ORDER NO. 02-854

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1038

In the Matter of an Investigation Into Issues Related to the Commission Policy of Posting Service Quality Reports to Its Website, pursuant to ORS 756.510.	)))	ORDER

DISPOSITION: SERVICE QUALITY REPORTS WILL BE POSTED

BACKGROUND. The Commission entered Order No. 00-002 in UM 960 on January 3, 2000. That order pertained to Qwest's service quality data. Starting in March 1999, Qwest had been labeling its monthly service quality reports confidential. In Order No. 00-002, the Commission determined that all Qwest's monthly service quality reports filed pursuant to then OAR 860-023-0055 should be made available to the public. The order was issued without input from Qwest and was subsequently stayed to allow Qwest to request a hearing on this issue, which it did. Before the matter went to hearing, Qwest, the intervenors, and Commission Staff (Staff) reached a stipulation that resolved all issues. The Commission approved the stipulation in Order No. 00-297.

The stipulation provides that the service quality standards to be adopted are based on the assumption that the Commission would adopt Staff's recommendations in AR 375, the service quality standard docket. The Staff recommendations included the requirement that all providers report their service quality data and that the rules would give clarity regarding how the service quality data would be compiled. The stipulation addressed the issues about whether all providers should report data and whether the data should be posted on the Commission's website. Section 2 of the stipulation, "Presentation of U S WEST service quality data and information on the Commission's Internet website," provides in part:

> If the Commission decides to present [Qwest] service quality data and information, compiled from the reports submitted to the Commission by [Qwest] pursuant to OAR 860-023-0055, on its Internet website, the Commission shall do so in accordance with the following:
>
> a. The Commission shall treat [Qwest] and other regulated telecommunications utilities and competitive local exchange carriers (CLECs) on a comparable basis to the extent practicable.

The 1999 Oregon Legislature passed Senate Bill 622 (SB 622) during its regular session. Section 29 of SB 622, now codified at ORS 759.450, requires the Commission to establish minimum service quality standards for all telecommunications utilities and competitive providers. The Commission did so in its AR 375 docket. On June 8, 2000, the Commission issued Order No. 00-303 in AR 375, adopting service quality standards and reporting requirements for all telecommunications carriers. These standards are codified in OAR 860-023-0055, which in relevant part requires carriers to comply with objective service levels and measuring and reporting requirements in the following categories: held orders, held orders over 30 days, commitments for service provisioning, trouble report rate, network blockage, trouble reports cleared within 48 hours, repair service center access, and sales office access. Trouble reports and held orders must be reported by wire center. These requirements apply to all large telecommunications carriers, incumbent local exchange carriers (ILECs), and competitive local exchange carriers (CLECs) alike.

Shortly after OAR 860-023-0055 took effect, Staff announced that it intended to publish the monthly service quality reports on the Commission website. In response, WorldCom and AT&T sent a joint letter asking the Commission to refrain from posting on its website the monthly service quality reports filed by CLECs pursuant to OAR 860-023-0055, asserting that the reports contain highly confidential, competitively sensitive commercial information and would be misleading to the public. The Commission responded to this letter on November 6, 2000, rejecting the CLECs' arguments. Thereafter, WorldCom and AT&T received a letter from Phil Nyegaard of Staff, reiterating the Commission's intent to post CLECs' service quality reports on the website.

The letter referred to the Commission's Order No. 00-002 in docket UM 960. In that docket, the Commission addressed and denied U S WEST's (now Qwest Communications) claims of confidentiality for its reported service quality data. The letter invited WorldCom and AT&T to distinguish that case from their own arguments. WorldCom and AT&T wrote a letter to Woody Birko, Commission Staff member, dated February 28, 2001. The letter explained why the service quality data AT&T and WorldCom are providing to the Commission should be exempted from disclosure as trade secrets under the Oregon Public Records Law (OPRL). The letter was supported by affidavits from WorldCom and AT&T personnel. By letter dated April 26, 2001, Phil Nyegaard stated that he had reviewed WorldCom and AT&T's arguments and concluded that their service quality reports are not exempt from disclosure under OPRL. The letter advises WorldCom and AT&T that beginning with the July 2001 reports, the Commission will post "your companies' service quality reports in the same format it uses for regulated utilities." On August 13, 2001, WorldCom and AT&T filed a petition for a declaratory ruling, asking the Commission to find that publication of WorldCom and AT&T's service quality data would violate state and federal law. At its September 25, 2001, Public Meeting, the Commission denied the petition and opened this docket to investigate the legal issues raised. The Commission's Public Meeting decision was formalized by Order No. 01-855.

A prehearing conference was held in Salem, Oregon, on November 6, 2001, to set the schedule and define the issues. The Commission received and granted petitions to intervene from Qwest Corporation (Qwest); Verizon Northwest Inc. (Verizon); WorldCom, Inc. (WorldCom); AT&T Communications of the Pacific Northwest, Inc. (AT&T); Sprint/United Telephone Company of the Northwest, Inc. (Sprint); and Integra Telecom of Oregon, Inc. (Integra).

After parties circulated a draft issues list and submitted comments on the draft list, the Administrative Law Judge (ALJ) established the list of issues below on November 27, 2001:

ISSUES LIST
UM 1038

Oregon Trade Secret Act Issues:

1. **Would the Commission's public disclosure of service quality reports for any, some, or all telecommunications carriers violate the OTSA?**
2. **Should the Commission treat any, some, or all carriers' service reports as trade secrets under the OTSA?**
3. **Should the Commission set generic standards for the treatment of service quality reports to meet the requirements for protection as trade secrets under the OTSA?**

Oregon Public Records Law Issues:

4. **Are part or all of the service quality reports of any, some, or all telecommunications carriers exempt from public disclosure under the ORPL?**
5. **Should the Commission treat any, some, or all telecommunications carriers' service quality reports as exempt from disclosure under the ORPL?**
6. **If the Commission finds that any carrier's service quality reports are trade secrets under the OTSA, may it legally publish those service quality reports based on a public interest determination under the OPRL?**
7. **Should the Commission set generic standards for treatment of service quality reports to meet the requirements for exemption under the OPRL?**

Telecommunications Act Issues:

8. **Would publication of the service quality reports of any, some, or all telecommunications carriers violate Section 253(a) of the Telecommunications Act of 1996?**
9. **Would it violate Section 253(a) of the Telecommunications Act for the Commission to publicly disclose some carriers' (ILECs') service quality reports while failing to publicly disclose the service quality reports of other carriers (CLECs)?**

Policy Issues:

10. **Is it in the public interest to publish CLEC service quality reports?**

11. Should the Commission post all telecommunications carriers' service quality reports on its website, or none at all?
12. For the service quality reports identified in this issues list, should the Commission require a showing and an analysis of the issues raised for each specific type of service quality report that a carrier claims the Commission may not or should not post on its website?
13. Should the Commission make a distinction about whether or not to post service quality reports based on the number of access lines a carrier has in the State of Oregon rather than on whether the carrier is an ILEC or a CLEC?
14. Do prior Commission orders (*e.g.*, Orders No. 00-002 and 00-297) affect the outcome of any of the issues on this list?

A standard protective order was issued in this docket on March 11, 2002. AT&T and WorldCom (together, AT&T/WorldCom), Qwest, Verizon, and Integra prefiled direct testimony. Staff and the same list of carriers filed rebuttal testimony. Before the scheduled hearing parties agreed that they needed no cross examination of the witnesses, and the hearing was canceled. All testifying parties filed opening briefs and all but Integra filed reply briefs.

THE ISSUES: OVERVIEW. Briefly, the carriers all argue that their service quality reports constitute trade secrets and as such are protected from disclosure on the web. Staff argues that the service quality reports do not constitute trade secrets and should be posted on the web. The parties have all agreed, however, on one point that narrows the issues.

Resolution of Issues 4, 5, 6, 7, 12, 13, and 14. The parties agree on the way the Oregon Public Records Law[1] and the Oregon Trade Secrets Act[2] interact. The Oregon Public Records Law provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 102.505." ORS 192.420. The OPRL has certain narrow conditional exemptions from disclosure, one of which is for trade secrets (ORS 192.501(2)). Information conditionally exempt from disclosure may be disclosed under the OPRL, however, if "the public interest requires disclosure in the particular instance."

The OTSA, on the other hand, protects trade secrets from disclosure and provides for no public interest exemption from its protection. We agree with the parties that the OTSA supersedes the OPRL. That is, if the service quality reports are found to contain trade secrets, that is the end of our inquiry. Under the OTSA, the data may not be published. The focus of the case thus becomes whether the carrier parties have met their burden to show that the data contained in the service quality reports qualifies as trade secrets. Issues 4, 5, 6, and 7 on the above issues list need not be addressed.

