BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In Re Application of U S WEST, Inc. And QWEST COMMUNICATIONS INTERNATIONAL, INC.	)	DOCKET NO. UT-991358
For An Order Disclaiming Jurisdiction, or in the Alternative, Approving the U S WEST, INC.--QWEST COMMUNICATIONS INTERNATIONAL, INC. Merger	)	EIGHTH SUPPLEMENTAL ORDER DENYING PETITIONS FOR LEAVE TO WITHDRAW; DENYING CONFIDENTIAL STATUS TO BENCH REQUEST RESPONSE AND PROVIDING NOTICE

SUMMARY

1 **SYNOPSIS**: The Commission orders that an agreement between AT&T and Joint Applicants U S WEST, Inc., and Qwest, Inc. is not confidential and gives notice of that determination to all interested persons. The Commission denies various Intervenors' requests to withdraw from this proceeding.

2 **PROCEEDINGS**: On August 31, 1999, U S WEST, Inc., and Qwest Communications International, Inc. (Joint Applicants) jointly filed an application requesting that the Commission issue an order disclaiming jurisdiction over their proposed merger transaction, or in the alternative, approving the merger. On September 23, 1999, the Commission, on due and proper notice, conducted its first prehearing conference in this matter before Chairwoman Marilyn Showalter, Commissioner William R. Gillis, and Administrative Law Judge Dennis J. Moss. Among other things, the Commission considered 14 petitions to intervene filed by various trade associations, special interest groups, and corporations that are both competitors and customers of U S WEST and/or Qwest. The Commission granted 13 of the 14 petitions finding these parties (Intervenors) demonstrated a substantial interest in the proceeding and that their participation would be in the public interest.

3 On April 26, 2000, after the conclusion of evidentiary hearings, public comment hearings, and other process, Commission Staff filed a Request for Continuance of Briefing Schedule combined with its Motion for Issuance of Bench Requests. The Request and Motion, filed only two days before the due-date for Initial Briefs, were based on asserted "new developments in the case that warrant an extension of the current briefing schedule." Among other things, these "new developments" included the fact that U S WEST and/or Qwest had entered into various side-agreements with certain Intervenors, one effect of which was to cause those Intervenors to file papers seeking leave to withdraw from the proceeding. Staff asserted that those side-agreements should be made

part of the record. Staff and, later, Public Counsel challenged the confidential designation asserted by the parties to some of these side-agreements. The Commission issued Bench Request No. 2 in response to Staff's Motion and required Joint Applicants to submit the side-agreements.

4 On further consideration, including preliminary *in camera* review of the side-agreements, some of which were submitted as "Confidential" or "Highly Confidential" under the Protective Order in this proceeding, the Commission determined it was necessary to adjust the dates for Initial and Reply Briefs until May 19, 2000, and May 26, 2000, respectively. This was to allow adequate time for additional process to consider, among other things:

5 1. Staff's request that all documents filed by the Joint Applicants in response to Bench Request No. 2 be made exhibits;

6 2. AT&T's objection to one of the documents filed by the Joint Applicants in response to Bench Request No. 2 being made a part of the record in this proceeding;

7 3. Assertions of confidentiality with regard to several of the documents filed by Joint Applicants in response to Bench Request No. 2, and Staff's and Public Counsel's challenges to these assertions;

8 4. Whether to grant various Intervenors' requests for leave to withdraw from the proceeding; and

9 5. What additional process, if any, might be required prior to the Commission's resolution of disputes concerning the Joint Applicants' response to Bench Request No. 2 and other pending matters.

10 The Commission set May 16, 2000, and May 19, 2000, as dates to receive written argument on the pending matters. The Commission also noticed hearing proceedings for May 23, 2000, to permit oral argument.

11 **PARTIES**: Lisa A. Anderl, Senior Attorney, U S WEST, Inc. (Seattle), and James M. Van Nostrand, Stoel Rives, LLP, Seattle, Washington, represent U S WEST, Inc. Ronald Wiltsie, Mace Rosenstein, and Gina Spade, Hogan & Hartson L.L.P., Washington, D.C., represent Qwest Communications International, Inc. Gregory J. Kopta and Dan Waggoner, Davis Wright Tremaine, Seattle, represent AT&T Communications of the Pacific Northwest, Inc. Gregory J. Kopta, Davis Wright Tremaine, Seattle, also represents Advanced Telecom Group, Inc., Nextlink Washington, Inc., and Northpoint Communications, Inc. Andrew O. Isar, Director-State Affairs, Telecommunications Resellers Association, represents that organization. Arthur A. Butler, Ater Wynne LLP, Seattle, represents Rhythms Links, Inc. and, during early stages of the proceeding,

represented SBC National, Inc. a/k/a SBC Telecom, Inc. Richard A. Finnigan, Attorney, Olympia, represents the Washington Independent Telephone Association (WITA) and, by notice of substitution of counsel filed late in the proceeding, SBC National, Inc. Mark P. Trinchero, Davis Wright Tremaine, Portland, Oregon, represents McLeodUSA Telecommunications Services, Inc. Brooks E. Harlow, Miller, Nash, Wiener, Hager & Carlson LLP, Seattle, represents Covad Communications Company, Northwest Payphone Association, and Metronet Services Corporation. Clay Deanhardt, Attorney, Santa Clara, California, also represents Covad Communications Company. Robert Nichols, Nichols and Associates, Boulder, Colorado, represents Level 3 Communications, Inc. Simon ffitch, Assistant Attorney General, Seattle, represents the Public Counsel Section, Office of Attorney General. Sally G. Johnston, Assistant Attorney General, Olympia, represents the Commission's regulatory staff (Staff).

12 **COMMISSION**: The Commission finds and concludes that the side-agreement between Joint Applicants and AT&T (Exhibit No. 456HC)[1] is neither entitled to "Highly Confidential" status under the Protective Order nor the type of document that otherwise qualifies for confidential treatment under statute or rule. The Commission denies the various requests for leave to withdraw.

MEMORANDUM

I. BACKGROUND AND PROCEDURAL HISTORY.

13 The full background and procedural history of this proceeding is described in the Commission's Ninth Supplemental Order Approving and Adopting Settlement Agreements and Granting Application, entered today. Only the background and procedural history pertinent to the pending requests to withdraw and Public Counsel's challenge to the "Highly Confidential" designation asserted by AT&T and U S WEST with respect to Exhibit No. 456HC is related here.

14 On August 31, 1999, U S WEST, Inc., and Qwest Communications International, Inc. (Joint Applicants) jointly filed an application requesting that the Commission issue an order disclaiming jurisdiction over their proposed merger transaction, or in the alternative, approving the merger. On September 23, 1999, the Commission, on due and proper notice, conducted its first prehearing conference in this matter before Chairwoman Marilyn Showalter, Commissioner William R. Gillis, and Administrative Law Judge Dennis J. Moss. Among other things, the Commission considered 14 petitions to intervene filed by various trade associations, special interest groups, and corporations that are both competitors and customers of U S WEST and/or Qwest.

---

[1] The exhibit list will be modified to remove the "HC" designation from this exhibit, if that action remains appropriate following the opportunity for such process as may be pursued under the Protective Order, or pursuant to RCW 80.04.095 and WAC 480-09-015.

