

Memorandum

To: Dale Roberts, Secretary
CC: Wess Henderson
Bill Voight
From: Natelle Dietrich
Through: John Van Eschen
Date: 4/3/2003
Re: Proposed Rulemaking Language - 4 CSR 240-2.135

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Missouri Public
Service Commission

The Telecommunications Department Staff offers the following informal comments on the proposed rulemaking language for 4 CSR 240-2.135 (Protective Order Rules).

The Telecommunications Department Staff supports the Single Tier Option, with the suggestions as proposed on pages 2 and 3 of this Memorandum incorporated. The disclosure agreements as anticipated by this method have been used in recent telecommunications cases such as TO-2001-455 and TO-2001-438 and there have been no claims of information being disclosed improperly through these "side" agreements. Incorporating such requirements into a protective order rule will eliminate the need for individual companies to negotiate these "side" agreements and will place all companies on a level playing field when requesting/receiving confidential information. Further, by allowing internal experts automatic access to confidential information without the "side" agreements, parties will be able to provide the Commission with well-informed, appropriately analyzed positions and evidence in a timely manner.

Under the current two-tier option, the lines between public information and highly confidential information have become blurred. There have been instances recently where it has been questioned whether the wholesale rates charged to other telecommunications carriers or the retail rates charged to consumers should be confidential since the underlying information used to calculate those rates was considered confidential. In effect, carriers and consumers could be asked to issue a blank check because their rates are confidential.

Should the Commission prefer a two-tier option, the Telecommunications Department Staff supports the HC Modification Option, with the suggestions as proposed on page 2 of this Memorandum incorporated. This option places the burden of proof on the company designating the information as highly confidential instead of requiring the company challenging the designation to prove its claims.

Staff also provides the following informal comments and suggestions on the specific content of each option as proposed.

General Comments: (Note: for purposes of these comments, confidential includes both highly confidential and confidential designations).

1. Section (1) of each proposed rule defines the type of information to be considered confidential and/or proprietary. These terms, with the exception of "information relating to the security of a company's facilities", are taken directly from the protective order language that has been in use for years. These terms are vague and overly broad. For instance: What is considered "business information"; does employee-sensitive information include such things as salaries and benefits, or is employee-sensitive information any information marked "for employees' eyes-only"; what is considered "financial information"? In a competitive telecommunications environment, these terms are antiquated because they do not adequately delineate the difference between wholesale and retail information. For instance, in many telecommunications cases, the confidentiality of cost studies has been an issue. Are cost studies considered "financial" or is financial limited to those things used to compile the companies' 10-K forms?

The Telecommunications Department Staff suggests these terms either be defined in a definition section of a rulemaking or be further clarified as to what type of information is included in the various terms.

2. The rules anticipate the party designating information as confidential and/or proprietary "must inform, in writing, the party seeking discovery of the reason..." Should the rules include a provision for electronic notification of such designation and reasons?

3. The rules require all confidential and proprietary information to be returned to the party claiming confidential treatment. Should the rules also contain a provision either prohibiting the reproduction of such material or requiring any reproductions to also be returned to the party claiming confidential or proprietary treatment?

Specific Comments:

HC Modification Option:

1. This option requires the party seeking to protect information with a highly confidential designation to file a motion with the Commission specifying the nature of the information for which heightened protection is sought. It is not clear whether discovery is postponed during this process. In other words, will the information be released as highly confidential until otherwise specified by the Commission? Or, is everything put on hold pending the Commission's decision on the confidentiality issue?

Single Tier Option:

1. Section (1) outlines the various terms considered confidential. The section ends with the statement, "Confidential information also includes trade secrets; and private, technical, financial, and business information." The Telecommunications Department Staff suggests that these be numbered consistent with the section. (i.e., (vii) trade secrets; (viii) private technical, financial and business information).