[1] ORS 192.410 *et seq.*
[2] ORS 646.461 *et seq.*

Because this case focuses on the OTSA rather than the OPRL, we are also able to answer the question posed in Issue 14 above. The prior Commission Orders No. 00-002 and 00-297 dealt directly or indirectly with the OPRL rather than the OTSA. They also considered arguments on the trade secret issue only from Qwest (at that time U S WEST). Greater participation in this case has led to production of arguments that were not aired there. We conclude that the earlier orders, 00-002 and 00-297, may be instructive but are not dispositive of the issues before us here. This disposes of Issue 14.

We can also dispose of Issue 13 in summary fashion. Only Integra argues that the Commission should differentiate among carriers on the basis of number of lines, and makes no significant argument in support of its position. We therefore determine that the number of access lines should have no effect on whether a carrier's reports are posted to the website. The rule exempts carriers with fewer than 1,000 lines from the measurement and reporting requirements altogether.

Finally, Issue 12 requires no separate discussion. In the Staff report appended to the order opening this docket, Staff recommended that parties asserting trade secret status for their service quality reports argue each reporting category separately. Staff also added this requirement as an issue on the issues list. Carriers have the burden to prove each category of report is a trade secret. They have all chosen to argue about the reports in the aggregate, with the exception of pointing out the granular character of data relating to individual wire centers. That is, the parties with the burden of proof have argued their case as they saw fit. We do not require them to argue it differently.

OTSA ISSUES.

1. **Would the Commission's public disclosure of service quality reports for any, some, or all telecommunications carriers violate the OTSA?**
2. **Should the Commission treat any, some, or all carriers' service reports as trade secrets under the OTSA?**
3. **Should the Commission set generic standards for the treatment of service quality reports to meet the requirements for protection as trade secrets under the OTSA?**

To deal with the simplest of these issues first, generic standards for treatment of service quality reports, ORS 646.461(4)(b) requires that a trade secret be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Because we do not find that the service quality reports are trade secrets, we do not consider it necessary at this time to develop guidelines for how carriers should protect trade secrets.

Questions 1 and 2 may be combined in the inquiry as to whether the service quality reports of any, some, or all carriers constitute trade secrets under the OTSA. If the reports are trade secrets, it follows that disclosure of any of the carriers' reports would violate the OTSA. Thus the two issues may be considered as a single question.

ORS 646.461(4) defines trade secret as follows:

> (4) "Trade secret" means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The parties asserting that the reports are trade secrets have the burden of proof on all issues. They have attempted to show that the reports have actual or potential value because of their use in marketing and in ILEC efforts to gain, retain, or win back customers. We consider that all carriers who have argued that their data are trade secrets have made a credible showing that they treat the information as trade secrets and do not lay out the parties' arguments on this issue.

The ILECs' Position. *Qwest* contends that its service quality data constitute a trade secret and are exempt from disclosure under OTSA. Qwest argues that the data are competitively valuable. According to Qwest, competitors can analyze and use a carrier's service quality information to discern patterns in Qwest's business management and planning processes including investment activities. Qwest argues that this type of information can also be used to identify timing and geographic locations of demand growth around the state. Qwest notes that none of its competitors appear to be making this kind of information publicly available, which demonstrates that the information has commercial value. In UM 960 Qwest argued, and argues here again, that geographic information by individual wire center conveys to competitors specific geographic areas within the state where Qwest is most vulnerable, which would substantially harm Qwest's competitive position.

Qwest also argues that the data are valuable because it has spent substantial resources to develop the information. Further, Qwest contends, the service quality data, especially wire center specific data, cannot be duplicated by Qwest's competitors.

Verizon argues that all carriers' service quality reports have actual or potential value and are protected by the OTSA. Verizon contends that it has submitted evidence and arguments showing that service quality reports have at least potential value and thus qualify for trade secret protection under the OTSA. Verizon argues that all CLECs and ILECs participating in this case show that the service quality reports have intrinsic economic value that could aid a competitor and disadvantage the owner of the information if the information were made public. Verizon contends that a competitor could use the data to convince a customer that its competition provides poor service. This is especially true of wire center level data. Even if

competitors do not explicitly use service performance data in marketing and sales efforts, Verizon argues, the fact that such information is generally known to the public gives it economic value. A company's reputation is critical to its success. Disclosure of unfavorable information has a negative effect on a company, ranging from loss of sales to a decline in the company's stock price. Finally Verizon asserts that CLECs are wrong in their claim that ILECs will improperly use CLEC information to harm competition if CLEC results are made public.

