

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCIMETRO ACCESS TRANSMISSION)	
SERVICES, INC.,)	
)	DOCKET NO. UT-971063
Complainant,))	
v.)	ELEVENTH SUPPLEMENTAL
)	ORDER DENYING
U S WEST COMMUNICATIONS, INC.,)	U S WEST'S PETITION
)	FOR RECONSIDERATION
Respondent.)	
.....)	

MEMORANDUM

I. PROCEDURAL BACKGROUND

1. On June 26, 1997, MCImetro Access Transmission Services, Inc. (MCImetro), filed a formal complaint against U S WEST Communications, Inc. (U S WEST) at the Washington Utilities and Transportation Commission (Commission), alleging breaches of contract and violations of law resulting from U S WEST's failure to adequately forecast network growth and timely provision interconnection facilities. On July 16, 1997, U S WEST filed its answer to the complaint. On October 28, 1997, the Commission entered a protective order governing disclosure of confidential information in this proceeding (Protective Order).

2. On February 10, 1999, the *Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, in Part, and Affirming, in Part* (Final Order), was entered. The Final Order modified prior decisions by the ALJ regarding confidential information and held that portions of two exhibits designated confidential by U S WEST constituted public information.

3. On February 18, 1999, U S WEST filed a *Petition for a Stay of the Provisions of the Final Order* removing confidential designation from portions of those two exhibits. On February 22, 1999, U S WEST timely filed a *Petition for Reconsideration* (Petition) requesting that the Commission reverse its decision that portions of confidential documents were not entitled to protection. On February 26, 1999, the *Tenth Supplemental Order Granting U S WEST's Petition for a Stay* was entered. MCImetro and Commission Staff filed answers to the Petition.

II. GOVERNING REGULATIONS AND STATUTES

A. WAC 480-09-015. Submission of "confidential" information.

4. WAC 480-09-015 states, in relevant part:

(1) General.

The commission will provide special handling and limited access to confidential information properly submitted pursuant to this section. Nothing in this rule shall foreclose the entry and enforcement of protective orders in specific cases. . . .

(3) Definitions.

"Confidential information." As used in this rule, confidential information consists of and is limited to information filed with or provided to the commission or its staff which is protected from inspection or copying under chapter 42.17 RCW or RCW 80.04.095. In the absence of a challenge, information designated as confidential under this rule will be presumed to meet this definition. In the event of a challenge, the burden of proving that the statutory definition applies is on the party asserting confidentiality. . . .

B. RCW 80.04.095. Protection of records containing commercial information

5. RCW 80.04.095 states, in relevant part:

Records, subject to chapter 42.17 RCW, filed with the commission or the attorney general from any person which contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, shall not be subject to inspection or copying under chapter 42.17 RCW: (1) Until notice to the person or persons directly affected has been given; and (2) if, within ten days of the notice, the person has obtained a superior court order protecting the records as confidential. The court shall determine that the records are confidential and not subject to inspection and copying if disclosure would result in private loss, including an unfair competitive disadvantage. When providing information to the commission or the attorney general, a person shall designate which records or portions of records contain valuable commercial information. Nothing in this section shall prevent the use of protective orders by the commission governing disclosure of proprietary or confidential information in contested proceedings.

III. THE COMMISSION'S PROTECTIVE ORDER

6. The Protective Order states, in relevant part:

1. Confidential Information. All access, review, use and disclosure of the correspondence, documents, data, studies, methodologies or other information or materials designated by a party to this proceeding as proprietary (hereafter referred to as "Confidential Information") shall be governed by the terms of this Order and by WAC 480-09-015. . . . Generally, the Commission expects confidential information to include only numbers, customer names, and planning details. The Commission expects the parties to delete such information from the primary exhibits and provide these "confidential" deletions under separate cover. * * * The Commission intends to minimize the amount of "confidential" information so as to maximize the amount of public information. . . .

7. Right to Challenge Admissibility. Nothing herein shall be construed to restrict any party's right to challenge the admissibility or use in this proceeding of any Confidential Information on any legitimate ground, including but not limited to competence, relevance, materiality or privilege. At any hearing to determine the confidentiality of information, the burden of proof to show that such information is properly classified as confidential shall be upon the party asserting the claim. . . .

10. Challenge to Confidentiality. In the event any party who desires to use or substantively refer to certain Confidential Information during this proceeding disputes the trade secret, proprietary or confidential nature of such Confidential Information, that party shall apply to the Administrative Law Judge for a determination. Any hearing on such application shall be conducted in camera, and the Confidential Information shall be treated in all respects as protected under the terms of the Order while the trade secret, proprietary or confidential nature of the Confidential Information is in dispute. In the event of a ruling against confidentiality, the Confidential Information shall continue to be protected under this Order for ten days thereafter, to enable the producing party to seek a stay pending Commission or judicial review. . . .

