

Service Date: October 26, 1993

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

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IN THE MATTER of the Application) UTILITY DIVISION
of the AMERICAN TELEPHONE AND) DOCKET NO. N-93-66
TELEGRAPH COMPANY Re: Nondocket)
Miscellaneous Filings.) ORDER NO. 5734

PROTECTIVE ORDER

On July 15, 1993 American Telephone and Telegraph Company (AT&T or Company) filed a motion with the Montana Public Service Commission (PSC or Commission) for a protective order pursuant to . 69-3-105(2), MCA, with respect to certain information submitted by AT&T in conjunction with various tariff or other nondocket filings.

Section 69-3-105(2), MCA, states: "The commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, required to carry out its regulatory function." In its motion AT&T asserts that certain information submitted to the Commission in various tariff or other nondocket filings contain proprietary studies or data; and, it is essential that such information be protected as soon as it is received by the Commission.

The Commission considers it appropriate to issue a Protective Order, to provide a procedure for balancing the public's right to know against AT&T's right to nondisclosure of confidential trade secret information. This Order affords interested parties an opportunity to challenge the proprietary designation.

In issuing this Order, the Commission is not deciding or expressing any opinion as to whether the subject information is or is not confidential trade secret information under Montana law.

Based upon the foregoing, the following Protective Order shall be in effect with respect to miscellaneous tariff or nondocket proprietary information filed by AT&T:

1. Proprietary Information. All documents, data and information furnished by AT&T in conjunction with miscellaneous tariff or nondocket filings claimed to be of a private, 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 "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 Commission and Montana Consumer Counsel (MCC), and shall not be used or disclosed except for the internal purposes of the PSC or the MCC, for the purposes of a proceeding before the Commission, or as otherwise permitted by subsequent PSC order. However, access to Proprietary Information may be authorized by counsel for the PSC or MCC (or counsel for such other party as may acquire access to said information pursuant to Paragraph 3 below) solely for the above described purposes, to those persons indicated by such party as being their expert consultants. Access to confidential information by a party's experts may be authorized by the following procedure:

- (a) Five (5) days written notice (counted from the date of receipt by the providing party) 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 be an 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) If 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 receipt 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 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) Notwithstanding the above, any member of the Public Service Commission, and any member of its staff, the Montana Consumer Counsel, and any member of his staff, may have access to any Proprietary Information made available pursuant to this Order (without complying with subsections (a)-(e) above) and shall be bound by the terms of this Order.

3. Petition for Proprietary Disclosure. Any member of the public or other interested party with proper standing may specially petition the Commission for access to the Proprietary Information pursuant to the terms of this Order. Such Petitioner must demonstrate to the PSC that his or her interest relates to the ratemaking, investigatory or other regulatory function of the PSC.

AT&T shall receive notice of any such petition and shall have a period of 14 days thereafter to file an objection or response prior to the Commission's ruling.

If such Petition is granted by the PSC, said party shall be accorded access to the Proprietary Information pursuant to the terms of this Order, and shall be bound

by all its terms. Prior to disclosure, said party shall submit signed nondisclosure agreements (Exhibit "A") pursuant to Paragraph 4 below.

4. Nondisclosure Agreement. Prior to giving access to Proprietary Information as contemplated in Paragraphs 2 and 3 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 AT&T and the Commission.

5. 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.
6. Challenge to Confidentiality. This Order establishes a procedure for the expeditious handling of information that AT&T claims is confidential; it shall not be construed as an agreement or ruling on the confidentiality of any such information. Any party to a proceeding before the PSC, the MCC, any member of the public or interested party with proper standing, or the Commission upon its own motion, may challenge AT&T's claim of confidentiality at any time. Any such Petition or Motion must be served upon AT&T, and AT&T may file a response or objection within 14 days thereafter.

AT&T'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 PSC or MCC 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 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 such in camera hearing shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER." 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 AT&T shall be afforded a reasonable opportunity to seek a stay or other appropriate relief.

7. Seal. While in the custody of the PSC and MCC, materials subject to this Order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER," and due to their private nature they shall not be considered as records in the possession or retained by the PSC or MCC within the meaning of the open meetings of public records statutes.
8. 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 exhibit number or by some other nonconfidential description. Any further use or substantive references 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 under this paragraph.
9. (a) Use in Decisions and Orders. The Hearing Examiner or the Commission will attempt to refer to Proprietary Information in only a general or conclus-

ionary 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, AT&T shall prepare a written summary of the Proprietary Information referred to in the decision or order, for placement on the public record.

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

11. 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.

12. 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 competition, 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 purposes and intent of this Order.

13. Return. Unless otherwise ordered, Proprietary Informa-

tion to which a claim of confidentiality is made, and which is either subject to the protective requirements of this Order or is finally determined to be confidential or trade secret, shall be returned by all parties to counsel for AT&T within 30 days after final settlement or conclusion of the proceeding or matter for which the information was provided, including administrative or judicial review thereof. The foregoing sentence does not apply to the Commission or the MCC (and his expert consultants). AT&T may request that Proprietary Information be returned by MCC and his expert consultants. Following the provision of microfiche copies to the Commission, AT&T may request that the hard/paper copies of Proprietary Information be returned by the Commission. Copies of all Proprietary Information which is made part of an evidentiary or administrative record must remain in the possession of the Commission in some form, either hard copies, microfiche, or other medium approved by the Commission. The MCC may refuse a providing party's request for the return of Proprietary Information which is made part of a record and may retain said information in the form

that he/she deems necessary or appropriate.

14. Reservation of Rights. The parties 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 or materiality.

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

15. Applicability. This Order shall only apply to information filed by AT&T with the PSC in conjunction with a miscellaneous tariff or other nondocket filings provided that such "filings" must include a specific request for proprietary treatment, and all confidential material must be provided on yellow paper. This Order shall only be effective for a period of four years from the date this Order is issued. AT&T may submit a similar motion at the end of four years, if it intends to seek

an extension of the term of this Order.

16. 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 by an appropriate party or entity accompanied by reasonable notice.

DONE AND DATED this 18th day of October, 1993 by a vote of

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

BOB ROWE, Vice 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 38.2.4806, ARM.

EXHIBIT "A"

I have reviewed the foregoing Protective Order in Docket No. N-93-66, dated October __, 1993, and agree to be bound by the terms and conditions of such order.

Signature

Typed or Printed Name

Residence Address

Employer or Firm

Business Address

Party

Date