BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Networks, Inc. and U S WEST Communications, Inc.	)))))))	DOCKET NO. UT-991358 AT&T, NEXTLINK & ATG OPPOSITION TO APPLICANTS' MOTION TO AMEND THE PROTECTIVE ORDER

AT&T Communications of the Pacific Northwest, Inc., NEXTLINK Washington, Inc., and Advanced TelCom Group, Inc. (collectively, "Intervenors"), provide the following opposition to the motion of U S WEST, Inc. and Qwest Communications International, Inc. (collectively "Applicants") to amend the protective order. The Applicants seek to deny the rights of parties other than Public Counsel and Staff to review and respond to information that is necessary to determine the impact of the proposed merger on Washington ratepayers, including the Intervenors. The Applicants identify no specific information to which the Intervenors should be denied access, much less make any demonstration that the Applicants will be harmed by disclosure of any confidential information under the existing protective order. Consistent with their prosecution of this case to date, Applicants ask the Commission to accept their representations of harm – without proof – and trust that the Applicants will justly and fairly determine the information Intervenors and similarly situated parties may receive –without establishing any objective criteria for making that determination. Consistent with its decisions in this case and precedent in other cases, the Commission should not permit the Applicants to

withhold evidence from affected parties and should refuse Applicants' request to abdicate authority over evidentiary matters in favor of the Applicants.

DISCUSSION

The Applicants bear the burden not only to prove that the proposed merger is in the public interest, but that the existing protective order is insufficient to protect their confidential information. The Applicants have not even attempted to make such a showing. The Motion requests that the Applicants be authorized to prevent disclosure to any party other than Staff and Public Counsel of "data relating to strategic plans and projections, and the synergies (both revenue and expense) that are expected to be generated by the merger, . . . information gathered in connection with the due diligence process which preceded the Merger Agreement . . . [and] current business arrangements and confidential contracts with third parties on matters which are unrelated to the merger." Motion at 2- 3. Other than this vague description, the Applicants do not identify the information to be withheld and do not even indicate which data requests seek the production of the ostensibly highly confidential information. The Applicants also make no showing that parties are abusing the discovery process for their own ends or that the Applicants will suffer any harm if the information is disclosed to intervening parties that are all already bound by the strict limitations of the existing protective order. The Applicants' Motion, on its face, lacks specificity and support and should be denied.

The Applicants ignore their obligation to specify highly confidential information and demonstrate harm from its disclosure to other parties and would shift the burden to those parties

to prove that they have a "need to know" such information. Motion at 7. Nothing in the Commission's practice suggests that parties' access to information provided in discovery be conditioned on a demonstrated "need to know" absent extraordinary circumstances. The Commission has already found that Intervenors and similarly situated parties have a substantial interest in this proceeding and have imposed no limitations on their ability to seek and obtain access to information that is reasonably calculated to lead to the discovery of admissible evidence. The Applicants effectively are asking this Commission to reconsider its decision granting these parties intervention and to preclude their full participation in this proceeding. The Commission should refuse that request.

Rather than specifying allegedly highly confidential information and the harm that would result from its disclosure under the existing protective order, the Applicants devote the vast majority of their motion to attempting to analogize their request to past Commission decisions. The Applicants' efforts are unavailing. The Applicants first purport to rely on the Commission's decision in the Puget Power merger proceedings, but that decision does not support their position. The Commission in that proceeding limited the disclosure of certain highly secret information to "Commission Staff, Public Counsel, and *customers of the applicants*," excluding only those parties granted limited intervention status because their sole interest in the proceeding was as competitors. *In re Puget Sound Power & Light Company*, Docket No. UE-960195, Sixth Supp. Order at 4 (Aug. 16, 1996) (emphasis added).

In sharp contrast to the excluded parties in the Puget Power case, Intervenors are customers, as well as competitors, of U S WEST and have been granted full party status in this proceeding. Indeed, AT&T is U S WEST's largest customer, and each of the Intervenors and similarly situated parties is heavily dependent on U S WEST facilities and services to provide competing local exchange service. No party stands to be affected more by the proposed merger, and denial of access to information related to the proposed merger would fundamentally prejudice their abilities to protect their interests. The Minnesota Public Utilities Commission emphasized the importance of such parties' full participation in its own review of the proposed merger:

> As consumers of USWC services and users of those services to provide competitive service, each of these petitioners [AT&T, Cady, Covad, McLeod and Rhythms] has a high level of involvement with and reliance upon the practical operations of USWC and would continue that involvement with and reliance upon the proposed merged entity. This involvement positions them to provide unique information and insights for this proceeding and to assist the Commission in applying the public interest standard to this proposed merger.

In re Merger of the Parent Corporations of Qwest and U S WEST, Docket No. P-3009, Order Granting Petitions to Intervene at 4 (Oct. 25, 1999); *see id.* (concluding that the two statutory parties, i.e., the Department of Commerce and the Attorney General, could not adequately represent the interests of these entities and noting the statutory parties acknowledgement that "they will not be able to adequately represent the interests of these petitioners and welcomed their assistance as interveners [*sic*] in developing a complete record").

The other Commission decisions the Applicants cite also do not support the requested relief. In the MCImetro complaint, MCImetro was permitted access to all confidential information, even though it is both a competitor and customer of U S WEST. *MCImetro v. U S WEST,* Docket No. UT-972063. In U S WEST's petition for competitive classification of its high capacity services, the Commission permitted individual company intervenors to provide highly confidential information to Staff, which Staff aggregated and provided to all parties. *In re Petition of U S WEST for Competitive Classification of High Speed Circuits,* Docket No. UT-990022, Fourth Supp. Order (March 25, 1999). The Commission found that U S WEST would not be unfairly prejudiced because U S WEST would receive the data in aggregated form. In addition, the Commission found that U S WEST bore the burden to demonstrate that its services are subject to effective competition and that aggregation of data on the extent of competition "is precisely the exercise that yields a significant component of the information essential to our factual determination." *Id*. at 4. The Applicants, in contrast, seek to prohibit Intervenors from receiving *any* "highly confidential" information, even though the Applicants bear the burden to prove that the proposed merger is consistent with the public interest and the Intervenors would be unfairly prejudiced by being denied access to data related to whether, and the extent to which, the Applicants have carried their burden.

Notwithstanding the Applicants' utter failure to make and support a proper motion to amend the protective order, Intervenors are sensitive to the need to protect information that is legitimately "highly confidential." Intervenors, therefore, do not object to a modification of the

protective order if the Applicants can make a sufficient demonstration that specific information requested in discovery is entitled to heightened protection, *e.g.*, third party vendor proprietary data. Intervenors propose that upon making such a showing, the Commission permit such information to be disclosed to all parties but only to counsel and one expert witness for each party that execute a separate agreement to maintain the heightened confidentiality of the information. The Commission adopted such heightened protection in the generic pricing proceeding, Docket Nos. UT-960369, *et al.*, and no party to that proceeding has alleged that the protection was insufficient to maintain the confidentiality of the data.

CONCLUSION

The Commission, therefore, should deny the Applicants' Motion to Amend the Protective Order. In the alternative, the Commission should provide heightened protection for any extremely sensitive data under the conditions adopted in Docket Nos. UT-960369, *et al*.

RESPECTFULLY SUBMITTED this 19th day of November, 1999.

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