

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

In the Matter of the Petition of)	DOCKET NO. UT-030614
)	
QWEST CORPORATION)	ORDER NO. 12
)	
For Competitive Classification of)	
Basic Business Exchange)	ORDER GRANTING REQUEST FOR
Telecommunications Services)	RECONSIDERATION OR
)	CLARIFICATION

.....

Synopsis: *The Commission grants Public Counsel’s request for reconsideration or clarification of the Commission’s exclusion of Public Counsel from access to highly confidential information on the same basis as Commission Staff.*

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). Richard H. Levin represents Advanced TelCom, Inc. (ATG).

3 **Background.** On June 30, 2003, the Commission entered Order No. 07, an
amended protective order providing for highly confidential protection for
market sensitive information proffered by parties to this proceeding.
Pursuant to petitions for reconsideration of that order by Public Counsel and
WeBTEC, the Commission entered Order No. 08, addressing various issues
related to the highly confidential protective order. Order No. 08 stated that
because Public Counsel may be sharing an expert witness or information with
another party or parties to this proceeding, Public Counsel was not on the same
footing as Commission Staff.¹ In such circumstances, the Commission found it
reasonable to make Public Counsel subject to the one counsel/one expert
requirement applicable to all parties but Commission Staff. This signified that
Public Counsel could only have access to highly confidential information
through one outside counsel and one outside expert.

4 On July 30, 2003, Public Counsel filed a Petition for Reconsideration or
Clarification of Order No. 08 (Public Counsel Petition).

5 Commission Staff and WeBTEC filed responses to the petition.

I. DISCUSSION AND DECISION

6 Public Counsel requests reconsideration of Commission Order No. 08 in this
proceeding pursuant to WAC 480-09-810, the rule governing reconsideration of
Commission orders. Public Counsel asserts that in past cases before the
Commission where highly confidential protective orders have been entered, Staff
and Public Counsel have been allowed access to the information under the same
terms and conditions as govern the treatment of confidential information. *Public
Counsel Petition at 2.*

7 This approach has been acceptable to the parties and workable as a practical
matter. Public Counsel contends that its possible co-sponsorship of a witness

¹ The protective order entered in Order No. 07 also contemplated disclosure of market sensitive information by Washington competitive local exchange carriers (CLECs) to Commission Staff. The provision of this information was separately protected as highly confidential and no party but Staff was permitted access to the raw data supplied by CLECs. Public Counsel is not here challenging its exclusion from access to that raw data.

with another party is not an adequate basis for changing this approach. Nevertheless, Public Counsel states that it is not co-sponsoring a witness with other parties to the proceeding.

- 8 Public Counsel points out that even in other cases where it has jointly sponsored witnesses with other parties, there has been no problem with allowing Public Counsel the same access to highly confidential information accorded Staff. Public Counsel further argues that no party to this proceeding requested that Public Counsel's access to highly confidential information be so limited. Because Public Counsel is a statutory public representative pursuant to RCW 80.04.510, it is not an appropriate candidate for restricted access to highly confidential information.
- 9 Finally, Public Counsel requests that the Commission clarify that joint action by the parties, including CLECs, consumers and, on occasion, Commission Staff is still considered by the Commission to be appropriate and to promote judicial economy.
- 10 WeBTEC and Commission Staff support Public Counsel's petition and request for clarification.
- 11 **Decision.** The Commission views Public Counsel's petition as one for clarification of Order No. 08. In that order, the Commission was required to balance concerns for orderly and expeditious proceedings with concerns for the confidentiality of information presented during such proceedings. Without adequate protection for the confidentiality of highly sensitive market-based information, the Commission might be prevented from obtaining information crucial to its decision-making responsibilities.
- 12 In this instance, Public Counsel has assured the Commission that it is not sharing a witness or information with any other party to this proceeding. Based on this assurance, the Commission agrees that Public Counsel should be permitted to receive and review highly confidential information on the same basis as Commission Staff, as stated in the attached revised amended protective order, Appendix A.

ORDER

13 THE COMMISSION ORDERS That the amended protective order entered in Order No. 08 is revised, as shown in Appendix A to this Order, to allow Public Counsel the same access to highly confidential information as Commission Staff.

DATED at Olympia, Washington, and effective this 6th day of August, 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 and Public Counsel 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.