15 The Commission considered the petitions to intervene during its prehearing conference on September 23, 1999, including requests by AT&T, McLeodUSA, MetroNet Services, Covad Communications, Rhythms Links, NEXTLINK, Level 3, and SBC International, Inc. a/k/a SBC Telecom, Inc. U S WEST and Qwest objected to these parties' petitions to intervene, asserting that none showed a substantial interest in the proceeding. TR. 13, 15. The Commission heard argument. Each of the Intervenors identified above asserted a substantial interest in the proceeding as a customer and/or competitor of U S WEST and/or Qwest. Covad argued the significant additional point that the Commission's standard for interventions requires consideration both of whether a party seeking leave to intervene asserts a substantial interest and whether its intervention is in the public interest. TR. 28.

16 These arguments echoed those asserted in the Intervenors' written petitions. All of the petitions asserted a substantial interest *in the proceeding*. Several of the petitions expressly recognize the importance to the Commission that a party seeking leave to intervene show that its participation will promote the public interest. Rhythms Links, for example asserted that its participation "will be of material value to the Commission in its determination of the issues involved in this proceeding . . .." Rhythms Petition To Intervene at 2. NEXTLINK made the identical assertion. NEXTLINK Petition To Intervene at 3. Covad and MetroNet asserted that their interests as customers and competitors "are consistent with a determination of whether the proposed merger is in the public interest." Covad Petition To Intervene at 2; MetroNet Petition To Intervene at 2. Public Counsel, a key guardian of the public interest in our proceedings, supported these petitions to intervene and asserted, among other things, that "it's particularly important to have their participation on those issues with regard to the competitive impact of the merger." TR. 32.

17 The Commission granted these Petitions To Intervene in its Prehearing Conference Order, entered on September 29, 2000. The Commission determined "that these petitioners [among others] all have demonstrated a substantial interest in this proceeding and that participation by these petitioners is in the public interest." Prehearing Conference Order at 2. On this determination, the Commission granted the Petitions. The Commission underscored its recognition of the public interest basis for these Parties participation in its Third Supplemental Order Outlining Scope of Review, entered on October 11, 1999. Indeed, a significant part of that Order is our discussion of the issues raised by these Intervenors during the September 23, 2000, prehearing conference. The Intervenors' issues focused on how the proposed merger might affect competition in the telecommunications industry under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. The Commission determined that the issues these Intervenors raised were "proper subjects for inquiry in this proceeding." Third Supplemental Order at 4.

18 Most, or all, of the Intervenors participated actively through the discovery and evidentiary phases of the proceeding. Several Intervenors filed extensive direct testimony and participated in the development of our record through cross-examination. At the conclusion of our evidentiary proceedings, we conferred with the Parties and established consensus dates for Initial Briefs (April 28, 2000) and Reply Briefs (May 12, 2000). Shortly after agreeing to these dates, however, Joint Applicants requested a shortened briefing schedule. Various Parties opposed the request. Intervenors AT&T, NEXTLINK, ATG, and McLeodUSA, for example, asserted that to grant Joint Applicants' request "would impose substantial hardship" on them and "deprive [them] of their right and ability to participate effectively in this proceeding." The Commission denied Joint Applicants' request and confirmed the previously established procedural schedule. Notice Confirming Procedural Schedule, March 28, 2000. The Commission considered it important to afford all Parties, including the Intervenors, an adequate opportunity to brief carefully the significant competitive issues that remained in dispute.

19 On April 21, 2000, Intervenor Rhythms Links filed a letter with the Commission stating its intent to withdraw immediately from further participation in the proceeding, pursuant to the terms of a side-agreement it had entered with U S WEST and which it submitted with its withdrawal letter. On April 26, 2000, just two days before Initial Briefs were due, Covad Communications and AT&T each filed similar papers, but without providing copies of the side-agreements with U S WEST and/or Qwest that required these Intervenors to withdraw.

20 Also on April 26, 2000, Commission Staff filed a Request for Continuance of Briefing Schedule combined with its Motion for Issuance of Bench Requests. The Request and Motion were based on asserted "new developments in the case that warrant an extension of the current briefing schedule." Among other things, these "new developments" included the fact of U S WEST and/or Qwest appeared to be embarked on a course of entering into individual side-agreements with the active Intervenors, one term of which in each agreement required the Intervenor to withdraw from the proceeding. Staff asserted those side-agreements should be made part of the record.

21 Various parties responded to Staff's Request and Motion, generally opposing the Motion for Issuance of Bench Requests, and either not opposing or supporting a short continuance of the briefing schedule. Staff filed a brief reply pertinent to one aspect of the U S WEST and Qwest Answer.

22 On April 28, 2000, the Commission granted a short (three business days) continuance of the briefing schedule until May 3, 2000, for Initial Briefs, but made no adjustment to the deadline for Reply Briefs. The Commission took Staff's Motion under advisement. On May 1 and 2, 2000, Staff informed the Bench by telephone that certain of the side-agreements between Joint Applicants (or one of them) and various Intervenors had been, or shortly would be, submitted to Staff. Staff related that some of the settlement

agreements would be submitted pursuant to the Protective Order in this proceeding, classified either as "Confidential" or "Highly Confidential."

23 Also on May 2, 2000, Staff filed a Renewed Request for Continuance of Briefing Schedule and Renewed Motion for Issuance of Bench Requests. Staff stated that it had received two side-agreements: one between U S WEST and Covad, and one between Joint Applicants and AT&T. Staff attached the Covad agreement which was submitted to Staff as a "public, non-confidential document," according to Staff's Renewed Motion. Staff later informed the Bench that U S WEST asserted that this agreement should have been treated as confidential, but Staff was not aware of that at the time it submitted the agreement as an attachment to its Renewed Motion. Staff related that the AT&T agreement was submitted with the Highly Confidential designation. Staff also said that McCleodUSA had agreed to provide a copy of its agreement with U S WEST and Qwest, but also under the Highly Confidential designation.

24 Finally, Staff's Renewed Motion contemplated that additional side-agreements might be reached between U S WEST/Qwest–NEXTLINK, and between U S WEST/Qwest--ATG. Level 3 Communications, LLC, also was negotiating with U S WEST and Qwest, according to Level 3's response to Staff's original Request and Motion. Later, the Commission learned Joint Applicants also had entered negotiations with SBC.

25 Based on Staff's review of the agreements it had seen so far, two of which had been provided to the Bench, Staff urged again that they be made part of the record. With respect to the allegedly highly confidential AT&T agreement, which had not been provided to the Bench, Staff stated that based on its analysis "it is essential that the Commission have access to the agreement as [the Commission] weighs the issues presented by the merger application." Finally, Staff moved the Commission to require production of any agreement U S WEST and/or Qwest achieved with either NEXTLINK or ATG in exchange for those companies' withdrawal of opposition to the merger. Staff wanted all of these agreements, and presumably any agreement reached with Level 3, or SBC, made part of the record. Staff previously requested, in addition, that a certain Interim Line Sharing Agreement between U S WEST and various CLECs, some of whom are Intervenors here, be made an exhibit.

