

{PRIVATE }

(Decision No. C92-1566)

BEFORE THE PUBLIC UTILITIES COMMISSION{PRIVATE }
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF JONES)
LIGHTWAVE OF DENVER, INC.,)
9697 EAST MINERAL AVE., ENGLEWOOD CO 80112) DOCKET NO. 92A-426T
FOR AUTHORITY TO PROVIDE CERTAIN)
TELECOMMUNICATIONS SERVICES PURSUANT)
TO SPECIFIC FORMS OF RELAXED REGULATION)
)

**COMMISSION DECISION AND ORDER
STATING PROCEDURAL DIRECTIVES**

Mailed Date: December 18, 1992
Adopted Date: December 10, 1992

STATEMENT, FINDINGS AND CONCLUSIONS

BY THE COMMISSION:

Jones Lightwave of Denver, Inc. ("Jones" or "applicant"), was granted a Certificate of Public Convenience and Necessity ("CPCN") on March 27, 1992 in Decision No. C92-440 (Docket No. 92A-104T). On July 30, 1992, Jones submitted an application for relaxed regulation (Docket No. 92A-426T), which was incomplete. On October 19, 1992, Jones filed an amendment to that application and advised the Commission, under Rule 22(e)(3) of the Commission's Rules of Practice and Procedure (4 CCR 723-1), that the application had been expanded and amended. The Commission granted the motion in Commission Decision No. C92-1506, effective December 2, 1992. On December 4, 1992, the Commission noticed the amended application. Jones issued notice of this amended application, as required by Rule 4.2 of the Rules Regulating Emerging Competitive Telecommunications Services, 4 CCR 723-24 ("Part 3 Rules").

In Docket No. 92A-104T, Jones also filed a motion to amend Commission Decision No. C92-440. By Decision No. C92-1507 effective December 2, 1992, the Commission granted the motion to modify ordering paragraph 3 of that order, essentially allowing an extension of time to file tariffs until June 30, 1993. This action was taken in anticipation of Jones's application for relaxed regulation, the subject of this docket.

Rule 5.2 of the Part 3 Rules requires the Commission to issue, within 20 days of the receipt of the application, a procedural order governing the process of Jones's application. Rule 5.2.2 requires the Commission to include appropriate protective provisions for the handling of any alleged confidential information. In compliance with Rules 5.2 and 5.2.2, the Commission will set a procedural schedule for the disposition of this matter.

THEREFORE THE COMMISSION ORDERS THAT:

1. Motions to intervene and entries of appearance must be filed in this docket on or before January 4, 1993.
2. On or before January 11, 1993, applicant, Jones Lightwave of Denver, Inc. shall serve copies of its prefiled testimony and exhibits upon all parties who have been granted intervenor status or who have entered their appearances.
3. On or before January 28, 1993, the Staff of the Commission and intervenors shall file their direct testimony and copies of exhibits to be offered at the hearing. If an exhibit is too large or cumbersome to prefile, the location of the exhibit shall be disclosed so that parties may inspect it. The parties shall file a title of each exhibit and a summary of the information contained in the exhibit. Parties shall indicate any information which is claimed to be confidential

and shall give the grounds for the claim of confidentiality. The protective provisions to be observed in this matter are stated in the attached Appendix to this Decision and Order.

4. All requests for discovery shall be made by February 2, 1993. Response time for discovery requests shall be 20 days.

5. Hearings are set before an Administrative Law Judge as follows:

DATE: March 1, 1993 and

March 2, 3, and 4, 1993, if necessary

TIME: 9 a.m.

PLACE: Commission Hearing Room
Logan Tower
1580 Logan Street (OL2)
Denver, Colorado 80203

Any motion for a continuance of the hearing set by this order shall be made only for good cause, and in no event shall the hearing be continued for a period in excess of 15 days.

5. Simultaneous closing statements and briefs may be filed within ten days after completion of the March 1, 1993 hearing set by this Order.

6. The Commission will issue a decision on or before May 3, 1993, or as soon as practicable, possible, or reasonable, pursuant to Rules 5.2.3 and 5.2.4(e) of the Rules Regulating Emerging Competitive Telecommunications Services, 4 CCR 723-24, Part 3 Rules.

7. The procedural directives contained in this Decision and Order may be modified or supplemented, as necessary, by further Decision and Order of the Commission.

This Decision is effective on its Mailed Date.

ADOPTED IN OPEN MEETING December 10, 1992.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER ROBERT E. TEMMER ABSENT

Protective Provisions Relating to Confidential Information

1. **Confidential Information:** All documents, data, information, studies, computer programs, and other matters furnished in any form in response to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed to be a trade secret or confidential in nature shall be furnished under the terms of this Order, and shall be treated by all persons accorded access pursuant to this Order as constituting trade secret, confidential, commercial, and financial information (here referred to as "confidential information"), and shall neither be used or disclosed except for the purpose of this proceeding, and solely in accordance with this Order.

To the extent there may be information which a party believes requires extraordinary protection beyond that provided for in this order, the party shall file the information with the Commission, only, under seal together with a motion seeking such extraordinary protection. The motion shall state the grounds for seeking the relief and advise all other parties of the request and the subject matter of the material at issue.

2. **Use of Confidential Information and Persons Entitled to Review.** All confidential information made available pursuant to this Order shall be given solely to the Commission or counsel for the parties 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 counsel, solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts or advisors in this matter. With the exception of the Office of Consumer Counsel, no expert may be an officer, director, or employee concerned with marketing or strategic planning of directly competitive products and services of the party or of any subsidiary or affiliate of the party. Any member of the Staff of the Commission may have access to any confidential information made available under the terms of this Order.

3. **Nondisclosure Agreement.** No access to confidential information shall be authorized under the terms of paragraph 2 of this Order until the person authorized by counsel to have access signs a nondisclosure Agreement in the form that is attached and incorporated as Attachment 1. The Nondisclosure Agreement shall require the persons to whom disclosure is to be made to certify in writing that they have read this Order and agree 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. This agreement shall be delivered to counsel for the providing party and the Commission at the time of review of the documents, or as soon thereafter as practicable.

4. **Delivery of Documentation.** Where feasible, confidential information will be marked as such and delivered to counsel. In the alternative the confidential information may be made available for inspection and then reviewed by counsel and experts, as defined in paragraph 2 of this Order, in a place and time mutually agreed on by the parties, or as directed by the Commission.

5. Challenge to Confidentiality. This Order establishes a procedure for the expeditious handling of information that a party claims is confidential; it shall not be considered as an agreement or ruling on the confidentiality of any document.

- (a) A party seeking to challenge the confidentiality of any materials pursuant to this Order shall first contact counsel for the providing party and attempt to resolve any differences by stipulation.
- (b) In the event that the parties cannot agree as to the character of the information challenged, any party challenging the confidentiality shall do so by advising all parties and the Commission, in writing, that it deems material nonproprietary and outside the scope of any Protective Order. This notice shall designate the material challenged in a manner that will specifically isolate the challenged material from other material claimed as confidential.
- (c) The providing party shall, within ten days of the notice, file appropriate pleadings stating grounds upon which challenged data is deemed to be confidential. The challenging party shall have ten days to respond to the pleading. In the event the providing party fails to file appropriate pleadings within ten days, any challenged material shall be removed from the provisions of the Protective Order.
- (d) When the Commission receives a pleading asserting confidentiality by the providing party regarding any items claimed as proprietary under the terms of this Order, the Commission will enter an order resolving the issue.
- (e) In the event the Commission should rule in response to a pleading that any information should be removed from the protective requirements of this Order or from the protection of the sealed record, the parties, at the request of the providing party and to enable the providing party to seek a stay or other relief, shall not disclose the information or use it in the public record for five business days.

6. Receipt into Evidence. Provision is made here for receipt of evidence in this proceeding under seal. At least ten days prior to the use of or substantive reference to any confidential information as evidence at hearing, the party intending to use the information shall make that intention known to the providing party unless the usage could not be reasonably anticipated. The burden to demonstrate that the usage could not be reasonably anticipated shall be upon the party seeking to use the information. This notice requirement may be met where the confidential information is cited or used in prefiled testimony or in prefiled exhibits. If used in prefiled testimony or in a prefiled exhibit, that portion of the prefiled material which is confidential shall be filed under seal. The requesting party and the providing party shall make a good faith

effort to reach an agreement so the confidential information can be used in a manner which will not reveal its trade secret, confidential, or proprietary nature. If these efforts fail, the providing party shall separately identify, within two business days, which portions, if any, of the documents or transcripts to be offered or referenced on the record containing confidential information shall be placed in the sealed record. Six copies of the document shall be filed under seal with the Commission. In the event any person reviews a copy of a document filed under seal, that person (including Counsel and Staff advisors to the Commission), shall first have signed a nondisclosure agreement. The six copies filed under seal shall be numbered serially. Otherwise, parties shall make only general references to confidential information in these proceedings.

- (a) Seal. While in the custody of the Commission, these materials shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 92A-426T."
- (b) Appeal. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction on appeal in accordance with applicable rules and regulations, but under seal as designated here for the information and use of the Court.
- (c) Data Requests. This procedure shall apply to data requests made during hearing and received thereafter. Resolution of disputes shall be by hearing thereafter, upon notice.

7. Use in Pleadings. Where reference to confidential information is required in pleadings, cross-examinations, briefs, arguments, or motions, it shall be by citation of title or exhibit number, or by some other description that will not disclose confidential information. 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 Commission under seal.

8. Segregation of Files. Those parts of any writing, depositions reduced to writing, written examinations, interrogatories and answers, or other written references to confidential information in the course of discovery, if filed with the Commission, will be sealed by the Executive Secretary of 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 the confidential information is released from the restrictions of this Order either through agreement of the parties and the providing party or, after notice to the parties and providing party, and hearing, pursuant to the Order of the Commission or final order of a Court having jurisdiction.

9. Preservation of Confidentiality. All persons who are afforded access to any confidential information by reason of this Order 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 this proceeding, and then solely as contemplated here, and shall take all reasonable precautions to keep the confidential information secure and in accordance with the purposes and intent of this Order. No party receiving confidential information pursuant to this Order may copy, microfilm, microfiche, or otherwise reproduce such confidential information without the written consent of the providing party.

10. Reservation of Rights. The parties and non-parties 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 the Protective Order on the grounds of relevancy or materiality.

11. Non-Waiver. This Order shall in no way constitute a waiver of the rights of any party or person to contest any assertion or finding of trade secret, confidentiality, or privilege, or to appeal any determination of the Commission or assertion by a party.

12. Scope. The provisions of this Order are specifically intended to apply to information supplied by any party to this proceeding, and any nonparty that supplies documents, testimony, or other information pursuant to process issued by this Commission.

13. Retention of Documents. Upon request of the entity providing confidential information, at the conclusion of these proceedings, all documents and information subject to this Order, including any copies or extracts or summaries, or documents containing information from them, shall be returned to the party or person producing them. No copy shall be retained, except the original shall be maintained in the Commission files. Copies of briefs and pleadings prepared by counsel for a party or by a pro se party may be retained.

14. Remedies. Any person or party to this Order retains all remedies existing at civil or criminal law for breach of this Protective Order, and no provision here shall be construed to be a waiver of those rights.

ATTACHMENT 1

NONDISCLOSURE AGREEMENT

I hereby agree that I have read the PROTECTIVE PROVISIONS RELATING TO CONFIDENTIAL INFORMATION entered in Docket No. 92A-426T and agree to be bound by its terms.

(NAME) _____

Employer or Firm _____

Business Address _____

Party in Case _____

Date _____

Signature _____