

APPENDIX B

Decision No. R06-0496-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06F-039T

ADAMS COUNTY E-911 EMERGENCY TELEPHONE SERVICE AUTHORITY,

COMPLAINANT,

V.

QWEST COMMUNICATIONS INTERNATIONAL, INC., AND QWEST CORPORATION,

RESPONDENTS.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
ENTERING PROTECTIVE ORDER
AND COMPELLING DISCOVERY
PURSUANT TO PROTECTIVE ORDER**

Mailed Date: May 3, 2006

I. STATEMENT

1. On April 7, 2006, Adams County E-911 Emergency Telephone Service Authority (Adams E-911), filed its Motion to Compel Discovery Responses (Motion) in the captioned consolidated proceeding.

2. The Motion seeks an order compelling Qwest Corporation (Qwest) to respond to Adams E-911's Interrogatories and Request for Production and Request for Admissions (Data Requests). A copy of the Data Requests is attached to the Motion as Exhibit A.

3. On March 24, 2006, Qwest objected to the Data Requests, presenting general and specific objections. A copy of Qwest's Objections is attached to the Motion as Exhibit B. On

April 21, 2006, Qwest Corporation's Response in Opposition to the Adams County E-911 Emergency Telephone Service Authority's Motion to Compel (Response) was filed.

4. The Commission's procedural rules allow any party to initiate discovery upon any other party to discover any matter, not privileged, that is relevant to the claim or defense of a party. Relevant information need not be admissible at hearing if the discovery is reasonably calculated to lead to the discovery of admissible evidence. *See*, Rule 1405 and Rule 77(b)(1) (now repealed), 4 *Code of Colorado Regulations* (CCR) 723-1 and Rule 26(b)(1) of the Colorado Rules of Civil Procedure (C.R.C.P.).¹

5. Qwest's Response summarizes only two objections that it deems applicable to the parties' dispute: "(1) the data requests seek information that is irrelevant, overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence; and, (2) the data requests seek information that contains customer proprietary network information."

a) Scope of Discovery

6. In request nos. 4, 5, 6, 7, 8, 10, 11, 12, 14, 16, 22, 23, 24, Adams E-911 seeks to discover information as to Qwest's application of the applicable tariff provisions giving rise to the dispute at issue in this docket.

7. In request nos. 29, 30, Adams E-911 seeks to compare the tariff rate Qwest charges to Adams County and the City and County of Denver.

8. In request No. 38, Adams E-911 seeks to identify each city, town, and county served by each local switching office in Colorado.

¹ The Administrative Law Judge notes that the Commission has adopted new Rules of Practice and Procedure since the discovery at issue was propounded. However, this Order is not affected by the change in rules as operative incorporated provisions have not changed.

9. For Request Nos. 4, 5, 6, 7, 8, 10, 11, 12, 14, 16, 17, 22, 23, 24, 29, 30, and 38, Qwest objects to the data requests as being irrelevant, overly broad, unduly burdensome and not designed to lead to the discovery of admissible evidence. Qwest highlights the relief requested in the Complaint, specifically whether Adams County should be charged for Enhanced Selective Routing if the number of Public Safety Answering Points (PSAPs) under its jurisdiction is reduced from two to one. *See Adams County's Complaint*, p. 5, Prayer for Relief.

10. Qwest argues that the principles of statutory construction apply to interpretation of tariffs, citing *Redfern v. U.S. West Communications*, 38 P.3d 566, 568. Based thereupon, Qwest argues that discovery regarding purchases of other customers (including corresponding payment) has absolutely no bearing on how the plain language of the tariff should be interpreted, and whether under the tariff Adams County should be charged for Enhanced Selective Routing if the number of PSAPs under its jurisdiction is reduced from two to one. *Id.*

11. While the Administrative Law Judge (ALJ) acknowledges the cited authorities, the ALJ nevertheless finds that information sought may lead to the discovery of admissible evidence.

12. Qwest further argues that the data requests are overbroad and unduly burdensome because the requested relief is limited to tariff interpretation. However, Qwest does not describe why it has come to this conclusion or any basis for why the burden "far outweighs" any utility to be gained. The burden is not self-evident and Qwest did not meet its burden to support this objection. Thus, the ALJ finds the subject requests are not overly broad or burdensome.

a) Customer Proprietary Network Information

13. In request nos. 4, 5, 6, 7, 8, 10, 11, 12, 14, 22, 23, 24, 29, and 30, Adams E-911 seeks to discover information that Qwest maintains to be protected customer proprietary network information under 47 U.S.C. §222 (CPNI).

14. In its motion, Adams E-911 argues that the purpose of CPNI protections is to protect privacy of customers. In this instance, the requested information cannot be sensitive information within the intended protections of 47 U.S.C. § 222 because it is open to the public under the Colorado Open Records Act.

15. In response, Qwest notes that Adams E-911 does not dispute that the information requested is within the definition of CPNI; rather it argues that the information is not protected because it is a public record. Qwest then argues that even though the document may be considered a governmental record open to the public under the Colorado Open Records Act, the Act simply does not apply to the same record in Qwest's possession.

16. The ALJ agrees with Qwest's analysis as to the inapplicability of the Colorado Open Records Act to the record in Qwest's hands. Just because information may be available from a governmental entity, it does not make it available from Qwest. Further, the affected governmental entity is in a better position than Qwest to represent its interests under the Colorado Open Records Act as they may appear.