26 Staff asked for a further continuance of the briefing schedule to afford Staff adequate time to review, analyze, and brief the agreements. Staff argued that a continuance was necessary and in the public interest. Staff and, later, Public Counsel challenged the confidential designation asserted by some parties to some of these side-agreements.

27 On further consideration, including preliminary *in camera* review of the side-agreements, including those submitted as Confidential or Highly Confidential under the Protective Order, the Commission determined it was necessary to adjust the dates for Initial and Reply Briefs until May 19, 2000, and May 26, 2000, respectively. Notice of Revised Schedule for Filing Briefs, May 10, 2000; Seventh Supplemental Order Granting Motion

To Issue Bench Requests and Revising Procedural Schedule, May 2, 2000. This was to allow adequate time for additional process to consider:

28 1. Staff's request that all documents filed by the Joint Applicants in response to Bench Request No. 2 be made exhibits;

29 2. AT&T's objection to one of the documents (Exhibit No. 456HC, the U S WEST/Qwest–AT&T side-agreement) filed by the Joint Applicants in response to Bench Request No. 2 being made a part of the record in this proceeding;

30 3. Assertions of confidentiality with regard to several of the documents filed by Joint Applicants in response to Bench Request No. 2, and Staff's and Public Counsel's challenges to these assertions;

31 4. Whether to grant various Intervenors' requests for leave to withdraw from the proceeding; and

32 5. What additional process, if any, might be required prior to the Commission's resolution of disputes concerning the Joint Applicants' response to Bench Request No. 2 and other pending matters.

33 The Commission set May 16, 2000, and May 19, 2000, as dates to receive written argument on the pending matters. The Commission also noticed hearing proceedings for May 23, 2000, to permit oral argument.

34 Joint Applicants, MetroNet, NEXTLINK and ATG, McLeodUSA, and AT&T all filed arguments on May 16, 2000, arguing that the various "Confidential" and "Highly Confidential" designations were proper under the Protective Order and relevant statute and rule. AT&T, supported by Joint Applicants, continued to argue that its side-agreement with Joint Applicants should not be made part of the record. No one objected to any of the other side-agreements being made exhibits. Except for the joint argument filed by NEXTLINK and ATG, the Intervenors' arguments concerning the confidential status of their respective agreements were filed under seal.

35 On May 18, 2000, Staff and U S WEST informed the presiding Administrative Law Judge by telephone that they had achieved a settlement agreement concerning the issues not resolved by a previously submitted, proposed partial settlement agreement among Joint Applicants, Public Counsel, and Staff on the retail issues (Exhibit No. 320–the "Retail Settlement Agreement"). These Parties suggested that the "Competitive Settlement Agreement" (Exhibit No. 465), together with the earlier Retail Settlement Agreement (Exhibit No. 320), would provide a basis upon which the Commission could determine all the issues in the proceeding. Joint Applicants and Staff informed the Commission through the presiding ALJ that the Competitive Settlement Agreement would be filed on or before May 23, 2000.

36 The Parties also informed the Commission that, as part of the Competitive Settlement Agreement, Staff would withdraw its challenge to the "Confidential" or "Highly Confidential" designation of certain of the side-agreements. On May 22, 2000, Staff counsel informed the Commission via letter that "Joint Applicants and AT&T agreed to stipulate to the admission of the U S West/Qwest–AT&T agreement into the record in the case." Public Counsel elected not to join in the Competitive Settlement Agreement, though it ultimately determined it would not oppose that agreement. Public Counsel also did not agree that the question of confidential designations asserted for several of the side-agreements should be dropped. Public Counsel challenged the confidential designations via written argument filed on May 22, 2000.

37 Thus, since the Parties had agreed that the various side-agreements should be made exhibits of record, the Commission set as its agenda on May 23, 2000, three principal issues:

38 1. Requests by AT&T, Rhythms Links, Covad, MetroNet Services, McLeodUSA, NEXTLINK, and Level 3 Communications to withdraw from the proceeding;

39 2. Public Counsel's challenge to confidential designations asserted for the side-agreements; and

40 3. Receipt of the Competitive Settlement Agreement and receipt of testimony relative to that Agreement.

41 On May 23, 2000, Public Counsel elected to challenge only the Highly Confidential designation asserted for the U S West/Qwest–AT&T agreement. The Commission conducted proceedings in chambers, with participation limited to Joint Applicants, AT&T, Public Counsel, and Staff. The transcript of the in-chambers argument currently remains under seal.

42 The Commission's determination with respect to the Competitive Settlement Agreement (Exhibit No. 465), considered together with the earlier Retail Settlement Agreement (Exhibit No. 320), is the subject of our Ninth Supplemental Order, entered in this proceeding today. This Order resolves the issues of the Intervenors' purported notices of withdrawal which we consider as requests for leave to withdraw, and Public Counsel's challenge to the Highly Confidential designation asserted for the U S West/Qwest–AT&T agreement.

II. DISCUSSION AND DECISION.

A. Governing Statutes and Rules.

43 The following statutory provisions and rules govern our determination of these issues:

> **RCW 80.04.095 Protection of records containing commercial information.**
>
> Records, subject to chapter 42.17 RCW, filed with the commission or the attorney general from any person which contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, shall not be subject to inspection or copying under chapter 42.17 RCW: (1) Until notice to the person or persons directly affected has been given; and (2) if, within ten days of the notice, the person has obtained a superior court order protecting the records as confidential. The court shall determine that the records are confidential and not subject to inspection and copying if disclosure would result in private loss, including an unfair competitive disadvantage. When providing information to the commission or the attorney general, a person shall designate which records or portions of records contain valuable commercial information. Nothing in this section shall prevent the use of protective orders by the commission governing disclosure of proprietary or confidential information in contested proceedings.[1987 c 107 § 1.]

> **WAC 480-09-015 Submission of "confidential" information.**
>
> (1) General.
> The commission will provide special handling and limited access to confidential information properly submitted pursuant to this section. Nothing in this rule shall foreclose the entry and enforcement of protective orders in specific cases.
> (2) Designated official.
> The secretary of the commission is responsible for the implementation of this rule.
> (3) Definitions.
> "Confidential information." As used in this rule, confidential information consists of and is limited to information filed with or provided to the commission or its staff which is protected from inspection or copying under chapter 42.17 RCW or RCW 80.04.095. In the absence of a challenge, information designated as confidential under this rule will be presumed to meet this definition. In the event of a challenge, the burden of proving that the statutory definition applies is on the party asserting confidentiality.
> "Provider." Any person who submits information to the commission or commission staff under a claim of confidentiality pursuant to this rule.

"Requester." Any person who submits a data request in an adjudicative proceeding or a request for public documents under the State Public Disclosure Law.

(4) How to seek protection under this rule.

A provider may claim the protection of this rule only by strict compliance with the following requirements:

(a) The claim of confidentiality must be submitted in writing on a form provided by the secretary or in a letter providing equivalent supporting information. The provider must identify any person (other than the provider itself) which might be directly affected by disclosure of the confidential information.

(b) The confidential information must be clearly marked "confidential." Marking must include the first page of a multi-page document and each specific page which contains allegedly confidential information.

(c) The confidential information must be sealed in an envelope or similar wrapping which is clearly marked "confidential."

