

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In re Application of

NO. UT-991358

U S WEST, INC. and QWEST  
COMMUNICATIONS INTERNATIONAL INC.

MOTION OF JOINT APPLICANTS TO AMEND  
PROTECTIVE ORDER JOINT MOTION TO  
AMEND PROTECTIVE ORDER

For an Order Disclaiming Jurisdiction or, in the  
Alternative, Approving the U S WEST, INC. –  
QWEST COMMUNICATIONS INTERNATIONAL  
INC. Merger

Qwest Communications Corporation ("Qwest")<sup>1</sup> and U S WEST Communications, Inc. ("U S WEST") jointly move the Washington Utilities and Transportation Commission ("Commission") for an order amending the protective order issued in this proceeding. The existing protective order, issued by the Commission on October 5, 1999 as the First Supplemental Order in this proceeding, is the standard form of protective order typically used in Commission proceedings. Qwest and U S WEST submit that additional protection is necessary to govern the release of highly confidential and ~~Complete~~ **RELEASABLE** information.

Joint Applicants request that the Commission amend the protective order entered in this case to include the following provision in Section 5 of the protective order:

Joint Applicants in providing certain company-specific data in response to discovery

---

<sup>1</sup> Qwest Communications Corporation submits this Motion on behalf of itself and the subsidiaries of Qwest Communications International Inc. that are regulated by the Commission: LCI International Telecom Corp., USLD Communications, Inc. and Phoenix Network, Inc.

requests may designate such data as "highly confidential." Access to data so designated shall be restricted to members of Commission Staff and the Office of Public Counsel who have signed a confidentiality agreement in this proceeding. Such highly confidential information shall be made available for inspection and review at a mutually agreed upon place and time. No Party other than Commission Staff or Public Counsel may review highly confidential data provided by Joint Applicants.

The Commission is authorized to amend "relevant documents" in a proceeding at any time "upon such terms as may be lawful and just." WAC 480-09-425(5).

## **II. BACKGROUND**

On August 31, 1999, Qwest and U S WEST jointly filed an application requesting that the Commission issue an order disclaiming jurisdiction over their proposed merger transaction or, in the alternative, approving the merger. At its prehearing conference on September 23, 1999, the Commission granted intervention to fourteen (14) parties, including present or future customers and competitors of Qwest and/or U S WEST. Prehearing Conference Order at 1. The Commission invoked the discovery rule in this proceeding. Id. at 3.

Pursuant to the discovery order, Staff and Public Counsel have issued several rounds of data requests to Qwest and U S WEST. In many situations, the information requested by Staff from Joint Applicants is competitively sensitive information. In particular, Staff and Public Counsel seek access to information that includes sensitive data relating to strategic plans and projections, and the synergies (both revenue and expense) that are expected to be generated by the merger. Staff has also requested certain information gathered in connection with the due diligence process which preceded the Merger Agreement. Joint Applicants also wish to limit disclosure of current business arrangements and confidential contracts with third parties on matters which are unrelated to the merger. Several intervenors have requested all responses to

data requests served on any party, which would include confidential information the Joint Applicants have provided to Staff. This information, if it were produced to Joint Applicants' competitors, could have devastating effects. Joint Applicants therefore need to protect this highly sensitive information.

Staff and Public Counsel, as statutory parties, have a sufficient basis for reviewing such information. Accordingly, Joint Applicants propose that such information be made available for inspection by members of Commission Staff and Public Counsel who have executed the confidentiality agreement in this proceeding. Access or disclosure would not be provided, however, to other parties to this proceeding, as their need to have access to such information has not been demonstrated.

### **III. ARGUMENT**

#### **A. The Commission Has Protected Documents Beyond the Terms of the Standard Protective Order in Other Proceedings**

##### **1. In a Previous Merger Proceeding, the Commission Limited Access to Certain Merger-Related Financial Information to Statutory Parties**

In the Puget Power – Washington Natural Gas Company merger proceeding (Docket Nos. UE-951270 and UE-960195), the merging utilities expressed concern that competitors would "use the Commission's discovery rule to uncover the Applicants' most sensitive propriety information and use that information to gain an unfair competitive advantage." (Fourth Supplemental Order, p. 4) In response, the Commission stated:

The Commission believes that access to confidential information should be granted on a need to know basis. It may be that none of the applicants' most sensitive data are relevant to the competitive issues which the competitors may address. *Intervenors do not necessarily need to review all of the information*

*provided to statutory parties.*  
Id., pp. 4-5 (emphasis added).

Subsequently, applicants in that proceeding requested that certain exhibits containing confidential information which is highly competitive-sensitive be specially designated to facilitate restriction of disclosure. This information contained "sensitive data relating to long-range strategic plans and projections" that, according to applicants, was considered to be "insider information" by the Securities and Exchange Commission, thereby requiring disclosure generally if released in the Commission proceeding. The information in that proceeding related to the estimates of synergy savings that were anticipated as a result of the merger, and the earnings projections which were based upon such estimates. The Commission ruled that:

[E]xhibits which are highly competitive-sensitive should be specially designated as "TS" exhibits, indicating that they are considered "top secret," as a protection against their inadvertent disclosure to parties who do not have a "need to know" that particular confidential information. The Commission limited distribution of exhibits which have been designated as "TS" exhibits to the Commission Staff, Public Counsel, and customers of the applicants; counsel for other parties who have signed confidentiality agreements are not allowed access to those exhibits.

