

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	DOCKET NO. UT-033044
)	
QWEST CORPORATION	)	ORDER NO. 05
)	
To Initiate a Mass-Market	)	ORDER DENYING JOINT CLEC
Switching and Dedicated Transport	)	MOTION; ESTABLISHING PROCESS
Case Pursuant to the Triennial	)	FOR MASKING OF CLEC
Review Order	)	IDENTITIES IN HIGHLY
	)	CONFIDENTIAL INFORMATION;
	)	NOTICE OF PREHEARING
	)	CONFERENCE
	)	(Set for Monday, November 24, 2003,
.....	)	9:30 am)

1 **Synopsis.** *In this Order, the Commission denies the Joint CLECs’ Motion for Anonymous Disclosure of CLEC Data. In order to address inadvertent disclosure of highly confidential information and to allow efficient administration of the proceeding, the order requires parties and non-party CLECs to mask CLEC identities in highly confidential information when distributing the information to the Commission and other parties, and allows distribution of the code listing CLEC identities only to attorneys signing Exhibit C to Order No. 02, the protective order in this proceeding.*

2 **Nature of the Proceeding:** Docket No. UT-033025 is a proceeding initiated by the Washington Utilities and Transportation Commission (Commission) to assist the Commission in implementing certain provisions of the Federal Communications Commission’s (FCC) Triennial Review Order. This proceeding addresses a petition filed by Qwest Corporation (Qwest) seeking review of the findings of the Federal Communications Commission (FCC) in its Triennial Review Order concerning impairment to competitors without unbundled access to mass-market switching and dedicated transport.

3 **Procedural History.** On August 21, 2003, the FCC released its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, also known as the Triennial Review Order, in CC Docket Nos. 01-338, 96-98, and 98-147. On

August 22, 2003, the Commission issued a notice in Docket No. UT-033025 requesting comments from interested persons concerning implementation on the Triennial Review Order.

- 4 The Commission held a prehearing conference in Docket No. UT-033025 on September 26, 2003, to establish a procedural schedule for proceedings arising from the FCC's Triennial Review Order. In Order No. 01 in Docket No. UT-033025, the Commission required all persons interested in challenging the FCC's national finding of no impairment for enterprise market switching to file a petition by October 3, 2003. The Commission also required all persons interested in challenging the FCC's national finding of impairment for mass-market switching, dedicated transport, and DS1, DS3, and dark fiber loops to file a petition with the Commission by October 10, 2003.
- 5 On October 10, 2003, Qwest filed a petition with the Commission in Docket No. UT-033044 to initiate a review of the FCC's findings concerning mass-market switching and dedicated transport. No other person or company filed a petition with the Commission concerning mass-market switching, dedicated transport, or loops.
- 6 On October 13, 2003, the Commission held a prehearing conference in this docket to take appearances of the parties, consider petitions for intervention, to establish a procedural and evidentiary schedule for the proceeding, and address issues concerning the form of a protective order and the form and timing of discovery in the proceeding. Order No. 01 in this proceeding, a prehearing conference order, established the procedural schedule for the proceeding, including issuance of bench requests and filing dates for testimony and exhibits.
- 7 On October 21, 2003, the Commission entered Order No. 02, the protective order in this proceeding, after discussions by the parties at the October 13, 2003, prehearing conference and subsequent written comments. The protective order provides for submission of certain information as "highly confidential information" and limits disclosure of such information to certain attorneys, party experts, and others who sign Exhibit C to the protective order.
- 8 On October 21 and 22, 2003, the Commission issued bench requests to the parties to gather information concerning the issues raised by Qwest in its

October 10, 2003, petition. On October 23, 2003, the Commission entered Order No. 03, Order Requiring Disclosure of Information, and served the order on all competitive local exchange carriers (CLECs) registered with the Commission to operate in Washington state.¹ The bench requests and responses to Order No. 03 were due to be filed with the Commission on Monday, November 17, 2003.

