

Woodruff, Morris

From: Roberts, Dale
Sent: Friday, April 04, 2003 11:44 AM
To: Dippell, Nancy*; Hopkins, Bill*; Jones, Kennard; Mills, Lewis; Pridgin, Ron; Roberts, Dale; Ruth, Vicky; Thompson, Kevin; Woodruff, Morris
Subject: FW: Missouri -- Protective Order -- Draft Proposals

FILED

MAY 02 2003

Missouri Public
Service Commission

Dale Hardy Roberts, Chief Judge
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-----Original Message-----

From: Stephen F. Morris [mailto:stephen.morris@wcom.com]
Sent: Friday, April 04, 2003 11:15 AM
To: daleroberts@psc.state.mo.us
Subject: Missouri-Protective Order-Draft Proposals

Judge Roberts-



Texas Revised
Protective Order...

- H re are my observations and suggestions regarding the three protective orders that were circulated:
- (1) The Single Tier Option is the best proposal of the three. It is similar to protective orders used by commissions in other states, most of whom have abandoned the two-tier designation.
 - (2) The other two proposals contain the HC and P designations which makes it difficult (and in some cases nearly impossible) to have meaningful participation in hearings due to the restrictions on who may view the HC information. This issue was briefed by the parties in TR-2001-65, the generic access charge investigation proceeding, and I will not repeat those arguments here other than to say that most parties believed that the current protective order in Missouri is not workable and is out of sync with the standard protective orders used by other commissions.
 - (3) The requirement that the party asserting either HC or P status of information has 5 days after testimony has been filed in which to file a pleading essentially reaffirming that classification is not necessary. The burden of proof should remain with the party asserting such classification; however, it would be simpler to require the other party to file a motion challenging the classification. At that time, the party asserting the classification would have the burden of proving the information is either HC or P. Requiring the parties to go through the "5-day drill" of proving the validity of the classification when the other party may not care would be a waste of time and resources. This requirement is found in paragraph 9 of the Single Tier Option, paragraph 10 of the HC and P Information, and paragraph 11 of the HC Modification Option.
 - (4) The requirement in paragraph 3 of the HC and P Information draft allowing a party to make information available only at its own premises should be eliminated. This provision makes it extremely difficult for the other party to participate, due to the expenses involved in getting to the premises of the party and due to the limited scope imposed on the other party, such as the inability to make copies and having to rely on notes taken while reviewing the information at the party's premises. These burdens are in addition to the burden on a requesting party having to hire an outside consultant to view the information in the first place or to do without an outside consultant and rely on their attorney to review the information.
 - (5) Finally, I have attached a recent protective order issued by the Texas Public

Utility Commission, which I hope you find useful. Some of the information, such as the reference to the Texas Public Information Act will, of course, not squarely apply in Missouri. Likewise, the reference to how testimony is handled in Texas is different than it is in Missouri. The structure of prefiled testimony currently used in Missouri is acceptable (i.e. using astericks where the protected information is found in the testimony). However, the classification of information (single-tier) and the mechanics of how information is provided to the parties should be instructive. In some respects the Texas protective order is similar to the Single-Tier Option being proposed in Missouri.

Thank you for giving us a heads up on this. Please give me a call if you have any questions or comments.

Stephen F. Morris
Senior Attorney
MCI
701 Brazos, Suite 600
Austin, Texas 78701
512-495-6727

DOCKET NO. 24515

PETITION OF SOUTHWESTERN	§	PUBLIC UTILITY COMMISSION
BELL TELEPHONE COMPANY FOR	§	
ARBITRATION REGARDING THE	§	OF TEXAS
IMPLEMENTATION OF SPECIAL	§	
ACCESS PERFORMANCE MEASURES	§	

ORDER 17
REVISED PROTECTIVE ORDER

In the above-styled proceeding, it is anticipated that the parties may designate certain documents and information to be confidential and exempt from public disclosure under the Texas Public Information Act, Tex. Gov't Code Ann. §§ 552.002-552.353 (Vernon Supp. 2000). Therefore, a Protective Order covering such documents and information should be entered to facilitate timely submission of information in this proceeding and in any discovery conducted in this proceeding. The Protective Order shall control the production of information and documents in this proceeding until such time as this Protective Order is modified by subsequent order of the presiding officer, the Commission, or a court of competent jurisdiction.

