

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

In the Matter of the Petition of)	DOCKET NO. UT-030614
)	
QWEST CORPORATION)	ORDER NO. 13
)	
For Competitive Classification of)	ORDER GRANTING IN PART
Basic Business Exchange)	REQUEST FOR RECONSIDERATION
Telecommunications Services)	OR CLARIFICATION; AMENDING
)	PROTECTIVE ORDER

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Synopsis: *The Commission grants in part WeBTEC’s request for reconsideration or clarification of paragraphs 17 and 18 of Order No. 08 concerning the language in the affidavit that parties must sign if they seek access to highly confidential data. The Commission modifies the affidavit language to require parties to certify they will not involve themselves in competitive decision-making with respect to which the documents or information may be relevant. In addition, the Commission amends Appendix A to the protective order to include references to Public Counsel that were inadvertently omitted in Order No. 12 in this proceeding.*

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 ffitich, 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.
- 4 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. 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 have access to highly confidential information only through one outside counsel and one outside expert.
- 5 Order No. 08 also addressed the affidavit required to be signed by those seeking to review highly confidential information under the amended protective order. The Commission lessened the term of the restrictions in the affidavit from five years to three years, but declined to make other changes, finding that the terms of the affidavit ensure the protection of highly confidential information submitted during these proceedings.
- 6 On July 30, 2003, Public Counsel filed a Petition for Reconsideration or Clarification of Order No. 08 (Public Counsel Petition). On August 3, 2003, WeBTEC filed a Petition for Reconsideration and Clarification of Order No. 08 and Response to Public Counsel's Petition for Reconsideration and Clarification (WeBTEC Petition).
- 7 AT&T and Commission Staff filed responses to WeBTEC's Petition.
- 8 On August 6, 2003, the Commission entered Order No. 12, which granted 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.

II. DISCUSSION AND DECISION

9 WeBTEC requests reconsideration or clarification of Commission Order No. 08 in this proceeding pursuant to WAC 480-09-810, the rule governing reconsideration of Commission orders.

10 First, WeBTEC seeks reconsideration of the requirement that Public Counsel no longer have the same access as Commission Staff to highly confidential information under the amended protective order.

11 Second, WeBTEC seeks clarification that “joint action and coordination between Public Counsel and other parties 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 joint [sic] action to disregard or circumvent Commission orders or professional or ethical obligations.” *WeBTEC Petition at 5*. Neither Commission Staff nor AT&T takes a position on this issue.

12 Finally, WeBTEC requests reconsideration of paragraphs 17 and 18 of Order No. 08 and requests the Commission modify the amended protective order to narrow the restrictions in the affidavit required for parties other than Staff and Public Counsel who seek access to or disclosure of highly confidential information. The amended protective order requires persons seeking to review highly confidential information to sign an affidavit certifying that:

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.

13 Specifically, WeBTEC objects to the following language: “involves themselves in competitive decision making by any company or business organization that competes, or potentially competes.” WeBTEC argues that the affidavit language

is not necessary given the protections of trade secret laws. WeBTEC further argues that the language is similar to a covenant not-to-compete, and that such covenants are discouraged as they limit the ability of employees to pursue their livelihoods.

- 14 WeBTEC argues that the “affidavit should be strictly limited to situations and activities where the highly confidential information would inevitably be disclosed and its misuse would result in unjust enrichment or unfair competitive disadvantage.” *WeBTEC Petition at 12, lines 20-23*. WeBTEC further argues that legal services by outside counsel and consulting or testimonial services provided by outside experts should be exempted from the employment restriction. *Id., at lines 23-25*.
- 15 Commission Staff asserts that the Commission has discretion to determine the appropriate terms of a protective order. Staff agrees with WeBTEC that the language regarding a company or business organization that “potentially competes” is vague, and that potential competition is speculative and difficult to measure. Staff recommends the Commission retain the remainder of the language regarding “competitive decision making.”
- 16 AT&T objects to WeBTEC’s petition. AT&T asserts that covenants not-to-compete address employment issues, not trade secrets, and that case law addressing covenants not-to-compete do not apply in this instance. AT&T further argues that “inevitable disclosure” and “impossibility” are not the standards applicable to the protection of trade secrets. AT&T asserts that the issue is not whether someone’s livelihood is diminished, but rather protecting the CLECs’ property rights in their trade secrets. *AT&T Response at 2-3*.
- 17 **Decision.** The Commission has already addressed in Order No. 12 whether Public Counsel should have the same access as Commission Staff to highly confidential information under the amended protective order, other than the company-specific market-sensitive data provided by CLECs. Paragraph 13 of that Order directed that the amended protective order be revised to allow Public Counsel the same access as Staff. The amended protective order, attached as Appendix A to Order No. 12, inadvertently omitted several references to Public Counsel. Paragraphs 5 and 9 of the amended protective order, attached as

Appendix A to this Order, have been revised to include additional references to Public Counsel.

- 18 The Commission does not bar parties from acting jointly, nor does the Commission discourage parties from working together. As we stated in Order No. 12, however, the Commission must balance concerns for orderly and expeditious proceedings with concerns for the confidentiality of information presented during such proceedings. All parties, including Public Counsel, are bound by the requirements of the protective order, and may not share confidential or highly confidential information even if acting jointly.
- 19 In this proceeding and others, WeBTEC, Public Counsel, and other parties have objected to the affidavit language in the amended protected order as overly broad and unduly restrictive. WeBTEC proposes that the affidavit language be modified to limit the restrictions to circumstances where disclosure or use of the trade secrets is impossible not to result, or inevitable. WeBTEC further requests that the restrictions not apply to outside counsel or experts. In our view, WeBTEC's proposed modifications would result in exceptions that swallow the rule.
- 20 The intent of the affidavit language is to protect the highly confidential trade secrets of individual companies that compete with one another. It is necessary to establish restrictions against involvement in competitive decision-making for those with access to highly confidential data. We recognize, however, that the restrictions in the affidavit language may be stated too broadly, in that the restrictions do not relate specifically to the highly confidential data at issue. For this reason, we find that the affidavit language in the amended protective order should be revised as follows:

They do not now, and will not for a period of three years, involve themselves in competitive decision-making, with respect to which the information may be relevant, 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.

III. ORDER

21 THE COMMISSION ORDERS That

- 22 (1) The amended protective order entered in Order No. 08 is revised, as
shown in Appendix A to this Order, to include the phrase “, with respect
to which the documents or information may be relevant,” in the required
affidavit language.
- 23 (2) Paragraphs 5 and 9 of the amended protective order entered in Order No.
12 are revised, as shown in Appendix A to this Order, to include
references to Public Counsel.

DATED at Olympia, Washington, and effective this 13th day of August, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

Appendix A

- 1 **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.
- 2 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."
- 3 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.
- 4 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.

- 5 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 and Public Counsel 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, with respect to which the documents or information may be relevant, 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.
- 6 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.

- 7 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.
- 8 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.
- 9 Other than the company-specific market-sensitive data discussed in paragraph 2 of this Appendix, 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 as otherwise provided by the terms of the Protective Order.