

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

In the Matter of the Petition of)	DOCKET NO. UT-033044
)	
QWEST CORPORATION)	ORDER NO. 08
)	
To Initiate a Mass-Market)	ORDER GRANTING IN PART
Switching and Dedicated Transport)	QWEST'S MOTION TO MODIFY
Case Pursuant to the Triennial)	ORDER NO. 02, PROTECTIVE
Review Order)	ORDER; DIRECTING
)	WITHDRAWAL OF EXHIBIT C
)	FILINGS

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1 **Synopsis.** *In this Order, the Commission grants in part Qwest's Motion to Modify Order No. 02, the protective order in this proceeding, modifying the protective order to allow up to five in-house experts to review highly confidential information. In this Order, the Commission also directs Qwest to identify the outside experts and five in-house experts who will review highly confidential information, and withdraw Exhibit C filings for all other in-house experts.*

2 **Nature of the Proceeding:** This proceeding addresses a petition filed by Qwest Corporation (Qwest) seeking review of the findings of the Federal Communications Commission (FCC) in its Triennial Review Order concerning impairment to competitors without unbundled access to mass-market switching and dedicated transport.

3 **Procedural History.** On October 10, 2003, Qwest filed a petition with the Washington Utilities and Transportation Commission (Commission) in Docket No. UT-033044 to initiate a review of the FCC's findings in the Triennial Review Order concerning mass-market switching and dedicated transport.

4 On October 13, 2003, the Commission held a prehearing conference in this docket to take appearances of the parties, consider petitions for intervention, to establish a procedural and evidentiary schedule for the proceeding, and address issues concerning the form of a protective order and the form and timing of discovery in the proceeding. Order No. 01 in this proceeding, a prehearing conference

order, established the procedural schedule for the proceeding, including issuance of bench requests and filing dates for testimony and exhibits.

- 5 On October 21, 2003, the Commission entered Order No. 02, the protective order in this proceeding, after discussions by the parties at the October 13, 2003, prehearing conference and subsequent written comments. The protective order provides for submission of certain information as “highly confidential information” and limits disclosure of such information to certain attorneys, party experts and others who sign Exhibit C to the protective order.
- 6 On October 21 and 22, 2003, the Commission issued bench requests to the parties to gather information concerning the issues raised by Qwest in its October 10, 2003, petition. On October 23, 2003, the Commission entered Order No. 03, Order Requiring Disclosure of Information, and served the order on all competitive local exchange carriers (CLECs) registered with the Commission to operate in Washington State. On November 13, 2003, the Commission entered Order No. 04, Order Requesting Disclosure of Information From Certain CLECs, after finding that 17 CLECs were not served with Order No. 03.
- 7 On November 21, 2003, the Commission entered Order No. 05 in this proceeding, directing parties and non-party CLECs to file highly confidential information using a code to mask the identity of the CLEC responding to bench requests or Order Nos. 03 and 04.
- 8 On December 2, 2003, Qwest filed with the Commission a motion to amend Order No. 02 to allow more than two in-house experts to review highly confidential information. Qwest also requested expedited resolution of the motion in order to meet the December 19, 2003, deadline for filing testimony and exhibits.
- 9 On December 2, 2003, the Commission issued a notice requesting that responses to Qwest’s motion be filed by noon on December 4, 2003. On December 4, 2003, Advanced TelCom, Inc., Eschelon Telecom, Inc., Global Crossing Local Services, Inc., Integra TelCom, Inc., McLeod Local Services, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLP, and XO Communications, Inc. (collectively the Joint CLECs), filed a response to Qwest’s motion. No other party filed a response.

10 **A. Qwest's Motion.** Qwest requests that the protective order be amended to allow up to eight in-house experts to review highly confidential information or to specify that the limit of two in-house experts applies to each subject area in the proceeding. Qwest asserts that their original intent in proposing the draft protective order was to allow two in-house experts per subject area. Qwest acknowledges that this proposal may be administratively complex and thus suggests increasing the overall number of in-house experts with access to highly confidential information to eight. Qwest asserts that increasing the number will not prejudice or disadvantage any party as the Commission has ordered that highly confidential information be masked.

11 **Discussion and Decision.** Paragraph 15 of Order No. 02 provides, in part:

Parties seeking disclosure of Highly Confidential Information shall designate no more than (1) a reasonable number of in-house attorneys who shall 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."

In entering the Order, the Commission found that "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." *Order No. 02, ¶ 1d.*

12 Only the Joint CLECs, a group of CLECs that are parties to the proceeding, responded to Qwest's motion. While the Joint CLECs are concerned with the extent of access to CLEC highly confidential information in the proceeding, they recognize the need to "make use of internal resources and minimize the need to engage outside experts and consultants." *Joint CLECs' Response, at 1.* The Joint CLECs do not object to amending the protective order to increase to five the number of in-house experts with access to highly confidential information. The Joint CLECs object to any additional expansion of access to in-house experts, asserting that Qwest has not demonstrated a legitimate need to provide access to more than five in-house experts, and because CLECs may be prejudiced simply by providing access to the highly confidential information, even if masked.

13 After considering Qwest's motion and the Joint CLECs' response, the Commission grants Qwest's motion in part, and amends the protective order to allow five in-house experts to have access to highly confidential information. Paragraph 15 of Order No. 02 is amended as follows:

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~~ five 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.

14 While the Commission remains convinced that access to highly confidential information must be strictly limited, the Commission acknowledges the needs of the parties to effectively evaluate the extensive information being produced in this proceeding. Under Order No. 05 in this proceeding, experts executing Exhibit C's will not have access to CLEC identities in highly confidential information.

15 Qwest asserts that no party would be disadvantaged or prejudiced by increasing the number of in-house experts with access to highly confidential information. Parties, as well as non-party CLECs, have submitted highly confidential information to the Commission and other parties based upon the provisions of Order Nos. 02 and 05. Expanding the number of in-house experts with access to highly confidential information to five, however, will not appear to seriously prejudice other parties to the proceeding, as these experts will only have access to masked information.

16 Sprint Corporation requested permission to withdraw from the proceeding, in part due to the limitation on the number and character of in-house experts that may review highly confidential information. The Commission granted Sprint's

petition to withdraw in Order No. 06. Sprint may petition to be reinstated as a party to this proceeding if the expansion of in-house experts with access to highly confidential information changes Sprint's need for party status in the proceeding.

- 17 **B. Qwest Exhibit C Filings.** In filings made on November 17, 2003, November 19, 2003, and December 2, 2003, Qwest has filed a total of 23 executed Exhibit C's for experts in this proceeding to obtain access to highly confidential information.
- 18 The Joint CLECs object to Qwest's filing of Exhibit C's for 18 experts on December 2, 2003. The Joint CLECs request that the Commission require Qwest to withdraw the filing and resubmit Exhibit C's only for the authorized number of in-house experts allowed to have access to highly confidential information under the protective order in this proceeding.
- 19 Based upon the Joint CLECs' objections as well as the decision in this Order to allow parties up to five in-house experts with access to highly confidential information, Qwest must limit the number of in-house experts with access to highly confidential information.
- 20 While the majority of Qwest's executed Exhibit C filings appear to be for in-house experts, it is not clear from the filings whether several of these experts are outside consultants or in-house experts. Qwest must file a letter with the Commission, by Monday, December 8, 2003, (1) identifying any outside experts who have executed Exhibit C's filed in this proceeding; (2) identifying no more than five in-house experts who have executed Exhibit C's filed in this proceeding; and (3) withdrawing the executed Exhibit C's filed for all other in-house experts in this proceeding.

DATED at Olympia, Washington, and effective this 5th day of December, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge