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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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In the Matter of the Petition of Metro)	
One Telecommunications, Inc., for)	ORDER
Enforcement of an Interconnection Agreement)	
with Qwest Corporation.)	

DISPOSITION: MOTION FOR PROTECTIVE ORDER
GRANTED IN PART

On February 12, 2002, Metro One Telecommunications, Inc. (Metro One) filed a Motion for a Protective Order pursuant to OAR 860-011-0000(3) and ORCP 36C. Metro One filed the motion because Qwest Corporation (Qwest) seeks production of an agreement between Metro One and a third party from whom Metro One received directory assistance listings (DALs). Metro One is willing to produce the agreement, but seeks a modified protective order that allows it to redact certain information and limit disclosure. On February 27, 2002, Qwest filed a reply, arguing that Metro One has failed to establish good cause for the additional protection it seeks.

Background

In 1995, Metro One began purchasing subscriber-listing information from US WEST MRG, an affiliate of Qwest. Following passage of the Telecommunications Act of 1996 (1996 Act), Metro One sought to purchase Qwest’s DAL database at non-discriminatory prices. Metro One later initiated an arbitration proceeding, docket ARB 100, asking the Commission to establish appropriate prices for the DALs. After hearing, the Commission concluded that the DAL prices should be based on the costs contained in Qwest’s studies. The Commission later approved the parties’ agreement on September 20, 1999.¹

On December 17, 1999, Metro One filed a petition for enforcement of the agreement. In Order No. 00-623, the Commission found that the agreement obligated Qwest to provide Metro One with DALs at cost based rates. Because Qwest had failed to do so, the Commission concluded that “Metro One is entitled to a refund of the amount it has been forced to pay for the DALs from other providers and the amount it should have paid Qwest under the interconnection agreement.” Order No. 00-623 at 10.

¹ See Order No. 99-544.

On June 4, 2001, Metro One initiated this action seeking an order specifying a sum certain to be paid by Qwest to Metro One. In its petition, Metro One seeks damages for the following time periods:²

- (1) September 20, 1999 (the effective date of the interconnection agreement) to January 31, 2000 (the last date Metro One purchased DALs from the Qwest affiliate); and
- (2) February 1, 2000 (the date Metro One began purchasing DALs from an unnamed third-party provider) to March 31, 2001.

DISCUSSION

Positions of the Parties

Metro One's agreement with the third party provider contains a confidentiality provision that covers the contents of the agreement and the identity of the third party provider. Nonetheless, recognizing Qwest's need for access to pricing terms and conditions, Metro One is willing to produce the agreement under a modified protective order. First, Metro One seeks permission to redact the identity of the third party and other information that is irrelevant to the charge Metro One paid for the DALs. Second, Metro One wants to restrict access to the redacted agreement to Qwest's outside lawyers and experts. Metro One claims that it would suffer a significant competitive injury if these pricing provisions were disclosed to an employee of Qwest.³ Metro One explains that Qwest is a competitor of Metro One and its carrier-customers. Metro One believes that, if a Qwest employee obtained access to Metro One's cost information, its ability—as well as that of its carrier-customers—to compete against Qwest in the marketing of services would be seriously compromised.

Qwest objects to Metro One's request for extraordinary protection. Qwest contends that Metro One has failed to establish that, absent the extraordinary safeguards it seeks, it will suffer a clearly defined injury. Preliminarily, Qwest contends that Metro One has waived any right to redact information it determines to be irrelevant because it failed to initially object to Qwest's data requests on those grounds. Furthermore, Qwest argues that, contrary to Metro One's assertions, the terms and conditions other than those related to pricing are relevant to its defense against Metro One's calculation of damages. For example, Qwest explains that Metro One began receiving DALs from Qwest at cost-based rates four months before it stopped buying DALs from the third-party provider. To present its defense against paying damages for this period, Qwest maintains that it must be allowed to determine the reason for this duplication, including whether the contract required Metro One to purchase DALs for a certain period of time. Qwest further contends that it should be allowed to examine the contract to verify Metro

² The Commission granted Qwest's motion for summary judgment regarding Metro One's claim for damages for periods prior to the Commission's approval of the interconnection agreement. *See* Order No.02-126.