Sixth Supplemental Order, pp. 3-4.

The information sought to be protected in this proceeding is the same type of merger-related financial data for which parties other than Staff and Public Counsel do not have a need to know. Access to this highly confidential information should therefore be limited to Staff and Public Counsel.

## **2. Access to Documents Has Been Limited in Other Proceedings**

In Docket No. UT-990022, *Petition of U S WEST Communications, Inc. for Competitive Classification of High Capacity Circuits*, the Commission granted a motion of the competitive

local exchange companies (CLECs) to amend the protective order to designate certain company-specific data as "highly confidential." This data related to the level and amount of competing facilities for the geographic markets in which competitive classification was sought. Under the Commission's ruling, access to the data was limited to Commission Staff which, in turn, was authorized to aggregate the data for purposes of the proceedings. U S WEST had objected to the request, claiming that it "would be unfairly prejudiced by receiving data from the intervenors in unverifiable aggregate form only." Fourth Supplemental Order, p. 2. U S WEST further noted that it was unclear "which data will be aggregated and the manner in which that aggregation will occur." *Id.*, p. 3 The Commission rejected these arguments, and granted the request to allow the designation of company-specific information from the CLECs as "highly confidential." Fourth Supplemental Order Re: Joint Motion to Amend (issued March 25, 1999).

In a case involving MCImetro and U S WEST, the Commission designated some documents admitted as evidence in the proceeding as highly confidential. *MCImetro Access Transmission Services, Inc. v. US West Communications, Inc. (MCImetro)*, Docket No. UT-972063, Ninth Supplemental Order, p. 7 (Sept. 25, 1998). Access to those documents was restricted to a limited number of individuals and the documents were to be returned to U S WEST at the conclusion of the proceeding. *Id.*; *see also MCImetro*, Fifth Supplemental Order on Discovery of Confidential Information (May 22, 1998). These documents consisted of trunking forecasts, summaries of network traffic, traffic reports, and information regarding end office switches and port allocations. *MCImetro* Fifth Supplemental Order, p. 3.

As noted in the above decisions, the Commission has used its discretion on several

occasions to modify its standard form of protective order to accommodate the handling of certain highly confidential, competitively sensitive information. Such additional measures are necessary as well in this proceeding to limit the release of Joint Applicants' strategic information to only the statutory parties.

**B. The Commission's Rules Do Not Preclude the Proposed Amendment to the Protective Order in This Case**

**1. There Is No Required Form of Protective Order**

The Commission issued a protective order in this case that protects disclosure of confidential information. This order is commonly considered the Commission's "standard" protective order. However, there is no statute or rule that limits the Commission's authority to issue protective orders containing provisions that differ from the standard protective order. Thus, the Commission may amend a protective order to address concerns of confidentiality that are not addressed by the standard protective order.

**2. The Discovery Rule Does Not Preclude Heightened Protection**

Under the Commission's discovery rule, a party must provide its responses to data requests to other parties. WAC 480-09-480(6)(v). However, this production shall be consistent with the terms of any protective order issued by the Commission. Id. Therefore, the discovery rule does not mandate the production of responses to data requests to parties other than the requesting party.

**C. Motion for Shortened Time to Respond to Motion**

Under the Commission's rules, a party has 20 days to respond to a pleading. WAC 480-09-425. However, this rule may be altered by the Commission if doing so would be in the public

interest. Because this case must be concluded in a few months, it is in the public interest to alter the time for responding to this motion so this case can proceed as quickly as possible. Therefore, Joint Applicants ask that answers to this motion be filed within five (5) days of service of the motion.

#### **IV. CONCLUSION**

The Commission's rule authorizes the Commission to enter any protective order it deems necessary in order to protect confidential information. Consistent with prior Commission decisions, additional protections should be provided to govern the release of information from Joint Applicants that is highly confidential and competitively sensitive. The statutory parties (Staff and Public Counsel) can demonstrate a "need to know" with respect to such information, and should be provided access to it. Other parties, however, can make no such showing, and the wider release of such information would adversely affect Joint Applicants. The modifications to the protective order proposed by Joint Applicants balance the need for such information to be disclosed on a limited basis against Joint Applicants' interests in protecting such information from disclosure. The Commission should therefore grant this motion.

DATED: November 5, 1999.  
Respectfully submitted,

**Qwest Communications Corporation**

**U S WEST Communications, Inc.**

By \_\_\_\_\_

Peter A. Rohrbach  
Mace J. Rosenstein  
Gina Spade  
Hogan & Hartson LLP  
555 Thirteenth Street NW  
Washington, D.C. 20004  
Phone: (202) 637-3657  
Fax: (202) 637-5910

By \_\_\_\_\_

Lisa A. Anderl  
Senior Attorney  
U S WEST, Inc.  
1600 7<sup>th</sup> Ave., Room 3206  
Seattle, WA 98191  
Phone: (206) 345-1574  
Fax: (206) 343-4040

**Perkins Coie LLP**

By \_\_\_\_\_

James M. Van Nostrand  
Kirstin S. Dodge  
411 – 108<sup>th</sup> Ave NE, Suite 1800  
Bellevue, WA 98004  
Phone: (425)-453-7323  
Fax: (425) 453-7350

[BA993000.091]