Definitions

1. The term "party" as used in this Protective Order means any party to a Commission proceeding in connection with an application or petition for arbitration related to a request for interconnection, services or network elements under the Telecommunications Act of 1996 and/or any party to a Commission proceeding in connection with a post-interconnection complaint/dispute.

2. The term "Confidential Information" refers to portions of petitions or applications and all documents, data, information, studies, cost study information, and other materials furnished pursuant to requests for information or other modes of discovery, including but not limited to depositions, that are claimed to be trade secrets, confidential business information, and information subject to an evidentiary privilege or exempt from public disclosure under the Public Information Act. The parties will work cooperatively to determine if certain limited, summary information from cost studies that would otherwise fit the definition of "Confidential Information" may be designated as not "Confidential Information" for use at the Hearing.

"Confidential Information" shall not include information contained in the public files of any federal or state agency that is subject to disclosure under the Public Information Act or a similar statute, nor shall it include information that, at the time it is provided through discovery in these proceedings or prior thereto, is or was public knowledge, or which becomes public knowledge other than through disclosure in violation of this Order or the violation of any other agreement or order protecting the confidentiality of the information. "Confidential Information" shall not include information found by the presiding officer, the Commission or a court of competent jurisdiction not to merit the protection afforded Confidential Information under the terms of this Order.

Confidential Information

(a) General. In the discovery or other proceeding or filings to be conducted in connection with this proceeding, a party may designate certain material produced by such party as "Confidential Information." Such materials shall be submitted in an enclosed, sealed and labeled 10x13 clasped envelope, pursuant to the requirements for confidential materials set forth in P.U.C. PROC. R. 22.71. Each page of the material submitted under seal shall be consecutively numbered and the envelope shall clearly specify the number of pages contained therein. For record purposes, two copies of the materials designated as confidential shall be delivered to the Filing Clerk of the Commission. To the extent that the presiding officer(s) request additional copies, such materials shall be delivered directly to the Commission's Confidential Documents Manager no later than 3:00 p.m. on the first business day after the original submission, unless otherwise approved by the presiding officer(s). Such additional copies shall be submitted in accordance with P.U.C. PROC. R. 22.71, for internal distribution to P.U.C. personnel. Multiple copies of the same document shall be grouped together as one set to ensure tracking of each submittal individually.

The party designating the material as confidential information shall clearly identify each portion of the material alleged to be confidential information, and provide a written explanation of the claimed exemption. Such explanation may be accompanied by affidavits providing appropriate factual support for any claimed exemption. The claim of exemption shall also indicate:

- (1) any and all exemptions to the Public Information Act claimed to be applicable to the alleged confidential information;

- (2) the reasons supporting the party's claim that the information is exempt from public disclosure under the Public Information Act and subject to treatment as confidential information; and
- (3) that counsel for the party has reviewed the information sufficiently to state in good faith that the information merits the confidential designation and is exempt from public disclosure under the Public Information Act. Each party will have an additional level of review to insure that the information determined to be confidential is reasonably classified as confidential. There is a rebuttable presumption that all information is non-confidential and the burden of establishing confidentiality will be on the party proposing confidential treatment.
- (4) in the event that any party questions whether an item has been inadvertently classified as confidential, then the party shall bring the matter to the producing party's attention prior to taking any action at either the Commission or elsewhere.

(b) Exemption from Disclosure. Material received by the Commission in accordance with this procedure shall be treated as exempt from public disclosure until and unless such confidential information is determined to be public information as the result of a Public Information Decision by the Attorney General, or pursuant to an order of the presiding officer entered after notice to the parties and hearing, or pursuant to an order of a court having jurisdiction.

(c) Material Provided to Parties. Material claimed to be confidential information must be provided to the other parties to this proceeding provided they agree to treat the material as Confidential Information as evidenced by the employees and representatives of the receiving party who have access to the Confidential Information signing the attached Exhibit A. One copy of the material shall be provided to each party, the receipt of which will be evidenced by counsel or other authorized representative signing the attached Exhibit B and returning it to the producing party upon receipt of the information. The receiving party shall be entitled to make limited copies of the Confidential Information, provided that each person receiving a copy of the information shall sign the attached Exhibit C and that a tracking report is developed by the receiving party accounting for the additional number of copies and the individuals in possession of such copies. The Confidential Information may be transmitted through the Internet, Intranet, or via a facsimile transmission, provided that it shall be the responsibility of the party transmitting documents to insure that the documents are only received by individuals authorized

to receive the information. Additionally, the individuals receiving the confidential information via electronic or facsimile must sign an Exhibit C, in addition to an Exhibit A and such individuals shall be included on the tracking report referenced above. The receiving party and any individuals in possession of Confidential Information shall keep the Confidential Information properly secured during all times when the documents are not being reviewed by a person authorized to do so.

(d) **Review by Parties.** Each receiving party may designate specific individuals associated with the party who will be allowed access to the Confidential Information. The individuals who may have access to the Confidential Information shall be limited to the receiving party's counsel of record, regulatory personnel acting at the direction of counsel, and outside consultants employed by the receiving party and who are under the direction of either counsel or said regulatory personnel: provided that those counsel, regulatory personnel and outside consultants are not involved in marketing and/or sale of retail services on behalf of the receiving party or any of receiving party's affiliates unless the producing party gives prior written authorization, which shall not be unreasonably withheld, for specific individuals who are involved in marketing activities and/or the sale of retail services to review the Confidential Information. If the producing party refuses to give such written authorization, the receiving party may, for good cause shown, request an order from the Arbitrators allowing individuals involved in marketing activities and/or the sale of retail services on behalf of the receiving party or any of receiving party's affiliates to have access to the Confidential Information.

Prior to giving access to Confidential Information as contemplated above to any party authorized to be given access pursuant to this Order, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such persons, and prior to disclosure, such persons shall affirmatively state that the individual has personally reviewed the Order, and will observe the limitations upon the use and disclosure of Confidential Information, in the form of Exhibit A, attached hereto. By signing such statements, a party may not be deemed to have acquiesced in the designation of the material as Confidential Information or to have waived any rights to contest such designation or to seek further disclosure of the Confidential Information. Said counsel shall, at the time of the review of such Confidential Information, or as soon thereafter as practicable, deliver to counsel for the party that produced the Confidential Information a copy of Exhibit A as executed, which shall show each signatory's full name, permanent address and employer, and the party with whom the signatory is associated.

Counsel of record for the persons authorized hereunder who requested the copies shall sign a statement in the form of Exhibit B, attached hereto; verifying that the sealed envelope clearly marked as containing Confidential Information has been received, and designate the name and address of the individual into whose custody the copies shall be delivered. Access to said copies shall be limited to those persons specified in this Order. Additionally, for every copy of the information that is made, counsel for the party seeking review of the Confidential Information shall deliver an Exhibit C, attached hereto, identifying what information has been copied and delivered to each person who is authorized to review said Confidential Information.

Public Information Act Requests

If the Secretary of the Commission, presiding officer, or Commission's Staff receive an Public Information Act request for disclosure of information claimed to be Confidential Information (or any notes reflecting such information) produced pursuant to this Order, then the Secretary, presiding officer, or Commission's Staff shall, as promptly as is reasonably feasible (preferably no later than two (2) business days following receipt of that request), notify the responding party that a request for disclosure has been made pursuant to the Public Information Act. The recipient of that request for disclosure shall timely request an Attorney General's opinion as to whether the information falls within any of the exemptions identified in the Public Information Act. Specifically, pursuant to §§ 552.301-552.308 of the Public Information Act, the recipient of that request for disclosure shall request that the applicable agency decline to release the requested information, in order to request an Attorney General opinion. As provided for in §§ 552.304 and 552.305(b), the party seeking non-disclosure may submit in writing to the Attorney General that party's reason for withholding the information. The recipient of the request for disclosure may contest the responding party's claim of exemption pursuant to Public Information Act § 552.305(c) in a separate communication to the Attorney General.

Storage at the Commission

Confidential Information, if filed with the Commission, shall clearly be labeled as Confidential and filed under seal, and shall be segregated in the files of the Commission, and shall be withheld from inspection by any persons not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, as a result of Public Information decision by the Attorney General, or, after notice to the parties and hearing, pursuant to the order of the presiding officer, the Commission, or a court having jurisdiction.

Good Faith Use of Material

To the extent that such efforts will not damage a party's presentation of its position in these proceedings, each party shall use its best efforts to phrase deposition and other discovery questions, prefiled testimony, questions asked on live examination of a witness, briefs, other pleadings and oral argument in a way which will eliminate or minimize the need for documents in the record to be under seal. Any party intending to refer to Confidential Information during a hearing in a proceeding shall, as soon as possible, provide advance notice of this to the parties, and the presiding officer, identifying with particularity the Confidential Information in question. The party asserting confidentiality bears the burden of proving that the alleged Confidential material should be admitted under seal.

If it becomes necessary, or at the request of a party, the presiding officer may order additional guidelines addressing the procedures and standards for admissibility of alleged Confidential materials.

All persons who may be entitled to receive, or who are afforded access to, any Confidential Information by reason of this Protective Order shall neither use nor disclose the Confidential Information for any purpose other than preparation for and conduct of the Proceeding in which the information was furnished before this Commission or any resulting proceedings before any judicial tribunal. All such persons shall use their best efforts to keep the Confidential Information secure in accordance with the purposes and intent of this Protective Order. To this end, persons having custody of any Confidential Information shall keep the documents properly secured during all times when the documents are not being reviewed by a person authorized to do so.

Upon the completion of Commission proceedings and any appeals thereof, Confidential Information received by the parties and all copies thereof shall be returned to the producing party or destroyed, at the option of the producing party, absent a contrary order of the Commission or agreement of the parties. Any notes or work product prepared by the receiving party which were derived in whole or in part from the confidential information shall be destroyed at that time. Material filed with the Commission will remain under seal at the Commission and will continue to be treated as Confidential Information under the Public Information Act. The Commission may destroy confidential information in accordance with its records retention standards.

Other Rights Preserved

This Protective Order shall in no way constitute any waiver of the rights of any party to contest any assertion of confidentiality or to appeal any finding that specific information is Confidential Information or should be subject to the protective requirement of this Order. The designation of any information as Confidential Information may be challenged to the presiding officer, the Commission, or a court having jurisdiction for a determination, after hearing, as to whether said material should be so classified. Nothing in this Protective Order shall be deemed to prevent the Commission from raising on its own motion the correctness of designating information as Confidential Information. Nothing in this Protective Order, or any order of the Commission adopting this Protective Order, shall be construed as an order by the presiding officer or the Commission that the materials exchanged under this Protective Order are in fact entitled to Confidential treatment. Nothing in this Protective Order shall be construed as requiring any party to produce any information that would otherwise be exempt from discovery as a matter of law (e.g., attorney-client privilege or attorney work-product materials), nor as altering the procedures set forth in 16 Tex. Admin. Code § 22.144(d)(2) for asserting any objections to discovery based on a claim of privilege or exemption.

The parties affected by the terms of this Protective Order further retain the right to question, challenge and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of the Protective Order in response to requests for information or other modes of discovery, and the right to cross-examine or any applicable grounds.

This Protective Order may be superseded by an order of the presiding officer, the Commission, or a court of competent jurisdiction after due notice and an opportunity for comment by affected parties. Titles or subtitles in this Order are informational only and are not intended to affect the textual provisions.

Signed on this the ____ day of March 2003.

D. DIANE PARKER
ARBITRATION PROJECTS MANAGER

EXHIBIT A

**DOCKET NO. 24515
PROTECTIVE ORDER**

I agree to comply with and be bound by the terms and conditions of this Protective Order.

SIGNATURE: _____

NAME PRINTED: _____

TITLE: _____

ADDRESS: _____

REPRESENTING: _____

EMPLOYER: _____

DATE: _____

**EXHIBIT B
DOCKET NO. 24515
PROTECTIVE ORDER**

STATEMENT OF RECEIPT

I, _____, acknowledge receipt of the original copy of the confidential information and agree to maintain in accordance with the terms of this protective order. These copies are to remain in the possession of:

Name: _____

Title: _____

Address: _____

Signed on this _____ **day of** _____, 2002.

Name (Printed)

**EXHIBIT C
DOCKET NO. 24515
PROTECTIVE ORDER**

The documents listed below have been copied pursuant to the terms of the Protective Order applicable to this Proceeding.

These copies will remain in the custody of:

Name: _____

Title: _____

Address: _____

Signed on this ____ **day of** _____, 2003

Name (Printed):

**ATTACHMENT 1
DOCKET NO. 24515
PROTECTIVE ORDER**

**Copies of the following documents have been provided to Counsel of Record,
pursuant to the terms of the Protective Order applicable to this proceeding.**
