

1
2
3
4
5
6 BEFORE THE WASHINGTON UTILITIES AND
7 TRANSPORTATION COMMISSION

8 In the Matter of the Petition of:

9 QWEST CORPORATION

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

Docket No. UT-030614

**WeBTEC'S PETITION FOR
RECONSIDERATION AND
CLARIFICATION OF ORDER NO.
08 AND RESPONSE TO PUBLIC
COUNSEL'S PETITION FOR
RECONSIDERATION AND
CLARIFICATION**

12
13
14
15 **I. INTRODUCTION**

16 The Washington Electronic Business and Telecommunications Coalition ("WeBTEC"),
17 pursuant to WAC 480-09-810, hereby petitions for reconsideration and clarification of Order
18 No. 08 in the above-captioned matter, served on July 22, 2003, and responds to Public
19 Counsel's Petition for Reconsideration and Clarification, served on July 29, 2003. Specifically,
20 WeBTEC requests that the Commission (1) reconsider and eliminate paragraph 13 of Order No.
21 8, which would subject Public Counsel to inappropriate and onerous requirements regarding the
22 designation of outside counsel, experts, and administrative support personnel and the signing of
23 an overly broad covenant restricting future employment because of assumed joint action and
24 coordination between Public Counsel and other parties; (2) clarify that joint action and
25

1 coordination between Public Counsel and other parties with common interests is not improper,
2 continues to be encouraged in appropriate cases, creates no presumption of lack of
3 independence by any party, and no presumption that parties will joint action to disregard or
4 circumvent Commission orders or professional or ethical obligations; (3) reconsider
5 paragraphs 17 and 18 and modify and/or clarify the terms of the highly confidential protective
6 order so as to narrowly limit the employment restraint to those situations where disclosure or
7 misuse of the protected information would be inevitable and would result in economic harm to
8 the party producing the information and state clearly that the restraint would not apply to the
9 provision of legal services by outside counsel or consulting and testimonial services by outside
10 experts.
11

12 II. ARGUMENT

13 A. Paragraph 13 Of Order No. 8 Should Be Modified To Remove The 14 Inappropriate And Onerous Outside Representation And Affidavit 15 Requirements On Public Counsel.

16 Order No. 8 improperly seeks to “punish” Public Counsel by subjecting it to
17 inappropriate and onerous requirements regarding the designation of outside counsel, experts,
18 and administrative support personnel and the signing of an overly broad covenant restricting
19 future employment because Public Counsel “appears to be coordinating with other parties with
20 private and competitive interests.” Order No. 8, ¶13. The Order goes on to state: “In
21 particular, it appears that Public Counsel may be sharing an expert witness or information with
22 other parties in the proceeding.” *Id.* This “punishment” appears to be based on the unwarranted
23 assumption that WeBTEC, and perhaps other parties, would behave unethically and either
24
25

1 (a) improperly disclose or use trade secrets of other parties or (b) seek to induce Public Counsel
2 to breach its duty to protect those secrets in violation of the protective order.

3 There is no factual basis for assuming unethical or unlawful conduct by Public Counsel
4 or by WeBTEC or its counsel. Indeed, as pointed by Public Counsel in its Petition for
5 Reconsideration or Clarification of Order No. 8, dated July 29, 2003, no violations of
6 confidentiality orders of any level have been asserted by any party, nor has there been a finding
7 by the Commission that confidential or highly confidential information has not been properly
8 protected by Public Counsel or any other protective order signatory. Public Counsel Petition
9 at 2.

10
11 Moreover, Public Counsel's joint action with other consumer parties in the pending Dex
12 sale case, UT-021120, has not presented any protective order difficulties. In that case, Public
13 Counsel, AARP, and WeBTEC acted jointly, co-sponsored a witness, and filed joint briefs.
14 Public Counsel was not subject to the outside representation and affidavit requirements of the
15 highly confidential protective order. AARP's outside counsel signed the highly confidential
16 affidavit. WeBTEC's counsel, however, did not sign the affidavit because of concerns about the
17 vagueness and overbreadth of the language. Highly confidential information acquired through
18 discovery and used in testimony and briefs was appropriately managed consistent with the
19 order, and there was no compromise of that information. Further, no party objected to the
20 arrangement or asserted that there was any misappropriation of highly confidential information
21 or any violation of the protective order. Public Counsel Petition at 3-4.

22
23 In addition to the absence of any past misconduct on the part of WeBTEC, its counsel,
24 Public Counsel, or any non-trivial violation by any other party, there is no evidence of any
25

1 actual or threatened misuse or improper disclosure of protected information by any of them in
2 this case.

3 Apart from the lack of evidence of any actual past, present, or future improper use or
4 disclosure of protected information, there is a strong statutory deterrent that would make it
5 unlikely that anyone would knowingly violate the protective order. For example, the Uniform
6 Trade Secrets Act (UTSA), which has been adopted in Washington, may provide a cause of
7 action for misappropriation of trade secrets against a signatory who improperly uses or discloses
8 trade secrets obtained under the terms of the protective order. *See* RCW 19.108.010 *et seq.* To
9 establish a claim for misappropriation, a party must establish the existence of a trade secret and
10 its wrongful acquisition or use by the defendant. RCW 19.108.010(2). The UTSA entitles a
11 party to recover damages for the actual loss caused by misappropriation, unjust enrichment that
12 is not taken into account in computing damages for actual loss and, in cases of willful and
13 malicious misappropriation, exemplary (up to double) damages and attorneys fees.
14 RCW 19.108.030.

15
16
17 Lawyers are also subject to professional ethical obligations, which would deter any
18 violations of protective order non-disclosure requirements. For example, Washington Rule of
19 Professional Conduct 1.2(d) provides: “A lawyer shall not counsel a client to engage, or assist a
20 client, in conduct that the lawyer knows is criminal or fraudulent . . .” And , RPC 8.4 provides:
21 “It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of
22 Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts
23 of another; ... (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation...”
24
25

1 Lawyers, ethically required to protect client confidences, are also used to protecting secret
2 information.

3 In short, the Commission's orders should not start with the assumption of unethical and
4 unlawful conduct on the part of Public Counsel, WeBTEC, or any other party without a showing
5 of actual or threatened misuse or improper disclosure of protected information.
6

7 Imposition of the "outside representation" requirements of the order on Public Counsel
8 is particularly inappropriate, because Public Counsel is already "outside" any competitor of
9 Qwest or the CLECs. Requiring Public Counsel to retain a further "outside counsel" would be
10 redundant and makes no sense.

11 Given the absence of any evidence of misconduct, the fact that Public Counsel
12 represents only customers, and given the fact that no party has requested that the outside
13 representation and affidavit requirements of the highly confidential protective order be applied
14 to Public Counsel, the Commission should remove paragraph 13 from Order No. 8.
15

16 **B. WeBTEC Agrees With And Joins Public Counsel's Request That The**
17 **Commission Clarify Order No. 8 With Respect To Joint Action And**
18 **Coordination Between Public Counsel And Other Parties With Common**
19 **Interests.**

20 WeBTEC agrees with and joins Public Counsel's request that the Commission clarify
21 that joint action and coordination between Public Counsel and other parties with common
22 interests is not improper, continues to be encouraged in appropriate cases, creates no
23 presumption of lack of independence by any party, and no presumption that parties will joint
24 action to disregard or circumvent Commission orders or professional or ethical obligations.
25

1 As pointed out by Public Counsel in its petition, “the experience before this Commission
2 has been that confidentiality requirements have been adequately protected by the procedures
3 used in previous highly confidential protective orders. Parties and counsel have acted
4 professionally and in good faith to abide by those requirements.” Public Counsel Petition at 6.
5 There is no reason to assume that Public Counsel has lacked or would lack independence as a
6 party or would be more likely to improperly disclose protected information simply because it
7 decides to act jointly or coordinate with other parties who have common interests.
8

9 As further pointed out by Public Counsel, the Commission has for many years
10 encouraged joint action by parties in the interests of judicial economy. Parties for their own
11 reasons may decide that they can best further their interests by cooperating with other parties
12 with similar interests; the Commission should not discourage them from doing so based upon an
13 unwarranted assumption that by acting jointly with others they will “disregard or circumvent
14 Commission orders or professional or ethical obligations.” Public Counsel Petition at 6.
15 Failure to clarify Order No. 8 to remove any presumption of improper conduct by parties acting
16 jointly could have a damaging effect on the appearance of the fairness and impartiality of
17 Commission proceedings and a chilling effect on participation in those proceedings.
18

19 **C. The Commission Should Reconsider And/Or Clarify Paragraphs 17 And 18**
20 **Of Order No. 8 To Eliminate Or Substantially Limit The Employment**
21 **Restriction In The Highly Confidential Affidavit.**

