

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of

QWEST CORPORATION

For Competitive Classification of
Basic Business Exchange
Telecommunications Services

DOCKET NO. UT-030614

PUBLIC COUNSEL PETITION FOR
RECONSIDERATION OR
CLARIFICATION OF
ORDER NO. 08

The Public Counsel Section of the Washington Attorney General's Office (Public Counsel), pursuant to WAC 480-09-810, respectfully petitions for reconsideration of one provision of Order No. 08, served July 22, 2003. Order No. 08 adopts a number of improvements to the procedures in the docket, with respect to both the protective order requirements and the CLEC data collection. This motion identifies one area of concern to Public Counsel.¹

I. PETITION FOR RECONSIDERATION AND CLARIFICATION

Public Counsel requests reconsideration of paragraph 13 of Order No. 08 to the extent it imposes on Public Counsel requirements as to designation of outside counsel, experts, and administrative support "outside representation" requirements, and the affidavit requirement for those persons. Public Counsel requests the Commission continue the approach it has adopted in prior Highly Confidential Protective Orders in which this requirement was not imposed on Staff or Public Counsel. To that end, Public Counsel requests that the "Staff/Public Counsel carve out" provisions of the pre-existing Highly Confidential Protective Order (Order No. 07, ¶¶ 14, 19) be reinstated.

¹ Public Counsel does not waive its general objections to entry of the Highly Confidential Protective Order, but does not reargue those in this petition for reconsideration.

A. The Provisions of Order No. 08 Depart From The Commission’s Prior Highly Confidential Protective Orders.

Order No. 07 in this case adopted a form of highly confidential protective order familiar from prior Commission cases, including two relevant and recent telecommunications proceedings. In both the currently pending DEX case, and Qwest’s prior competitive classification case for business service, the Highly Confidential Protective Orders have provided:

Highly confidential documents and information will be provided to Staff and Public Counsel under the same terms and conditions of this Protective Order as govern the treatment of “Confidential Information” provided to Staff and Public Counsel and as otherwise provided by the terms of the Protective Order other than this Section.²

The orders have also “carved out” both Staff and Public Counsel from the “outside counsel representation” and affidavit requirements.³ The approach reflected in these prior cases, and incorporated in Order No. 07, should be continued. These orders reflect the Commission’s reasonable assessment of the respective legal and practical roles of the parties and the level of safeguard required. This approach has been acceptable to parties producing “highly confidential” information, including Qwest and CLECs, and has been workable as a practical matter. No violations of confidentiality requirements have been established, or even asserted. Public Counsel is aware of no proceeding before this Commission involving confidentiality orders of any level in which there has been an assertion by any party, much less a finding by the Commission, that confidential or highly confidential information has not been properly protected by Public Counsel (or any other protective order signatory).

² Order No. 07, ¶ 19; UT 000883, Second Supplemental Order, ¶ 20; UT 021120, Third Supplemental Order Amending Protective Order, Appendix , p. 7.

B. The Modification Of The “Staff/Public Counsel Carve Out” To Remove Public Counsel Is Not Necessary To Protect Confidential Information.

1. Public Counsel is not jointly sponsoring a witness in this proceeding with another party.

The amendment to Order No. 08 appears to be primarily based on the concern that Public Counsel is jointly sponsoring a witness with “other parties with private or competitive interests.” Order No. 08, ¶13. Although Public Counsel does not concede that is an adequate basis for changing the prior “carve out” (see discussion below), Public Counsel is not co-sponsoring a witness with other parties in this case, so that concern does not provide a basis for the modification.

2. The “Staff/Public Counsel carve out” has not posed problems in prior cases, even where Public Counsel has acted jointly with other parties.

The fact that Public Counsel (or any other party) has chosen to join with other consumer parties to sponsor a witness and present a joint position has not previously been found to present difficulties under the Highly Confidential Protective Orders. The current DEX proceeding and the most recent competitive classification case are illustrative. In the DEX case, Public Counsel, AARP, and WeBTEC jointly sponsored a witness in that case, filed joint briefs, and generally acted together to present their positions. AARP and WeBTEC are subject to the “outside representation” and affidavit requirements of the Highly Confidential Protective Order in that case, Public Counsel is not. AARP retained outside counsel who signed the required affidavit. WeBTEC opted not to sign the affidavit because of concerns regarding the affidavit, and does not receive any highly confidential documents. Highly confidential information acquired through discovery and used in testimony has been carefully and appropriately managed in accordance with the order and the different status of the parties under the order.

³ Order No. 07, ¶ 14; UT 000883, Second Supplemental Order, ¶ 15; UT 021120, Third Supplemental Order Amending Protective Order, Appendix , p. 5.

There has been no objection by Qwest or any other party to this arrangement and there has been no assertion of any improper disclosure. Nor has there been any evidence or assertion that the differential requirements have been administratively burdensome in that or other previous cases.⁴

3. No party, including Qwest and CLECs, requested imposition of this additional restriction on Public Counsel on interlocutory review.

The original issue presented to parties in this case was whether a Highly Confidential Protective Order of the type entered in UT-000883 would be appropriate here.⁵ After parties filed responses, Judge Mace issued a “UT 000883 type” Highly Confidential Protective Order.⁶ In Order No. 05, Judge Mace noted that “application of the ‘one expert/one attorney’ limitation to Public Counsel and Staff, as suggested by AT&T is unwarranted, because they represent neither specific competitors or customers.” Order No. 05, ¶ 34. On Petition for Interlocutory Review, the issue was whether any “highly confidential protective order” was necessary at all, and if so, whether it should apply to consumer parties, as well as competitors. While other parties recommended that all be subject to the “highly confidential” order, no party recommended modification of ¶¶ 14 and 19 of Order No. 07 to require Public Counsel to employ outside counsel and experts, and to execute affidavits. None of the parties with an interest in protecting their commercially sensitive data raised any new concern or produced information about the adequacy of the protection under the provisions of Order No. 07, nor was the issue of joint activity by Public Counsel and other parties raised. They simply requested that Public Counsel be subject to the order, as it was in UT-000883 and in the DEX proceeding. Essentially, parties asked that order No. 07 remain in effect. There is nothing in the record, therefore, on

⁴ In UT-000883, Public Counsel and WeBTEC also co-sponsored a witness. In that case, the Commission, while declining to allow Public Counsel full access to “raw” CLEC data submitted under RCW 80.36.330(5), specifically noted the “carve out” provision as still applicable to Public Counsel’s receipt of other highly confidential data. UT-000883, Fifth Supplemental Order, ¶¶ 4, 15.

⁵ Request for Responses on Issues Raised In Staff’s Motion Requesting Production of Information, UT 0030614, June 23, 2003, p. 2.

⁶ Order No. 07. The term “highly confidential protective order” refers to the amendments adopted to the Commission’s “standard” protective order which apply to material designated as highly confidential.

which to base a conclusion that Public Counsel's continued inclusion in the "carve out" poses a risk of improper disclosure.

4. The "outside representation" and affidavit requirements are not appropriate or workable for Public Counsel.

The Commission's use of the "Staff/Public Counsel carve out" recognizes that the "outside representation" requirements are not consistent with the special role played by Public Counsel in these proceedings as a statutory party. Public Counsel, a statutory public representative pursuant to RCW 80.04.510 and part of the Attorney General's office, is not engaged in private business of any sort, and is not a potential competitor of any telecommunications company. RCW 80.04.095 recognizes that commercially sensitive information provided to the Commission may also be provided to the Attorney General's office, again reflecting our statutory role.

The fundamental purpose of the "outside representation" and affidavit requirements is to prevent internal personnel of competitor businesses who are involved in Commission cases from obtaining access to sensitive commercial information. This is accomplished by requiring these parties to handle material "outside" their own house counsel, expert, and administrative staff. This restriction is not practical as applied to Public Counsel. The provision would appear to preclude Public Counsel from using its own attorneys, analysts, or support staff on this case and it would require Public Counsel to find outside counsel, experts, and support staff willing to sign the affidavit required. It is unclear whether the outside representatives would have to be found completely outside the Attorney General's office in order to comply with this rule. In addition to the practical and budgetary difficulties presented, such a restriction on Public Counsel's access to information in a Commission proceeding would appear to be inconsistent with the role recognized in RCW 80.05.510 and 80.04.095.

Finally, even under the "carve out" provision, it is important to remember that both Staff and Public Counsel, their staff, and experts, are subject to broad obligations to provide a special

level of protection for the “highly confidential” data which they receive in the case, including limitations under which they are able to share the information with others. Again, there has been no showing in this or any prior case that these procedures are inadequate.

II. PUBLIC COUNSEL REQUESTS CLARIFICATION OF ¶13 OF ORDER NO. 08 AS REGARDS “INDEPENDENCE” AND “COORDINATION” OF PARTIES

The new “outside representation” requirement for Public Counsel appears to be based on concerns and assumptions in paragraph 13 regarding independence and coordination between parties. Public Counsel would agree that there is an issue to be addressed, at least potentially, when a competitor and a non-competitor work jointly on a case and, for example share a witness. As noted above, however, the experience before this Commission has been that confidentiality requirements have been adequately protected by the procedures used in previous highly confidential protective orders. Parties and counsel have acted professionally and in good faith to abide by those requirements.

Public Counsel reads ¶ 13 of the order as an expression of this technical concern, rather than any suggestion by the Commission that by taking joint positions with parties with similar interests, Public Counsel (or any other party) is presumed to lack independence as a party, and is assumed, if not presumed, to be more likely to improperly disseminate information.

Joint action by parties, including CLECs, consumers, and on occasion Commission Staff, is commonplace in Commission proceedings and has been for many years. The Commission and its presiding officers encourage joint activity by parties in the interests of judicial economy. Parties with similar interests act jointly for a range of reasons, whether because of economics, or to add force to a position, or for other reasons. In order to avoid an unintended message, it may be appropriate to clarify ¶13 to indicate that such joint action and coordination is not improper, continues to be encouraged in appropriate cases, creates no presumption of lack of independence by any party, and no presumption that parties will use joint action to disregard or circumvent Commission orders or professional or ethical obligations.

III. CONCLUSION

For the foregoing reasons, Public Counsel requests that Order No. 08 be reconsidered, and that the previous provisions of Highly Confidential Protective Order No. 07, specifically ¶¶ 14 and 19 be reinstated in an amended protective order in this proceeding.

RESPECTIFULLY SUBMITTED, this 29th day of July, 2003.

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