

Service Date:

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

* * * * *

IN THE MATTER OF Employee Compensation)	UTILITY DIVISION
Information in PSC Annual Report Forms for)	DOCKET NO. N-95-34
Telecommunications Utilities (Schedule 27).)	ORDER NO. 5844

PROTECTIVE ORDER

On March 9, 1994 the Montana Public Service Commission (PSC or Commission) issued Protective Order No. 5777 governing the employee compensation information required by Schedule 27 of the PSC Telecommunications Annual Report Form ("Compensation of Top 10 Montana Based Employees"). Protective Order No. 5777 protected the information filed in Schedule 27 for the 1993 Annual Report Forms. The Commission indicated that it would "... reconsider the Protective Order issue prior to the due date for next year's report." Nineteen ninety-four annual reports are due on April 30, 1995.

The PSC reconsidered this protective order issue at a work session on April 18, 1995. The PSC decided on its own motion to issue a Protective Order for two years, 1994 and 1995, governing Schedule 27 of the 1994 Telecommunications Annual Report Form which is due to be filed by April 30, 1995, and the 1995 Telecommunications Annual Report Form, due to be filed by April 30, 1996. The PSC will reconsider the Protective Order issue prior to the due date for the 1996 Reports, on April 30, 1997. (The due date was changed from March 15 to April 30 by Montana House Bill 138, effective March 6, 1995.)

In issuing this order, the Commission is not deciding or expressing any opinion as to whether the subject information is or is not a trade secret, or otherwise constitutionally protected.

Based upon the foregoing, the following Protective Order shall be in effect with respect to Schedule 27 of the 1994 and 1995 PSC Annual Report Forms filed by Telecommunications Utilities (hereinafter "providing party" or "providing parties") (due April 30, 1995 and April 30, 1996):

1. Proprietary Information. All documents, data and information furnished by the providing parties in Schedule 27 of the 1994 PSC Annual Report Forms for Telecommunications Utilities 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 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 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. Any such expert may not be an officer, director or employee (except legal counsel) of such party, or an officer, director, employee or stockholder, or member of an association or corporation of which any party is a member, subsidiary or affiliate. Any member of the PSC and any member of its staff, the MCC, and any member of his staff may also have access to the Proprietary Information made available pursuant to 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. The providing party 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 the providing parties 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 a providing party claims is confidential; but 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 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. A 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 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 privacy 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 any such in camera hearing shall be marked "CONFIDENTIAL--SUBJECT TO A 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 disclosure 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.

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 its 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.

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 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.

9. (a) Use in Commission Orders. The Hearing Examiner or the Commission will 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 party shall prepare a written summary of the Proprietary Information referred to in a 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 the 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. 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 or materiality.

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

14. Applicability/Term. This order shall only apply to information supplied to the PSC pursuant to Schedule 27 of the 1994 and 1995 PSC Annual Report Forms for Telecommunications Utilities. This order shall apply to all Montana telecommunications utilities which request confidential treatment of the Schedule 27 information. A telecommunications utility shall indicate its choice to file Schedule 27 information as proprietary (subject to the terms of this Order) by filing all such information on yellow paper.

This Protective Order shall only be in effect for the 1994 and 1995 PSC Annual Report Forms for Telecommunications Utilities (due 4-30-95 and 4-30-96), unless modified pursuant to Paragraph 15 below. It shall not apply to Annual Reports filed in subsequent years unless a new motion is filed and granted by the PSC.

15. 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 a motion by an appropriate party, after reasonable notice.

Done and Dated this 18th day of April, 1995 by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair

DAVE FISHER, Vice Chair

BOB ANDERSON, Commissioner
(Voting to dissent)

DANNY OBERG, Commissioner

BOB ROWE, Commissioner
(Voting to dissent - attached)

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.

EXHIBIT "A"

I have reviewed the foregoing Protective Order in PSC Docket No. N-95-34, dated April 18, 1995, and agree to be bound by the terms and conditions of such order.

Signature

Typed or Printed Name

Employer or Firm

Business Address

Party

Date

**DISSENT OF COMMISSIONER ROWE
PROTECTIVE ORDER, DOCKET NO. N-95-34, ORDER NO. 5844**

I continue to dissent from the Commission's wrongheaded policy of granting protected status to information about the compensation received by top utility employees, in this case telephone utility management. My reasoning has been fully set out in dissents to a number of Commission orders. Concerning telephones, my dissent to Order No. 5777 in Docket N-93-105 is most on point. I will not unduly restate that analysis.

Both the Montana Constitution¹ and statutes² emphasize the public's right to know about and participate in the activities of governmental agencies. This creates a powerful presumption in favor of access and openness.³

Section 69-3-105, MCA, authorizes the Commission to grant protective orders to cover "trade secrets." Trade secrets are defined in Section 30-14-402, MCA, as information which "derives independent economic value" from not being generally known. There is no credible argument that information about compensation constitutes trade secrets. There is also no predominant "privacy" concern about this information. Similar information is routinely disclosed for a variety of purposes.⁴

For large and small utilities alike, compensation is a legitimate question in utility revenue requirement cases and elsewhere. The public has a right to this information both in order to participate in Commission proceedings and to evaluate the reasonableness of Commission decisions. The public is entitled to disclosure of "all information required to enable citizens to determine the

¹ Right of Participation, Art II, Sec. 8; Right to Know, Art. II, Sec. 9.

² E.g. Public Participation in Government, Section 2-3-101, et seq.; Public Records, Section 2-6-101, et seq.

³ See, Associated Press v. Bd. of Education, 246 Mont. 386, 391-392 (1991).

⁴ The Securities and Exchange Commission requires disclosure of compensation for the top five employees of publicly traded companies. No harm done. Previously, the Commission majority has extended protective status even to information which was otherwise publicly available. The majority has now more appropriately limited protective status to information which is not otherwise available.

propriety of governmental actions affecting them." Mountain States Telephone v. Dept. of Public Service Regulation, 194 Mont. 277, 286. (1981). This is such information.

The Commission majority has stubbornly dug in its heels to defend an indefensible policy which is directly contrary to the public interest. The information should be made public.

RESPECTFULLY SUBMITTED this 2nd day of May, 1995.

BOB ROWE