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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
PETITION OF WEBTEC FOR
REVIEW OF FIRST
SUPPLEMENTAL ORDER

Pursuant to 480-09-760, Washington Electronic Business and Telecommunications Coalition, (“WEBTEC”), respectfully petitions the Commission for review of the First Supplemental Order Amending Protective Order, issued in this proceeding (“*First Supplemental Order*”). WEBTEC asks that the *First Supplemental Order* be vacated, or in the alternative, amended. Review is necessary to prevent substantial prejudice and to prevent unnecessary effort and expense.

I. PROCEDURAL BACKGROUND

On September 12, 2002, the Commission issued its standard protective order in this case (the “*Protective Order*”). That order provides that confidential information produced in this docket may be distributed only to Commissioners, Commission Staff, the presiding officer(s), counsel for the parties (including attorneys’ administrative staff), and expert witnesses engaged by counsel. Before being allowed access to the confidential information, each counsel or expert must sign a non-disclosure agreement, in which he or she agrees to be bound by the terms of the *Protective Order*. See *Protective Order*, ¶¶ 8-9.

On September 27, 2002, Qwest Corporation, (“Qwest”), filed a motion to amend the protective order (“*Motion to Amend*”). In that motion, Qwest sought additional “highly confidential” protections for documents that it claimed to be “extremely sensitive and

1 potentially commercially valuable to competitors.” *Motion to Amend*, p. 1. However, Qwest
2 did not specify *what* additional protections it sought. In order to determine what treatment
3 Qwest sought for its “highly confidential” information, and in order to determine whether they
4 could agree upon appropriate protections the parties engaged in discussions. While those
5 discussions were ongoing, and before any party had filed a response to Qwest’s *Motion to*
6 *Amend*, the Commission issued its *First Supplemental Order*. Under the specific terms of the
7 Order, each party intervenor may designate only one counsel and one expert that may be
8 qualified to review highly confidential information. *First Supplemental Order*, pgs. 2-3.

9
10 **A. REVIEW OF THE COMMISSION’S FIRST SUPPLEMENTAL ORDER IS APPROPRIATE.**

11 Under WAC 480-09-425(3)(a), parties have 20 days to respond to pleadings. Thus,
12 parties should have been allowed to file objections to Qwest’s *Motion to Amend* until
13 October 16, 2002. WEBTEC filed its Petition to Intervene in the proceeding on September 30,
14 2002, and engaged in discussions with Public Counsel and counsel for DEX Holdings, LLC,
15 (“DEX”), to determine whether the parties could come to a mutually agreeable resolution of
16 the issue. Counsel for WEBTEC assumed that after its intervention had been granted at the
17 prehearing conference, the parties would discuss the *Motion to Amend*. WEBTEC planned to
18 file an objection to the *Motion to Amend* only if parties could not settle the matter themselves.

19 WEBTEC understands that the Commission issued its *First Supplemental Order* in
20 order to expedite the discovery process in this case. However, the terms of that order impose
21 serious limitations on WEBTEC’s and other parties’ participation in this case. Given that the
22 Commission issued its order without hearing from all parties, WEBTEC believes that it is
23 especially appropriate that the Commission give careful consideration to the arguments herein.

1 **B. QWEST HAS MADE NO SHOWING THAT ADDITIONAL PROTECTION IS NEEDED.**

2 Qwest has requested that the Commission accord “highly confidential” status to certain
3 documents that it believes are “competitively sensitive.” In its *Motion to Amend*, Qwest
4 provided two examples of documents that it felt would be valuable to competitors. First,
5 Qwest stated that some of the “highly confidential” documents “describe the nature and form
6 of the debt and equity financing, including a significant amount of sensitive details that would
7 be commercially valuable to competitors.” *Motion to Amend*, p. 1. In addition, Qwest stated
8 that the “documents also contain details about the publishing business, including future product
9 names, strategies, and information that would enable competitors to target their competitive
10 efforts.” *Id.* at p. 2.

