

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

QWEST CORPORATION

For Competitive Classification of
Basic Business Exchange
Telecommunications Services

DOCKET NO. UT-030614

JOINT PUBLIC COUNSEL AND
WEBTEC RESPONSE
COMMISSION REQUESTS
REGARDING CLEC
INFORMATION

The Public Counsel Section of the Washington Attorney General (Public Counsel) and the Washington Electronic Business and Telecommunications Coalition (“WEBTEC”) (Joint Commenters) submit the following joint response to the Commission’s June 18 Request For Responses On Issues Raised in Staff Motion Requesting the Production of Information. The Commission asked six sets of questions (six bullet points). This response provides answers to each bullet point. In addition, Public Counsel and WebTEC are in receipt of Staff’s responses filed today, and will, where appropriate, address staff’s comments.

1. Joint Commenters agree with Staff that this information should be provided in the greatest degree of detail available. We would prefer information by wire center. If that is not available, information by exchange or rate center in that order of preference should be provided. In addition, if wire center information is not available, geographical descriptions of the actual location of facilities should be provided – for example, buildings, rights of way, portions of towns or cities – that enable parties to identify facility location as accurately as possible.
2. We have a number of concerns with seeking this information only from Qwest: (1) obtaining information from CLECs directly enables the Commission and parties to identify which CLECs are actually providing service at which locations; (2) in the case of special access, Qwest will likely not be aware of whether the CLEC is using special access circuits to provide local service;

(3) even if the information is also sought from Qwest, CLEC responses will provide a confirmation/verification of Qwest's data to ensure the most accurate picture available.

3. RESPONSES TO COMMENTS OF STAFF REGARDING PC/WEBTEC QUESTIONS

a. Staff misunderstands Joint Commenters' recommendation. To clarify, we are recommending that CLECs be asked to provide responses as to all the services identified in the Qwest petition, rather than a simplified set of services described as "basic business telecommunications, PBX, or Centrex service." While Staff or other parties may ultimately believe it makes sense to categorize or group services in certain ways, we do not believe it is appropriate to include such a limitation in the initial request. We are not requesting that CLECs provide information as to services not covered by the petition.

b. Public Counsel and WeBTEC do not believe that an evaluation of CLEC future plans is a relevant consideration under the statute, which focuses on existing competition. Any information Staff wishes to request about future matters should be segregated from information produced about currently existing activities.

c. There are two points here: (1) Staff, Public Counsel and WeBTEC appear to be in agreement with respect to item (d), i.e., that it should be clarified to say "loops" (not "facilities") owned by the CLEC. (2) We have recommended obtaining data regarding the types of loops (analog, digital, high-capacity) used by CLECs. The type of loop is relevant to the types of services that can be provided, to the costs of providing service, and to the types of customers being served. In Docket UT-000883, the Commission based its decision on competitive classification in significant part on the type of facilities used by the CLECs in specific areas, finding that services over high-capacity loops were competitive. Finally, the long-awaited Triennial Review Order may conclude that certain types of loops are no longer available to CLECs from Qwest. The fact that Staff states it does not intend to use this information in its own analysis does not mean it

is not relevant, or that the Commission or other parties may not find it useful and relevant to their analyses.

d. Public Counsel and WeBTEC stand by their original recommendation to obtain information regarding service via special access. In Docket UT-000883 the Commission specifically relied on the availability of special access over high-capacity loops as a basis for finding effective competition. Again, Staff's is free to approach this case as it wishes. Requests under RCW 80.36.330(5), however, should not be tailored to one advocacy party's approach, but should be broadly crafted to gather accurate and complete basic information relevant to the Commission's review of the statutory criteria. The information should also be sufficient to allow parties besides Staff to perform their own analyses and reach their own judgments about which approach is most relevant.

e. Staff indicates that the May 30, 2003 Performance Results Report contains information about service installation and repair intervals for special access. We have reviewed the report and do not see that information. It should be requested from CLECs.

f. As noted, the fact that Staff does not itself seek the information about collocation and transport services should not be determinative. It is relevant to the analysis in this case. While it may be available to some extent from Qwest, getting the information from the CLECs provides a separate verification function.

g. The EBITDA information will assist the Commission in determining whether any competition is sustainable or capable of constraining Qwest prices. Whether the CLEC is operating at a loss is relevant to weighing these factors.

h. We have a different view than Staff on this issue. Public Counsel and WeBTEC believe that the statutory analysis must take the business plan and target market into account in determining if customers truly have competitive alternatives available to them or remain captive to Qwest.

i. The level of detail sought here will assist in the statutory analysis. The concern here is to enable the Commission to determine, if data shows a CLEC serving 10,000 lines through a wire center, whether that is made up of one customer with 10,000 lines, two 5000 line customers, or many smaller customers. The goal is to avoid the misleading conclusions that might be drawn from averaging.

j. Public Counsel and WeBTEC would again differ with Staff on this point. Installation delays and interconnection disputes are key issues in analyzing whether a CLEC can truly offer a customer functionally equivalent service to Qwest. Staff does not identify which reports filed by Qwest contain this information. We are not aware that it is available in existing reports at the level of detail required in this case.

4. PROTECTIVE ORDER

The ALJ asks whether a protective order consistent with the protective order entered in Docket No. UT-000883, Second Supplemental – Protective Order, July 31, 2000, is appropriate in the current docket. Public Counsel and WeBTEC object to such an additional protective order being entered in this docket. The existing protective order is sufficient. The protective order entered in Docket No. UT-000883 goes far beyond what is necessary or reasonable to protect sensitive information.

First, the protective order should allow for full access for Public Counsel, WeBTEC, and any other consumer intervenor under the same terms and conditions as govern the treatment of “Confidential Information”. If any more restrictive access is to be imposed, it should apply only to competitors of the entity producing the highly confidential information, not to customer parties and their attorneys or experts. In no event, should access to the information provided by CLECs be limited to Staff alone, as it was in Docket UT-000833 (Second Supp. Order, ¶ 12)

Second, there is no good reason for restricting access to only one outside counsel or one outside expert (UT-000883 Second Supp. Order, ¶ 15); the critical factor is that the counsel or expert be “outside” of a competitor, not whether there is more than one attorney or expert working on the case. Restricting access to one attorney or expert imposes logistical barriers to counsel and experts, and limits the resources they can devote to the case, directly disadvantaging them as against the petitioner.

Third, administrative staff of the lawyer or expert should be able to have access to the information. There is no good reason to needlessly handicap a party in the way it most efficiently handles documents in the case. In WeBTEC’s case, administrative staff play a key role in managing and controlling access to documents, including discovery responses, exhibits, and testimony. Depriving them of the ability to access highly confidential document would, in fact, make their protection more difficult, not less so. In addition, parties should not limited to one set of highly confidential documents, effectively requiring experts, including out of state experts, to come to counsel’s office to review discovery, a completely unworkable requirement. (Second Supp. Order, ¶ 17)

Fourth, the language of the affidavit required in the UT-000883 protective order is too broad. (Second Supp. Order, ¶ 15) It would require the affiant to certify that he/she does not now, and will not for a period of five years, “involve themselves in competitive decision making by any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information.” It is uncertain what being “involved” in competitive decision making means. It could effectively preclude any outside counsel from giving any legal advice whatsoever to a client that competes or “potentially competes” with the company producing the highly confidential information. Moreover, the restriction is not even tied to competition relating to the

highly confidential information produced; any competition on any subject or in any location would qualify. Similarly, the concept of “potential” competition is grossly overbroad. A far more appropriate commitment would be a certification that the affiant would not disclose or use the highly confidential information for any purpose other than for this proceeding.

Public Counsel and WeBTEC concur with Staff’s comments regarding scheduling.

Respectfully submitted, this 23rd day of June, 2003.

CHRISTINE O. GREGOIRE
Attorney General

Simon J. ffitch
Assistant Attorney General
Public Counsel

ATER WYNNE LLP

Arthur A. Butler
Attorneys for WEBTEC