

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Request of Covad to  
Define and Price a Line Sharing over DLC  
UNE to be offered by Qwest

PUC Docket No. P-421/CI-02-293  
OAH Docket No. 12-2500-14765-2

## **PROTECTIVE AGREEMENT AND ORDER**

WHEREAS, the parties to this proceeding may request each other to produce certain valuable confidential, trade secret and business information including third party information, i.e., cost studies, computer models, workpapers, analyses and other documentation (“Confidential Information”) upon which any such party will rely to demonstrate the existence of costs and to support rates and charges associated with the provision of the interconnection services and unbundled facilities and wholesale services requested by the competitive entrants.

AND WHEREAS, either (1) no protective order has been issued by the Commission and without such order or its equivalent, the parties are unwilling to produce those responses which in the party’s view are legally protected trade secret or otherwise confidential business information, or (2) such protective order as has been issued, does not specifically refer to and protect the vendor proprietary data in a responding party’s possession, production of which is desired by the requesting party. The requesting parties desire the production of such information.

Therefore, in order to make these materials available for purposes of this proceeding, the parties have entered into the following Protective Agreement regarding the protection of confidential, trade secret and business information:

1. (a) Confidential Information. All documents, data, information, studies and other materials furnished or made available pursuant to any interrogatories or

requests for information, subpoenas, depositions, or other modes of discovery that are claimed by the parties to be of a trade secret, competitive or business nature shall be furnished pursuant to the terms of this Agreement, and shall be treated by all persons accorded access thereto pursuant to this Agreement as constituting confidential, competitive, trade secret, and business information, and shall neither be used nor disclosed except for the purpose of such proceedings, and solely in accordance with this Agreement. All material claimed to be Confidential Information shall be so marked by the party or its affiliates by stamping each individual page with the designation, "CONFIDENTIAL -- SUBJECT TO PROTECTIVE AGREEMENT." All copies of documents so marked will be made on yellow paper. For purposes hereof, notes made pertaining to or as the result of a review of Confidential Information shall be subject to the terms of this Agreement. Parties serving on disk should serve both a confidential and non-confidential disk clearly marked as such.

(b) Use of Confidential Information and Persons Entitled to Review. All Confidential Information made available pursuant to this Agreement shall be given solely to counsel for the requesting party and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by said counsel, solely for the purpose of this proceeding, to those persons indicated by counsel as being the party's experts or witnesses in this matter.

(c) Special limitation on use for Marketing Sensitive Information. The disclosing party may designate the Confidential Information as "Marketing Sensitive" information if it determines in good faith that the information made available would disclose product development, marketing plan or customer information. Such Confidential Information will not be made available to any

employee of a party with responsibility for marketing, product development or market entry.

(d) Identification of persons receiving access to Confidential Information.

Counsel for each party receiving such information as described in paragraphs (b) and (c) above will provide written notice to the disclosing party listing the names and firm or company affiliation of all experts to whom such information will be disclosed. In addition, if such experts are employees of the party or an affiliate, a general description of such employee's job responsibilities will be part of the notification required in this paragraph. Such notice will be made in sufficient time prior to receipt of information to provide reasonable opportunity for objection by the disclosing party.

(e) Special Limitation on Use for Vendor Proprietary Information.

If information [containing Confidential Information] as claimed by a third party vendor to be confidential ("Vendor Proprietary Information") is to be provided by a responding party, each party receiving such information will provide written notice to the involved vendor indicating the information to be received and listing the names and firm or company affiliation of all attorneys and experts to whom such information will be disclosed. Such notice will be made in sufficient time prior to receipt of information to provide reasonable opportunity for intervention or objection by vendor(s). This notice is in addition to any notice that U S WEST may be obligated to make to vendors as a result of its contractual agreements with them. Similar notification and opportunity to object will be made in the event that additional attorneys or experts are to be given access by any party to vendor proprietary information during the course of any such proceeding. No expert gaining access to Vendor Proprietary Information may be an officer, director, employee, or major shareholder (holding 5% or more of total issued stock) of any corporation, partnership or other business

entity which is a competitor or customer of a vendor whose proprietary information is made available hereunder. Any dispute concerning this restriction which cannot be resolved by the parties, may be brought before the arbitrator for resolution.

(f) Nondisclosure Agreement. Prior to giving access to Confidential Information as contemplated in paragraph (b) above to any expert, whether or not such expert is a person designated to testify in any such proceeding, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Agreement to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this Agreement. In connection therewith, Confidential 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 Exhibit "A" Nondisclosure Agreement (Exhibit "A") shall require the person to whom disclosure is to be made to read a copy of this Protective Agreement and to certify in writing that he or she has reviewed the same and has consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party at least 24 hours, excluding weekends and holidays, prior to the expert gaining access to the Confidential Information.

(g) Availability of Documentation. As to highly sensitive documents and information, the parties shall have the right, at their option, to refuse to provide copies to counsel for the other party or to its experts as defined in paragraph 1(b). Should the parties refuse to provide copies, such documents shall be made available for inspection and review by counsel or experts at a place and time mutually agreed upon by the parties. Where copies are not provided, the

counsel or expert reviewing the Confidential Information may make limited notes regarding the Confidential Information for reference purposes only. Such notes shall not constitute a verbatim or substantive transcript of the Confidential Information. For purposes hereof, notes made pertaining to or as the result of a review of Confidential Information shall be considered Confidential Information and subject to the terms of this Agreement. If pursuant to order of the ALJ or voluntarily a party decides to provide copies of documents in this category to outside counsel for the opposing party or an expert witness, these documents shall not be copied by the opposing party and shall be returned or destroyed at the end of the proceeding.