(d) If the confidential information is submitted under the provisions of a protective order, said order must be cited in the form or letter claiming confidentiality. The "confidential" mark should indicate "Confidential per Protective Order in WUTC Docket No. . . . ."

(5) Requests for "confidential information."

Information designated confidential will be released upon a request properly filed under the following requirements.

(a) The requester shall submit a written request to the secretary on a form provided by the commission or in a letter containing equivalent supporting information. The request must, at a minimum, identify the requester by name, address, any organization represented, and whether the information sought is to be used for a commercial purpose.

(b) The request must be sufficiently specific to allow the secretary to readily identify the documents or other material which contains the information requested. Upon receipt of a request for confidential information, the secretary will notify the requester of any deficiency which has been identified in the request. It will be the responsibility of the requester to correct the request and resubmit same pursuant to this rule. No action will be taken pending resubmission.

(c) The requester shall commit to prepayment of copying fees designated by the secretary.

(6) Informal resolution.

When the secretary finds that the request may be satisfied without disclosing confidential information, the secretary will attempt to facilitate an informal resolution.

(7) Release of information.

Any information alleged to be exempt from inspection and copying pursuant to RCW 80.04.095, shall be released only upon notice to the provider and any person identified by the provider as one who might be directly affected by release of the information so as to allow invocation of the statutory procedures for securing a court

> order protecting the records as confidential. Such notice shall be given not more than two days following location of the materials requested, and determination that they contain information claimed to be confidential. Notice will be given in writing, either by first class mail or by transmission of a copy of the request by electronic facsimile. Notice by mail shall be deemed complete in accordance with WAC 480-09-120(2), and facsimile shall be deemed complete when transmission is complete. A copy of the notice will be forwarded concurrently to the requester.
> If the provider consents to the release of the information, in writing or facsimile, or does not restrain disclosure by way of court order within ten days following notice, the information shall thereupon be deemed public, shall be so designated in the files of the commission, and shall promptly be released to the requester. The foregoing shall not apply if the request is withdrawn or modified so as to exclude confidential material, or if the requester agrees in writing to the satisfaction of the provider to be bound by a pre-existing and effective protective order.
> (8) Judicial intervention.
> The commission need not assist any person in seeking or resisting judicial intervention, but reserves the right to participate in any such proceeding as its interest may appear.

44 We also are mindful of the Public Records Act, Chapter 42.17 RCW. Although no specific provisions under the Public Records Act apply directly to our determination here, we are guided by the declared public policy in Washington State that the records of public agencies should be open. RCW 42.17.010. We note also the relationship between RCW 80.04.095 and RCW 42.17.310(q), which exempts from public inspection and copying:

> Records filed with the utilities and transportation commission or attorney general under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095.

45 Our Protective Order in this proceeding, grounded in RCW 80.04.095 and WAC 480-09-015, provides in relevant parts as follows:

> All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential (referred to in this Order as "Confidential Information") is governed by this Order and by WAC 480-09-015. The Commission expects Confidential Information to include only numbers, customer names, and planning details. . . .
>
> Parties 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.

> . . .
>
> Any party may challenge another party's assertion of confidentiality . . .. 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. . . . 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 party to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.

46 On November 30, 1999, the Commission amended the Protective Order and provided, in relevant part, as follows:

> Intervenors and Joint Applicants in this proceeding are 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 of that nature as "Highly Confidential" and such documents or information will be disclosed only in accordance with the provisions of this Section.
>
> 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 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.

B. Should the Commission Grant The Requests for Leave To Withdraw by AT&T, Rhythms Links, Covad, MetroNet Services, McLeodUSA, NEXTLINK, Level 3 Communications, and SBC?

1. Essential Facts.

a. Rhythms Links.

47 On April 21, 2000, Rhythms Links filed a letter with the Commission stating in relevant part that it "hereby withdraws as a party in [Docket No. UT-991358] concerning the Qwest Communications International, Inc. ('Qwest') – U S WEST, Inc. ('U S WEST') Merger Application ('the Merger')." The Commission historically has regarded such filings as requests for leave to withdraw and follows that long-standing practice here. Rhythms states that its

> withdrawal follows the execution of a Stipulation by and between Rhythms and U S WEST that provides, inter alia, significant operational improvements regarding collocation, unbundled loops, cooperative testing, circuit installations, line conditioning, and other processes that will provide operational benefits to Rhythms and its customers. The stipulation also contains important provisions that will encourage the rapid deployment of line-sharing throughout U S WEST's territory, including an agreement by U S WEST to provide an unbundled shared line to Rhythms at no cost on an interim basis.

48 A copy of the agreement is enclosed as part of Rhythms' filing and has been made an exhibit of record in this proceeding. Exhibit No. 457. Even though the agreement provides that "[t]he Parties agree that this Stipulation represents a just, equitable and reasonable resolution of the issues in this docket," neither Rhythms nor U S WEST suggests that it provides a basis upon which the Commission might determine any issue in this proceeding. Indeed, Rhythms does not request the Commission to take any action with respect to the agreement. Instead, Rhythms simply says it no longer opposes the merger in light of the special commitments made to Rhythms by U S WEST under the agreement. Rhythms' only obligations under the agreement are to withdraw its opposition to the merger and "to encourage the expeditious processing of all proceedings before regulatory authorities considering the U S WEST and Qwest merger," and "to withdraw its pending complaint against U S WEST regarding collocation issues before the Federal Communications Commission." In exchange, Rhythms has secured U S WEST's commitment to provide wholesale service to Rhythms superior in quality to that previously provided.

b. AT&T.

49 On April 26, 2000, AT&T filed with the Commission a document styled "AT&T's Notice of Withdrawal." Again, the Commission treats this as a request for leave to withdraw, upon which the Commission must rule before releasing the requesting party from its voluntary submission to Commission jurisdiction as an Intervenor. AT&T's "Notice" recites only that "[b]ased upon a confidential settlement with U S WEST and Qwest, AT&T . . . has agreed to withdraw [and does hereby withdraw] from participation and intervention in [this docket]. Although not submitted with AT&T's "Notice," this side-agreement ultimately was produced by U S WEST in response to Bench Request No. 2, designated as "Highly Confidential" under our Protective Order. The agreement was marked and admitted to the record by stipulation of the Parties as Exhibit No. 456HC.

We consider Public Counsel's challenge to this "Highly Confidential" designation in a separate section below. Here, it is sufficient to note that this side-agreement does not purport to resolve any contested issue in this proceeding, either individually (as in the case of the Rhythms' agreement), or more globally.

c. Covad Communications.

50 Also on April 26, 2000, Covad Communications filed a letter with the Commission stating it "hereby withdraws as a party in [Docket No. UT-991358] and no longer opposes the . . . merger application." Although Covad's letter offers no explanation of why it seeks leave to withdraw, the Commission later learned it did so as required under the terms of a side-agreement with U S WEST (Exhibit No. 458). Covad's agreement with U S WEST captures the ILEC's commitment to "make demonstrable improvements in its provisioning service performance on unbundled loops, in order to reach within a reasonable time the following service quality standards in the metropolitan areas where Covad provides to U S WEST wire center forecasts." Much of the balance of the agreement spells out standards for firm order confirmation, unbundled loop service provisioning, new service failures, and held orders. The agreement states that "[b]ased on U S WEST's commitment to meet these service performance standards, Covad commits to withdrawing its opposition to the U S WEST/Qwest merger."

d. MetroNet.

51 On April 27, 2000, MetroNet filed a letter with the Commission and stated that it "hereby withdraws as a party to this proceeding and no longer opposes the proposed merger of Qwest and U S WEST." MetroNet says that its withdrawal follows "the resolution of certain business issues" that satisfied MetroNet's "concerns about potential anti-competitive impacts of the merger . . .." The "resolution" to which MetroNet referred is memorialized in Exhibit No. 459HC. No one challenged the "Highly Confidential" designation asserted as to this document. Accordingly, we address it here only to the extent of observing that it does not appear to address in any way the "potential anti-competitive impacts of the merger," at least to the extent such concerns were articulated by MetroNet and others in this proceeding. Instead, the agreement is highly specific to existing business arrangements between MetroNet and U S WEST.

e. McLeodUSA.

52 Also on April 27, 2000, McLeodUSA filed a "Notice of Withdrawal," which states that "[b]ased upon a confidential settlement with [Joint Applicants], McLeodUSA has agreed to withdraw from [Docket No. UT-991358 and] hereby withdraws from participation and intervention in the captioned docket." In a letter filed simultaneously with its "Notice," McLeodUSA argued against having its "confidential settlement" being made an exhibit. McLeodUSA argued that:

> [t]he agreement between McLeodUSA and USW is a highly confidential negotiated business agreement between carriers. The agreement contains proprietary and sensitive business information and it is critical that the information be kept confidential to protect McLeodUSA from the possible detrimental impact associated with its disclosure. *Furthermore, the agreement resolves issues between the companies that are unrelated to the public interest determination before the Commission in this proceeding*. . . . [emphasis ours]
>
> Requiring McLeodUSA to provide the Commission with the agreement, without regard to its relationship to the issues raised in this proceeding, would discourage future negotiated agreements, contrary to the Commission's efforts to encourage settlement. Disclosure of those agreements will not aid the Commission's evaluation of the proposed merger and threatens substantial harm to the public, as well as McLeodUSA's interest.

53 Ultimately, we required that the agreement be produced in response to Bench Request No. 2. The Parties stipulated to its admission and it was made Exhibit No. 460HC. TR. 1620-21. Although the document is designated "Highly Confidential" and no one has challenged that designation, we can confirm without disclosing anything about the substance of the agreement that by its terms it resolves only highly specific business disputes between the parties to it and the resolution of those issues is, as McLeodUSA represents, unrelated in any substantive way to our resolution of the issues in this proceeding. Like the other agreements, however, this agreement is related to the present docket insofar as it requires an Intervenor who asserted a substantial interest in this proceeding, and whose intervention was granted as being in the public interest, to withdraw from participation at a critical juncture, just prior to briefing.

f. NEXTLINK.

54 On May 12, 2000, NEXTLINK filed a letter with the Commission stating that it "hereby withdraws as a party to this proceeding and no longer opposes approval of the proposed merger of Qwest and U S WEST in this proceeding." NEXTLINK related that its "withdrawal follows the resolution of certain competitive and business issues with U S WEST" and that "NEXTLINK's concerns about potential anti-competitive impacts of the merger have been sufficiently addressed by the resolution of those issues with U S WEST for NEXTLINK to withdraw from [Docket No. UT-991358]." The agreement, Exhibit No. 461, requires NEXTLINK's "immediate and formal withdrawal" from Docket No. UT-991358 and NEXTLINK's agreement to not intervene or otherwise opposed the merger in any other state in exchange for U S WEST's agreement "to make available to NEXTLINK the performance measures and penalties set forth in the April 9, 2000

Stipulation Between Rhythms and U S WEST" and certain other consideration, including resolution of a specific business dispute in the Spokane market.

g. Level 3 Communications.

55 On May 15, 2000, Level 3 Communications filed a letter with the Commission stating that it "hereby withdraws as a party in [Docket No. UT-991358] and no longer opposes the Qwest Inc. and U S WEST Communications, Inc., merger application." As in the case of the other Intervenors who seek leave to withdraw, the basis for Level 3's request was its commitment to withdraw in a side-agreement with U S WEST. In consideration of Level 3's withdrawal, U S WEST agreed to pay Level 3 the sum of $50,000, allegedly "in settlement of certain payment disputes."

h. SBC Telecom.

56 Finally, on June 2, 2000, SBC Telecom, Inc. (SBCT) filed a letter with the Commission stating that it "hereby withdraws its opposition to the US WEST/Qwest merger [and gives] notice of [its] withdrawal as an intervenor." SBCT stated that its withdrawal was to "fulfill its obligations under the terms and conditions of the settlement agreement reached June 1, 2000 between it and US WEST Communications, Inc." The SBCT agreement with USWC (Exhibit No. 464) concerns specific business arrangements between the two companies and appears to be aimed at expediting SBCT's market entry on terms available to other CLECs under interconnection agreements that already are in place. In any event, the agreement requires SBCT to withdraw from participation in our proceedings and to refrain from opposing the merger in Washington State or any other jurisdiction where the matter might be under consideration.

2. Commission Discussion and Determination.

57 During our hearing on May 23, 2000, Staff counsel argued that "[a]s a matter of both Commission policy and Commission practice, we strongly urge the Commission to not permit the various intervenors to simply depart from this docket." TR. 1554. In response to questions from the Bench, Staff counsel touched on a point we consider significant to our decision:

> the context where you have two private litigants trying to resolve a single private issue between the two of them [is a] circumstance [that] differs dramatically from when we have a public agency or public body in findings and determinations as to whether something is or is not consistent with the public interest.
>
> TR. 1559-60.

58 We agree that the two types of proceedings are fundamentally different. Moreover, the bases and purposes for our conduct of adjudicative proceedings are fundamentally different from those conducted by the constitutional and statutory courts. Even the courts, however, do not permit parties who come before them to simply withdraw without leave. See Washington Superior Court Rules, Civil Rule 41. In our proceedings, when parties are given leave to intervene, we expect them to participate in the public interest. That is, while we expect them to pursue their individual interests in the issues before us, they must do so in a manner calculated to resolve the proceeding in a manner that promotes the public interest. Indeed, if it appears a party's participation is no longer in the public interest, we may dismiss that party from the proceeding. WAC 480-09-430(3).

59 Public Counsel also argued that the Intervenors should not be allowed to withdraw from the proceeding. TR. 1560. He agreed with Staff counsel's arguments and added that by not permitting withdrawal, our Order regarding the merger and our other orders entered in this docket would be more directly binding on those who elected to participate in our proceeding. *Id.*

60 Neither Joint Applicants nor any of the Intervenors who sought leave to intervene chose to argue in support of their individual requests for leave to withdraw. Counsel for AT&T observed simply that "[t]he only reason we asked to withdraw is because we agreed we [would ask] to withdraw, and that's why we ask to withdraw." TR. 1561.

61 We agree with Staff and Public Counsel that these Intervenors should not be allowed to withdraw from the proceeding. Proceedings such as this one are different in scope and purpose from proceedings conducted to resolve disputes between individual companies or between regulated companies and their customers, whether those disputes are brought before us or the courts. Although we always must act in the public interest, whether resolving a private dispute or deciding an application for merger approval, in the second type of proceeding the public interest determination is paramount.

62 The central purpose of this proceeding was to determine whether the merger between U S WEST and Qwest is consistent with the public interest. WAC 480-143-170. The Intervenors were permitted to participate because the Commission believed they would do so with a steady eye to the public interest and advocacy directed to the interests of the telecommunications industry generally, as opposed to their individual commercial interests. The Commission allowed these parties to intervene based on their representations that their participation would assist the Commission to develop a record necessary to make the public interest determination it is charged by law to make. Instead, the Intervenors, in active cooperation with Joint Applicants, appear to have used our public proceeding as a vehicle to resolve private business disputes unrelated to the merger itself, or as a leverage point in negotiations for private arrangements that by and large promote their individual interests in commerce and not the broader concerns related to

ensuring the merger does not impede development of a more fully competitive market in telecommunications services in Washington State.

63 Corporations are expected to be good citizens as well as good companies. When corporations elect to participate in proceedings such as this one, we expect them to fulfill their good citizenship obligation by bringing forth evidence and making sound argument that will assist us to make a reasoned decision in the public interest. As a corollary, the Intervenors are encouraged to engage with other parties in settlement discussions that may produce negotiated results to be presented to the Commission as a means to resolve *in the public interest the previously contested issues in the case.*

64 Here, the Intervenors purported to enter the proceedings to further public interest considerations, but now they seek to withdraw from the proceedings based on their private interests. They have abdicated their broader responsibility to be good citizens in favor of pursuing their own narrower commercial interests. This threatens to undermine the integrity and credibility of the Commission's adjudicatory process. With respect to the arrangements between Joint Applicants and AT&T, between U S WEST and MetroNet, and between U S WEST and McLeodUSA, these Intervenors to have asked our leave to intervene in the public interest and then agreed privately to withdraw under a veil of confidentiality when offered a concession in what they characterize as a private dispute that is wholly unrelated to the matters before us. Although Level 3 Communications ultimately waived its initial claim of confidentiality, we regard its agreement to withdraw in exchange for a cash payment in the same light.

65 The side-agreements between U S WEST and the remaining Intervenors who seek to withdraw pursuant to their agreements (i.e., Rhythms Links, Covad Communications, NEXTLINK, and SBC), do touch on some of the issues raised in the merger proceeding. But these private agreements are not intended to, and do not, assist the Commission in its duty to ensure the merger between U S WEST and Qwest is consistent with the public interest. Instead, these agreements promote the narrower commercial ends of those who entered into them. Indeed, the agreements arguably raise the question whether they are contrary to the public interest, to the extent an individual corporate participant in the telecommunications sector gains advantages for itself relative to other corporate participants in the same industry.

66 These Intervenors abdicated their responsibility to participate in the public interest at a critical juncture in the proceedings. Ironically, we have grounds to dismiss them from the proceeding for their failure to adhere to the purpose for which they were allowed to intervene. WAC 480-09-430. However, allowing withdrawal could appear to tacitly endorse, or reward, their private side-agreements. Also, as a general matter, intervenors who participate to nearly the last day of the proceeding should not be allowed to depart at the last minute and avoid being bound directly by the Commission's final order in the case. While there may be sound reasons in future cases for late withdrawal by an

intervenor, such reasons have not been presented here. Accordingly, we deny the Intervernors' pending requests for leave to withdraw.

C. Public Counsel's challenge to confidential designation of Exhibit No. 456HC.

67 The only remaining matter directly before us is whether Exhibit No. 456HC should remain confidential. All of the side-agreements have been admitted to the record without objection. Exhibit Nos. 456HC - 462, and 464; TR. 1621. All of the side-agreements except Exhibit No. 456HC either have been made public without objection, or remain confidential without challenge.[2]

1. Essential Facts.

68 Exhibit No. 456HC is the side-agreement between Joint Applicants and AT&T. In our Bench Request No. 2 we required Joint Applicants to produce the document. This was done, but the document was designated as "Highly Confidential" under our Protective Order. Staff challenged this designation. Unfortunately, in our view, Staff later agreed to withdraw its challenge as part of a comprehensive settlement of the competitive issues in this proceeding. Public Counsel, however, also challenged the "Highly Confidential" designation asserted for the agreement between Joint Applicants and AT&T.[3]

69 We provided the Parties two opportunities to present their positions regarding whether the agreement between Joint Applicants and AT&T is entitled to designation as "Highly Confidential" under the Protective Order, or otherwise entitled to confidential treatment by the Commission under governing statutes and rules. Written arguments were filed on May 16 and 22, 2000, and oral argument was heard on May 23, 2000. AT&T filed under seal its arguments respecting confidentiality. Joint Applicants filed written arguments in support of AT&T without asserting confidentiality with respect to their filing.

70 In addition to the written arguments filed on May 16, 2000, and May 22, 2000, we have considered in connection with our analysis here all written and oral argument pertinent to the asserted confidentiality of various of the side-agreements, including the challenged

---

[2] No one has objected to the confidentiality of the McLeod or MetroNet agreements. The issue of whether they should be confidential therefore has not been presented to us. Under our Rule, WAC 480-09-015, a document asserted to be confidential is presumed confidential if its asserted confidentiality is not challenged. This is a presumption and procedure we may wish to examine in a future rulemaking.

[3] Public Counsel elected also to challenge the "Confidential" designation asserted as to the agreement between U S WEST and Level 3 Communications, but the parties to the side-agreement waived their confidentiality claim, rendering the challenge moot.

"Highly Confidential" designation asserted with respect to the agreement between Joint Applicants and AT&T.

2. Commission Discussion and Determination.

71 In this Order, we carefully avoid disclosing the substance of the challenged document, because our statutes and rule provide that parties asserting confidentiality should have an opportunity to pursue the question in court even when the Commission finds the challenged document is not entitled to confidential treatment. RCW 80.04.095; WAC 480-09-015. The written arguments submitted under seal by AT&T, the sealed transcript of oral argument, and the "Highly Confidential" agreement itself all will be available to the court should action eventuate there.

72 The parties have argued that we should be influenced by various public policy considerations (which we address shortly). In our view, though, whether the document should remain confidential is a matter of applying our statute and rule, and our Protective Order, which all state consistent standards for determining whether a challenge to confidentiality should be sustained.

73 Joint Applicants argue that:

> The designation of documents as confidential is expressly contemplated by the Commission's Protective Orders in this docket, by Commission rule, and by statute and, as a matter of policy, should not be discouraged.

74 It is true that our statutes and rules provide for the use of protective orders in appropriate cases to promote discovery and otherwise ensure development of a complete record. This, however, does not imply a policy that favors the designation of documents as confidential; nor does it imply that any particular document should enjoy confidential status. Indeed, the policy enunciated by our Public Records Law, Chapter 42.17 RCW is quite the opposite:

> It is hereby declared by the sovereign people to be the public policy of the state of Washington: . . .
>
> (11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.
>
> The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting . . . full access to public records so as to

> assure continuing public confidence of . . . governmental processes, and so as to assure that the public interest will be fully protected.

75 The designation of documents as confidential is not encouraged. Thus, RCW 80.04.095, WAC 480-09-015, and our protective orders entered in contested proceedings, narrowly circumscribe the types of information that may be designated as confidential, allow for challenges to such designation, and place the burden to establish confidentiality on the party asserting it.

76 Joint Applicants recognize, and quote in their Response, some of the standards for confidential designation as stated in RCW 80.05.095, WAC 480-09-015, and our Protective Order in this proceeding. They also acknowledge the procedure for challenges to the confidentiality of a document, including the requirement for *in camera* review, and including the requirement that the party asserting confidentiality bears the burden of demonstrating the need for confidentiality. Joint Applicants and AT&T, however, fail completely to offer any explanation or argument as to how the particular document at issue qualifies under the standards for confidentiality.

77 Joint Applicants argue that the "documents are business agreements that resolve issues that are important to each party . . .." We do not doubt that the issues thus resolved are important to the parties, but importance to the parties is not a criterion that establishes confidentiality. We also do not disagree with Joint Applicants assertion that "[t]he intervenors in this docket are engaged in a highly competitive business . . .." but, again, being engaged in a competitive business does not give parties subject to our jurisdiction carte blanche to designate whatever documents they wish as confidential. The Joint Applicants' third argument that the intervenors "are placed at a potential competitive disadvantage by the public disclosure of their business agreements when such disclosure is not otherwise required by law" merely begs the question before us. The very thing we are asked to determine is whether, despite the confidentiality designation asserted by these parties, they are, in fact, entitled to such designation; if not, they then are subject to public scrutiny because that is precisely what is "otherwise required by law."

78 The most persuasive argument we received on the confidentiality issue was that filed by Public Counsel on May 22, 2000. Public Counsel argues in part as follows:

> While there are many reasons why persons, including businesses, may wish to keep certain information or documents confidential, it is declared public policy in Washington state that government be conducted in public, RCW Ch. 42.30, and that the records of public agencies be open. RCW 42.17.250 et seq. These general policies are subject only to certain specified and carefully drawn exceptions. The statutes do provide for confidential treatment of certain commercial information filed with the Commission. RCW 42.17.310(1)(q); RCW 80.04.095. The statute, in pertinent part, provides protection for:

> valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer specific usage and network configuration and design information.

79 Any request for protection in this case must meet that standard. We agree with Public Counsel's analysis of the standards by which we must decide this question, which were the focus of our inquiry during our *in camera* argument with respect to the AT&T agreement with Joint Applicants.

80 We have considered carefully the written and oral argument concerning the AT&T agreement, and have examined the document *in camera*. We find nothing that persuades us that the agreement includes valuable commercial information within the meaning of RCW 80.04.095. We find nothing in the agreement that meets the Protective Order's definition of "Confidential" or "Highly Confidential" or the related definitions in our statute or rule. To the contrary, the agreement concerns matters that are of public import, and the parties' conduct under the agreement will be publicly observable and ultimately disclosable by the parties. It is only the nature of the agreement–not the performance of its basic terms–that the parties aim to keep confidential for the time being. Accordingly, the agreement is not entitled to confidential treatment by the Commission either in this proceeding under the Protective order, or otherwise.

81 We base our decision on statute and rule, and not directly on public policy concerns. However, in our view, public policy considerations militate strongly in favor of this agreement being treated as an open public record. We now address the public policy arguments urged by the Joint Applicants and AT&T. It should be noted that these arguments were, at the time, directed both to the admissibility of the document into the record and the confidentiality of the document, if admitted. Objections to admission of the document have since been waived.

82 In their written argument filed on May 16, 2000, Joint Applicants argue, in part, as follows:

> In accordance with the Commission's encouragement to the parties that the issues in this case be resolved through settlement rather than litigation, Joint Applicants pursued settlement negotiations with all the parties. These negotiations were successful, and have resulted in the withdrawal of most of the intervenors in this docket given that their issues with Joint Applicants have been resolved.

83 This assertion that "the issues in this case" are resolved by the side-agreements is disingenuous, at best. It is flatly controverted by Joint Applicants' and the Intervenors' own arguments. Joint Applicants, for example, in answering Staff's Request for Continuance and Motion for Issuance of Bench Requests, argued in part as follows:

> First, the agreements that Qwest and U S WEST have entered into with the various CLEC intervenors are not appropriately characterized as "merger settlements" and should not therefore be placed on the record in the merger docket. Those confidential agreements with the other carriers in this proceeding addressed a broad variety of business issues which have no nexus to the merger transaction. As a result of the parties' ability to agree on a number of operational and/or billing and/or other types of issues, each of these parties agreed to withdraw their opposition to the merger. However, many of these agreements address issues which were not presented as issues in this docket. Lacking such a nexus to the merger transaction, the agreements should not be required to be produced.

84 AT&T filed on May 8, 2000, its Objection To Entry of Confidential Agreement Into the Record and to Commission Retention. AT&T's arguments include the following points:

> The AT&T Agreement resolves a private business dispute between AT&T, U S WEST, and Qwest ("Parties") that does not arise from, or in any way relate to, the merger between U S WEST and Qwest. In consideration for the negotiated resolution of this [private business] dispute, AT&T has agreed to withdraw its participation in state commission review of the merger, including this proceeding. . . . The terms and conditions in the AT&T Agreement thus bear no direct relationship to the public interest determination that the Commission must make in this case.

85 The first two sentences, juxtaposed as they are, exhibit plainly the fundamental contradiction that undermines the arguments advanced by Joint Applicants and AT&T in various filings and in oral argument. The third sentence is at odds with the second sentence.

86 These parties assert that we should encourage settlements in proceedings before us, but then assert that their settlement agreement "bear[s] no direct relationship to the public interest determination that the Commission must make in this case." In the name of "encouraging settlements," we are asked to keep confidential an agreement that is asserted to be unrelated to the underlying issue in this case. And yet, it provides the basis on which AT&T agrees with U S WEST/Qwest to withdraw from the case. In essence, AT&T argues that because its motivations are private, we should ignore the public consequences (i.e., withdrawal from this docket) of its agreement. As we said earlier, the proper role of an Intervenor is to participate in the process of determining the public interest. Regardless of any private motivation, we are going to focus on the public-interest considerations. In that regard, AT&T's agreement to withdraw clearly has public import.

87 Considering that AT&T was one of the most vocal, active, and strident opponents to the merger application, it is implausible at best for AT&T to argue now that its agreement to

cease that opposition and withdraw from the merger proceeding "bear[s] no direct relationship to the public interest determination that the Commission must make in this case." Indeed, AT&T's argument is squarely at odds with the obvious tactical underpinning for these side-agreements, which is exposed by Joint Applicants' argument that:

> Staff's request [for continuance and Motion for Issuance of Bench Requests] reveals that it is faced with a situation where all of the parties who could have supported its proposed merger conditions have withdrawn. Staff appears to be attempting at the last minute to assemble a new set of merger conditions based upon what the withdrawn parties have agreed to. This is improper. Staff relied on the CLEC intervenors for its proposed merger conditions, and may either accept that the CLECs have been satisfied with something else, or continue to advocate its earlier position if it believes that any support for that position remains.

88 From this it is clear that Joint Applicants' goal in entering these side-agreements was to eliminate advocacy for conditions that might be necessary to ensure the proposed merger would be consistent with the public interest. By securing agreements from the Intervenors to withdraw from the proceeding, Joint Applicants clearly intended to at least raise in our minds the question of why, and how, the Commission could entertain seriously Staff's position that the Commission should impose conditions that were originally advocated only by the Intervenors and supported principally by extensive testimony by several of the Intervenors' witnesses. And yet, AT&T's agreement to withdraw was not based on resolution of the issues in the case but on private considerations. (If anything, the AT&T agreement has an anticompetitive flavor.)

89 AT&T's Objection also asserts that including this document in the record, and stripping it of its confidential status, will have a chilling effect on future settlement negotiations and negate "the Commission's consistent efforts to foster settlement." We wish to be clear that our rule concerning settlements, WAC 480-09-466, does not contemplate settlements in the sense of these side-agreements. Our rule provides that "[t]he Commission favors the voluntary settlement of disputes within our jurisdiction." Yet, the parties to this side-agreement argue that the issues resolved by their side-agreement are not issues raised in this proceeding or even within our jurisdiction to decide. We observe, too, that our rule and our long-standing practice encourage settlements that are fully disclosed and made available for presentation and inquiry on the record (with the potential exception of discreet, individually justified financial data). Thus, if what we decide here, according to statutory standards for the treatment of allegedly confidential documents, incidentally has a chilling effect on such activity in the future, so be it; that is entirely consistent with our purpose and our broader mission as an agency charged with protecting the public interest.

90 Joint Applicants argue that "[a]s a matter of policy the parties' designation of confidentiality as to settlement agreements should be honored." Joint Applicants observe in this connection that "[s]ettlement agreements in court actions are also typically treated

as confidential and not publicly disclosed." One asserted basis for this is that parties "routinely" treat such agreements as confidential and do not disclose them. All of this may be true, and may even be completely acceptable behavior in the conduct of unregulated commerce and the resolution of private disputes, so long as the agreement is not illegal or void as against public policy. But what parties do in connection with their voluntary participation in public proceedings before administrative agencies is another matter entirely. It is not "routine" for parties to intervene in proceedings such as this one, under claims that their participation will be in the public interest, and then to withdraw after using their participation to gain leverage to resolve largely, or wholly, unrelated private disputes, or to gain commercial advantages relative to competitors. Indeed, for a party to do so is an abuse of our process. We will not permit parties to hide such unacceptable behavior behind a cloak of confidentiality.

91 In conclusion, consistent with statute, rule, our Protective Order, and public policy considerations, we find and conclude that Exhibit No. 456HC is not entitled to, and does not deserve, protection as a confidential document. Joint Applicants and AT&T have failed to carry their burden to establish entitlement to confidential treatment of their agreement in the face of Public Counsel's challenge.

FINDINGS OF FACT

92 Having discussed above in detail all matters material to our decision, and having stated findings and conclusions upon contested issues, the Commission now makes the following summary findings of fact. Those portions of the preceding detailed findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

93 1. The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, property transfers, and mergers of public service companies, including telecommunications companies.

94 2. The document as to which "Highly Confidential" status is asserted by Joint Applicants and AT&T (i.e., Exhibit No. 456HC) does not include valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information.

95 3. The document as to which "Highly Confidential" status is asserted by Joint Applicants and AT&T (i.e., Exhibit No. 456HC) does not include numbers, customer names, or planning details as required under the terms of our Protective Order for a document to be classified confidential.

96 4. There is no evidence to support Joint Applicants' and AT&T's assertions that the document as to which "Highly Confidential" status is claimed (i.e., Exhibit No. 456HC) includes 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 our Protective Order.

97 5. Joint Applicants and AT&T have failed to show that they scrutinized carefully the document as to which "Highly Confidential" status is asserted (i.e., Exhibit No. 456HC) and limited the information they designated as highly confidential information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in our Protective Order.

98 6. Joint Applicants and AT&T have failed to show that the document as to which "Highly Confidential" status is claimed (i.e., Exhibit No. 456HC) includes information that truly might impose a serious business risk if disseminated without the heightened protections provided in our Protective Order.

CONCLUSIONS OF LAW

99 Having discussed above in detail all matters material to our decision, and having stated findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

100 1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings. Title 80 RCW.

101 2. The Commission exercises its discretion when it grants a party leave to intervene in Commission proceedings on a proper showing that the party has a substantial interest in the proceeding and that its intervention is in the public interest. WAC 480-09-430. The Commission may dismiss an intervenor from a proceeding, after notice an reasonable opportunity to be heard, if the Commission determines the intervenor has no substantial interest in the proceeding or that the public interest will not be served by the intervenor's continued participation. *Id.* The Commission may exercise its discretion to deny an intervenor's request for leave to withdraw from party status in a proceeding. See generally, *Id.*

102 3. "Confidential information" consists of and is limited to information filed with or provided to the commission or its staff which is protected from inspection or copying under chapter 42.17 RCW or RCW 80.04.095. In the absence of a challenge, information designated as confidential under this rule will be presumed

to meet this definition. In the event of a challenge, the burden of proving that the statutory definition applies is on the party asserting confidentiality. WAC 480-09-015.

103 4. Exhibit No. 456HC, an agreement between U S WEST/Qwest and AT&T, entered into the record without objection, is not entitled to confidential status under statute, rule, or the Commission's Protective Order in this proceeding. RCW 80.04.095; WAC 480-09-015; First Supplemental Order–Protective Order, Docket No. UT-991358 (October 5, 1999), and Sixth Supplemental Order Amending Protective Order, Docket No. UT-991358 (November 30, 1999).

104 5. This Order includes written notice that the Commission has determined that Exhibit No. 456HC, an agreement between U S WEST/Qwest and AT&T, entered into the record without objection, is not entitled to confidential status under statute, rule, or the Commission's Protective Order in this proceeding. U S WEST, Qwest, and/or AT&T may seek within ten days of the date of this Order, an order from the superior court to protect this record as confidential.

105 6. The Commission should, and does, retain jurisdiction over the subject matter and the parties to effectuate the provisions of this Order.

ORDER

106 THE COMMISSION ORDERS That the requests for leave to withdraw by Rhythms Links, Inc., AT&T Communications of the Pacific Northwest, Inc., Covad Communications Company, MetroNet Services Corporation, McLeodUSA Telecommunications Services, Inc., NEXTLINK Washington, Inc., Level 3 Communications, Inc., and SBC Telecom, Inc., are denied.

107 THE COMMISSION ORDERS FURTHER That Exhibit No. 456HC, an agreement between U S WEST/Qwest and AT&T, is not entitled to confidential treatment as a matter of statute, rule, or under the Protective Order in this proceeding.

108 THE COMMISSION ORDERS FURTHER That **this Order constitutes official, written notice to U S WEST, Qwest, and AT&T, as required by RCW 80.04.095 and WAC 480-09-015, that they have ten days from the date of this Order and notice to obtain a superior court order protecting Exhibit No. 456HC as confidential.**

DATED at Olympia, Washington, and effective this 19th day of June, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).