

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

QWEST CORPORATION

For Competitive Classification of
Basic Business Exchange
Telecommunications Services

DOCKET NO. UT-030614

PUBLIC COUNSEL PETITION FOR
REVIEW OF INTERLOCUTORY
ORDERS 05,06, AND 07

The Public Counsel Section of the Washington Attorney General (Public Counsel) petitions for review of interlocutory Order Nos. 05, 06, and 07 in this matter, pursuant to WAC 480-09-760(b). In their current form, the orders impose substantial prejudice on Public Counsel as a party in this proceeding, as set forth below.

I. PUBLIC COUNSEL OBJECTS TO ENTRY OF A “HIGHLY CONFIDENTIAL” PROTECTIVE ORDER IN THIS PROCEEDING IN THE FORM SET OUT IN ORDER NO. 07.

A. Public Counsel Objects to Issuance Of A “Highly Confidential” Protective Order Applicable to Non-competitors.

The standard protective order already in place in this proceeding provides adequate protection for all confidential material in the record produced to parties, such as Public Counsel, who are not competitors of Qwest or the CLECs. Public Counsel is not aware of a single instance in Commission proceedings where any party has violated the terms of a standard form protective order and disclosed sensitive information. There has been no showing in this case that there is any risk that parties will produce sensitive information to non-competitors under the existing protective order. MCI, indeed, has taken the position that no additional protective order needed.

Title 80 expressly contemplates access by the Attorney General to commercially sensitive data filed with the Commission. RCW 80.04.095 (see discussion below). Given that the Commission rules do not expressly provide for “highly confidential” protective orders, and given

the state policy of openness in public proceedings, any such order, if entered at all, must be narrowly tailored to meet only the reasonable concerns of the competitive parties, and should not place additional restrictions on non-competitors.

B. Public Counsel Objects to The Provisions of Order Nos. 05 and 07 Prohibiting It From Reviewing the CLEC Information Provided Under Order No. 06.

Under the terms of Order No. 07, ¶11, Public Counsel is prohibited from reviewing the “raw” data produced by the CLECs in response to Order No. 06. Public Counsel is only permitted to review an aggregation of the data prepared by Staff. This substantially prejudices Public Counsel’s ability to evaluate Qwest’s petition and testimony as to whether effective competition exists in Washington for its business services, as defined by RCW 80.36.330. Public Counsel will be unable to have its own expert analyze and evaluate this basic data which is critical to the statutory determination in this case.

The prohibition in Order No. 07 is inconsistent with and unnecessary under RCW 80.04.095. This statute is designed to address the very situation presented here where parties are required to present commercially sensitive information to the Commission. The statute clearly provides that any “valuable commercial information” filed with “the commission or the attorney general” is not subject to the public disclosure laws of Title 42 RCW. The type of potential harm the statute is designed to avoid includes “unfair competitive disadvantage.” The statute permits the Commission to issue protective orders to protect such information in contested proceedings, but says nothing about excluding the Attorney General’s office from access. RCW 80.04.095 reflects an express legislative intent that the Attorney General’s office will have access to “valuable commercial information” on the same terms as the Commission. Public Counsel may not disclose any confidential information produced without complying with the statute. That is fully adequate protection for the CLECs that provide information pursuant to Order No. 06.

Order No. 05, ¶ 32 -33, concludes that Public Counsel does not need access to the raw CLEC data because “it has the ability to contact the CLECs separately to obtain such data or to

obtain the CLECs' consent to release of the raw information to it by Staff." Neither of these means is adequate. Most of the CLECs who will provide data are not subject to discovery because they are not parties to the case. It is speculative as to whether CLECs will voluntarily share the information. Unless all CLECs do so, we will not have the full basic data set available to us for analysis.

Public Counsel is not a competitor of any of the telecommunications carriers who will provide information to the Commission in this proceeding. Public Counsel is already subject to the restrictions of the standard protective order in this proceeding, and the requirements of RCW 80.04.095. There is no reasonable or rational basis, nor is their statutory support, for imposing the restrictions on Public Counsel contained in ¶ 11 of Order No. 07.

C. The Commission Should Clarify The Aggregation Requirement.

Order No. 07. ¶ 11 provides that:

Staff will provide aggregate this data into such documents as appropriate and relevant to this proceeding...

Without waiving its objection to the access restrictions in the order, Public Counsel respectfully requests clarification and modification of the aggregation language. The only purpose of the aggregation requirement is to protect sensitive data. Accordingly, the aggregation of data performed by Staff should be the minimum necessary to protect that data. The aggregation should not consist of Staff's own interpretation of the data for purposes of its own testimony, such as an HHI analysis.¹ That is a separate analytic step which Staff is free to perform, and to make available. The aggregation itself, however, should track each of the specific data requests to CLECs in Order No. 06, and each subpart, and provide the maximum information possible, consistent with protecting confidentiality. Public Counsel would recommend consideration of a

¹ Public Counsel notes that Commission Staff did not request entry of a "highly confidential" protective order, or seek this restriction for access to the CLEC data.

less restrictive approach, short of aggregation, such as allowing access to the raw data, stripped of identifying company information.

II. PUBLIC COUNSEL OBJECTS TO ENTRY OF ORDER NO. 06 IN ITS CURRENT FORM - CLECS SHOULD BE REQUIRED TO PRODUCE PRICE INFORMATION PURSUANT TO ORDER NO. 06.

Public Counsel requests that Order No. 06 be modified to require all CLECs to provide current price information for relevant services offered. Order No. 05 states that this information “is not germane to the statutory issues...” ¶ 23 (a). RCW 80.36.330(1)(c), however, requires the Commission, in evaluating a petition for competitive classification, to consider: “[t]he ability of alternative providers to make functionally equivalent or substitute services readily available *at competitive rates...*” (emphasis added). It appears, therefore, that the prices of services are indeed to be taken into account in the statutory analysis. While CLEC prices are filed under price lists, Public Counsel is concerned that price lists currently on file may not be complete, up-to-date, or accurate. Failing to obtain current price information from CLECs for the services under consideration here will deprive the Commission, Staff and parties of key information. Public Counsel will be substantially prejudiced in the preparation of its case because the information is not readily available to it otherwise.

III. CONCLUSION.

For the foregoing reasons, Public Counsel respectfully petitions for interlocutory review of Order Nos. 05, 06, and 07, for the reasons set forth.

Respectfully submitted, this ____ day of July, 2003.

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