IV. The Commission's Final Order

7. The Final Order discussed challenges U S WEST's designation of confidential information (par. 57-69), made relevant findings of fact (par. 196-198), and ordered that policy-related statements in excerpts from two Common Funding Documents (Exhibits C-94 and C-116) constitute public information (par. 281). Common Funding Documents are used in network planning, state the nature and

necessity for engineering projects, and provide milestones for project completion. The two policy-related statements excerpted in Exhibits C-94 and C-116 are nearly identical to each other.

8. The Commission conducted a balancing test on review, consistent with a “preponderance of the evidence” standard. The Commission found that the policy-related statements do not disclose technical details, are not planning details, and more “probably” constitute public information than not; thus, they do not present any potential for an unfair competitive disadvantage. The Commission also found that the policy statements are consistent with other non-confidential information admitted into the record.

ISSUES, DISCUSSION, AND DECISION

I. WHAT IS THE SCOPE OF INFORMATION SUBJECT TO CONFIDENTIAL PROTECTION?

A. Discussion

9. RCW 80.04.095 sanctions the use of protective orders by the Commission to govern the process by which proprietary or confidential information is designated and disclosed in contested proceedings (including challenges to confidentiality). U S WEST argues that RCW 80.04.095 defines the minimum level of protection afforded confidential information, and that a protective order may expand, but may not limit, the scope of statutory protection. Furthermore, The Protective Order describes confidential information in general terms, thus allowing for broader application. U S WEST also argues that the confidential character of information must be considered in the context within which it appears, and policy-related statements are not inherently non-confidential.

10. Commission Staff states that the Protective Order and WAC 480-09-015 govern access, review, use, and disclosure of confidential information. Under WAC 480-09-015 confidential information consists of, and is limited to, information that is protected from inspection or copying under RCW 80.04.095 and chapter 42.17 RCW. Staff argues that, under those statutes, information must contain “valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information” to meet the criteria for confidential classification.

11. MCImetro states that the provisions of RCW 80.04.095 state a narrow exception to the broad disclosure requirements of the Public Records Act, chapter 42.17 RCW. Thus, RCW 80.04.095 establishes the maximum level of protection. MCImetro argues that the Protective Order and RCW 80.04.095 categorically limit the scope of confidential information.

12. Neither RCW 80.04.095 nor the Protective Order impose a narrow interpretation on the scope of information subject to confidential protection. RCW 80.04.095 protects “valuable commercial information.” Likewise, the Protective Order broadly states categories of information or materials subject to confidential protection. The Commission agrees that the Protective Order’s general reference to “numbers, customer names, and planning details” does not preclude protection of other valuable commercial information.

13. Both RCW 80.04.095 and the Protective Order make illustrative references to categories of valuable commercial information to guide the use of confidential designation by parties. However, the Commission must employ the statutory test set forth in RCW 80.04.095 to determine whether challenged confidential information is entitled to protection.

B. Decision

14. The Commission agrees with U S WEST’s argument that there is nothing inherent in a policy-related statement that exempts it from confidential protection. While both RCW 80.04.095 and the Protective Order protect valuable commercial information, the Commission must employ the statutory test in RCW 80.04.095 to determine whether challenged confidential information is entitled to protection. Records, or portions of records, constitute valuable commercial information (and must be afforded confidential protection) if their disclosure would result in private loss, including an unfair competitive disadvantage.

II. WHO HAS THE BURDEN OF PROOF WHEN CONFIDENTIAL INFORMATION IS CHALLENGED?

A. Discussion

15. U S WEST argues that it does not release Common Funding Documents except under protective agreement and that the Commission should apply a dictionary definition of “confidential”, meaning “told in confidence; imparted in secret.” On that basis, U S WEST argues that MCImetro should be required to prove that U S WEST has disclosed challenged documents as non-confidential.

16. Commission Staff responds that under WAC 480-09-015, when a party challenges the confidential designation of information, the burden of proving confidentiality is on the party asserting the privilege.

17. RCW 80.04.095 clearly states that valuable commercial information includes trade secrets, but U S WEST seeks to protect all confidential information as if it were a trade secret. Trade secret protection requires implementation of certain policies

and practices controlling access to information, and may give rise to greater protection than provided for other confidential information; however, U S WEST does not argue that the Common Funding Documents constitute trade secrets. Accordingly, the Common Funding Documents are entitled to no greater protection than other confidential information pursuant to WAC 480-09-015.

B. Decision

18. As discussed above, RCW 80.04.095 sanctions the use of a protective order to govern the process by which confidential information is challenged. Both the Protective Order and WAC 480-09-015 state that the burden of proof shall be on the party asserting confidentiality to show that challenged information is properly classified. Thus, the burden is on U S WEST to prove that the policy-related statements excerpted from the Common Funding Documents are entitled to protection.

III. IS IT PROPER TO EXCERPT SENTENCES FROM CONFIDENTIAL DOCUMENTS?

A. Discussion

19. U S WEST argues that for each of the exhibits, the entire document is confidential and that consideration of the document as a whole is consistent with RCW 80.04.095 (which refers to the protection of “records”) and the Protective Order (which refers to “correspondence, documents, data, studies, methodologies, or other information or materials”). U S WEST claims that in neither instance is a party fairly warned that excerpted confidential information is subject to challenge. Furthermore, U S WEST argues that excerpts may appear to be non-confidential when taken out of context.

