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6 BEFORE THE
7 WASHINGTON UTILITIES AND
8 TRANSPORTATION COMMISSION

9 In the Matter of the Petition of:

10 QWEST CORPORATION

11 For Competitive Classification of Basic Business
12 Exchange Telecommunications Services.

Docket No. UT-030614

**WebTEC'S PETITION FOR
REVIEW OF INTERLOCUTORY
ORDERS 05, 06, AND 07 AND
RESPONSE TO PUBLIC
COUNSEL'S PETITION FOR
REVIEW**

13
14 I. INTRODUCTION.

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 Counsel and the arguments contained therein. In addition, WebTEC believes that the orders
21 referenced would substantially prejudice WebTEC as a party and impair its ability to present its
22 case in this proceeding, as set forth below.
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1 services, as defined by RCW 80.36.330. WeBTEC will be unable to analyze and evaluate this
2 basic data which is critical to the statutory determination in this case.

3 Order No. 05, ¶32 -33, concludes that Public Counsel (and, by implication, WeBTEC)
4 does not need access to the raw CLEC data because “it has the ability to contact the CLECs
5 separately to obtain such data or to obtain the CLECs’ consent to release of the raw information
6 to it by Staff.” As Public Counsel correctly points out, neither of these means is adequate.
7 Most of the CLECs who will provide data are not subject to discovery because they are not
8 parties to the case. Based on WeBTEC’s and Public Counsel’s experience in past cases, it is
9 highly unlikely that CLECs will voluntarily share their information. The Commission is in a
10 unique position to require disclosure of the information; it would be extremely burdensome, if
11 not impossible, for any party to the proceeding to obtain that data. The most efficient and
12 fairest way to obtaining relevant data for the decision that has to be made in this case is for the
13 Commission to order disclosure from the CLECs. Unless data from all of the CLECs is made
14 available, WeBTEC and Public Counsel, the only customer representatives in the case, will not
15 have the full basic data set available to them for analysis.
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18 **C. The Commission Should Clarify the Aggregation Requirement.**

19 WeBTEC concurs with and joins Public Counsel’s request that the Commission clarify
20 and modify the language of Order No. 07, ¶ 11 that provides that “Staff will aggregate [the
21 CLEC] data into such documents as appropriate and relevant to the proceeding...” As argued by
22 Public Counsel, any “aggregation” of data performed by Staff should be just that, a summation
23 of the units reported by the individual CLECs. It should be the minimum necessary to protect
24 the commercial concerns of the specific CLECs. The aggregation should not consist of Staff’s
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1 own interpretation of the data for purposes of its own testimony, such as an HHI analysis. That
2 is a separate analytic step which Staff is free to perform, and to make available. The
3 aggregation should track each of the specific data requests to CLECs in Order No. 06, and each
4 subpart, and provide the maximum information possible, consistent with protecting
5 confidentiality.

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

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

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

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

16 The Orders would restrict WeBTEC to having only "one expert/one counsel" while not
17 subjecting Public Counsel or Staff to that limitation. The reason cited is "because they
18 represent neither specific competitors nor customers." Order No. 5, ¶34. There is no rationale
19 offered as to why representing *specific customers* presents a greater danger of disclosing
20 confidential or highly confidential information than representing *customers in general*. As
21 pointed out above, WeBTEC members are not competitors of the CLECs or Qwest, but
22 customers only. Further, as noted above, the WeBTEC members do not even get access to
23 either confidential or highly confidential information; only their experts and counsel would.
24

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

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

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

9
10 In sum, there is no legitimate basis for such blatant discrimination against the specific
11 customers who are WeBTEC members. There should be no restriction on the number of outside
12 expert consultants or outside counsel representing WeBTEC who can have access to the highly
13 confidential data.

14
15 **2. The highly confidential affidavit is too broad and restrictive.**

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

21
22 First, the phrase “involve themselves in competitive decision making” is vague and
23 ambiguous. It is not at all certain what activities would fall within the scope of such a
24 restriction. Read strictly, simply advising a competitor about registering or seeking competitive
25 classification could be considered involvement in competitive decision making. Assisting in the

1 filing and prosecution of a complaint against a competitor could also qualify. As could
2 participating in a cost proceeding or a Commission rulemaking. WeBTEC submits that it
3 should be sufficient to require that the affiant commit to not disclose the information except as
4 provided in the protective order and agree to use the information only for purposes of this
5 proceeding. Alternatively, the terms of the affidavit should be modified specify that the affiants
6 will not engage in or consult for a specified period of time in the marketing or pricing of
7 services that compete with the services about which data are disclosed.
8