22 The highly confidential protective order in this case would require an affidavit that the
23 affiants would not for a period of three years “involve themselves in competitive decision
24 making” by any company or business organization that “competes, *or potentially competes,*
25 with the company or business organization from whom they seek disclosure of highly

1 confidential information.” This affidavit is much too vague and therefore is overly broad and
2 restrictive. It should be modified or at a minimum clarified to restrict the employment restriction
3 to those circumstances where disclosure or use of the trade secrets is “impossible” not to result.
4 Further, the provision of legal services by outside counsel or consulting and testimonial services
5 by outside experts should be exempted from the employment restriction.
6

7 In Order No. 8 the Commission states that it has “broad discretion” to create protective
8 orders to facilitate the production of information vital to its decision-making process. *See Order*
9 *No. 8 at 4.* However, RCW § 80.04.095, regarding protection of commercial information, does
10 not justify disregard of the settled rules of law concerning restraints on trade and the rights of
11 individuals to pursue their livelihoods. WeBTEC submits that the affidavit required to gain
12 access to highly confidential information produced in this case violates acceptable limits on
13 competitive restraints found in the law of covenants not to compete and trade secret
14 misappropriation.
15

16 The highly confidential protective order closely mimics a covenant not to compete, a
17 limit generally imposed by employers upon termination of an employment relationship. The
18 protective order limits the ability of the attorneys involved in this case to serve an extremely
19 broad range of current and potential clients—including any organization that “competes or
20 potentially competes” with the companies providing classified information—on any matter that
21 might constitute “involvement” in “competitive decision making”. There is no geographic
22 limitation on this restriction, and it applies for three years. *See Order No. 8 at 5 ¶ 17.*
23

24 Covenants not to compete have been closely scrutinized because they limit the ability of
25 employees to move from job to job, exercise their skills, and pursue their livelihoods. *Winston*

1 *Research Corp. v. Minnesota Mining and Manufacturing*, 350 F.2d 134, 137-138 (9th Cir.
2 1965). Washington courts have noted that “public policy requires us to carefully examine
3 covenants not to compete, even when protection of a legitimate business interest is
4 demonstrated, because of equally competing concerns of freedom of employment and free
5 access of the public to professional services.” *Knights, Vale & Gregory v. McDaniel*, 37 Wn.
6 App. 366, 371, 680 P.2d 448, 452(1984). A covenant not to compete will only be enforced if it
7 is “reasonable,” a determination that is made after considering the following factors: 1) whether
8 the restraint is necessary to protect the business or goodwill of the employer; 2) whether it is
9 narrowly tailored to impose no greater restraint on the employee than necessary; and 3) whether
10 the degree of injury to the public caused by the restraint justifies non-enforcement of the
11 covenant. *Id.* at 452.

12
13
14 The employment restraint imposed here would fail all of these tests. It has no geographic
15 limit and the restraint is not narrowly tailored to only that which is necessary to protect the
16 CLECs’ businesses. The organizations that attorneys may not serve are broadly defined, and
17 require subjective interpretation about which entities with whom the protected parties may
18 “potentially compete.” There is no time limitation on when the “potential competition” may be
19 expected to materialize and the prohibited competition is not limited to activities where the
20 protected information would be of use. The restraint on all involvement with competitive
21 decision making could prevent attorneys from assisting clients in almost any aspect of their
22 business activities in the market. This protective order makes no effort to balance the injury to
23 the public of imposing such a restraint on the possible harm to the CLECs involved. It does not
24 provide any rationale for limiting the rights of the attorneys involved to matters that may occur
25

1 in remote geographic locations, to vaguely defined parties, to issues only tangentially related to
2 the matters at hand in this docket (if related at all).

3 Although the WUTC has imposed such protective orders in the past to protect highly
4 confidential trade secrets, no justification is offered to explain why it is necessary to go beyond
5 the protections offered by the Uniform Trade Secrets Act (UTSA), RCW 19.108 *et seq.* While
6 the UTSA allows for an injunction to prevent actual or threatened misappropriation of trade
7 secrets, courts have been reluctant to use such power to prevent individuals from obtaining
8 employment. In *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995), the leading case
9 on the doctrine of “inevitable disclosure,” the court notes that trade secret law “should not
10 prevent workers from pursuing their livelihoods.” The *Pepsico* court would only restrict the
11 defendant from employment where his new job would “inevitably lead him to rely on the
12 plaintiff’s trade secrets.” *Id.* at 1269. By imposing a prior restraint on the activities of the
13 affected attorneys and experts without any showing that the restricted activities would
14 inevitably result in the disclosure of protected information, the highly confidential protective
15 order far exceeds these reasonable limits.

16 As noted previously, it is not at all certain what activities would fall within the scope of
17 the phrase “involve themselves in competitive decision-making”. Read strictly, simply advising
18 a competitor about registering or seeking competitive classification could be considered
19 involvement in competitive decision making. Discussing with clients the wisdom of a particular
20 competitive approach in the context of providing antitrust advice could qualify, as could
21 assisting in the filing and prosecution of a complaint against a competitor. Representing a party
22 in the Commission’s pending cost proceeding, Docket No. UT-023003, could be considered
23
24
25

1 involving oneself in “competitive decision-making.” None of these circumstances would present
2 a situation where the disclosure or misuse of highly confidential information would be
3 inevitable.

4 As it is currently written the affidavit would effectively force counsel to choose between
5 having access to information that may be essential to meaningful participation in this case, or
6 limiting future, or even current, employment. Given the vagueness and resulting potential
7 breadth of the employment restriction, WeBTEC frankly cannot see how any lawyer regularly
8 engaged in representing clients in Commission proceedings could sign the affidavit. Certainly
9 where the engagement is merely one of providing outside legal or expert consulting and
10 testimonial services, it should be sufficient to require that the affiant commit to not disclose the
11 information except as provided in the protective order and agree to use the information only for
12 purposes of this proceeding. The only circumstance that could arguably justify an employment
13 restraint would be direct employment with a competitor in the marketing or pricing of services
14 that compete with the services about which data are disclosed. Only in those circumstances
15 could it be argued that the nature of the employment might make it inevitable that protected
16 information would be disclosed or misused.

17 As pointed out by WeBTEC in previous advocacy on this point, the phrase “potentially
18 competes” is also too vague. It is impossible to know what that would encompass. It would
19 require some sort of clairvoyance or speculation about the future plans of companies that is
20 totally unrealistic. This is particularly troublesome because no time limit is included about the
21 “potential competition.”
22
23
24
25

1 WeBTEC further submits that application of the affidavit's employment restriction to
2 some counsel and experts who are not direct employees of a CLEC competitor but not others is
3 unjustified. As mentioned above, no attorney in private practice who ever provides counsel to
4 telecommunications clients could safely sign the affidavit because of its vagueness and potential
5 breadth, yet he or she would be required to do so as a condition of receiving the highly
6 confidential information. Staff counsel and other employees, on the other hand, are not required
7 to sign. After viewing the information, counsel for Staff and other Staff members would be free
8 to go to work for Qwest or any CLEC in any capacity without fear of violating the order. And it
9 is not inconceivable that such an event would take place. The Commission undoubtedly is
10 aware that in the past Staff members, ALJs, and even Commissioners have taken various
11 positions with companies active in the telecommunications industry. And, some of those
12 positions could be considered to involve "competitive decision making." Yet no one seriously
13 believes that there needs to be a future employment restraint imposed on Commission
14 employees, ALJs, Commissioners, or Commission counsel in order to protect highly
15 confidential information. Nor does there need to be such a restraint imposed on Public Counsel
16 and its experts. There is no reason to believe that outside counsel for other parties would be
17 more likely to improperly share information with potential clients or employers than Staff or
18 Public Counsel. Therefore, WeBTEC submits that the unequal treatment should be eliminated.

19
20
21
22 There apparently is some concern on the part of CLECs and the Commission that end-
23 user customers, such as the WeBTEC members participating in this case, might use highly
24 confidential information in an effort to "seek a better deal" from a provider. Those concerns are
25 unwarranted. First, as pointed out in WeBTEC's previous Petition for Review in the case,

1 WeBTEC members do not even get confidential information, much less highly confidential
2 information. Second, it is not clear what highly confidential information being produced would
3 be of any interest or value to a customer seeking a better deal. If a potential customer wants to
4 know if a particular company provides service in the customer's area, it could simply call the
5 provider and presumably the company would tell the customer, if it wants to remain in business.
6
7 The same would be true for pricing information. The customer could also check the
8 Commission or the company's website for the information. The number of lines being provided
9 by the carrier would be of little interest or value to a customer seeking a deal. If the customer
10 was concerned about what facilities the provider would use to provide service, again it could
11 ask the carrier and the carrier presumably would tell the customer. What facilities were being
12 used to provide service to other customers would be of no interest or value. While information
13 about future business plans might be of interest to competitors so they could counteract those
14 plans, such information might be of passing interest to a customer but of no value in trying to
15 get a better deal. Only a provider's costs would be of use, and cost information, apart from the
16 publicly available prices for UNEs and UNE-P, is not being produced. Again, any cost
17 information that is classified as confidential or highly confidential would not be given to the
18 WeBTEC members. There is no legitimate basis for concern on this point.