17. Adams E-911 requests alternative relief in the event production is not compelled under its initial theory. Production is requested pursuant to the Commission's confidentiality protections. However, if the alternative request for relief is granted, Adams E-911 requests "the tariff rate charged each Authority board not be deemed confidential so that the information may be shared with the PUC 911 Task Force. Finally, Adams E-911 requests the Commission follow

the lead of *ICG Communications, Inc., v. Allegiance Telecom*, 211 F.R.D. 610, 612 (N.D. Cal. 2002) and compel discovery subject to a protective order.

18. Qwest does not dispute the possibility of the Commission compelling production generally as addressed in *ICG Communications* to a non-governmental entity if the information is discoverable. However, for the first time, Qwest's Response raises a concern and a request in this regard.

19. First, Qwest argues that *ICG Communications* does not address applicability to a governmental entity seeking disclosure, citing 18 U.S.C. § 2703(c). Second, if production is ordered, Qwest requests that the Commission give notice of its decision to all customers whose CPNI is sought so that they may object to the production of their CPNI. Thereafter, the Commission could issue a protective order.

20. Under Rule 77, 4 CCR 723-1, and under current rules, the Commission incorporated discovery procedures from the Colorado Rules of Civil Procedure. Rule 77(b)(3) specifically requires that objections to discovery state the grounds for objection.

21. Rule 33 C.R.C.P. provides that:

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable....(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection will be deemed to be waived unless the party's failure to object is excused by the court for good cause shown.

22. Rule 34(b) C.R.C.P. similarly provides that "[t]he response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified."

23. Qwest's objections, Exhibit B to Adams E-911's Motion to Compel, are silent as to the Electronic Communications Privacy Act of 1986, as amended (ECPA), 18 U.S.C.S. § 2701 *et. seq.* Qwest first raises ECPA in the Response.

24. "The Electronic Communications Privacy Act amends Title III of the Omnibus Crime Control and Safe Streets Act of 1968 -- the federal wiretap law -- to protect against the unauthorized interception of electronic communications." 132 Cong Rec S 14441.

25. Congress amended the 1968 Federal wiretap law in order to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." Sen. Rep. No. 99-541, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3555. ECPA is divided into Title I, which governs unauthorized interception of electronic communications, 18 U.S.C. §§ 2510-2522, and Title II, which governs unauthorized access to stored communications, 18 U.S.C. §§ 2701-2711. *Organizacion JD Ltda. v. United States Dep't of Justice*, 124 F.3d 354, 356 (2d Cir. 1997). Qwest raises Title II exclusively.

26. Qwest conclusively asserts "federal law prohibits a wire or electronic service provider from disclosing subscriber information to the government in the absence of a specifically identified legal process," citing 18 U.S.C §§ 2703(c).

27. Even if the ECPA applies to the facts at bar, an administrative subpoena may require disclosure of substantial information to a governmental entity. *See* 18 U.S.C. § 2703(c)(2). Because the Commission may issue a subpoena requiring production, it is consistent that production can be compelled by Commission order.

28. Qwest does not present a factual or legal basis that the discovery sought is within the scope of information protected by the ECPA. Further, Qwest does not demonstrate that the information sought is solely available from sources protected by the ECPA.

29. Without regard to the timeliness of the objection, Qwest did not meet its burden to support its objection under the rules of practice and procedure governing discovery.

30. Finally, Qwest requests that the Commission give notice of a decision compelling discovery to all customers whose CPNI is sought so that they may object to the production of their CPNI. It is not clear that this request extends to the relief granted in the Order below. In any event, Qwest presents no precedent or basis requiring such notice. To the contrary, *ICG Communications, supra.*, provided no such notice. To the extent the ECPA applies to the facts at bar, a “governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.” 18 U.S.C. § 2703(c)(3).

31. Despite this ruling upon the Commission’s discovery rules, the Commission is clearly mindful of customer privacy concerns. Particularly considering the fact that discovery will include CPNI, it is appropriate that the Commission order extraordinary protections for the highly confidential data. Further, the request to have any portion or aspect of CPNI produced outside of this protective order will be denied.

32. Customer privacy will be protected by a protective order limiting the use or disclosure of CPNI. Qwest will be ordered to respond to Adams E-911’s discovery, under the “Highly Confidential” designation and subject to the protective provisions of this order. The Rules of Practice and Procedure, 4 CCR 723-1, effective as of April 1, 2006, shall apply to this proceeding as modified by Attachment A. If Adams County E-911 requires further latitude as to

any specific information obtained in discovery, further modifications may be considered at a later time.

33. Considering the nature of certain information sought, persons with knowledge of the market may infer the identity of a customer or carrier, even though Qwest would not have specifically identified such person or entity. For all purposes of this docket, such information shall be treated as highly confidential information subject to this protective order.

II. ORDER

A. It Is Ordered That:

1. Adams County E-911 Emergency Telephone Service Authority's Motion to Compel Discovery Responses in the captioned proceeding is granted, consistent with the discussion above.

2. Qwest Corporation shall provide responses to Adams County E-911 Emergency Telephone Service Authority's Interrogatories and Request for Production and Request for Admissions, within ten days of the effective date of this Order.

3. The Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, effective as of April 1, 2006, shall apply to this proceeding as modified by Attachment A.

4. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge