

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-971140
	)	
Complainant,	)	
	)	
v.	)	FIRST SUPPLEMENTAL ORDER
	)	
WASHINGTON EXCHANGE CARRIER ASSOCIATION, et al.,	)	PROTECTIVE ORDER
	)	
Respondents.	)	
.....	)	

**BACKGROUND**

Pursuant to the request from Washington Exchange Carrier Association and Commission Staff the Commission issues the following Protective Order governing disclosure of proprietary and confidential information in this proceeding. The Commission has provided the parties an opportunity to comment on the proposed Protective Order, has duly considered such comments, and has included language in the order requested by the parties. The Commission notes the instant Protective Order is patterned after the Protective Order issued in Docket No. UT-901029, In the Matter of the Application of ELECTRIC LIGHTWAVE, INC., for an Order Authorizing Registration of Applicant as a Telecommunications Company. It is likely that proprietary and confidential information will be provided in this proceeding, and that, absent the existence of this Order, a significant risk of disclosing truly confidential material to large numbers of parties will exist. Based upon the record and file herein, the Commission hereby makes and enters the following Protective Order to govern the discovery and use of proprietary and confidential documents in this proceeding.

**ORDER**

A. General Provisions.

1. Confidential Information. All access, review, use and disclosure of the correspondence, documents, data, studies, methodologies or other information or materials designated by a party to this proceeding as proprietary (hereafter referred to as "Confidential Information") shall be governed by the terms of this Order and by WAC 480-09-015. Parties shall in good faith designate documents as Confidential Information by a proprietary stamp. The placing of such a stamp or placing the word "confidential" on the first page of an exhibit will indicate that the entire document is

Confidential Information. This practice is disfavored. A stamp on any other individual page will indicate that only that page is Confidential Information. Generally, the Commission expects confidential information to include only numbers, customer names, and planning details. The Commission expects the parties to delete such information from the primary exhibits and provide these "confidential" deletions under separate cover.

The Commission may reject a filing which fails to segregate confidential information, or categorizes as confidential that which is clearly public information. The Commission intends to minimize the amount of "confidential" information so as to maximize the amount of public information. The stamp should read: "Confidential Per Protective Order in WUTC Docket No. UT-971140."

2. Purpose of Access and Use; Confidentiality. No Confidential Information shall be requested, reviewed, used or disclosed except for purposes of this proceeding. Confidential Information shall be requested, reviewed, used or disclosed only by or to the persons authorized under this Order, and only in accordance with the terms specified herein.

B. Disclosure of Confidential Information.

3. Persons Permitted Access. No Confidential Information shall be made available to anyone other than counsel for the parties to this proceeding, including counsel for the Commission; provided; however, that access to any Confidential Information may be authorized by said counsel, solely for the purposes of this proceeding, to those persons indicated by the parties as being their experts in this matter. No such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the responding party). Any disputes concerning the above shall be brought before the Administrative Law Judge for a ruling.

4. Nondisclosure Agreement. Prior to being given access to any Confidential Information as provided in paragraph 3 above, counsel or expert shall agree in writing to comply with and be bound by this Order in the form of Exhibit A (attorney) or B (expert) attached hereto, and counsel for the party seeking access to the Confidential Information shall deliver to counsel for the party producing Confidential Information a copy of such written agreement which shall show each signatory's full name, permanent address, the party with whom the signatory is associated and in the case of experts, the employer (including the expert's position and responsibilities). The party seeking access shall send a copy of the agreement to the Commission and, in the case of experts, the responding party shall complete its portion and likewise file same with the Commission or waive objection as described in Exhibit B.

5. Access to Confidential Information. Copies of documents shall be provided in the same manner as customary under Commission rules and practice. Requests for special provisions for inspection of documents must be submitted to the Administrative Law Judge if not agreed upon by the parties. The parties hereto shall not distribute copies of Confidential Information to, nor shall they discuss their contents with, any person(s) not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order shall be deemed to warrant that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

C. Use of Confidential Information in This Proceeding.

6. Protected Use by Agreement. Any party desiring to use any Confidential Information in the course of this proceeding, including but not limited to testimony to be filed by the party, exhibits, direct and cross-examination of witnesses, rebuttal testimony or a proffer of evidence, shall give reasonable notice of such desire, and attempt in good faith to reach an agreement to use the Confidential Information in a manner which will protect its trade secret, proprietary or confidential nature. In attempting to reach an agreement, the parties shall consider such methods as deletions of material from the information requested to be made public, characterizations of data rather than disclosure of substantive data, and aggregations of data in an effort to protect the party's rights while at the same time allowing the adverse party to present the evidence necessary to its case: Provided, That these provisions do not restrict the right of any party to fully engage in cross-examination, as allowed by statute and the Commission rules. If it is necessary to use confidential information in cross-examination, appropriate notice shall be given to the Administrative Law Judge and arrangements to protect the Confidential Information shall be made at that time.

7. Right to Challenge Admissibility. Nothing herein shall be construed to restrict any party's right to challenge the admissibility or use in this proceeding of any Confidential Information on any legitimate ground, including but not limited to competence, relevance, materiality or privilege. At any hearing to determine the confidentiality of information, the burden of proof to show that such information is properly classified as confidential shall be upon the party asserting the claim.

8. Use of Confidential Information During Hearings; Reference to Confidential Information in Briefs, Motions, or Other Filings. To the extent that reference is to be made to any Confidential Information by counsel or persons afforded access thereto during any aspect of this proceeding including, but not limited to, motions, briefs, arguments, direct testimony cross-examination, rebuttal, and proposed offerings of proof, any public reference (i.e., any reference that will not be placed in a sealed portion of the record) shall either be solely by title or by its exhibit

reference, thereby not disclosing the Confidential Information, and any other reference shall be segregated so that, if written, it is marked "Confidential Information," and access to it shall be given solely to the Commission and specified members of the Commission staff and to counsel and experts who have executed a written agreement to be bound pursuant hereto and shall be withheld from inspection by any person not bound by the terms of this Order. In oral testimony, cross-examination or argument, public references to be made shall be on such prior notice as is feasible to the affected party and in any event on sufficient notice to clear the hearing room of persons not bound by this Order.

9. Admission and Confidential Information Under Seal. That part of the record of this proceeding containing Confidential Information, including all exhibits, writing, direct testimony, cross-examination, argument, responses to discovery procedures, etc., shall be sealed for all purposes, including administrative and judicial review, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to an Order of the Commission.

10. Challenge to Confidentiality. In the event any party who desires to use or substantively refer to certain Confidential Information during this proceeding disputes the trade secret, proprietary or confidential nature of such Confidential Information, that party shall apply to the Administrative Law Judge for a determination. Any hearing on such application shall be conducted in camera, and the Confidential Information shall be treated in all respects as protected under the terms of the Order while the trade secret, proprietary or confidential nature of the Confidential Information is in dispute. In the event of a ruling against confidentiality, the Confidential Information shall continue to be protected under this Order for ten days thereafter, to enable the producing party to seek a stay pending Commission or judicial review.

11. Return of Confidential Information. Every person possessing any Confidential Information (including notes taken during the review of the Confidential Information which make substantive reference to such Confidential Information), shall return all Confidential Information to the party producing it, or certify in writing that all copies and substantive references to confidential information in notes have been destroyed, within thirty days following completion of this proceeding, including any administrative or judicial review. These provisions apply to all copies of exhibits which contain confidential information and for that reason were admitted under seal. The only exceptions are that exhibits may be preserved by counsel as counsel records, and will be preserved by the Secretary of the Commission as part of the agency's official records.

12. Freedom of Information Laws. Until such time as any particular Confidential Information is found to be not of a trade secret, proprietary or confidential nature by a court of competent jurisdiction (or, absent judicial proceedings or review, by the Commission), any federal agency that has access to and/or receives copies of the Confidential Information will consider and treat the Confidential Information as within the exemption from disclosure provided in the Freedom of Information Act as set forth at 5 U.S.C. § 552 (b)(4); and any state agency that has access to and/or receives copies of the Confidential Information will consider and treat the Confidential Information as within the exemption from disclosure provided in RCW 42.17.310(1)(h) and (q).

13. Modification. The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.

14. Violation of this Order. Violation of this Order by any party to this proceeding or by any other person bound by this Order by reason of unauthorized use of unauthorized divulgence of Confidential Information shall subject such party or person to liability for damages and penalties as generally provided by law.

DATED at Olympia, Washington, and effective this 16<sup>th</sup> day of October 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ANNE LEVINSON, Chair



WILLIAM R. GILLIS, Commissioner