

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET NO. UT-030614
)	
	)	ORDER NO. 08
QWEST CORPORATION)	
	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART PUBLIC
For Competitive Classification of	)	COUNSEL'S AND WeBTEC'S
Basic Business Exchange	)	PETITIONS FOR REVIEW OF
Telecommunications Services	)	INTERLOCUTORY ORDERS;
	)	MODIFYING AMENDED
.....	)	PROTECTIVE ORDER

I. INTRODUCTION

1 **Proceeding.** Docket No. UT-030614 involves a petition filed by Qwest Corporation (Qwest), for competitive classification of basic business exchange telecommunications services pursuant to RCW 80.36.330.

2 **Appearances.** Lisa Anderl, attorney, Seattle, represents Qwest. Jonathan C. Thompson, assistant Attorney General, represents Commission Staff. Simon ffitch, assistant Attorney General, represents Public Counsel Section of the Office of Attorney General. Letty S. D. Friesen, attorney, Denver, Colorado, represents AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on Behalf of TCG Seattle and TCG Oregon (AT&T). Karen J. Johnson, attorney, Beaverton, Oregon, represents Integra Telecom of Washington, Inc. (Integra). Michel Singer-Nelson, attorney, Denver, Colorado, represents WorldCom/MCI. Lisa Rackner and Arthur A. Butler, attorneys, Seattle, represent Washington Electronic Business and Telecommunications Coalition (WeBTEC). Stephen S. Melnikoff, attorney, Arlington, Virginia, represents the United States Department of Defense and all other Federal Executive Agencies (DOD/FEA).

3 **Background.** On June 30, 2003, the presiding Administrative Law Judge entered Order Nos. 05, 06 and 07 in this docket. These orders addressed Commission Staff's request that Competitive Local Exchange Carriers (CLECs) in the state of

Washington respond to certain questions designed to obtain information regarding the status of competition for business services in the state of Washington.

- 4 Order No. 05 identified the list of questions that it would be appropriate to propound to CLECs in order to obtain information helpful in deciding issues in this case. Order No. 05 also indicated that it would be appropriate to amend the protective order already entered in Order No. 03 in this proceeding. The amendment would serve to protect highly confidential information supplied by the CLECs in response to the Commission Staff's questions, as well as other information of a highly confidential nature that might be at issue in the case. Order No. 05 indicates that the protective order entered in Docket No. UT-000883 would be a proper model for the highly confidential amended protective order entered in this case, except that the highly confidential information could also be shared with one administrative support staff, in addition to one expert and one attorney per party. By the terms of the amended order, only Commission Staff would receive the CLECs' responses to the questions posed in Order No. 06. Staff would in turn aggregate the information and distribute it to other parties, in accordance with the terms of the amended protective order.
- 5 Order No. 06 is the order requiring CLECs to disclose information to the Commission Staff. This order does not require CLECs to respond with information pertaining to services not covered by Qwest's petition. It also does not require CLECs to submit current pricing information.
- 6 Order No. 07 amended the existing protective order to create protection for highly confidential information and created a method for Staff to review, aggregate and distribute the information submitted by CLECs in response to Order No. 06. The order also identifies additional terms of the affidavit required to be signed by those seeking to review highly confidential information under the amended protective order.
- 7 **Petitions for Review of Interlocutory Orders.** On July 9, 2003, Public Counsel filed a petition for interlocutory review of Order Nos. 05, 06 and 07. On July 10, 2003, WeBTEC filed a similar petition for review.

8 Integra, AT&T, and Commission Staff filed responses to the petitions for review on July 15, 2003.

II. DISCUSSION AND DECISION

A. **Is It Necessary and Appropriate for the Commission to enter a Highly Confidential Protective Order in this proceeding? Should the Terms of the Highly Protective Order Apply to All Parties other than Commission Staff?**

9 Public Counsel and WeBTEC object to the Commission entering a Highly Confidential protective order in this proceeding. They assert the existing protective order offered adequate protection for all confidential material that might be submitted by CLECs to parties that are not competitors, but rather are customers of Qwest and the CLECs. Both Public Counsel and WeBTEC represent customers. Public Counsel represents residential ratepayers and small business customers generally. WeBTEC represents a named list of business customers, including such entities as Boeing. WeBTEC contends that its “customer” members do not involve themselves in the prosecution of cases such as this. Instead they participate only through their outside counsel and witnesses. Public Counsel and WeBTEC argue that the state policy of openness in public proceedings should require any amended protective order to be tailored to address the reasonable concerns of competitive parties and not place additional restrictions on non-competitors.