20. MCImetro responds that RCW 80.04.095 states “a person shall designate which records or portions of records contain valuable commercial information.” Both MCImetro and Commission Staff argue that the Protective Order expressly directs the parties to delete confidential information from the primary exhibits and provide these “confidential” deletions under separate cover. Staff argues that redacting confidential information is consistent with the Commission’s policy to maximize public information and minimize the amount of confidential information submitted, and with state policy to narrowly construe exemptions to disclosure of records under the Public Disclosure Act.

21. The reference in RCW 80.04.095 to the designation of *portions of records* containing valuable commercial information establishes a legal basis for challenging excerpts of confidential documents. The Protective Order not only states the expectation that confidential information will be redacted from the non-confidential portions of exhibits but it also provides a process for challenging confidentiality. Thus,

U S WEST's argument that it did not receive fair warning that excerpts from the Common Funding Documents are subject to challenge is not persuasive.

22. The Commission agrees with U S WEST that the context of information may provide commercial value that would not otherwise be evident. The value of context is most apparent in the presentation of data in spreadsheets that would otherwise seem insignificant. Likewise, the commercial value of non-numerical information may be dependent on its context and should be considered.

B. Decision

23. Express provisions stated in RCW 80.04.095 and the Protective Order constitute fair notice to the parties that portions of exhibits designated as confidential are subject to challenge. The context in which information is provided should be considered when determining whether disclosure would result in private loss, including an unfair competitive advantage.

IV. DOES DISCLOSURE OF THE POLICY-RELATED STATEMENTS EXCERPTED IN EXHIBITS C-94 AND C-116 RESULT IN PRIVATE LOSS, INCLUDING AN UNFAIR COMPETITIVE DISADVANTAGE?

A. Discussion

24. U S WEST argues that Exhibits C-94 and C-116 are network planning documents in their entirety, and all information in the documents relate to network planning. U S WEST claims that the policy-related statements constitute planning details in the context of the Common Funding Documents. U S WEST states two unfair competitive disadvantages that result from disclosure: (1) MCImetro is enabled to take planning details out of context and publicly disclose them in a misleading way; and (2) U S WEST must publicly disclose additional confidential network planning details and processes in order to explain the excerpts.

25. MCImetro and Commission Staff argue that policy-related statements do not fall into any of the categories of commercial information recognized by RCW 80.04.095 or the Protective Order, and U S WEST's reluctance to explain corporate policy is not a legitimate unfair competitive disadvantage. MCImetro also argues that U S WEST fails to provide any substantive example of additional confidential network information requiring disclosure in order to explain the excerpts.

26. The sections of the Common Funding Documents in which the policy-related statements appear are for the express purpose of justifying the proposed increases in network capacity; however, neither exhibit relies upon the challenged policy-related statements. The policy-related statements are unnecessary to the decisions being made based upon other technical and planning details. Since the

policy-related statements are not relevant to the network planning decisions being made, they do not constitute planning details in the context of the Common Funding Documents. Thus, public disclosure does not result in taking planning details out of context. The policy-related statements are consistent with other non-confidential information admitted into the record, and it is more probable than not that disclosure will result in no private loss, including an unfair competitive disadvantage, to U S WEST.

27. U S WEST agrees that information is not entitled to confidential protection merely because it is susceptible to misinterpretation; therefore some other showing must be made. U S WEST fails to identify other confidential information necessary to explain the policy-related statements. Since the Common Funding Documents do not rely upon the policy-related statements, it is totally speculative whether U S WEST would be required to disclose valuable commercial information in order to explain the excerpts. U S WEST has not met its burden of proof that disclosure constitutes an unfair competitive disadvantage.

28. The Commission remains committed to the protection of valuable commercial information disclosed in contested cases, and has thoroughly considered the claims presented in U S WEST's Petition. The Final Order upheld confidential protection for those portions of the challenged excerpts consisting of planning details and the Commission made findings to minimize the potential for misinterpretation of the policy-related statements. In the instant case, the record simply does not support U S WEST's claims.

B. Decision

29. The excerpted policy-related statements do not constitute planning details in the context of the Common Funding Documents. It is more probable than not that disclosure of the policy-related statements does not result in private loss, including an unfair competitive disadvantage, to U S WEST. Therefore, the policy-related statements do not constitute valuable commercial information.

ORDER

THE COMMISSION ORDERS:

30. U S WEST's Petition requesting that the Commission reverse its decision that policy-related statements in confidential Exhibits C-94 and C-116 are not entitled to protection, and are public information, is denied.

31. The policy-related statements in Exhibits C-94 and C-116 shall continue to be protected for thirty days to enable U S WEST to seek a stay pending judicial review of the instant order.

DATED at Olympia, Washington and effective this day of March 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner