

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	
)	DOCKET NO. UT-000883
U S WEST COMMUNICATIONS, INC.)	
)	
)	
for Competitive Classification of Business)	FIFTH SUPPLEMENTAL ORDER
Services in Specified Wirecenters)	DENYING MOTION TO CLARIFY
)	PROTECTIVE ORDER AND TO
.....))	COMPEL DISCOVERY

Background. On June 7, 2000, U S WEST Communications, Inc. (Qwest) filed with the Commission a Request for Competitive Classification of Business Services in Specified Wirecenters in Washington. On June 22, 2000, pursuant to RCW 80.36.330(5), the Commission issued a letter requiring that each local exchange company providing services in the areas covered by the petition provide information on its services in these markets. The information provided would assist the Commission in determining whether Qwest's business services in these markets are competitive. The Commission, by Order entered July 14, 2000, set the petition for hearing.

On July 21, 2000, and continuing on July 28, 2000, the Commission convened a prehearing conference. Several parties requested that the Commission enter a protective order patterned off the amendment to the protective order in Docket No. UT-990022, in order to protect market-sensitive data that individual competitive local exchange companies (CLECs) might provide to Commission Staff to aggregate. In addition, parties requested that the information that CLECs had already provided to Commission Staff in response to the June 22, 2000, letter, be included in the information that would be provided only to Commission Staff. No one objected to the treatment of this data as described above.

On July 31, 2000, the Commission entered its Second Supplemental-Protective Order. Paragraph 12 of the Order provides:

In this proceeding, the Commission has determined that it will treat as "Highly Confidential" certain information already filed by Competitive Local Exchange Companies (CLECs). Specifically, the Commission required by letter dated June 22, 2000, that CLECs providing business services in the areas covered by U S WEST's petition provide information on their service in these markets. The company-specific data filed in response to the June 22, 2000, letter is of the type that might impose serious business risk if disseminated without heightened

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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 proposes to 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 intervenor CLECs in response to discovery request may be designated as "Highly Confidential."

Second Supp. Order, Protective Order, July 31, 2000, par. 12. Paragraph 13 addresses other potential "Highly Confidential" data. Paragraph 15 discusses the process for parties, other than Public Counsel and Staff, who seek access to or disclosure of highly confidential information.

Motion to Clarify Protective Order and to Compel Discovery. On September 14, 2000, Public Counsel and TRACER filed a motion requesting the Commission to clarify the scope of the Second Supplemental Order - Protective Order entered on July 31, 2000. The following parties support or do not object to the motion: NEXTLINK Washington, Inc., Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., Focal Communications Corporation of Washington, Global Crossing Local Services/ Telemanagement, and Eschelon Telecom of Washington, Inc. Qwest and Commission Staff oppose the motion.

Public Counsel's Position. The issue presented by Public Counsel is whether the terms of paragraph 12 of the Protective Order should be amended to include Public Counsel and its expert, Dr. Sarah Goodfriend, who is a jointly sponsored witness with TRACER. In support of the request Public Counsel argues that the provisions of paragraphs 12 and 15 of the Protective Order conflict in that paragraph 12 limits access to Commission Staff, while paragraph 15 allows access by Public Counsel and Staff. Public Counsel asserts that its status as a statutory party to proceedings before the Commission provides Public Counsel with an unqualified right to review confidential data.

Public Counsel requests that the Commission enter an order clarifying that Public Counsel and its retained expert are entitled to review the data provided to Commission Staff, from which Commission Staff produced an analysis, and order Commission Staff to produce all raw data directly to Public Counsel's expert. Alternatively, Public Counsel requests an order compelling production of the requested data after ten days notice to the non-party CLECs pursuant to the Commission's procedures as outlined in WAC 480-09-015(5)

Qwest's Position. Qwest opposes the motion. Qwest argues that Paragraph 12 of the Protective Order clearly states that highly confidential information will be available only to Staff. Thus, all parties except Staff are currently in the same position - they

cannot review the raw data that Staff relied upon. Qwest maintains that this was the outcome contemplated by the Protective Order.

Qwest asserts that Public Counsel's argument that Public Counsel is a statutory party to this proceeding and therefore has an unqualified right to review the confidential information is undermined by its joint sponsorship of Dr. Goodfriend with TRACER, a private party. Qwest notes that Public Counsel represents the people of the State of Washington, or, alternatively, residential and small business customers. TRACER's members include the Boeing Company and other large businesses. Commission Staff makes a similar observation.

Commission Staff's Position. Commission Staff argues that the Commission should not order Commission Staff to disclose data submitted to it by CLECs that are not parties to this docket, because it is unclear the extent to which access to such data may be governed by the Protective Order in this case. Staff notes that some of the data at issue were submitted by non-party CLECs on a confidential basis, and reasons that there exists a tension between RCW 80.04.095 and the Protective Order.

Commission Staff does not oppose the efforts of Public Counsel and TRACER to obtain consent from those CLECs to release the data provided to Commission Staff on a highly confidential basis. In Attachment A to its response, Commission Staff identifies the CLECs, both parties and non-parties, from whom the Commission sought data concerning business services. Attachment B provides a table of the number of responses received by CLECs broken down by party/non-party and confidential/non-confidential.

Commission Staff argues that Public Counsel does not have the same rights to data as the Commission or its Staff. Staff notes that Public Counsel's legal position as to its unqualified right to review confidential data is unsupported by citation to authority. Staff argues that it obtained the data at issue under the authority of RCW 80.36.330(5) which addresses competitive classification of telecommunications services. Section (5) provides: "Telecommunications companies shall provide *the commission* with all data it deems necessary to implement this section." (Emphasis added)

Commission Discussion and Decision. The Commission denies the motion to clarify the protective order and to compel discovery. As early as the July 21, 2000 prehearing conference, all parties to this proceeding agreed to the "Highly Confidential" treatment of information submitted by CLECs in response to the Commission's June 22, 2000, letter. This procedure was reiterated in the Commission's July 27, 2000 Order Requiring Disclosure of Information, and formalized in paragraph 12 of the Second Supplemental - Protective Order. Public Counsel voiced no objections at the conference and filed no objection to the orders.

14 Paragraph 12 of the Protective Order addresses the "Highly Confidential" treatment of this specific information as requested by the parties at the prehearing conference. Pursuant to the suggestion of the parties, paragraph 12 of the Protective Order is patterned from an amendment to the protective order in Docket UT-990022, *In re Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits in Selected Geographical Locations* (March 25, 1999). That amendment limits access to company-specific data filed by intervenor CLECs to Commission Staff. Likewise, paragraph 12 of the Protective Order explicitly provides that access to the company-specific data submitted by CLECs in response to the Commission's June 22, 2000, letter will be limited to Commission Staff.

15 Contrary to Public Counsel's suggestion, the Commission finds no conflict between paragraphs 12 and 15 of the Protective Order. Intervening paragraph 13 addresses other highly confidential data. The procedures for other parties described in paragraph 15 apply to the other highly confidential addressed in paragraph 13.

16 Ultimately, the Commission has a responsibility to enforce its protective orders. Paragraph 12 assures those CLECs submitting company-specific data in response to the Commission's June 22, 2000, letter that the data will be designated as "Highly Confidential" and only Commission Staff will have access to it. Public Counsel did not raise this issue in a timely manner. We agree with Commission Staff that the appropriate procedure for Public Counsel is to contact the CLECs and obtain the data, or consent that the Commission Staff release the data provided to it on a highly confidential basis.

Dated at Olympia, Washington and effective this 22nd day of September, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


KAREN M. CAILLÉ
Administrative Law Judge