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Missouri Public Service Commission

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① SCW
FOR
MAY 15

April 4, 2003

VIA ELECTRONIC MAIL AND HAND DELIVERY

Judge Dale Hardy Roberts
Executive Secretary
Missouri Public Service Commission
Governor State Office Building, 9th Floor
Jefferson City, Missouri 65102
daleroberts@psc.state.mo.us

Re: Protective Order Rule - Proposed Rulemaking

Dear Judge Roberts:

Thank you for the opportunity for informal comment on the proposed rulemaking for protective orders issued by the Missouri Public Service Commission (the Commission). In response to the invitation for informal comment, the Jefferson City, Missouri law firm of Brydon, Swearngen & England P.C. respectfully offers the following:

SUMMARY

1. **The Commission should continue to distinguish and protect both Highly Confidential and Proprietary information.**
2. **Information related to the security of a company's facilities should be designated as highly confidential.**
3. **Information that is not subject to disclosure under the rules of the federal Securities and Exchange Commission (SEC) should be included in the Commission's definition of Highly Confidential information.**
4. **The protective order may be codified into a rule.**

COMMENTS

1. **The Commission should continue to distinguish and protect both Highly Confidential and Proprietary information.**

The Commission's present protective order recognizes the need for two levels of protected information: Highly Confidential and Proprietary. In addition, the protective order provides that only attorneys and outside experts may review sensitive information. These protections effectively balance the rights of parties seeking to review sensitive information and the rights of the parties that disclose the sensitive information.

Competitively sensitive information is one type of information that is appropriately protected as Highly Confidential under the Commission's standard form protective order. Indeed, the need for the two-tiered protective order is essential in telecommunications cases involving direct competitors.

For example, the Commission is presently investigating the state of competition in the exchanges served by Sprint Missouri, Inc. (Sprint), an incumbent local exchange carrier. In that case, Sprint sought highly confidential, company-specific information from its direct competitors about, among other things, marketing plans, business strategies, and customer information. The Commission rejected Sprint's request and stated:

Under the standard protective order that the Commission has used for many years, internal company experts are not permitted to review highly confidential information. If a company wishes to utilize highly confidential information in its case, it must hire an outside expert to review that information, and perhaps offer testimony about that information, without disclosing the highly confidential information to employees of the company. **This restriction protects particularly sensitive information from disclosure to competitors who might otherwise use that information to gain a competitive advantage over the disclosing company.**

* * *

Sprint has not shown that the current protective order will cause it any particular hardship. There is no reason to believe that the standard protective order will deny Sprint its right to due process. Sprint is free to employ an outside expert to evaluate any information it may obtain from its competitors. Requiring Sprint to hire an outside expert may increase Sprint's costs and it may be inconvenient, but it is the current policy and **ensures that confidential competitive information is protected**.

In the Matter of an Investigation into the State of Competition in the Exchanges of Sprint Missouri, Inc., Case No. IO-2003-0281, *Order Denying Motion for Entry of a Modified Protective Order*, issued March 25, 2003 (emphasis added).

Likewise, in the Commission's investigation of the access rates charged by Missouri's telephone companies, the Commission explained the balancing of interests that allows outside consultants to have full access to analyze and review Highly Confidential information. The

Commission stated:

[D]ata is designated "Highly Confidential" because access to it may well confer an unfair advantage upon a competitor. AT&T's desire to have access to that data for its employees must be balanced against the rights of other parties who have an interest in that data.

Investigation of Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in Missouri, Case No. TO-2001-65, Order Regarding Protective Order, issued July 8, 2002.

The present protective order allows parties to challenge the confidential designation of information and allows the Commission or the Regulatory Law Judge to rule on any challenge to such designations prior to the hearing or at the hearing. Moreover, if the terms of the protective order produce undue hardship, then a party may ask for a waiver. The Commission's present protective order balances the parties' need to review sensitive material with the equally important need to protect that such information from disclosure. In order to protect competitively sensitive information, the Commission should retain its current two-tiered protective order.

2. **Information related to the security of a company's facilities should be designated as highly confidential.**

All three of the variations of the draft protective order rules posted on the Adjudication Division's web page recognize that information related to the security of a company's facilities should be designated as confidential. Express protection for such information is an appropriate measure, and it should be included in all protective orders issued by the Commission. As discussed above, the "Highly Confidential" designation should be retained, and information about the security of a company's facilities should be classified as Highly Confidential. *However, if the Commission chooses to move to a single classification of "Confidential" information, then it should allow the opportunity for parties to petition for further restrictions, depending on the circumstances, to protect highly sensitive security information.*

3. **Information that is not subject to disclosure under the rules of the federal Securities and Exchange Commission (SEC) should be included in the Commission's definition of Highly Confidential information.**

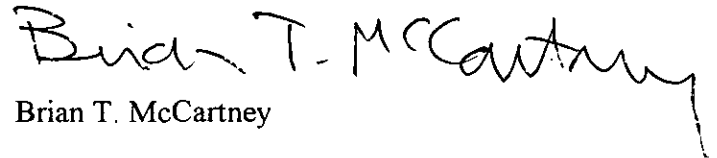
The protective order's definition of Highly Confidential information should include information that is not subject to disclosure under the rules of the federal Securities and Exchange Commission (SEC). Over the years, such information has been treated as Highly Confidential by the parties, generally without dispute. This practice should be spelled out in the rule with language that includes "information that is not subject to disclosure under the rules of the SEC" in the definition of Highly Confidential.

4. **The protective order may be codified into a rule.**

Codifying the level of protection afforded by the protective order into a rule may add certainty and save time for the parties, the judges, and the Commission. A rule on the protective order should be flexible enough to allow requests for modification depending on the circumstances of each case.

Thank you for the opportunity to submit informal comments on the draft rules under consideration by the Commission. Please feel free to contact me at your convenience if you have any questions or thoughts about these comments.

Sincerely,

A handwritten signature in black ink that reads "Brian T. McCartney". The signature is written in a cursive, slightly slanted style.

Brian T. McCartney