10 Integra and AT&T respond that entry of a highly confidential protective order is necessary to protect CLEC trade secrets. Integra points out that Commission Staff is delegated responsibility by the legislature for regulating the telecommunications industry, as opposed to either Public Counsel or WeBTEC, which represent consumers looking for better deals, or potential customers. *Integra Response at 3.*

11 Staff asserts the Commission has discretion to determine the appropriate terms of a protective order governing disclosure of proprietary or confidential information in contested proceedings. *RCW 80.04.095.* Staff argues that for ease of administration such a protective order should apply to all parties, including non-competitors.

12 **Decision.** The Commission finds it is necessary and appropriate to enter a Highly Confidential protective order in this proceeding. The information sought in this case concerns market sensitive information from all CLECs registered in the State of Washington, including the geographic locations where they provide business services, customer locations, lines provided for customers, and future business plans to offer service in the state. This information, if obtained by competitors or those with competitive interests, would severely harm the CLECs providing the information. The Commission has entered such orders in other similar proceedings where highly confidential trade secrets are produced by competitive service providers. The Commission has broad discretion to fashion protective orders that will facilitate the production of information conducive to making fair, reasonable and just decisions on the issues presented in a proceeding, even to the point of limiting access to such information by “customer” as opposed to “competitor” parties.

13 Moreover, Public Counsel does not appear to be acting as an independent party in the proceeding, but rather appears to be coordinating with other parties with private and competitive interests. In particular, it appears that Public Counsel may be sharing an expert witness or information with other parties in the proceeding. Until Public Counsel demonstrates to the Commission that it is operating independently of other parties in this proceeding, the terms of the amended protective order should apply equally to all parties other than Commission Staff. The information for which protection is sought is highly confidential and the potential for improper dissemination or use of the information increases with the breadth of access granted. Finally, application of the order to all parties avoids administrative burden and confusion.

B. SHOULD THE PROVISIONS OF THE PROTECTIVE ORDER BE ALTERED TO ALLOW PARTIES GREATER FLEXIBILITY OF ACCESS TO PROTECTED INFORMATION?

14 WeBTEC argues that the portion of the Highly Confidential protective order allowing review of confidential information by only one counsel and one expert (and one administrative support person under Order No. 07), would restrict WeBTEC’s ability to analyze the data, prepare testimony, prepare cross-examination, and brief the issues in the case. WeBTEC contends that its

attorneys and experts pose no greater threat of disclosure of sensitive information than those of Commission Staff or Public Counsel.

- 15 WeBTEC also argues that the affidavit required under the Highly Confidential protective order is overly broad and restrictive. WeBTEC particularly objects to the provision requiring affiants not to 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” for a period of five years.
- 16 **Decision.** The Commission recognizes that circumstances might occur that would make the limitation of one outside counsel/one outside expert contained in the Highly Confidential protective order unreasonable. Parties should be allowed an opportunity to demonstrate that additional individuals need to be authorized to review highly confidential material when such circumstances arise. The terms of the Highly Confidential protective order should be modified as shown in Appendix A attached to this order.
- 17 It appears that given the temporal quality of telecommunications information, a three year period for affiants to avoid involvement in competitive decision making is sufficient to protect highly confidential information provided under the amended protective order. If a party believes there is particular information, or a type of information, that justifies a greater or lesser time period under Appendix A to the amended protective order, that party may raise the matter by motion filed with the Commission.
- 18 The Commission also recognizes that the terms of the affidavit required under the Highly Confidential protective order have been the subject of frequent challenge by parties such as WeBTEC in proceedings before this body. The Commission continues to find that the terms of the affidavit ensure the protection of the highly confidential information submitted during these proceedings. Absent future order of the Commission concluding otherwise, these provisions should remain in effect.

