

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

In the Matter of the Petition of)	
)	DOCKET NO. UT-033044
QWEST CORPORATION)	
)	ORDER NO. 02
To Initiate a Mass-Market Switching and)	
Dedicated Transport Case Pursuant to)	
the Triennial Review Order)	PROTECTIVE ORDER
)	
.....)	

1 The Commission finds that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. The Commission provided the parties in this proceeding an opportunity to comment on the need for and form of a protective order, considered their comments, and finds as follows:

- a. It is likely that proprietary and confidential information, as well as highly confidential information, will be required to resolve the issues in this proceeding;
- b. Absent a protective order, a significant risk exists that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider could result;
- c. The nature of the Commission’s inquiry in this proceeding precludes masking and aggregating data, methods that the Commission has used in the past when collecting data from competitive companies. The provisions of the Federal Communications Commission’s (FCC) Triennial Review Order require that the Commission collect and analyze detailed information about companies providing telecommunications services in the state of Washington, and allow parties to this proceeding access to that information in order that they may evaluate the evidence before the Commission.

d. Due to the fact that confidential information will be made available to all parties, access to competitive information and highly competitive information must be strictly limited to certain persons, such as inside and outside counsel and experts, consultants, and advisors, as well as certain employees. No person involved in design, development, sales, or marketing should have access to confidential information. More-restrictive requirements apply to access to highly confidential information. The Commission may allow exceptions to these restrictions for good cause, but only after the entity that would be providing access has an opportunity to fully explain its objection to the person seeking access.

2 Accordingly, the Commission enters the following protective order pursuant to RCW 34.05.446 and RCW 80.04.095 to govern the discovery and use of proprietary and confidential documents in this proceeding:

ORDER

A. General Provisions

3 **Confidential Information.** All access, review, use, and disclosure of any material designated by a party to this proceeding, or by a person or company providing information in response to a bench request or Commission order, as confidential (referred to in this Order as "Confidential Information") is governed by this Order and by WAC 480-09-015. In addition, all notes, or other materials that refer to, derive from, or otherwise contain parts of Confidential Information shall also be governed by this Order and by WAC 480-09-015. The Commission expects Confidential Information to include only numbers, customer names, and planning details. The Commission requires the parties to delete such information from pre-filed testimony, exhibits, briefs and all other documents filed with the Commission and to provide these "confidential deletions" under separate cover in the manner described below. The Commission may reject a filing or any other submission that fails to segregate Confidential Information, or categorizes clearly public information as confidential.

4 Entities must scrutinize potentially confidential material, and limit the amount they designate "Confidential Information" to only information that truly might

compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order. The first page and individual pages of a document determined in good faith to include Confidential Information must be marked by a stamp that reads: "**CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UT-033044.**" Placing a Confidential Information stamp on the first page of an exhibit indicates only that one or more pages contains Confidential Information and will not serve to protect the entire contents of the multipage document. Each page that contains Confidential Information must be marked separately to indicate where confidential information is redacted. Confidential Information shall be provided on yellow or buff-colored paper with references to where Confidential Information is redacted in the original document.

- 5 **Confidential and Redacted Versions.** Parties are required to provide **complete** confidential and redacted versions of testimony, exhibits, and briefs. This includes electronic versions and requires that **all diskettes** and **all electronic mail** specify whether the file is confidential, redacted, or public.
1. If a witness has a confidential portion of her testimony, the sponsoring party must provide a complete redacted version of the testimony and a complete confidential version, with confidential pages on yellow or buff-colored paper.
 2. Parties must submit (at least) two diskettes and E-mails—one with the electronic version of the confidential text and one with the electronic version of the redacted text.
 - a. Parties **MUST** identify the confidential diskettes with prominent red markings and the word "confidential" in addition to the contents and the docket number. The others must be prominently labeled "redacted" or "public."
 - b. Parties **MUST** identify each confidential digital file with a C in the file name and **MUST** have the legend "**CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UT-033044**" prominently displayed on the first page (i.e., the page that appears on the computer screen when the file is opened).

6 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this Order may be requested, reviewed, used, or disclosed, directly or indirectly, by any party, expert, counsel, or other person having access pursuant to this Order, except for purposes of this proceeding. Persons having access to Confidential Information pursuant to this Order must request, review, use, or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order, and only for the purpose of preparation for and conduct of proceedings in Docket No. UT-033044 or before the FCC, and all subsequent appeals (TRO Proceedings). Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product or service of the entity asserting confidentiality. All persons who may be entitled to review, or who are afforded access to any Confidential Information by reason of this Order, shall keep the Confidential Information secure as confidential or proprietary information and in accordance with the terms specified in this Order.

B. Disclosure of Confidential Information

7 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, Commissioners' Advisory Staff, Commission Staff, the Presiding Officer(s), counsel for Commission Staff, Public Counsel and counsel for the parties employed, retained by, or otherwise representing the Party in TRO Proceedings, and attorneys' administrative staff such as paralegals. However, access to any Confidential Information may be authorized by counsel, solely for the purposes of this proceeding, to (1) those persons designated by the parties as their experts, consultants, or advisors in this matter, and (2) only those employees of the party who are directly involved in this proceeding, provided that counsel for the party represents that no such employee is engaged in the design, development, sale or marketing of that party's products or services. Except for the Washington Utilities and Transportation Commission Staff and Public Counsel, no such expert, consultant, advisor, or employee may be an officer, director, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the entity asserting confidentiality). Any dispute concerning persons entitled to

access Confidential Information must be brought before the Presiding Officer for resolution.

- 8 **Nondisclosure Agreement.** Before being allowed access to any Confidential Information designated for this docket, each counsel, administrative staff, expert, consultant, advisor, or employee must agree to comply with and be bound by this Order in the form of Exhibit A (counsel and administrative staff) or B (expert, consultant, advisor, and employee) attached to this Order. Counsel for the party seeking access to the Confidential Information must deliver to counsel for the party or other entity producing Confidential Information a copy of each signed agreement, which must show each signatory's full name and permanent address, the party with whom the signatory is associated and, in the case of experts, consultants, advisors, or employees, the employer (including the signatory's position and responsibilities). The party seeking access must also send a copy of the agreement to the Commission. Copies of these agreements will be posted to the Commission's web site at www.wutc.wa.gov/033044 to allow all non-parties to determine the persons seeking access to Confidential Information. In the case of experts, consultants, advisors, or employees, the entity providing Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit B.

- 9 **Access to Confidential Information.** Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-09-480 or any successor rules governing discovery that may be adopted by the Commission and become effective during the course of this proceeding. Requests for special provisions for inspection, dissemination, or use of confidential documents must be submitted to the Presiding Officer if not agreed to by the parties. The parties must neither distribute copies of Confidential Information to, nor discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

C. Highly Confidential Information

- 10 **Designation and Disclosure of Highly Confidential Information.** Qwest, other incumbent local exchange companies (ILECs), and competitive local exchange carriers (CLECs) who are parties to this proceeding are competitors, or potential competitors. CLECs and ILECs that are not parties to this proceeding, but who must submit information pursuant to Commission order or in response to discovery requests from parties, are also competitors or potential competitors. Any of these entities may receive discovery requests that call for the disclosure of highly confidential documents or information, the disclosure of which poses a significant risk of competitive harm to the disclosing party. Entities 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 of this Order.
- 11 **Designation of Highly Confidential Information.** In this proceeding, the Commission has determined that it will treat certain information as "Highly Confidential" if a party or non-party determines in good faith that it would be competitively disadvantaged by the disclosure of such information to its competitors. Highly Confidential Information includes, but is not limited to, documents, pleadings, briefs, and appropriate portions of deposition transcripts, which contain information regarding the market share of, number of access lines served by, or number of customers receiving a specified type of service from a particular provider, or other information that relates to a particular provider's network facility location detail, revenues, costs, and marketing, business planning or business strategies.
- 12 Parties and non-parties must scrutinize carefully responsive documents and information and strictly 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.
- 13 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-033044.**" Placing a "Highly Confidential" stamp on the first page of a document indicates only that one or more pages contain 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 light blue paper.

- 14 **Access to Highly Confidential Information.** Parties seeking disclosure of Highly Confidential Information must designate the person(s) to whom they would like the Highly Confidential Information disclosed in advance of disclosure by the providing party. Each person seeking access to Highly Confidential Information must agree to comply with and be bound by this Order on the form of Exhibit C attached to this Order. Counsel for the party seeking access to the Highly Confidential Information must deliver to counsel for the party or non-party producing the Highly Confidential Information a copy of each signed agreement which must show each signatory's full name and permanent address, the party with whom the signatory is associated and, in the case of experts, consultants, advisors, or employees, the employer (including the signatory's position and responsibilities). The party seeking access must also send a copy of the agreement to the Commission. Copies of these agreements will be posted to the Commission's web site at www.wutc.wa.gov/033044 to allow all non-parties to determine the persons seeking access to Highly Confidential Information. In the case of experts, consultants, advisors, or employees, the entity providing Highly Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit C.
- 15 Parties seeking disclosure of Highly Confidential Information shall designate no more than (1) a reasonable number of in-house attorneys who have direct responsibility for matters relating to Highly Confidential Information; (2) two in-house experts; and (3) a reasonable number of outside counsel and outside experts to review materials marked as "Highly Confidential." Highly Confidential Information may not be disclosed to persons engaged in the development, planning, marketing, or selling of retail or wholesale services for the purposes of any entity competing with or against any other entity, or for strategic or business decision making, non-regulatory strategic or business planning, or procurement on behalf of the receiving entity.

- 16 Notwithstanding the restrictions in paragraphs 8 and 15 of this Order, a Small Company or other party to which the restrictions pose a severe hardship, may designate any employee or in-house expert to review Confidential Information and/or Highly Confidential Information if the producing entity, upon request of the Small Company or other party, gives prior written authorization for that person to review Confidential Information and/or Highly Confidential Information. The requesting party must provide to the producing entity the name, job title, and job responsibilities of the designated employee or in-house expert. If the producing entity refuses to give such written authorization, the requesting party may, for good cause shown, request an order from the Presiding Officer allowing a prohibited person to review Confidential Information and/or Highly Confidential Information. The producing entity shall be given the opportunity to respond to the Small Company or other party's request before an order is issued. "Small Company" means an entity with fewer than 3,000 employees, including the employees of affiliates within a common holding company.
- 17 Any producing entity may object in writing to the designation of any individual as a person who may review Highly Confidential Information by filing a motion with the Commission. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged individual from the review of Highly Confidential Information. Written response to any objection must be filed with the Commission within three (3) days after receipt of the objection. If, after receiving a written response to a producing entity's objection, the producing entity still objects to disclosure of the Highly Confidential Information to the challenged individual, the Commission shall determine whether the Highly Confidential Information must be disclosed to the challenged individual.
- 18 Persons authorized to review Highly Confidential Information will maintain the documents and any notes reflecting their contents in a secure location to which only designated counsel and experts have access. No additional copies will be made, EXCEPT FOR USE DURING HEARING AND THEN SUCH COPIES SHALL ALSO BE SUBJECT TO THE PROVISIONS OF THIS ORDER. 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.

19 **Protected Use by Agreement.** Any testimony or exhibits prepared that include or reflect Highly Confidential Information must be maintained in the secure location until filed with the Commission or 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 Officer following consultation with the parties.

20 **Challenge.** 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 Officer(s).

21 Unless specifically addressed in this Section, all other sections of this Order applicable to Confidential Information also apply to Highly Confidential Information.

D. Use of Confidential Information in This Proceeding

22 **Reference to Confidential Information.** If counsel or persons afforded access to Confidential Information refer to such information orally or in writing during any part of this proceeding, any public reference (i.e., any reference that will not be placed in a sealed portion of the record) shall be solely by title, exhibit reference, or some other description that will not disclose the substantive Confidential Information contained in the document. Any other written reference shall be segregated and marked "Confidential Information" and access to it shall be given solely to persons who are authorized access to the information under this Order. References to the Confidential Information must be withheld from inspection by any person not bound by the terms of this Order.

23 In oral testimony, cross-examination or argument, public references to Confidential Information must be on such prior notice as is feasible to the affected party and the Presiding Officer. Unless alternative arrangements exist to

protect the Confidential Information as provided below, there must be minimum sufficient notice to permit the Presiding Officer an opportunity to clear the hearing room of persons not bound by this Order or take such other action as is appropriate in the circumstances.

- 24 **Protected Use by Agreement.** Any party who intends to use any Confidential Information in the course of this proceeding, including but not limited to testimony to be filed by the party, exhibits, direct and cross-examination of witnesses, rebuttal testimony, or a proffer of evidence, shall give reasonable notice of such intent to all parties and to the Presiding Officer, and attempt in good faith to reach an agreement to use the Confidential Information in a manner which will protect its confidential nature. The parties shall consider such methods as: (1) use of clearly edited versions of confidential documents, (2) characterizations of data rather than disclosure of substantive data, and (3) aggregations of data. The goal is to protect each party's rights with respect to Confidential Information while allowing all parties the latitude to present the evidence necessary to their respective cases.
- 25 If the parties cannot reach agreement about the use of Confidential Information, they must notify the Presiding Officer, who will determine the arrangements to protect the Confidential Information to ensure that parties' due process rights are protected.
- 26 **Right to Challenge Admissibility.** Nothing in this Order may be construed to restrict any party's right to challenge the admissibility or use of any Confidential Information on any ground other than confidentiality, including but not limited to competence, relevance, or privilege.
- 27 **Right to Challenge Confidentiality.** Any party may challenge another entity's assertion of confidentiality with respect to any information asserted to be entitled to protection under this Order. The Presiding Officer will conduct an *in camera* hearing to determine the confidentiality of information. The burden of proof to show that such information is properly classified as confidential is on the party asserting confidentiality. Pending determination, the assertedly Confidential Information will be treated in all respects as protected under the terms of this Order.

- 28 The Presiding Officer may challenge an entity's assertion of confidentiality by notice to all parties.
- 29 If the Presiding Officer determines the challenged information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing entity to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.
- 30 **Admission Of Confidential Information Under Seal.** The portions of the record of this proceeding containing Confidential Information will be sealed for all purposes, including administrative and judicial review, and must not be examined by any person except under the conditions of this Order, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful order of the Commission or of a court having jurisdiction to do so.
- 31 **Return of Confidential Information.** Within thirty (30) days after the conclusion of this proceeding, including any administrative or judicial review, every person who possesses any Confidential Information (including personal notes that make substantive reference to Confidential Information and transcripts of any depositions to which a claim of confidentiality is made), must return all Confidential Information to the entity that produced it, or at the producing entity's election, certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed. These provisions apply to all copies of exhibits that contain Confidential Information and for that reason were admitted under seal. The only exceptions are that exhibits may be preserved by counsel as counsel records, and a complete record, including Confidential Information, will be preserved by the Secretary of the Commission as part of the Agency's official records.
- 32 **Notice of Compelled Production In Other Jurisdictions.** If a signatory to this protective order is compelled to produce confidential documents in any regulatory or judicial proceeding by the body conducting the proceeding, the signatory must provide notice to the entity that provided the confidential information. Such confidential information must not be produced for at least ten days following notice, to permit the entity that provided such information an

opportunity to defend the confidential nature of the material before the regulatory or judicial body that would compel production. Disclosure after that date, in compliance with an order compelling production, is not a violation of this Order.

- 33 **Modification.** The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity to respond.
- 34 **Violation of this Order.** Violation of this Order by any party to this proceeding or by any other person bound by this Order by unauthorized use or unauthorized divulgence of Confidential or Highly Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law, including, but not limited to, the provisions of RCW 80.04.380-.405.

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

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

EXHIBIT A (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UT-033044
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as attorney in
this proceeding for _____ (party
to this proceeding) agree to comply with and be bound by the Protective Order
entered by the Washington Utilities and Transportation Commission in Docket
No. UT-033044, and acknowledge that I have reviewed the Protective Order and
fully understand its terms and conditions.

Signature

Date

Address

EXHIBIT B (EXPERT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UT-033044
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as expert witness, consultant, or advisor in this proceeding for _____ (a party to this proceeding) hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket No. UT-033044 and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Permanent Address

Position and Responsibilities

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt. Failure to do so will constitute a waiver and the above-named person will be deemed an expert, consultant, or advisor having access to Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named expert, consultant, or advisor having access to Confidential Information. The objecting party shall file a motion setting forth the basis for objection and asking exclusion of the expert, consultant, or advisor from access to Confidential Information.

Signature

Date

EXHIBIT C (HIGHLY CONFIDENTIAL INFORMATION AGREEMENT)

AGREEMENT CONCERNING HIGHLY CONFIDENTIAL INFORMATION
IN DOCKET NO. UT-033044
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as

- In-house attorney
- In-house expert
- Outside counsel
- Outside expert
- Small company employee or in-house expert

in this proceeding for _____ (a party to this proceeding) hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket No. UT-033044 and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Permanent Address
Responsibilities

Position and

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt. Failure to do so will constitute a waiver and the above-named person will be deemed a person having access to Highly Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named person having access to Highly Confidential Information. The objecting party shall file a motion with the Commission, supported by affidavit, setting forth the basis for objection and asking exclusion of the person from access to Highly Confidential Information.

Signature

Date