1 2 3 4 5 6 BEFORE THE WASHINGTON UTILITIES AND 7 TRANSPORTATION COMMISSION 8 In the Matter of the Petition of: Docket No. UT-030614 9 **QWEST CORPORATION** WeBTEC'S PETITION FOR 10 REVIEW OF INTERLOCUTORY For Competitive Classification of Basic Business **ORDERS 05, 06, AND 07 AND** 11 Exchange Telecommunications Services. RESPONSE TO PUBLIC 12 **COUNSEL'S PETITION FOR REVIEW** 13 14 INTRODUCTION. T. 15 The Washington Electronic Business and Telecommunications Coalition ("WeBTEC") 16 hereby petitions for review of interlocutory Orders Nos. 05, 06 and 07 in the above-captioned 17 matter, pursuant to WAC 480-09-760(b), and responds to Public Counsel's Petition for Review 18 of Interlocutory Orders 05, 06 and 07 pursuant to the Commission's Notice of Opportunity to 19 Respond dated July 9, 2003. WeBTEC concurs with the petition for review filed by Public 20 21 Counsel and the arguments contained therein. In addition, WeBTEC believes that the orders 22 referenced would substantially prejudice WeBTEC as a party and impair its ability to present its 23 case in this proceeding, as set forth below. 24

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II. WEBTEC AGREES WITH PUBLIC COUNSEL'S OBJECTION TO ENTRY OF THE "HIGHLY CONFIDENTIAL" PROTECTIVE ORDER SET FORTH IN ORDER NO. 07

A. WeBTEC Agrees That There Is No Need For Issuance of A "Highly Confidential" Protective Order Applicable to Non-Competitors.

Public Counsel correctly points out that the standard protective order already in place in this proceeding provides adequate protection for all confidential material in the record produced to parties who are not competitors of Qwest or the CLECs. Both Public Counsel and WeBTEC represent customers of Qwest and CLECs, not competitors. As Public Counsel also points out, 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. Indeed, as far as WeBTEC is concerned, WeBTEC members routinely do not sign the confidentiality orders and do not have access to confidential information nor will they in this case. WeBTEC members participate only through their outside counsel and expert witnesses.

WeBTEC agrees with Public Counsel that any highly confidential, 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. WeBTEC Objects to the Provisions of Order Nos. 05 and 07 Prohibiting Them from Reviewing the CLEC Information Provided Under Order No. 06.

Under the terms of Order No. 05, ¶33 and Order No. 07, ¶11, WeBTEC and Public Counsel are prohibited from reviewing the "raw" data produced by the CLECs in response to Order No. 06. WeBTEC and Public Counsel are only permitted to review an aggregation of the data prepared by Staff. This substantially prejudices WeBTEC'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. WeBTEC will be unable to analyze and evaluate this basic data which is critical to the statutory determination in this case.

Order No. 05, ¶32 -33, concludes that Public Counsel (and, by implication, WeBTEC) 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." As Public Counsel correctly points out, 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. Based on WeBTEC's and Public Counsel's experience in past cases, it is highly unlikely that CLECs will voluntarily share their information. The Commission is in a unique position to require disclosure of the information; it would be extremely burdensome, if not impossible, for any party to the proceeding to obtain that data. The most efficient and fairest way to obtaining relevant data for the decision that has to be made in this case is for the Commission to order disclosure from the CLECs. Unless data from all of the CLECs is made available, WeBTEC and Public Counsel, the only customer representatives in the case, will not have the full basic data set available to them for analysis.

C. The Commission Should Clarify the Aggregation Requirement.

WeBTEC concurs with and joins Public Counsel's request that the Commission clarify and modify the language of Order No. 07, ¶ 11 that provides that "Staff will aggregate [the CLEC] data into such documents as appropriate and relevant to the proceeding..." As argued by Public Counsel, any "aggregation" of data performed by Staff should be just that, a summation of the units reported by the individual CLECs. It should be the minimum necessary to protect the commercial concerns of the specific CLECs. The aggregation should not consist of Staff's

own interpretation of the data for purposes of its own testimony, such as an HHI analysis. That is a separate analytic step which Staff is free to perform, and to make available. The aggregation 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.

WeBTEC also concurs with Public Counsel's suggestion that the Commission consider a less restrictive approach, short of aggregation, such as allowing access to the raw data, stripped of identifying company information.

D. The Highly Confidential Protective Order Is Too Broad And Restrictive and Should Be Modified

The Highly Confidential Protective Order called for in Order No. 05, ¶32-33, and Order No. 07 much too broad and restrictive and should be modified.

1. There is no legitimate basis for restricting WeBTEC to one expert/one counsel who can have access to highly confidential information.

The Orders would restrict WeBTEC to having only "one expert/one counsel" while not subjecting Public Counsel or Staff to that limitation. The reason cited is "because they represent neither specific competitors nor customers." Order No. 5, ¶34. There is no rationale offered as to why representing *specific customers* presents a greater danger of disclosing confidential or highly confidential information than representing *customers in general*. As pointed out above, WeBTEC members are not competitors of the CLECs or Qwest, but customers only. Further, as noted above, the WeBTEC members do not even get access to either confidential or highly confidential information; only their experts and counsel would.

There is no factual basis for assuming that outside experts or outside counsel

representing WeBTEC would pose any greater threat of disclosing highly confidential information than would experts or counsel for Public Counsel or Staff. The critical factor is the "outside" nature of the expert or counsel, not the number of "outside" people working on the matter.

Restricting WeBTEC to having only one expert or counsel see the CLEC data would restrict their ability to analyze the data, prepare testimony, prepare cross-examination, and brief the issues in the case. Further, it is also only prudent to have more than one person capable of covering parts of the case in the event of illness, conflicts, or emergencies.

In sum, there is no legitimate basis for such blatant discrimination against the specific customers who are WeBTEC members. There should be no restriction on the number of outside expert consultants or outside counsel representing WeBTEC who can have access to the highly confidential data.

2. The highly confidential affidavit is too broad and restrictive.

Order No. 7, ¶14(a) would require an affidavit that the affiants would not for a period of five years involve themselves in "competitive decision making" by any company or business organization that "competes, *or potentially competes*, with the company or business organization from whom they seek disclosure of highly confidential information. This affidavit is much too broad and restrictive in a number of respects.

First, the phrase "involve themselves in competitive decision making" is vague and ambiguous. It is not at all certain what activities would fall within the scope of such a restriction. Read strictly, simply advising a competitor about registering or seeking competitive classification could be considered involvement in competitive decision making. Assisting in the

filing and prosecution of a complaint against a competitor could also qualify. As could participating in a cost proceeding or a Commission rulemaking. WeBTEC submits that it should be sufficient to require that the affiant commit to not disclose the information except as provided in the protective order and agree to use the information only for purposes of this proceeding. Alternatively, the terms of the affidavit should be modified specify that the affiants will not engage in or consult for a specified period of time in the marketing or pricing of services that compete with the services about which data are disclosed.

Second, the five year period of time specified is much too long. The kind of information being sought from CLECs would have a much shorter sensitivity shelf-life than five years. WeBTEC submits that a more appropriate time period would be a year.

Third, the phrase "potentially competes" is too vague. It is impossible to know what that would encompass. It also would require some sort of clairvoyance about the future plans of companies that is totally unrealistic. This is particularly troublesome because no time limit is included about the "potential competition."

Fourth, the affidavit does not include any language that would restrict the non-compete obligation to activities related to the highly confidential data disclosed. For example, the data disclosed may relate only to Washington, but companies could compete in other states where the information would be of no relevance. Nevertheless, the language of the affidavit would restrict an affiant from engaging in competitive decision making related only to that foreign state. There is no legitimate justification for such a restriction. The same would be true for circumstances where the disclosing company and the affiant's company or client competed with one another in the provision of services or products that are completely different from and

unrelated to the services about which the data is disclosed in this proceeding. Any restriction in the affidavit should be strictly limited to situations and activities where the highly confidential information would have commercial value and its use would result in an unfair competitive disadvantage.

III. WEBTEC AGREES WITH PUBLIC COUNSEL THAT CLECS SHOULD BE REQUIRED TO PRODUCE PRICE INFORMATION.

Public Counsel requests that Order No. 06 be modified to require all CLECs to provide current price information for relevant services offered. WeBTEC agrees and joins Public Counsel's request. As pointed out in Public Counsel's petition, Order No. 05 states that price information "is not germane to the statutory issues..." ¶ 23 (a). RCW 80.36.330(1)(c), requires the Commission, in evaluating a petition for competitive classification, to however. consider: "[t]he ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates...." (emphasis added). Consequently, the prices of services must be taken into account in the statutory analysis. While CLEC prices are filed under price lists, price lists are allowed to include only a range of prices and do not necessarily reflect the actual prices currently being charged. Also, as Public Counsel points out, price lists on file may not be complete, up-to-date, or accurate. Failing to obtaining current price information from CLECs for the services under consideration here will deprive the Commission, Staff and the parties of key information about whether competitive alternatives are really available and capable of constraining Qwest's prices. WeBTEC, like Public Counsel, will be substantially prejudiced in the preparation of its case without CLEC price information.

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IV. THE COMMISSION SHOULD CLARIFY WHAT SERVICES CLECS SHOULDINCLUDE IN THEIR LINE COUNTS.

In Order No. 05, ¶23(a) the CLECs are directed to provide a detailed description of each business local exchange service and location where they offer the service, whether by Qwest exchange, wire center or other parameter, but, then, are instructed that they "need not describe business local exchange services that are of a type not included in the petition. ." Qwest in its petition purports to exclude *digital services* from the scope of its petition. However, there is no indication that the CLEC line counts reflected in Qwest's petition as UNE loops, UNE-P, etc. are restricted to those used to provide *analog services*. Similarly, there is no indication in Order No. 6, ¶5(2) that CLECs should not report lines used to provide *analog and not digital services*.

The Orders need to be clarified so that there is not a mismatch in the line counts reported and the market share calculations derived from that data. Otherwise, the Commission should modify Orders Nos. 05 and 06 to require CLECs to report all lines used to provide business local exchange services, both *analog and digital*, and separately describe each, separately identify how many lines are used to provide each, where, and what types of loops are used to provide them. Without either clarification, the information received will be misleading and, ultimately, useless.

V. CONCLUSION.

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

WeBTEC'S PETITION FOR REVIEW OF INTERLOCUTORY ORDERS 05, 06, AND 07 AND RESPONSE TO PUBLIC COUNSEL'S PETITION FOR REVIEW - Page 8 WUTC Docket No. UT-030614 Petition for Review.doc

1	Respectfully submitted, this 10th day of July, 2003.	
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WeBTEC'S PETITION FOR REVIEW OF INTERLOCUTORY ORDERS 05, 06, AND 07 AND RESPONSE TO PUBLIC COUNSEL'S PETITION FOR REVIEW - Page 9 WUTC Docket No. UT-030614 Petition for Review.doc ATER WYNNE LLP

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1	CERTIFICATE OF SERVICE	
2 3	I hereby certify that I have this 11th day of July, 2003, served the true and correct original of the foregoing document upon the WUTC, via the methods noted below, properly addressed as follows:	
4	Carole Washburn Hand Delivered	
5	Executive Secretary U.S. Mail (first-class, postage prepaid)	
6	WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION XX Overnight Mail –UPS Next Day Air Facsimile	
7	1300 S. Evergreen Park Drive SW Olympia, WA 98504-7250 Email	
8		
9	I hereby certify that I have this 11th day of July, 2003, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:	
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11	Lisa Anderl QWEST CORPORATION Hand Delivered U.S. Mail (first-class, postage prepaid)	
12	1600 – 7th Ave., Room 3206 Seattle, WA 98290 V.S. Mail (list-class, postage prepart) XX Overnight Mail – UPS Next Day Air Facsimile	
13	Email	
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12		der the laws of the State of Washington that the
	foregoing is true and correct.	
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14	DATED this 11th day of July, 2003, at Sea	Susan Arellano
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