C. IN WHAT FORM SHOULD STAFF DISTRIBUTE THE INFORMATION IT RECEIVES FROM CLECS?

- 19 Public Counsel and WeBTEC argue that they should be permitted to review the raw data submitted by CLECs in response to Order No. 06. They argue that alternative methods of obtaining the information from CLECs are insufficient because most of the CLECs are not parties to this case and it is highly unlikely that CLECs will voluntarily share the confidential information with Public Counsel and WeBTEC. The fairest and most efficient way for Public Counsel and WeBTEC, the only customer representatives in the case, to obtain the information, is to receive it, as all other parties will, pursuant to Commission order.
- 20 Public Counsel and WeBTEC also contend that if they are not permitted review of the raw data, the aggregation of the data by Staff should be the minimum necessary to protect the commercial concerns of specific CLECs.
- 21 Staff identifies three ways in which the confidential information could be distributed: unaggregated raw data; raw data with CLEC identities masked; and aggregation of information only to the extent of tracking each of the specific data requests and responses, consistent with preserving confidentiality. Staff has stated that it intends to distribute the raw data with the CLEC identities masked.
- 22 Integra responds that since Qwest competes against the market as a whole, rather than against individual CLECs, Staff's aggregation of the data is exactly the information required to show the status of competition. Such an aggregation would show the Commission and the parties what they need to know without exposing individual CLEC trade secrets and highly confidential information.
- 23 **Decision.** The Commission is concerned that merely masking CLEC identities will not provide adequate protection, particularly when only one CLEC is active in a specific geographic area. Staff must aggregate the CLEC-provided information sufficiently to protect CLEC identities, but should provide no more interpretation of the data than necessary to do so. Staff must explain the steps it takes to aggregate the information it distributes to the parties pursuant to the Highly Confidential protective order.

D. SHOULD THE COMMISSION MODIFY THE REQUEST FOR CLEC INFORMATION TO INCLUDE: A) PRICE INFORMATION; AND B) INFORMATION ON NUMBERS OF ALL LINES, BOTH ANALOG AND DIGITAL, USED BY CLECS TO PROVIDE SERVICE?

- 24 Public Counsel requests that Order No. 06 be modified to require all CLECs to provide current price information for relevant services offered. Public Counsel contends that the prices of services are required by statute to be taken into account in determining a petition for competitive classification. *RCW 80.36.330(1)(c)*. Price lists filed by CLECs with the Commission may not be complete, up-to-date, or accurate.
- 25 WeBTEC argues that Qwest excludes digital services from the scope of its petition, but asserts that there is no indication that the CLEC line counts that Qwest reflects in its petition are restricted to those used to provide analog services. WeBTEC represents that paragraph 5 of Order No. 06 does not indicate whether CLECs should report lines used to provide analog and not digital services. In order to avoid a mismatch with Qwest's data and market share calculation derived from that data, WeBTEC proposes that CLECs be required to report all lines used to provide business local exchange services, both analog and digital, and separately describe each.
- 26 Commission Staff agrees that price information is germane to the issues in this proceeding.
- 27 Commission Staff indicates it would be willing to contact the responding CLECs to determine that the line counts are accurate and exclude digital services.
- 28 **Decision.** The Commission is persuaded that price information is required to reach a determination on Qwest's petition in this case. By separate order, the Commission will direct CLECs to provide relevant pricing information.
- 29 The Commission is also persuaded that the record in this case will benefit from accurate comparisons of data supplied by the various parties.

Staff should ascertain that CLEC line counts are accurate, that they exclude digital services, and should include this information in its distribution to parties to the proceeding.

III. ORDER

THE COMMISSION ORDERS That:

- 30 (1) Public Counsel's and WeBTEC's petitions are denied insofar as they request that no Highly Confidential protective order be entered in this proceeding.
- 31 (2) The Highly Confidential protective order should be amended to allow parties to show good cause for allowing more than one counsel or one expert to review highly confidential information, as reflected in attached Appendix A.
- 32 (3) The affidavit required pursuant to the Highly Confidential protective order should provide that the affiant will not, for a period of three 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 who they seek disclosure of highly confidential information, as reflected in attached Appendix A.
- 33 (4) Commission Staff must aggregate the CLEC-provided information sufficiently to protect CLEC identities, but should provide no more interpretation of the data than necessary to do so. Staff must explain the steps it takes in aggregating the CLEC information that it distributes to the parties pursuant to the Highly Confidential protective order.
- 34 (5) CLECs must provide pricing information for services relevant to Qwest's petition.
- 35 (6) Commission Staff must ascertain whether CLECs have excluded digital services from the information they provide pursuant to Order No. 06 and must advise the parties whether and how they have done so.

