

Service Date: December 28, 1990

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

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IN THE MATTER of the Application)	UTILITY DIVISION
of U.S. West Communications RE:)	
Montana Network Improvement and)	DOCKET NO. 90.12.86
Rate Stability Plan Cost of)	
Service and Rate Design.)	ORDER NO. 5535

PROTECTIVE ORDER

On December 5, 1990 U.S. West Communications (USWC or Company) filed a motion with the Montana Public Service Commission (PSC or Commission) for a protective order pursuant to < 69-3-105(2), MCA, with respect to certain information to be submitted in its upcoming filing. Said filing was received by the PSC on December 14, 1990 and has been designated Docket No. 90.12.86.

Section 69-3-105(2), MCA, states: "The commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, required to carry out its regulatory function." In its motion, USWC asserts that its filing will contain proprietary information; and, "it is essential that such information be protected as soon as it is received by the Commission."

The Commission considers it appropriate to issue a Protective Order, to provide a procedure for balancing the public's right to know against USWC's right to nondisclosure of confidential trade secret information. This Order affords interested parties an opportunity to challenge the proprietary designation. In issuing

this Order, the Commission is not deciding or expressing any opinion as to whether the subject information is or is not confidential trade secret information under Montana law.

Based upon the foregoing, the following Protective Order shall be in effect with respect to information claimed to be of a trade secret nature submitted by any party in Docket No. 90.12.86 (hereinafter "providing party" or "providing parties"):

Proprietary Information. All documents, data and information furnished pursuant to any interrogatories or requests for information, subpoenas, depositions, other modes of discovery, or pursuant to Commission order, or otherwise submitted to the Commission or intervenors in this docket, that are 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 "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.

Terms of Disclosure. All Proprietary Information made available pursuant to this Order shall be given solely to counsel for the parties, the PSC and PSC staff, and shall not be used or disclosed except for the purposes of this docket, or as otherwise permitted by subsequent PSC order. Counsel may authorize access to confidential information by that party's experts as follows:

(a) Five (5) days written notice (counted from the date of receipt by the providing party) shall be given to the party that produced the Proprietary Information. The notice shall contain the name, title, job description, description of previous positions and experience, and area of expertise of any person to be given access to such information. Any such expert may be an employee of a party, provided that such employee's duties are solely dedicated to regulatory activities on behalf of the party, and such employee's duties are not related to marketing or strategic planning of competitive products or services, including those provided by any party to this proceeding.

(b) If it is the good faith position of the party that produced the Proprietary Information that the designated person should not be given access to the information, that party must respond to the notice with a written objection.

(c) If the party that proposed that access be given to the designated person does not receive written objection by the party that produced the Proprietary Information within five (5) days after receipt of the written notice, counsel for that party shall be authorized to provide access to the information to the designated person.

(d) If the party that produced the Proprietary Information objects to access by the designated person to Proprietary Information, the party that requested such access and the party that produced the information shall attempt to resolve the objection. If these parties are unable to resolve the objection, either of them may apply to the Commission for a ruling as to the access proposed. In that event, access to the information shall not be given to the designated person, pending resolution of the objection by the Commission.

(e) The standard to be applied by the Commission in determining a question of expert access to Proprietary Information shall be whether access by the individual in question would be reasonably likely to jeopardize the confidential nature of the information sought. A party dissatisfied with a decision of the Commission may appeal to the District Court, and, pending appeal, the information shall not be disclosed to the designated person.

(f) Any member of the Public Service Commission, and any member of its staff, the Montana Consumer Counsel (MCC), and any member of his staff, may have access to any Proprietary Information made available pursuant to this Order and shall be bound by the terms of this Order.

Nondisclosure Agreement. Prior to giving access to Proprietary Information as contemplated in Paragraph 2 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 party and the Commission.

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.

Challenge to Confidentiality. This Order establishes a procedure for the expeditious handling of information that the providing parties claim is confidential; but it shall not be construed as an agreement or ruling on the confidentiality of any such information. A party to this proceeding or other interested person or entity with proper standing, or the Commission on its own motion, may challenge USWC's claim of confidentiality at any time.

Any such Petition or Motion must be served upon the providing party, and the providing party may file a response or objection within 14 days thereafter. The 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 parties 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 proprietary 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 party or 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 PROTECTIVE ORDER IN DOCKET NO. 90.12.86."

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 disclose such information or use it in the public record for a period of seven (7) business days thereafter, so that USWC shall be afforded a reasonable opportunity to seek a stay or other appropriate relief.

Seal. While in the custody of the PSC and MCC, materials subject to this order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 90.12.86," and due to their private nature they 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.

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.

(a) Use In Commission Orders. The Hearing Examiner or the Commission will attempt to refer to Proprietary Information in only a general or conclusory 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.

The PSC and its counsel and staff, and the MCC and its counsel and staff, shall be bound by the terms of this Order.

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 this 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.

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 purpose and intent of this Order.

Compliance with PSC Order Nos. 5354d and 5354e. With respect to the Proprietary Information provided pursuant to the terms of this Order, USWC (and other providing parties) shall comply with all the requirements and directives of PSC Order No. 5354d, Finding of Fact No. 40, as modified in Order No. 5354e, Finding of Fact No. 6 (USWC Docket No. 88.1.2, et al.).

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 or entity to contest any assertion or finding on the right of privacy, confidentiality or privilege, and to appeal any such determination of the Commission.

Amendment or Modification. The Commission retains jurisdiction of this matter and may alter or amend the provisions hereof as it deems appropriate, upon motion by an appropriate party or entity and reasonable notice.

DOCKET NO. 90.12.86, ORDER NO. 5535
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DONE AND DATED this 21st day of December, 1990 by a vote of 5 -
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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

DANNY OBERG, Vice Chairman

JOHN B. DRISCOLL, Commissioner

REX MANUAL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)