³ Metro One states that it and its lawyer are willing to meet with Qwest's outside lawyers and experts to answer any questions they may have about the pricing provisions.

One's claim that the third party provided it with a higher quality product at a lower cost than that it received from US WEST MRG.

Qwest also disputes Metro One's assertions of the dangers of allowing Qwest employees to have access to the contract. Qwest contends that it would be unfair to require Qwest to hire an independent witness. It explains that such a requirement would unnecessarily complicate the proceeding and drastically increase the company's expense of litigating this matter.

Applicable Law

The Commission has adopted the Oregon Rules of Civil Procedure (ORCP) to govern agency practice and procedure.⁴ With regard to the issuance of protective orders, ORCP 36C provides, in relevant part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * * that the discovery may be had only on specified terms and conditions, including a designation of the time or place; * * * that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; that discovery be conducted with no one present except persons designated by the court; * * * that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]⁵

In *Citizens' Utility Board v Oregon Public Utility Commission*,⁶ the Court of Appeals affirmed the Commission's authority to issue protective orders. In that proceeding, the Court explained that there was a two-pronged test to obtain a protective order under ORCP 36C. First, the party seeking protection must show that the information is a trade secret or confidential commercial information. Second, a party must establish good cause for the protective order by demonstrating that disclosure will work a clearly defined and serious injury.

"Good cause" generally signifies a sound basis or legitimate need to take judicial action. Courts have identified four factors for ascertaining the existence of good cause: (1) the severity and the likelihood of perceived harm; (2) the precision with which the order is drawn;

⁴ OAR 860-011-0000(3).

⁵ The Commission has also promulgated OAR 860-012-0035(1)(k), which provides that a presiding officer may issue a standard "umbrella" protective order, under which any document may be designated as confidential material. Metro One, however, seeks protection beyond that afforded by the standard protective order.

⁶ 128 Or App 650 (1994)

(3) the availability of a less restrictive alternative; and (4) the duration of the order.⁷ When examined in the context of protective orders, this Commission also applies a “balancing of interests” analysis, in which we balance the potential harm from disclosure of the material against the benefit that might accrue from disclosure.⁸

Commission Resolution

Qwest does not challenge the need for a protective order to govern the disclosure of the third-party contract in this docket. Rather, Qwest objects to Metro One’s request for protection above that required by the Commission’s standard protective order. It contends that Metro One has failed to establish good cause to redact information from the contract and to limit its disclosure to Qwest’s outside attorneys and consultants.

Historically, the Commission rarely issued protection beyond that granted in the standard protective order. The recent restructuring of the regulated industries, however, has focused greater attention on the need to limit the disclosure of certain confidential and proprietary information in Commission proceedings. Consequently, during the past several years, the Commission has granted several requests for additional protection.⁹ Several orders have limited disclosure of certain documents to members of the Commission Staff; other orders have limited disclosure to unaffiliated consultants. In the investigation of Qwest’s entry into in-region interLATA services under Section 271 of the Telecommunications Act of 1996, the Commission issued a modified protective order that limited disclosure of certain information to the Commissioners, the presiding Administrative Law Judge, two Staff members, and one attorney for Qwest.¹⁰

After review, we grant, in part, Metro One’s motion for additional protection. Contrary to Qwest’s assertions, Metro One has met its burden for obtaining a heightened protective order. Metro One’s motion explains the risk to the company and its carrier-customers should the third-party agreement be disclosed to any Qwest employee who is now, or in the future may be either negotiating agreements relating to local exchange services or intra- and inter-exchange toll services, or may be pricing those services. Directory assistance is an important cost component of those services, and Metro One and the third-party provider would lose a competitive advantage they now have if that information was disclosed to Qwest.

