{PRIVATE } (Decision No. C93-37){PRIVATE }

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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{ PRIVATE } IN THE MATTER OF THE APPLICATION OF U S WEST COMMUNICATIONS, INC., FOR WAIVERS OF RULE 5 OF THE COMMISSION'S RULES FOR COLLECTION AND DISCLOSURE OF PERSONAL INFORMATION OBTAINED BY PUBLIC UTILITIES, 4 CODE OF COLORADO REGULATIONS 723-7, TO PERMIT THE OFFERING OF CALLER IDENTIFICATION SERVICE.	DOCKET NO. 91A-462T
IN THE MATTER OF THE APPLICATION OF U S WEST COMMUNICATIONS, INC.'S ADVICE LETTER NO. 2211 CONCERNING CUSTOM LOCAL AREA SIGNALING SERVICES.	DOCKET NO. 91S-548T
IN THE MATTER OF THE APPLICATION OF U S WEST COMMUNICATIONS, INC.'S ADVICE LETTER NO. 2235 CONCERNING THE "CALL TRACE" CUSTOM LOCAL AREA SIGNALING SERVICE.	DOCKET NO. 92S-040T

COMMISSION FINAL AND APPEALABLE ORDER:
(1) DENYING MOTION TO STRIKE CITY OF DENVER'S APPLICATION FOR REHEARING;
(2) DENYING MOTION TO STAY DECISION NO. C92-1303;
(3) DENYING ALL APPLICATIONS FOR REHEARING, RECONSIDERATION, AND REARGUMENT OF DECISION NO. C92-1303;
(4) CLARIFYING DECISION NO. C92-1303.

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Mailing date: January 14, 1993
Adopted date: January 13, 1993

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I. Summary

The Colorado Public Utilities Commission ("commission") hereby denies all applications for rehearing, reargument, or reconsideration of Decision No. C92-1303 (October 19, 1992) in these consolidated dockets concerning several call management features proposed by U S West Communications, Inc. ("U S West"), including the controversial caller identification service known as "Caller ID." The commission affirms its ruling in Decision No. C92-1303, which approved a compromise proposal reached among U S West, the Staff of the Colorado Public Utilities Commission, and the Colorado Office of Consumer Counsel, as a modification to the commission's original ruling, Decision No. C92-566 (May 21, 1992). In the two decisions, the commission reached a compromise that we believe properly balanced the benefits of these call management technologies with the privacy rights of citizens on the telecommunications network. We believe that the May 1992 Caller ID decision, Decision No. C92-566[1], when read together with the Compromise Proposal approved in Decision No. C92-1303, not only offers Colorado citizens the advantages of these new technologies, but also ordered clear consumer and privacy protections. We are particularly pleased with the Call Trace service offering proposed by U S West, which we hope will serve as an effective model for other jurisdictions and which may virtually eliminate obscene and harassing telephone calls. We are also quite satisfied that U S West will offer Caller ID with universal, per-call blocking at no charge.

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1. Public Utilities Reports published the May 1992 Decision, Colorado Caller ID Decision, 133 PUR4th 326 (Colo. PUC 1992).

First, the commission will deny the two pending procedural motions, a motion to stay Decision No. C92-1303, and a motion to strike one of the applications for rehearing, reargument, or reconsideration of Decision No. C92-1303. Because the commission affirms its decision to allow these services, and because we see no reason for this commission to further delay the services, the commission hereby denies the motion to stay Decision No. C92-1303 filed by the Colorado Domestic Violence Coalition. Because the commission finds the City and County of Denver's application timely and without such serious defects in form and procedure to merit default, the commission will deny U S West's motion to strike the City and County of Denver's application for rehearing, reargument, or reconsideration.

Second, the commission denies on the merits the three pending applications for rehearing, reargument, or reconsideration of Decision No. C92-1303, filed by the Colorado Domestic Violence Coalition, the City and County of Denver, and the Colorado Office of Consumer Counsel. The commission, however, will clarify Decision No. C92-1303 to state, as suggested by the Office of Consumer Counsel, that blocking options should be available to all customers, including Centron, Centrex, and PBX users. Further, the commission clarifies Decision No. C92-1303 to state that the commission intended the original model for advertisement and education for custom local area signaling services contained in Decision No. C92-566 at 46-47 to govern, due to the importance of extensive initial (and ongoing) consumer information to allow Colorado consumers to understand the changes, benefits and limitations of the new call management technology which will affect all U S West customers, and that disputes concerning advertisement and educational materials relating to the new custom local area signaling services will be decided promptly by the commission.

II. Discussion

A. Motion to Strike Denied

On November 19, 1992, U S West filed a motion to strike the City and County of Denver's application for rehearing, reargument, or reconsideration. The City and County of Denver filed a response to the motion to strike on November 25, 1992. The commission has reviewed the matter, and concludes that the City and County of Denver filed the application on time. The October 16, 1992 mailing date written on Decision No. C92-1303 ("October Caller ID order") was incorrect. By an errata notice dated November 4, 1992, the commission corrected its error and changed the mailing date to October 19, 1992. The governing statute provides that an application for rehearing, reargument, or reconsideration is due twenty days after a decision becomes a commission decision (in other words, the effective date, which is the mailing date). *See* Colorado Revised Statutes § 40-6-114(1) (1992 Cum.Supp. Vol.17). The twentieth day would have been Sunday November 8, 1992. Rule 7(c) of the PUC's Rules of Practice and Procedure, 4 Code of Colorado Regulation 723-1, provides that a document this is due on a Sunday is due by 5 p.m. on the next business day, in this case, by 5 p.m. Monday November 9, 1992. The City and County of Denver ("Denver") filed its application at 4:19 p.m. on Monday November 9, 1992, thus it filed the application in time. U S West's technical arguments to strike the application -- about the lack of a service list on the copy of Denver's application, and the alleged lack of substantive arguments in Denver's application -- can be forgiven. Denver states that it included the service list in the copy filed at the commission, furnished the service list to other parties, and sent another copy to U S West. Although the "incorporation by

reference" approach used by Denver in its application is awkward, we find that the City and County of Denver has preserved its rights.

B. Motion to Stay Denied

On November 5, 1992, the Colorado Domestic Violence Coalition filed a motion to stay Decision No. C92-1303. On November 19, 1992, U S West filed a response, opposing the motion to stay. We will deny the motion to stay. If and when the Domestic Violence Coalition files its promised appeal, the district court has the power to grant a stay should it agree with the Coalition's arguments. *See* Colorado Revised Statutes § 40-6-116 (1984 Rep. Vol.17).

C. Applications for Rehearing Denied

The commission has reviewed the applications for rehearing, reargument, or reconsideration of Decision No. C92-1303 filed by the following parties: (1) the Colorado Domestic Violence Coalition (filed November 5, 1992); (2) the City and County of Denver (filed November 9, 1992); and, (3) the Colorado Office of Consumer Counsel (filed November 3, 1992). As discussed in the summary, we affirm our ruling in Decision No. C92-1303, which approved a compromise proposal reached among U S West, the Staff of the Colorado Public Utilities Commission, and the Colorado Office of Consumer Counsel, as a modification to the commission's original ruling, Decision No. C92-566 (May 21, 1992). The commission sees nothing in the legal or factual arguments in the briefs which convince it to change the result it reached earlier.

The commission, however, agrees with many of the points made by the Colorado Office of Consumer Counsel ("OCC") in its application for rehearing, reargument, or

reconsideration, and will clarify the two Caller ID decisions, Decision No. C92-566 ("May 1992 Caller ID decision") and Decision No. C92-1303 ("October 1992 decision") along the lines proposed by the OCC.

D. Clarification of the Caller ID Decisions

The commission will clarify, but not modify, its Caller ID decisions to assist the parties and the reviewing court.

First, we now agree with the legal arguments presented by the Colorado Domestic Violence Coalition (and the OCC) that the "state action" requirement has been met. While the involvement of the Colorado Public Utilities Commission in a matter does not automatically create the nexus required for state action, *see* Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), the involvement of this commission in the proceedings surrounding these applications, including extensive hearings, probably does qualify as "state action" under the Colorado Supreme Court's interpretation in Denver Welfare Rights Organization v. PUC, 547 P.2d 239, 245 (Colo. 1976) (interpreting United States Supreme Court cases, and concluding "state action" met because the PUC held two days of hearings on a rule and expressly adopted the procedures in the rule, thereby throwing its weight on the side of the rule. "This, in our view, clearly constitutes 'state action' within the bounds of the Supreme Court's definition of that phrase and, therefore, lies within the purview of the Fourteenth Amendment.") (citations omitted).[2]

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2. An interesting law review article concludes that Caller ID should be subject to constitutional review. The article argues that the "state action" requirement is met . . . . "[B]ecause the state directly sanctions Caller ID, because the state is directly connected to the implementation of Caller ID, and because the implementation of new services, such as Caller ID, is a major part of the continuing relationship between the state and the telephone company, Caller ID can be 'fairly treated' as the action of the state itself." S. Oates, "Caller

We continue, however, to find no statutory or constitutional violation of the right to privacy. The commission finds a reasonable balance of privacy interests in the Stipulation approved by the commission in the October 1992 Caller ID order. The user of the telecommunications network has the ability to protect privacy -- at no charge -- by dialing "* 67" prior to making a telephone call. In this regard, the education requirements in the May 1992 Caller ID order are vital to assuring the constitutionality and legality of Caller ID. If users of the network are well-informed of their availability to protect their privacy, through per-call or per-line blocking, then one can argue that privacy rights are knowingly and voluntarily waived if the user makes a telephone call on an unblocked line without utilizing per-call blocking. *See*, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938) (standard for a knowing and voluntary waiver of a constitutional right).

Regarding the other arguments in the Colorado Domestic Violence Coalition's brief, the commission disagrees with the Coalition's characterization that "Caller ID will inconvenience, endanger, or annoy the vast majority of the calling public in order to provide a telephone service of extremely limited benefit to a very small percentage of the calling public." CDVC Brief at 4 (filed November 5, 1992). The Coalition ignores the substantial evidence in the record showing that many people strongly desire Caller ID to protect their safety and health. For example, many victims of telephone harassment will

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ID: Privacy Protector or Privacy Invader?" 1992 U. Ill. L. Rev. 219, 239 (1992). The article distinguishes Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), by noting that Jackson involved an electric company's termination of a single customer. The state public utilities commission's actions in Jackson were not a major part of the continuing relationship between the state and the electric company, nor was the state directly involved, in contrast to a state public utilities commission decision to allow Caller ID.

be assisted by Caller ID by being able to identify a caller before answering the telephone, and members of the deaf community eloquently testified to the benefit of the service to the hearing-impaired. At the public hearing in this matter, the commission heard a wide range of witnesses, testifying on both sides of the issue, including members of law enforcement, victims of domestic violence, and a Planned Parenthood staffer who had been harassed by anti-abortion advocates, all testifying to their strong support for the service on safety and health grounds. Caller ID protects, and can potentially harm, the right to privacy. The commission's task was to strike the right balance in crafting a Caller ID decision. The October 1992 Caller ID order, we feel, properly mitigated the potential harm of Caller ID, in a manner which did not unduly burden the potential benefits of the service.

Further, the commission had adequate evidence on the costs of the various call management services to conclude that they were not priced below cost, and thus the general body of ratepayers would not be subsidizing the services. Costing and pricing is not a science, but the evidence showed at least that no cross-subsidization would occur. In the comparative pricing studies submitted by the OCC regarding the prices for the call management features from other states, Colorado would be in the mid to low range of prices for these services.

In Colorado, the commission has allowed the call management services and beneficial new technology at fair prices tending to be below the national average, but with the clearest consumer and privacy protections. In this order, the commission wishes to emphasize the importance it attaches to the educational requirements in the May 1992 Caller ID order. U S West must educate consumers about the options in the new technology. If it does not carefully implement these requirements set forth by the

commission, the constitutionality of Caller ID (a knowing and voluntary waiver of privacy rights) will be in serious question. Further, the commission would never have approved Caller ID without the educational requirements. Thus, we clarify the October 1992 Caller ID order, Decision No. C92-1303 to state that the educational requirements in the May 1992 Caller ID order, and the remedy provisions therein (disputes concerning custom local area signaling services' advertisements and educational materials, shall be referred to the commission for prompt resolution), continue to be in full force and effect. *See* Decision No. C92-566 at 46-47 (discussing the need for consumer education) (May 21, 1992).

Education is clearly needed, and is in the best interests of U S West and the public of Colorado, so that the benefits of Caller ID and the other custom local area signaling services are not outweighed by the detriments, and in order that everyone understands the changed telecommunications network.

Last, the commission clarifies Decision No. C92-1303 to state, as suggested by the Office of Consumer Counsel, that blocking options should be available to all customers, including Centron, Centrex, and PBX users.

THEREFORE THE COMMISSION ORDERS THAT:

1. The motion to strike the City and County of Denver's application for rehearing, reargument, or reconsideration, filed on November 19, 1992 by U S West Communications, Inc., is hereby denied.

2. The motion to stay Decision No. C92-1303, filed on November 5, 1992 by the Colorado Domestic Violence Coalition, is hereby denied.

3. The application for rehearing of Decision No. C92-1303 filed by the Colorado Domestic Violence Coalition (filed November 5, 1992); the City and County of Denver (filed November 9, 1992); and, the Colorado Office of Consumer Counsel (filed November 3, 1992), are hereby denied.

4. The Colorado Public Utilities Commission hereby clarifies Decision No. C92-1303 to state that it now agrees that the "state action" requirement has been met for the custom local area signaling services, but that nevertheless, no violation of constitutional or statutory rights is found on the custom local area signaling services as approved in Decision No. C92-1303. The commission further clarifies Decision No. C92-1303 to state that the educational requirements, and the remedy provisions in Decision No. C92-566 (May 21, 1992) at 46-47 and Ordering Paragraph 4 at 49, are in full force and effect and continue to govern this action. The commission clarifies Decision No. C92-1303 to state, as suggested by the Office of Consumer Counsel, that blocking options should be available to all customers, including Centron, Centrex, and PBX users.

5. This Order is effective on its Mailing Date.

ADOPTED IN OPEN MEETING January 13, 1993.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CONCURRING STATEMENT BY COMMISSIONER CHRISTINE E. M. ALVAREZ

I strongly agree with, and join, all matters in this opinion. Because I feel so strongly about the educational requirements of that opinion, I would have granted the Colorado Domestic Violence Coalition's motion to stay in order to assure U S West's compliance with educational and advertising requirements in our May 1992 Caller ID decision during this vital introductory phase of what will be a changed telecommunications network for everyone. In all other respects, I join in the opinion.

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF COLORADO

CHRISTINE E. M. ALVAREZ, COMMISSIONER