2. (a) Challenge to Confidentiality. This Agreement establishes a procedure for the expeditious handling of Confidential Information; it shall not be construed as an agreement or ruling on the confidentiality of any such document.
- (b) In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute Confidential Information or Marketing Sensitive information or highly sensitive documents and information referred to in paragraph 1(b), (c) or (g) above, the party objecting to the classification as Confidential Information or Marketing Sensitive information or highly sensitive documents and information shall forthwith submit the said matters to an arbitrator for review pursuant to this Agreement.
- (c) Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents that have been designated as Confidential Information removed from the protective requirements of this Agreement. If the confidential or proprietary nature of this information is challenged, resolution of the issue shall be made by an arbitrator after proceedings *in camera* which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such

confidential matter shall be present. The record of such *in camera* hearings shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE AGREEMENT IN ARBITRATION DOCKET."

3. (a) Receipt into Evidence. Provision is hereby made for receipt of evidence in this proceeding under seal. At least ten (10) days prior to the use of or substantive reference to any Confidential Information as evidence, the party intending to use such Confidential Information shall make that intention known to the providing party. The requesting party and the providing party shall make a good faith effort to reach an agreement so the information can be used in a manner which will not reveal its trade secret, confidential or proprietary nature. If such efforts fail, the providing party shall separately identify, within five (5) business days, which portions, if any, of the documents to be offered or referenced on the record containing Confidential Information shall be placed in the sealed record. Only one (1) copy of documents designated by the providing party to be placed in the sealed record shall be made and only for that purpose. Otherwise, parties shall make only general references to Confidential Information in this proceeding.
- (b) In Camera Hearing. Any Confidential Information which must be orally disclosed to be placed in the sealed record in this proceeding shall be offered in an *in camera* hearing, attended only by persons authorized to have access to the Confidential Information under this Agreement. Similarly, cross examination on or making substantive reference to Confidential Information as well as that portion of the record containing references thereto, shall be marked and treated as provided herein.
- (c) Return. Unless otherwise ordered, Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, shall continue to be subject to the protective requirements of

this Agreement, and shall be returned to counsel for the providing party within 30 days after final settlement or conclusion of the applicable matter including administrative or judicial review thereof.

4. Use in Pleadings. Where reference to Confidential Information in the sealed record is required in pleadings, cross-examinations, briefs, argument or motions, it shall be by citation of title or exhibit number or by some other nonconfidential description. Any further use of or substantive references to Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the arbitrator under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed a Nondisclosure Agreement. All the protections afforded in this Agreement apply to materials prepared and distributed under this paragraph.

5. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Agreement shall neither use nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of these proceedings, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Agreement.

6. Reservation of Rights. The parties hereto affected by the terms of this Protective Agreement 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 this Protective Agreement in response to interrogatories, requests for information or documents or cross-examination on the grounds of relevancy or materiality.

7. No Waiver. This Agreement shall in no way constitute any waiver of the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege.

8

Information Provided to State Agencies. The files of the Public Utilities Commission, the Office of Administrative Hearings, the Department of Commerce, and other state agencies containing trade secret data or otherwise protected information shall be treated as required by Minn. Stat. §§ 13.01 et seq. and 138.161 et seq. and shall not be subject to the return requirements of this Protective Agreement and Order. However, experts and consultants retained by an agency are subject to all the requirements of this Protective Agreement and Order

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ACCEPTED AND AGREED by the undersigned counsel on behalf of the parties:

Date:

Covad Communications Company

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By: \_\_\_\_\_

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Date:

Qwest Corporation

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By: \_\_\_\_\_

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**IT IS SO ORDERED** this 8<sup>th</sup> day of August, 2002.

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s/Steven M. Mihalchick

**Steve M. Mihalchick**

**Administrative Law Judge**

**EXHIBIT A**  
**TO**  
**PROTECTIVE AGREEMENT AND ORDER**

**NONDISCLOSURE AGREEMENT**

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I, the undersigned, hereby acknowledge that I have read the attached Protective Agreement and Order dated August 7, 2002, in Minnesota Public Utilities Commission Docket No. P-421/CI-02-293, OAH Docket 12-2500-14765-2, and understand the terms thereof and agree to be bound by all such terms. Without limiting the generality of the foregoing, I agree not to disclose to any person or entity not authorized to receive materials designated "TRADE SECRET – NOT FOR PUBLIC DISCLOSURE" or "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE AGREEMENT" under the terms of said Protective Agreement and Order, or any copies of extracts of information derived therefrom, which have been disclosed to me. I further agree to use any such materials disclosed to me solely for the purpose of this proceeding and for no other purpose.

I hereby submit myself to the jurisdiction of the Office of Administrative Hearings in Minnesota and the Minnesota Public Utilities Commission for the purpose of enforcing said Protective Agreement and Order.

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Date: \_\_\_\_\_, 2002

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Signature

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\_\_\_\_\_  
Type or Print Name

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\_\_\_\_\_  
Address

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Name of Employer

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Name of Party