We stress that this finding does not reflect on the integrity of any attorney or other person involved in this matter. The disclosure of sensitive material may be inadvertent and may be undetectable, especially over long periods. While we are confident that a Qwest employee

⁷ See, e.g., *In Re Alexander Grant & Co Litigation*, 820 F. 2d 352 (11th Cir. 1987).

⁸ *In Re PacifiCorp*, UE 111, Order No. 00-305.

⁹ See, e.g., *In the Matter of the Application of Portland General Electric Company for Approval of the Customer Choice Plan*, UE 102, Order No. 98-163; *In the Matter of the Application of Northwest Natural Gas Company for a General Rate Revision*, UG 132, Order No. 98-505; *In the Matter of the Application of Scottish Power and PacifiCorp*, UM 918, Order Nos. 99-106 and 99-293.

¹⁰ Order No. 01-874.

would be scrupulous in abiding by the terms of a protective order, it would be impossible for that employee to disregard all personal knowledge of the information in subsequent engagements where that information may be relevant. Due to such risks, the Commission believes that Metro One should be entitled to the heightened protection it seeks for the confidential agreement with the third party provider.

We do not believe that restricting access to Qwest's outside counsel and experts will unnecessarily complicate the proceeding and drastically increase Qwest's expense of litigating this matter. First, as Qwest itself acknowledges, this is a relatively straightforward phase of this proceeding that concerns only the amount of damages that Qwest must pay Metro One.¹¹ Second, the scope of the restriction is narrowly drawn. Because the restriction applies only to the review of the third-party contract, Qwest may rely on in-house employees to review and litigate other matters raised in this proceeding. Third, Metro One has indicated that it and its lawyer are willing to meet with Qwest's outside lawyers and experts to answer any questions they may have about the pricing provisions. Given these facts, the time required to review the pricing provisions in the contract should be minimal.¹²

We also dismiss Qwest's claim that Metro One has waived any right to redact information because it had failed to initially object to Qwest's data requests on those grounds. ORCP 43B provides, in part:

The party upon whom a request [for production of documents] has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts.

Although Metro One did not precisely comply with the terms of ORCP 43B, it has always indicated that its willingness to produce the third-party agreement was limited by the agreement's confidentiality clause. Metro One's request to redact irrelevant information is consistent with the confidentiality provision that covers both the contents of the agreement and the identity of the third party provider.¹³

We agree with Qwest, however, that terms and conditions other than those related solely to pricing may be relevant to its defense against Metro One's calculation of damages. While Metro One should be entitled to redact the agreement to exclude information not related to the provision of DALs, such as the identity of the third party provider, Qwest is entitled to review applicable terms and conditions to determine the type of DAL product Metro One was purchasing from the third-party provider, and whether the contract required Metro One to purchase DALs for a certain period of time.

¹¹ Qwest's Response to Motion for Protective Order at 7, lines 21-22.

¹² The Commission also notes that, to date, Qwest has used outside counsel in its defense of this enforcement action.

¹³ See also *Citizen's Utility Board*, 128 Or App at 657 (ORCP 43B does not expressly provide that objections are deemed waived unless made within the time for production).

To ensure that Qwest’s outside counsel and expert has the ability to review a properly redacted agreement, Metro One shall submit to the presiding Administrative Law Judge (ALJ) a copy of the third-party agreement *in camera*, as well as a proposed redacted copy of the agreement. The ALJ shall review the redacted agreement to make certain that Metro One has complied with the terms of this order and redacted only those provisions not relevant to Qwest’s defense. If necessary, the ALJ will ask Metro One to modify the redacted agreement.

ORDER

IT IS ORDERED that:

- (1) A Protective Order, attached as Appendix A, shall govern the disclosure of confidential information in this case.
- (2) Each party shall submit a list of “qualified persons” associated with that party at the time it files with the Commission a copy of the signatory page set forth in Appendix B.
- (3) Metro One’s request for additional protection regarding the third-party agreement is granted in part. Metro One may redact the third-party agreement as explained above. Disclosure of the redacted agreement shall be limited to Qwest’s outside attorneys and experts.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to ORS 756.580.

APPENDIX A

IC 1 PROTECTIVE ORDER

Scope of this Order-

1. This order governs the acquisition and use of “confidential information” in this proceeding. Paragraphs 2 through 16 apply to general confidential information; paragraph 17 governs the disclosure and use of the contract between Metro One and the third-party provider subject to the above referenced motion for additional protection.

Definitions -

2. “Confidential Information” is information that falls within the scope of ORCP 36(C)(7) (“a trade secret or other confidential research, development, or commercial information”).

3. A “qualified person” is an individual who is:

- a. The author(s), addressee(s), or originator(s) of the confidential information;
- b. The Commissioner(s) or the Commission staff;
- c. Counsel of record for a party;
- d. A person employed directly by counsel of record;
- e. An unaffiliated expert retained by a party;
- f. A person approved by the party desiring confidentiality (pursuant to paragraph 9); or
- g. A party designated a qualified person by order of the Commission (pursuant to paragraph 9).

Designation of Confidential Information-

4. A party providing confidential information shall inform other parties that the material has been designated confidential by placing the following legend on the information:

CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

To the extent practicable, the party shall designate only the portions of the document that fall within ORCP 36(C)(7).

5. A party may designate as confidential any information previously provided by giving written notice to the other parties. Parties in possession of newly designated confidential information shall, when feasible, ensure that all copies of the information bear the above legend to the extent requested by the party desiring confidentiality.

Disclosure of Confidential Information-

6. Confidential information shall not be disclosed to any person other than a “qualified person,” as defined in paragraph 3. When feasible, confidential information shall be delivered to counsel. In the alternative, confidential information may be made available for inspection and review by qualified persons in a place and time agreeable to the parties or as directed by the presiding officer.

7. Before reviewing confidential information, a person qualified under paragraphs 3(e) through 3(g) must:

- a. Read a copy of this Protective Order;
- b. Execute a statement acknowledging that the order has been read and agreeing, in return, for access to the information, to be bound by the terms of the order; and
- c. Date the statement.

Counsel shall, upon request, deliver a copy of the signed statement to the party desiring confidentiality.

8. Prior to disclosing confidential information to an unaffiliated expert qualified under paragraph 3(e), the party seeking to disclose the information must notify the party desiring confidentiality, in writing, at least three business days prior to the intended disclosure. The notice shall state:

- a. The exact nature of the information to be disclosed;
- b. The identity of the unaffiliated expert; and
- c. Any past, present, or anticipated future affiliation between the expert and any party to the proceeding.

9. When a party desires to disclose confidential information to an unqualified person, the party must, in writing, request permission from the party desiring confidentiality. The request must state:

- a. The exact nature of the information to be disclosed;
- b. The identity of the person(s) to whom it would be disclosed;
- c. The nature of any past, present, or anticipated future affiliation between the person(s) and any party to this proceeding; and
- d. The specific reasons why disclosure is necessary.

If the party desiring confidentiality agrees to disclosure, the person to receive the information will become qualified under paragraph 3(f) for the information identified in the request. If a party requests permission to disclose confidential information to an unqualified person, and the party desiring confidentiality fails to grant permission in writing within three business days, the party requesting disclosure may move to qualify the person under paragraph 3(g). The motion must contain the information set forth in the original request. The information shall not be disclosed pending the presiding officer's ruling on the motion.

Preservation of Confidentiality-

10. All persons who are given access to any confidential information by reason of this order shall not use or disclose the confidential information for purposes of business or competition, or for any purpose other than the purposes of preparation for and conduct of this proceeding, and shall take all reasonable precautions to keep the confidential information secure.

With the exception of Commission staff, parties may not copy, microfilm, microfiche, or otherwise reproduce confidential information without the written consent of the providing party.

Information Given to the Commission-

11. Confidential Information that is: (a) filed with the Commission or its staff; (b) made an exhibit; (c) incorporated into a transcript; or (d) incorporated into a pleading, brief, or other document, shall be separately bound and placed in a sealed envelope or other appropriate container. To the extent practicable, only the portions of a document that fall within ORCP 36(C)(7) shall be placed in the envelope container. The envelope/container shall bear the legend:

THIS ENVELOPE IS SEALED PURSUANT TO ORDER
NO. _____ AND CONTAINS CONFIDENTIAL
INFORMATION. THE INFORMATION MAY BE
SHOWN ONLY TO QUALIFIED PERSONS AS
DEFINED IN THE ORDER.

12. The Commission's Administrative Hearings Division shall store the confidential information in a locked cabinet dedicated to the storage of confidential information.

Duration of Protection-

13. The confidentiality of confidential information shall be preserved until the Commission, by order, terminates the protection conferred by this order.

Destruction After Proceeding-

14. Counsel of record may retain memoranda or pleadings containing confidential information to the extent reasonably necessary to maintain a file of this proceeding. The information retained may not be disclosed to any person. Any other person retaining confidential information must destroy or return it to the party desiring confidentiality within 90 days after final resolution of this proceeding unless the party

desiring confidentiality consents, in writing, to retention of the confidential information. This paragraph does not apply to the Commission or its staff.

Appeal to the Presiding Officer-

15. If a party disagrees with the designation of information as confidential, the party shall contact the designating party and attempt to resolve the dispute on an informal basis. If the parties are unable to resolve the dispute, the party desiring to use the information may move for exclusion of the information from the protection conferred by this order. The motion shall:

- a. Specifically identify the contested information; and
- b. Assert that the information does not fall within ORCP 36(C)(7).

The party resisting disclosure has the burden of showing that the challenged information falls within ORCP 36(C)(7). If the party resisting disclosure does not respond to the motion within 10 days, the challenged information shall be removed from the protection of this order.

The information shall not be disclosed pending a ruling by the Commission or the presiding officer on the motion.

Additional Protection-

16. A party desiring additional protection may move for any of the remedies set forth in ORCP 36(C). The motion shall state:

- a. The parties and persons involved;
- b. The exact nature of the information involved;
- c. The exact nature of the relief requested; and
- d. The specific reasons the requested relief is necessary.

The information need not be released and, if released, shall not be disclosed pending the Commission's ruling on the motion.

Third Party Contract

17. The agreement between Metro One and a third party from whom Metro One received directory assistance listings shall receive additional protection as follows:

- a. Metro One must redact the agreement consistent with the Commission's decision set forth above. Metro One shall, within 14 days of the issuance of this order, submit a complete copy of the agreement, *in camera*, to the presiding Administrative Law Judge (ALJ), as well as a proposed redacted copy. The ALJ shall review the redacted agreement for consistency with the Commission's order, and may direct Metro One to make any changes deemed necessary.
- b. The redacted agreement shall be made available only to Qwest's outside counsel and experts, and no others. Persons allowed to review the redacted contract shall not divulge or reveal the information contained therein to anyone not specified in this order.
- c. Within ten days of the issuance of this order, the parties and outside counsel shall execute a copy of the attached Appendix B, agreeing to be bound by the terms of this protective order.

SIGNATORY PAGE

IC 1

Consent to be Bound-

This order governs the use of “confidential information” in this proceeding.

I have read this Order, including Appendix A, and agree to be bound by its terms.

_____ Signature & Printed	_____ Date
_____ Party	
_____ Signature & Printed	_____ Date
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