- 9 On November 12, 2003, Advanced TelCom, Inc., Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc., Global Crossing Local Services, Inc., McLeodUSA Telecommunications, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc. (collectively Joint CLECs), filed with the Commission a Motion for Anonymous Disclosure of CLEC Data.
- 10 On November 12, 2003, the Commission issued a notice of opportunity to respond to the Joint CLECs' Motion. In addition, in response to the Joint CLECs' motion and requests for an extension of time to filed responses to bench requests and Order No. 03, the Commission issued a notice of extension of time to file responses to the bench requests and Order No. 03 until Monday, November 24, 2003.
- 11 On November 13 and 17, 2003, the Joint CLECs filed supplemental information in support of their motion. On November 14, 2003, Commission Staff, WorldCom, Inc., n/k/a MCI (MCI), the Washington Electronic Business and Telecommunications Coalition (WeBTEC), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively AT&T), and Qwest filed responses to the Joint CLECs' motion.
- 12 **Joint CLECs' Motion.** The Joint CLECs request that the Commission establish a procedure that would allow CLECs to provide to the Commission highly confidential information in response to both bench requests and data requests from other parties, and have the Commission mask the identities of the CLECs and provide that information to the signatories to Exhibit C of the protective order, which allows access to highly confidential information.

¹ The Commission entered Order No. 04, Order Requesting Disclosure of Information From Certain CLECs, on November 13, 2003, after finding that 17 CLECs were not served with Order No. 03. Responses to Order No. 04 are due to be filed on December 8, 2003.

- 13 The Joint CLECs assert that the Oregon and Minnesota Commissions have adopted a similar process. Supplemental information provided by the Joint CLECs does not clearly explain the masking process used in Oregon. In Minnesota, the Department of Commerce, the equivalent of Public Counsel in Washington, will assign codes to allow CLECs to mask their identities, and CLECs will submit an original and necessary copies to Department of Commerce, who will then distribute the masked responses to all parties. Qwest must also mask any data that includes CLEC identifying information when providing it to parties, but the Attorney General's Office and Department of Commerce will have access to Qwest's codes for each carrier.
- 14 Staff does not object to the motion, and suggests that after the Commission assigns a code number to each CLEC, the code number would be provided to Staff and Public Counsel, and that Staff or the Commission would then distribute the masked responses to all parties. Staff notes that the Commission may need to disclose the identity of a CLEC if a party demonstrates a need to know the CLEC's identity.
- 15 MCI and WeBTEC have no objection to the motion to mask data, but object to any request that would allow access to raw data only to Staff and aggregated data to all other parties. WeBTEC notes that if a party needs to do follow-up discovery it may be necessary to know the identity of the responding CLEC.
- 16 AT&T opposes the motion, arguing that the issue was fully addressed and argued at the October 13, 2003, prehearing conference, and that the Joint CLECs agreed that some highly confidential information would need to be disclosed to parties subject to the protective order. AT&T asserts that the issue can be handled on a case-by-case basis. AT&T asserts that there is no masking process in place in Oregon, and that the issue of masking CLEC identities has not been fully resolved in Minnesota. AT&T argues that access to the data is critical to the parties developing their cases, and that masking data will create an extremely cumbersome and onerous process that will delay production of information.
- 17 Qwest also opposes the motion, arguing that the motion is late-filed, that the issue was argued at the October 13, 2003, prehearing conference and resolved by the protective order entered in this proceeding, that the Joint CLECs have made no showing that the protective order is insufficient to protect highly confidential

CLEC data, and that granting the motion will cause delay and preclude Qwest and other parties from gathering the necessary information in the case.

- 18 **Discussion and Decision.** The Joint CLECs raise an issue of great import in this proceeding. The Commission is acutely aware that the information requested of party and non-party CLECs in this proceeding is competitively sensitive and that inappropriate disclosure of such information may be damaging to the party providing the information. It is for that reason that the Commission modified the standard protective order in this proceeding to restrict access to and disclosure of highly confidential information.
- 19 The Commission considered the issue of masking and aggregating the data during the October 13, 2003, prehearing conference and in the subsequent comments filed by the parties. In paragraph 1(c) of Order No. 02, the Commission stated that “the nature of the Commission’s inquiry in this proceeding precludes masking and aggregating data, methods the Commission has used in the past when collecting data from competitive companies.”
- 20 After considering the Joint CLECs’ motion and other parties’ responses, the Commission affirms the finding in paragraph 1(c) of Order No. 02 and denies the Joint CLECs’ motion. While masking CLEC identities would give some CLECs a sense of security in the information provided to the Commission and other parties, masking CLEC identities would create a number of procedural and administrative difficulties for the parties and the Commission in litigating and managing the proceeding.
- 21 If the Commission were to act as a clearinghouse for highly confidential information, as well as any follow-up discovery requests, it would make it difficult and cumbersome for parties and their attorneys to conduct follow-up discovery or communicate about discovery disputes with any other party without knowing CLEC identities. Masking the identity of a CLEC would likely involve masking the name of the person responding to a bench request or data request. That person may also be a witness in the proceeding. Such a process would compromise the ability of parties to litigate the proceeding and the ability of parties and the Commission to cross-examine witnesses during hearing. In addition, such a masking process would certainly add delay in an already tight discovery schedule in this proceeding.

- 22 To address the issues raised in the Joint CLECs' motion, as well as the issues of procedure and administration of the proceeding, the Commission requires that CLEC identities in highly confidential information provided in response to bench requests and data requests be masked. However, highly confidential information should be submitted to other parties directly, instead of through the Commission.
- 23 The Commission will assign an alpha-numeric code to each company served with Order No. 03, Order No. 04, or bench requests in this proceeding. Only attorneys, paralegals, and legal secretaries who have signed Exhibit C to the protective order will be provided a copy of the code listing CLEC identities. Experts who have signed Exhibit C will not have access to the code. **Companies who are providing highly confidential responses to bench requests, Order No. 03, or Order No. 04 should contact ALJ Ann E. Rendahl at (360) 664-1144 to obtain a code reference for that company.**
- 24 Selective access to the code will allow parties to effectively conduct discovery in this proceeding, but is intended to prevent the harm that may occur through inadvertent disclosure of highly confidential information. If a person inadvertently receives highly confidential information, the person will see only an alpha-numeric reference, not a company name. The masked identity of CLECs will also allow for greater communication among attorneys representing parties and non-parties in this proceeding and greater openness in the hearings scheduled for March 2004.
- 25 **Availability of Responses of Non-Party CLECs to Order Nos. 03 and 04.** Responses to Order No. 03 are due to be filed with the Commission on November 24, 2003, while responses to Order No. 04 are due to be filed with the Commission by December 8, 2003. The Commission will post all responses to Order Nos. 03 and 04, as they are received, on the Commission's web site at www.wutc.wa.gov/033044, but will not provide links to any confidential or highly confidential responses to the orders. Upon request, the Commission will provide copies of confidential or highly confidential responses to party representatives who have signed Exhibits A, B, and C to the protective order in this proceeding.

- 26 **Notice of Prehearing Conference.** The Commission convenes a prehearing conference in this matter to discuss the process of masking and distributing highly-confidential information in this proceeding. **The conference will be held in Room 108 of the Commission's Hearing Room, First Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S. W., Olympia, Washington, at 9:30 a.m., Monday, November 24, 2003.** Persons who cannot attend the workshop in person may participate via a teleconference bridge number to be provided by separate electronic notice later today. Persons desiring to participate via the bridge line must make advance reservations by contacting Gregory Kopta, attorney for the Joint CLECs, at 206-628-7692 before the close of business today.

DATED at Olympia, Washington, and effective this 21st day of November, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge