March 14, 1995

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

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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. 5778e

**PHASE I ADDITIONAL ORDER**

**BACKGROUND**

1. On March 9, 1994 the Commission issued a Notice of Investigation and Contemplated Rulemaking which initiated Docket No. 94.2.8. The purpose of the Docket was to investigate the regulatory status of other common carriers (OCCs) 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. The proceeding was divided into two phases: Phase I concerned the regulatory status of a number of OCCs operating within the state that were not parties to Docket No. 88.11.49 (the first OCC case). Phase II addressed the form of regulation that would be applied to IXCs.

2. The Commission's Notice of Investigation delegated staff authority to draft a questionnaire designed to gather basic information from which the Commission would be able to determine

which entities could be dismissed from the proceeding and which required further scrutiny to determine their regulatory status. On March 18, 1994 staff's questionnaire was served on all firms listed on Exhibit "A" attached to the Commission's Notice of Investigation. Exhibit "A" contained the names of 24 different firms. Ten firms did not respond. On May 2 and again on May 17, 1994 additional questionnaires were served on firms that had submitted letters to the Commission regarding their plans to begin offering telecommunications services in Montana. This order addresses the 15 IXCs that responded to the staff questionnaire.

3. The following findings review earlier Commission decisions in this docket, as well as testimony and comments filed by AT&T and Touch America, which relate to Phase I issues. The Commission then explains the criteria used to determine which of the 15 IXCs are public utilities. Finally, the Commission addresses One Call Communications' request (in Docket N-94-83) that the Commission reconsider its regulatory status.

4. In Phase I Final Order No. 5778b (May 25, 1994) the Commission found that Advantis, Deltacom, and Northwest Telecommunications, Inc. only provide interstate telecommunications services and do not fall within the

Commission's jurisdiction. These companies were dismissed from this Docket. Intermountain Digital Network was dismissed based on a finding that the Company had merged with TRI Touch America and no longer exists as a corporation. The Commission made no findings in Order No. 5778b on the regulatory status of the 15 IXCs that will be addressed in this Order.

5. The Commission issued its Final Order on Phase II issues (Order No. 5778d) on December 29, 1994. The Phase II order established the best level of equal regulation to apply to public utilities providing regulated telecommunications services.

PHASE I TESTIMONY: PUBLIC UTILITY STATUS

6. Both AT&T and TRI Touch America (TA) provided written comments concerning which companies they thought should be regulated by the Commission. These comments were based on the Respondent parties' responses to the staff questionnaire.

7. AT&T testified on this issue in the Phase II portion of this case. According to AT&T, two things must be determined regarding each company in order to decide which carriers should be regulated pursuant to the Montana Telecommunications Act: 1) does the company provide intrastate two-way switched telecommunications service, and 2) does the company own, operate or control facilities or equipment used to provide the services.

Using these criteria, AT&T listed companies it believes should be regulated. TA, in its post hearing brief, also listed companies it believes should be regulated.

8. The companies that AT&T and TA recommended be regulated are shown in Table 1.

Table 1.

AT&T's Recommendations	TRI-TA's Recommendations
Cable & Wireless LDDS ITC Tele Services One-2-One Wiltel West Coast Telecom SP Telecom Allnet AMNEX	Cable & Wireless LDDS ITC Tele Services One-2-One Wiltel West Coast Telecom Oncore Econo Call

AT&T's list includes Allnet, which is already regulated, and SP Telecom which was not listed on Exhibit "A" and did not file a response to the staff questionnaire.

COMMISSION DECISION

9. To determine which of the Respondent parties are public utilities the Commission refers to the statutes and reviews Docket No. 88.11.49.

10. In Order No. 5548a, Docket No. 88.11.49, the Commission determined that the basis for the regulatory status of

telecommunications providers is the ownership and control of facilities used to provide regulated telecommunications services.

"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, private or municipal:

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(f) regulated telecommunications service. (emphasis added)

Section 69-3-101, MCA.

"Regulated telecommunications service" 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 it is intended to be converted to or from voice-grade access and transport. Regulated telecommunications service does not include...resale of telecommunications service

Section 69-3-803(3), MCA.

