

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

QWEST CORPORATION

Regarding the Sale and Transfer of Qwest
Dex to Dex Holdings, LLC, a non-
affiliate.

Docket No. UT-021120

PUBLIC COUNSEL'S PETITION
FOR REVIEW OF AMENDED
PROTECTIVE ORDER

Pursuant to WAC 480-09-760, Public Counsel respectfully petitions the Commission for review of the First Supplemental Order Amending Protective Order in this proceeding. Public Counsel asks that the order be vacated, or in the alternative amended to narrow its scope. Review is necessary to prevent substantial prejudice and to save substantial effort and expense.

I. ARGUMENT

A. The Order Was Issued Before Parties Could Respond to Qwest's Motion.

While this pleading is framed as a petition for review, Public Counsel raises the arguments it would have made in response to Qwest Corporation's (Qwest) Motion to Amend the Protective Order had the order not issued. Qwest's motion was filed on September 26th, 2002. Under WAC 480-09-425(3)(a), parties are allowed 20 days to respond to pleadings, in this case until October 16th, 2002.¹ The Qwest motion did not include specific proposed order language. Public Counsel had objections to the request, but was conferring with counsel for Qwest and the buyers (a) to determine what specific provisions Qwest was requesting, since this was not specified in the motion, and (b) in an attempt to resolve or narrow the issues prior to filing a written response. The order was issued prior to the time allowed for parties to respond,

¹ WAC 480-09-420(8) defines motions as a form of pleading before the Commission. WAC 480-09-425(3)(a) provides a party answering a pleading 20 days to do so.

and while these discussions were still ongoing, substantially prejudicing Public Counsel's ability to present its position on the request to the Commission.

Other parties may also have been prejudiced. The motion was filed prior to the prehearing conference held on October 8th, 2002. Public Counsel's records do not show that any certificate of service was attached to the motion, and the documents for the case on the Commission's website do not include a certificate of service with the motion to amend.

Issuance of a "highly confidential" protective order of this type is neither routine nor routinely agreed to by all parties. Public Counsel had expected the matter to be taken up at the prehearing conference, which fell during the responsive period provided for by the Commission's rules.

In view of the foregoing circumstances, it is particularly appropriate that the Commission seriously consider issues raised by Public Counsel and other parties who may request review of the amended protective order.

B. Qwest's Request and the Resulting Order As Issued Is Inconsistent With Washington's Law and Public Policy Favoring Open Public Proceedings.

Washington law strongly favors openness in public proceedings. Open Public Meetings Act, Title 42.30 RCW; Public Records Act, RCW 42.17.250 et seq. Commission proceedings are no exception. The regulation of public utilities is inherently the public's business, not a private matter to be conducted behind closed doors and under seal. While the standard form of protective order is commonly issued in major Commission proceedings, parties are admonished to limit its use and the Commission's rules so require. WAC 480-09-015. A request for higher levels of confidentiality must be measured even more strictly against the policy of openness. The starting point is a presumption that proceedings and documents related to those proceedings will be open to the public. As a result, the mere request or assertion by Qwest of a desire to

protect information does not end the inquiry. Qwest must overcome the presumption by a sufficient showing. As shown below, it has failed to do so.

C. Qwest Has Not Carried Its Burden Of Establishing The Need For Additional Protection.

1. Qwest's position regarding confidentiality has changed.

Qwest initially represented to the Commission, Staff, and Public Counsel that issuance of the standard protective order was all that was necessary to allow filing of the assertedly sensitive ancillary documents to the Dex purchase agreements which are part of the Qwest application in this docket. In a letter to the Commission dated September 6, 2002, Qwest stated:

In its filing on August 30, 2002, Qwest provided the purchase agreement for the Dex sale, and stated that it would provide the ancillary agreements in the future, following the entry of an appropriate protective order. Qwest requests that the Commission's standard protective order be entered as soon as possible, even prior to the prehearing conference. *In this way, Qwest will be able to file any confidential information and share it with the parties without unnecessary delay.* (emphasis added).

Public Counsel did not object to the request, after confirming with Ms. Anderl that the company was not requesting issuance of a "highly confidential" form of protective order. The order was issued, but the parties and the Commission have yet to receive the full filing. The letter set out above clearly represents that the standard form order was the "appropriate protective order" necessary for it to file *all* the remaining unfiled documents. Qwest's motion makes no reference to this prior representation and no explanation of why it was not accurate.

2. Qwest's arguments in support of the motion are unclear and unsupported.

Qwest's motion appears based on the concern that the information "is commercially valuable to competitors." At the hearing, however, counsel for the purchasers, Mr. Harlow, stated that the concern was not so much with the competitive value of the information, but more significantly with its general commercial value. The proponents themselves seem uncertain what

basis to assert for protection. In any event, what the motion ignores is that a protective order was already in place in this docket. The existing order provides more than adequate protection for commercially sensitive information in the ordinary course, indeed that is one of its chief purposes.

Qwest has provided no explanation as to why the existing protective order is inadequate to protect the information from competitors, or any other outside party. The motion does not specify what type of competitor or competitive business is at issue, nor does it point to any party to the case who might potentially benefit from access to the information. The orders cited as models in the Qwest motion involve cases where competitive matters were directly at issue and a number of competitors were parties. Neither in its motion, nor at the prehearing, has Qwest identified any specific competitor or commercial party who would be of concern, nor does the Amended Protective Order. Indeed, at the time of the motion and the order, there were no formal parties, since no interventions had been allowed, and no prehearing held.

The order as written applies generally to all parties other than Staff and Public Counsel. As a result it treats all other parties alike in subjecting them to the additional confidentiality requirements, whether they have commercial, non-profit, competitor, non-competitor, or governmental agency interests. Qwest has not met even a minimal burden of persuasion of demonstrating that evidence exists that the standard protective order is insufficient and further, justifying the highly confidential protective order amendment the Commission has granted. It is overbroad in scope for the expressed interest being addressed.

D. The Order Creates Practical Problems.

In its current form the Amended Protective Order creates practical problems for a number of parties. As in previous yellow pages litigation, Public Counsel anticipates working closely with other consumer groups including the sharing of witnesses and other efforts to minimize

duplicative efforts and expense. The amended protective order as currently drafted creates artificial distinctions between non-commercial consumer representatives without a compelling rationale for doing so. Further, the “one counsel, one witness” provision creates immediate difficulties for at least one party to the proceeding, WeBTEC. It also creates the risk of inhibiting parties’ presentation of their cases by forcing them to elect early in the proceeding which expert witness will have access to evidence that has not yet been produced. Correcting these practical problems with the order will save the parties substantial expense and effort.

II. RELIEF REQUESTED.

Public Counsel respectfully requests that the Commission vacate the First Supplemental Order: Amending Protective Order, advising Qwest that it is free to renew its request, to make a sufficient showing, and to propose fairly tailored protective provisions applicable to appropriate parties. All parties, including intervenors, will then have a reasonable opportunity to respond if they have concerns.

In the alternative, Public Counsel requests that the Amended Protective Order be again amended to distinguish between intervenors with a competitive or commercial interest in the information for which highly confidential treatment is sought, and those parties which have no such interest. Parties in the latter category (the majority of parties to the case) should be treated

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identically to Staff and Public Counsel. If necessary, Qwest can be asked to identify the specific parties who would fit in the former category and be subject to the greater restrictions.

RESPECTIFULLY SUBMITTED this 11th day of October, 2002.

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