DATED at Olympia, Washington, and effective this 23rd day of July, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

Appendix A

Disclosure of Highly Confidential Information. Qwest and Competitive Local Exchange Carriers (CLECs) who are parties to this proceeding are competitors, or potential competitors. CLECs that are not parties to this proceeding, but who must submit information pursuant to Commission order, are also competitors or potential competitors. Any of these parties may receive discovery requests that call for the disclosure of highly confidential documents or information, the disclosure of which imposes a significant risk of competitive harm to the disclosing party. Parties may designate documents or information they consider to be "Highly Confidential" and such documents or information will be disclosed only in accordance with the provisions of this Section.

In this proceeding, the Commission has determined that it will treat as "Highly Confidential" certain information required to be filed by CLECs pursuant to Commission Order No. 06. The company-specific market-sensitive data filed in response to the Commission's Order is of the type that might impose a serious business risk if disseminated without heightened protections and should be designated "Highly Confidential." Access to this data will be limited to Commission Staff who have executed the confidentiality agreement attached to this Protective Order. Staff will aggregate this data into such documents as appropriate and relevant to the proceeding, and provide such documents to all parties requesting the information. Similarly, other company-specific data filed by Qwest and intervenor CLECs in response to discovery requests may be designated as "Highly Confidential."

With respect to other potential "Highly Confidential" data, parties must scrutinize carefully responsive documents and information and limit the amount they designate as highly confidential information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section.

The first page and individual pages of a document determined in good faith to include highly confidential information must be marked by a stamp that reads: "Highly Confidential Per Protective Order in WUTC Docket No. UT-030614." Placing a "Highly Confidential" stamp on the first page of a document indicates only that one or more pages contains highly confidential information and will

not serve to protect the entire contents of a multipage document. Each page that contains highly confidential information must be marked separately to indicate where highly confidential information is redacted. The unredacted versions of each page containing highly confidential information, and provided under seal, also must be marked with the "Highly Confidential . . ." stamp and should be submitted on excited colored paper distinct in color from non-confidential information and "Confidential Information" as described in Part A of this Protective Order.

Parties other than Staff who seek access to or disclosure of highly confidential documents or information must designate one outside counsel, no more than one outside consultant, legal or otherwise, and one administrative support person to receive and review materials marked "Highly Confidential . . ." Parties other than Staff who make a specific showing of special need may designate one additional outside counsel to receive "Highly Confidential" documents and information. In addition to executing the appropriate Agreement required by this Protective Order for "Confidential Information," each person designated as outside counsel, consultant or administrative support staff for review of "Highly Confidential" documents or information must execute an affidavit, under oath, certifying that:

- a. They do not now, and will not for a period of three 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.
- b. They have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding and by this provision of the Protective Order.

Any party may object in writing to the designation of any individual counsel, consultant, or administrative support staff as a person who may review highly confidential documents or information. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged individual from the review of highly confidential documents or information. Written response to any objection must be filed within three days after service of the objection.

Designated outside counsel will maintain the highly confidential documents and information and any notes reflecting their contents in a secure location to which only designated counsel has access. No additional copies will be made. If another person is designated for review, that individual must not remove the highly confidential documents or information, or any notes reflecting their contents, from the secure location. Any testimony or exhibits prepared that reflect highly confidential information must be maintained in the secure location until removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review highly confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. Appropriate procedures for including such documents or information will be determined by the presiding Administrative Law Judge following consultation with the parties.

The designation of any document or information as "Highly Confidential" may be challenged by motion and the classification of the document or information as "Highly Confidential" will be considered in chambers by the Presiding Administrative Law Judge, or by the Commission.

At the conclusion of this proceeding, and the exhaustion of any rights to appeal, designated outside counsel must return all highly confidential documents and information provided during the course of the proceeding, and must certify in writing that all notes taken and any records made regarding highly confidential documents and information have been destroyed by shredding or incineration.

Highly confidential documents and information will be provided to Staff under the same terms and conditions of this Protective Order as govern the treatment of "Confidential Information" provided to Staff as otherwise provided by the terms of the Protective Order.