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

12 Third, the phrase “potentially competes” is too vague. It is impossible to know what that
13 would encompass. It also would require some sort of clairvoyance about the future plans of
14 companies that is totally unrealistic. This is particularly troublesome because no time limit is
15 included about the “potential competition.”
16

17 Fourth, the affidavit does not include any language that would restrict the non-compete
18 obligation to activities related to the highly confidential data disclosed. For example, the data
19 disclosed may relate only to Washington, but companies could compete in other states where
20 the information would be of no relevance. Nevertheless, the language of the affidavit would
21 restrict an affiant from engaging in competitive decision making related only to that foreign
22 state. There is no legitimate justification for such a restriction. The same would be true for
23 circumstances where the disclosing company and the affiant’s company or client competed with
24 one another in the provision of services or products that are completely different from and
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1 unrelated to the services about which the data is disclosed in this proceeding. Any restriction in
2 the affidavit should be strictly limited to situations and activities where the highly confidential
3 information would have commercial value and its use would result in an unfair competitive
4 disadvantage.

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

7 Public Counsel requests that Order No. 06 be modified to require all CLECs to provide
8 current price information for relevant services offered. WeBTEC agrees and joins Public
9 Counsel's request. As pointed out in Public Counsel's petition, Order No. 05 states that price
10 information "is not germane to the statutory issues..." ¶ 23 (a). RCW 80.36.330(1)(c),
11 however, requires the Commission, in evaluating a petition for competitive classification, to
12 consider: "[t]he ability of alternative providers to make functionally equivalent or substitute
13 services readily available *at competitive rates...*" (emphasis added). Consequently, the prices
14 of services must be taken into account in the statutory analysis. While CLEC prices are filed
15 under price lists, price lists are allowed to include only a range of prices and do not necessarily
16 reflect the actual prices currently being charged. Also, as Public Counsel points out, price lists
17 on file may not be complete, up-to-date, or accurate. Failing to obtain current price
18 information from CLECs for the services under consideration here will deprive the
19 Commission, Staff and the parties of key information about whether competitive alternatives are
20 really available and capable of constraining Qwest's prices. WeBTEC, like Public Counsel,
21 will be substantially prejudiced in the preparation of its case without CLEC price information.
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Respectfully submitted, this 10th day of July, 2003.

WeBTEC

By: _____
Arthur A. Butler, WSBA #04678
Ater Wynne, LLP

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 11th day of July, 2003, served the true and correct
3 original of the foregoing document upon the WUTC, via the methods noted below, properly
4 addressed as follows:

4 Carole Washburn _____ Hand Delivered
5 Executive Secretary _____ U.S. Mail (first-class, postage prepaid)
6 **WASHINGTON UTILITIES AND** XX Overnight Mail –UPS Next Day Air
7 **TRANSPORTATION COMMISSION** _____ Facsimile
8 1300 S. Evergreen Park Drive SW _____ Email
9 Olympia, WA 98504-7250

8 I hereby certify that I have this 11th day of July, 2003, served a true and correct copy of
9 the foregoing document upon counsel of record, via the methods noted below, properly
10 addressed as follows:

11 Lisa Anderl _____ Hand Delivered
12 QWEST CORPORATION _____ U.S. Mail (first-class, postage prepaid)
13 1600 – 7th Ave., Room 3206 XX Overnight Mail – UPS Next Day Air
14 Seattle, WA 98290 _____ Facsimile
15 _____ Email

14 Letty Friesen _____ Hand Delivered
15 AT&T COMMUNICATION OF THE PACIFIC _____ U.S. Mail (first-class, postage prepaid)
16 NORTHWEST XX Overnight Mail – UPS Next Day Air
17 1875 Lawrence Street, Floor 15 _____ Facsimile
18 Denver, CO 80202 _____ Email

18 Simon J. ffitc _____ Hand Delivered
19 PUBLIC COUNSEL SECTION _____ U.S. Mail (first-class, postage prepaid)
20 OFFICE OF ATTORNEY GENERAL XX Overnight Mail – UPS Next Day Air
21 900 Fourth Avenue, Suite 2000 _____ Facsimile
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21 Karen Johnson _____ Hand Delivered
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24 Beaverton, OR 97006 _____ Facsimile
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of July, 2003, at Seattle, Washington.

Susan Arellano
Secretary to Arthur A. Butler
Ater Wynne LLP