20
21 In sum, any restriction in the affidavit should be strictly limited to situations and
22 activities where the highly confidential information would inevitably be disclosed and its
23 misuse would result in unjust enrichment or unfair competitive disadvantage. Legal services
24 provided by outside counsel or consulting and testimonial services provided by outside experts
25 should be expressly exempted from the employment restriction. The other restrictions on the

1 handling of highly confidential information in the protective order would be adequate to protect
2 that information and the business interests of the parties producing the information.

3 **III. CONCLUSION.**

4 For the foregoing reasons, WeBTEC respectfully petitions for reconsideration and
5 clarification of Order No. 08 as set forth above.

6 Respectfully submitted, this 1st day of August, 2003.

7
8 WeBTEC

9
10 By: 

11 Arthur A. Butler, WSBA #04678
12 Ater Wynne, LLP
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2003, I served the original and 14 true and correct copies of the foregoing document upon the WUTC via the methods noted below, properly addressed as follows:

Carole Washburn Executive Secretary WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION 1300 S. Evergreen Park Drive SW Olympia, WA 98504-7250 Hand Delivered XX U.S. Mail (first-class, postage prepaid) Overnight Mail (UPS) Facsimile XX Email

I hereby certify that one true and correct copy of the foregoing document was served via the methods noted below, properly addressed as follows:

Lisa Anderl Qwest Corporation 1600 - 7th Ave., Room 3206 Seattle, WA 98290 Hand Delivered XX U.S. Mail (first-class, postage prepaid) Overnight Mail (UPS) Facsimile XX Email

Letty Friesen AT&T Communication of the Pacific Northwest 1875 Lawrence Street, Floor 15 Denver, CO 80202 Hand Delivered XX U.S. Mail (first-class, postage prepaid) Overnight Mail (UPS) Facsimile XX Email

Simon J. ffitc Public Counsel Section Office of Attorney General 900 Fourth Avenue, Suite 2000 Seattle, WA 98164-1012 Hand Delivered XX U.S. Mail (first-class, postage prepaid) Overnight Mail (UPS) Facsimile XX Email

Karen Johnson Integra Telecom 19745 NW Von Neuman Dr, # 200 Beaverton, OR 97006 Hand Delivered XX U.S. Mail (first-class, postage prepaid) Overnight Mail (UPS) Facsimile XX Email

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

1 Stephen Melnikoff
2 US Army Litigation Center
3 Regulatory Law Office
4 901 N Stuart Street, #700
5 Arlington, VA 22203-1837

Hand Delivered
XX U.S. Mail (first-class, postage prepaid)
Overnight Mail (UPS)
Facsimile
XX Email

6 Michel Singer-Nelson
7 Senior Counsel
8 WorldCom, Inc.
9 707 17th Street, Suite 4200
10 Denver, CO 80202-3432

Hand Delivered
XX U.S. Mail (first-class, postage prepaid)
Overnight Mail (UPS)
Facsimile
XX Email

11 Jonathan Thompson, Esq.
12 Assistant Attorney General
13 Attorney General of Washington
14 1400 S Evergreen Park Drive SW
15 PO Box 40128
16 Olympia, WA 98504-0128


Hand Delivered
XX U.S. Mail (first-class, postage prepaid)
Overnight Mail (UPS)
Facsimile
XX Email

17 Deborah Harwood
18 Integra Telecom of Washington, Inc.
19 19545 NW Von Neumann Drive
20 Suite 200
21 Beaverton, Oregon 97006

Hand Delivered
XX U.S. Mail (first-class, postage prepaid)
Overnight Mail (UPS)
Facsimile
XX Email

22 I declare under penalty of perjury under the laws of the State of Washington that the
23 foregoing is true and correct.

24 DATED this 1st day of August, 2003, at Seattle, Washington.

25 

Susan Arellano
Secretary to Arthur A. Butler
Ater Wynne LLP