"Resale of telecommunications service" is defined as:

The resale of regulated telecommunications service, with or without adding value, provided any value added would not otherwise be subject to regulation.

Section 69-3-803(4), MCA

11. In Order No. 5548a the Commission found that four IXCs were public utilities. These IXCs were: American Sharecom, MCI, Sprint and Touch America. In Finding of Fact 48 the Commission states:

"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 unregulated facilities used in the provision of telecommunications services."

Order 5548a, FOF 48

12. Order 5548a goes on to describe the facilities that are either owned or leased by each of the companies found to be public utilities. For example, the order states that Sprint owns transmission capacity in Montana. Touch America leases transmission capacity and a switch in Montana.

13. The Commission applies the same reasoning in this order as was applied in Order 5548a. That is, a company's ownership or control of facilities used to provide regulated telecommunications services, as established by record evidence, determines the regulatory status of the Respondent parties. The record evidence in this case consists of the Respondent parties' responses to the staff questionnaire, comments filed by AT&T and

Touch America and prefiled testimony from AT&T provided in the Phase II portion of this case.

14. After an initial review of the responses to staff's questionnaire, it appeared that four companies were operator service providers (OSPs). Operator service providers are already regulated in terms of service standards. Current Commission rules do not require OSPs to file tariffs (ARM 38.5.3401-3424). Therefore, the Commission finds that Network Operator Services, Intellicall Operator Services, Oncore Communications and AMNEX are not subject to the regulatory decisions made in Phase II of this Docket.

15. In Order No. 5548a (Finding of Fact 49) the Commission states that MTS is an example of two-way switched service, i.e. regulated service. Based on review of the Respondent parties' responses to the staff questionnaire, it appears that all companies not previously found to be OSPs provide some type of MTS. Therefore, since these companies are providing regulated telecommunications services, it must be determined whether the services are being provided in a manner which, based on the statutes, qualifies them as public utilities.

16. The statutes cited in Finding of Fact 8 once again provide the foundation for the Commission's decisions. While the

statutes do not mention lease of facilities, the Commission finds that control of plant or equipment that may be used to provide regulated telecommunications services includes leasing plant or equipment. This interpretation is consistent with AT&T's testimony in this case<sup>1</sup>. It also is consistent with the Commission's findings in Docket No. 88.11.49 wherein Touch America was found to be a public utility based on findings that the Company leases facilities.

17. Another component of the statutes relates to whether a company owns or controls any part of a plant or equipment used to provide regulated telecommunications services. The Commission finds it reasonable to consider a transmission facility that is capable of carrying communications messages a "part" of a plant or equipment that may be used to provide telecommunications services. As noted above, control includes lease. Therefore, the Commission finds that leasing transmission capacity implies ownership or control of at least a part of a plant or equipment

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<sup>1</sup> Direct testimony of Sydney L. Wagner, June 10, 1994, p. 17.

that may be used to provide regulated telecommunications services.

18. Finally, the statutes state that the plant or equipment, or a part thereof, which is either owned or controlled must be located within the state. The Commission focused on the firms' transmission arrangements, rather than switching, given that none of the firms being looked at in this case own or lease switches in Montana, although, several own switches in other states<sup>2</sup>. The in state requirement of the statutes causes the Commission to find that there are two companies that do not qualify as public utilities although they own switches in other states.

19. Based on the criteria described above, in combination with comments and testimony from AT&T and TA, and responses to the staff questionnaire, the Commission finds the following companies are public utilities: Econo Call, LDDS Communications, Inc. (aka Dial-Net), Cable & Wireless, Inc., One-2-One Communications, ITC Tele Services, Inc., Wiltel, Inc. and West

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<sup>2</sup> Had these companies owned or controlled (leased) switches located in Montana, this would have been sufficient evidence to conclude that they are public utilities, assuming the switches were used to provide two-way switched service not otherwise exempt from regulation.

Coast Telecommunications, Inc. All of these companies indicate, in their responses to the staff questionnaire, that they lease transmission (LDDS states that it "utilizes" facilities owned by Sprint to provide telecommunications services). The Commission finds that these Companies must file and maintain tariffs pursuant to the Commission's Order No. 5778d in this Docket.

20. The Commission finds that the remaining Respondent parties in this case are not public utilities and are, therefore, not subject to Commission regulation. These Companies are Target Telecom, Inc., Quest Telecommunications, Inc., U.S. Long Distance, Inc. and Matrix Telecom, Inc. These companies do not lease transmission capacity in Montana.

21. AT&T testified that SP Telecom should be regulated. However, SP Telecom did not appear on Exhibit "A" of the Commission's Notice of Investigation and did not file a response to the staff questionnaire. SP Telecom cannot be considered a Respondent party to this case. The Commission finds that there is insufficient record evidence in this case to determine whether SP Telecom is a public utility. The Commission is, therefore, unable to find that SP Telecom must file tariffs.

22. One Call Communications, Inc. is not a Respondent party in this case. However, One Call voluntarily filed tariffs for 1+

and operator services in November 1993. The Commission designated this filing Docket N-93-112 and processed the tariffs, thus concluding One Call is a regulated public utility. In October 1994, One Call requested to withdraw its tariff stating that it was not the Company's intent to subject itself to regulation. One Call also asked the Commission to reconsider the regulatory status of the Company's 1+ services. This request was designated Docket N-94-83. The Commission has no information regarding the facilities, or parts thereof, that One Call may own or control in Montana. Therefore, until such information is available the Commission finds that One Call should not be considered a public utility. The Commission grants One Call's request to withdraw its tariff. One Call may continue to offer its 1+ services in Montana without filing and maintaining tariffs.

23. In Order 5548a, Docket No. 88.11.49, the Commission stated that the list of companies that were found to be public utilities was only as exhaustive as the record evidence in that case. The Commission finds that the same is true in this case. There are, most likely, other firms that now operate, or that will begin operating, in Montana that qualify as public utilities.

CONCLUSIONS OF LAW

1. The provision of two-way switched voice-grade telecommunications originating and terminating in the State constitutes "regulated telecommunications services" subject to the regulatory jurisdiction of the Montana Public Service Commission. ' ' 69-3-101 and 69-3-803, MCA. The Commission has authority to supervise, regulate and control public utilities. ' 69-3-103, MCA.

2. The Commission properly exercises jurisdiction over the provision of "regulated telecommunications services" pursuant to Title 69, Chapter 3, MCA.

3. The PSC 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.

ORDER

IT IS HEREBY ORDERED BY THE MONTANA PUBLIC SERVICE COMMISSION:

1. The following Respondent parties are public utilities subject to the jurisdiction of the Montana Public Service Commission: Econo Call, LDDS Communications, Inc. (aka Dial-Net), Cable & Wireless, Inc., One-2-One Communications, ITC Tele

Services, Inc., Wiltel, Inc. and West Coast Telecommunications, Inc. These companies must file tariffs for all regulated telecommunications services offered in Montana consistent with Order No. 5778d in this Docket.

2. The following companies are currently not public utilities subject to the jurisdiction of the Montana Public Service Commission: Target Telecom, Inc., Quest Telecommunications, Inc., U.S. Long Distance, Inc. and Matrix Telecom, Inc.

3. The following companies are operator service providers subject to Commission jurisdiction pursuant to ARM 38.5.3401 through 38.5.3424: Network Operator Services, Inc., American Network Exchange, Inc. (AMNEX), Oncore Communications, Inc. and Intellicall Operator Services, Inc.

4. One Call Communications, Inc is authorized to withdraw its tariff as requested in Docket No. N-94-83. One Call shall not be considered a public utility until such time as information regarding the facilities, or parts thereof, that One Call may own or control (lease) in Montana is obtained.

DONE AND DATED this 13th day of March, 1995, by a 5 to 0 vote.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

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NANCY McCAFFREE, Chair

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DAVE FISHER, Vice Chair

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BOB ANDERSON, Commissioner

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DANNY OBERG, Commissioner

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BOB ROWE, 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 38.2.4806, ARM.