11 Qwest has generally described the type of competitively sensitive information that is
12 routinely accorded confidential treatment by the Commission. What Qwest has failed to do is
13 explain why the Commission’s standard protective order would accord the information
14 inadequate protection. For this reason alone, the Commission’s First Supplemental Order
15 should be vacated.

16
17 **C. QWEST HAS MADE NO SHOWING THAT THE HIGHLY CONFIDENTIAL ORDER SHOULD
18 APPLY TO NON-COMPETITOR PARTIES.**

19 Even if the Commission finds that Qwest’s motion does state grounds for the issuance
20 of additional protections for Qwest’s highly confidential information, those protections should
21 apply only to documents in the hands of competitor parties in this case. As discussed above,
22 Qwest’s stated reasons for requesting the highly confidential order was that certain of its
23 information was “competitively sensitive.” Thus, it makes sense that Qwest might request
24 additional protections for its documentation that is received by its competitors. However, it
25 makes no sense for Qwest to request additional protections for its information that is received

1 by AARP, WEBTEC, or any other consumer or consumer group that is granted party status in
2 this case.

3 At the prehearing conference, counsel for DEX, Brooks Harlow, explained that in
4 addition to the “competitively sensitive” nature of the documents, DEX was concerned that the
5 information was more generally sensitive, and that the information, in the hands of the general
6 public, could be misused. However, this argument is unpersuasive. Under the terms of the
7 standard protective order, the information will not be in the hands of the general public, but
8 will only be released to individuals that are qualified under the order.

9
10 **D. THE HIGHLY CONFIDENTIAL PROTECTIVE ORDER WILL IMPAIR WEBTEC’S
PARTICIPATION IN THIS CASE.**

11 At the prehearing conference, counsel for WEBTEC explained that the terms of the
12 First Supplemental Order granted by the Commission would impair WEBTEC’s participation
13 in this case in two practical respects. In view of the importance of this case to WEBTEC’s
14 members, and because of certain schedule considerations, WEBTEC has determined that two
15 attorneys, Art Butler and Lisa Rackner, will be representing WEBTEC in this docket. This is a
16 reasonable determination under the circumstances. (Public Counsel, Qwest and DEX all had
17 more than one attorney present at the prehearing conference.) However, the terms of the First
18 Supplemental Order issued by this Commission would allow only one of WEBTEC’s lawyers
19 access to the documents produced in this case. Thus, if the Commission does not vacate or
20 amend its First Supplemental Order, WEBTEC will be forced to decide which of its attorneys
21 has access to all of the relevant information in this docket. Moreover, in the course of their
22 joint representation of WEBTEC’s interests in this case, WEBTEC’s attorneys will be barred
23 from openly discussing all aspects of this case. This situation is untenable.
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1 Similarly, while at the present time, WEBTEC is contemplating retention of one expert
2 witness, it may well decide that it should hire an additional expert. Under the terms of the
3 ordered Highly Confidential Order, WEBTEC would be forced to seek approval of the
4 Commission before it hired such an expert. There simply is no good reason for WEBTEC's
5 participation in this case to be so burdened.
6

7 **II. CONCLUSION**

8 Qwest has failed to show good reason why its documents should be accorded "highly
9 confidential" status, particularly with respect to the non-competitor parties to this case. If this
10 Commission agrees with Qwest that a highly confidential order should apply to consumer
11 groups as well as Qwest's competitors, then the terms of the order should be altered as to those
12 consumer groups. Specifically, WEBTEC asks this Commission to allow WEBTEC (and other
13 non-competitor parties to this docket) to qualify more than one attorney, and more than one
14 expert, to receive highly confidential information. The other protections imposed by the
15 Commission's order will be adequate to protect Qwest's information.
16

17 RESPECTFULLY SUBMITTED this 14th day of October 2002.

18 **ATER WYNNE LLP**

19
20 By: _____

Arthur A. Butler, WSBA #04678

Lisa F. Rackner

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22 ATTORNEYS FOR WEBTEC
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