Verizon takes issue with Staff's position on economic value. According to Verizon, Staff assumes that because no company has professed to use service quality results in the past, such results have no value today. Staff relies on Orders No. 00-002 and 00-297 to support its position, but Verizon maintains that these orders addressed value in a different context. The issue then was competitive entry; the issue now is whether service quality reports would help gain, retain, or win back customers once entry has been established. Staff believes that because carriers did not use service quality results in marketing in the past we can conclude that it will not happen in the future, but no evidence supports this assertion. Verizon also contends that there is no evidence that customers would be harmed if results are not published, as long as customers are informed when a carrier is under a corrective plan resulting from poor service quality.

Verizon also argues that Staff's reading of "potential" in the OTSA denies the term any meaning at all. Verizon submits that a showing of potential value requires what has been shown in this case: that one carrier could use a competitor's service quality data to that carrier's competitive advantage. Verizon contends that this is not speculative, given the competitive market for telecommunications business customers in Oregon. Competitors in the market, Verizon contends, will look for ways to distinguish themselves from competing carriers. Superior service quality data would be a natural source of information for a carrier to draw on to convince potential customers to switch to the carrier.

Verizon addresses CLEC arguments that CLECs are at the mercy of ILECs for provisioning service components. According to Verizon, CLECs argue that ILECs miss appointments and delay timely processing of orders. Verizon contends that CLEC errors can also cause significant delays in provisioning. If a CLEC gives the wrong information to a customer about an installation or misses an appointment, or mishandles a number porting request, it is the CLEC's own action and not the ILEC's that gives rise to a problem. Verizon points out that CLECs cannot separate their own errors from the errors of the ILECs. Without this ability, Verizon argues, CLECs cannot assign blame to ILECs for their own poor service quality results.

CLECs. AT&T/WorldCom argues that CLEC service quality reports contain trade secrets and that their publication on the website would give the ILECs a significant advantage in the market. Publication of the service quality reports would have a prohibitive effect on competition, AT&T/WorldCom argue, erecting yet another barrier to competitive entry in Oregon's telecommunications market. AT&T/WorldCom argue that the harm to CLECs from

disclosure of the reports may not be detectable but may instead involve ILEC decisions about where and when to market services.

According to AT&T/WorldCom, this is a case of first impression. No other state has published similar CLEC service quality data on a website or otherwise released it to the public. AT&T/WorldCom contend that Staff does not address the fact that ILECs and CLECs have differing abilities and motivations with respect to the use of service quality information in their advertising and marketing strategies. Staff holds the CLECs to a standard they cannot meet, AT&T/WorldCom maintain, because the CLECs have no real world experience seeing their service quality data published and are therefore not capable of making a case of potential economic value under the OTSA. AT&T/WorldCom argue that if Staff has its way, the CLECs will have to suffer competitive harm first, then ask Commission to protect them.

AT&T/WorldCom argue that the CLECs have given the Commission ample evidence to suggest that if the Commission publishes their service quality information, the ILECs will use that information against them in the marketplace. Because CLEC service quality data have never been released, the CLECs must make their case by showing that their service quality reports have potential value. AT&T/WorldCom maintains that its witnesses have described how the ILECs will be able to use CLEC service quality information to the ILECs' economic advantage if it is released and why they will be motivated to do so.

AT&T/WorldCom maintain that the term "potential" in the statute simply means "possible." According to these carriers, if the CLECs show that it is reasonably possible that the ILECs will use their service quality information to gain a competitive advantage over the CLECs, the service quality information constitutes trade secret information and cannot be released. AT&T/WorldCom argue that the CLECs have gone beyond required showing and have provided evidence that ILECs will have the ability and an incentive to use CLEC service quality information against CLECs in the marketplace.

AT&T/WorldCom argue that their service quality reports have significant economic value. To determine economic value, courts consider: (a) the value of the information to the owner, and (b) whether competitors could use the information to the competitive disadvantage of the firm. *See, e.g.*, MAI Systems Corp. v. Peak Computer, 991 F2d 511 (9th Cir. 1993); State Utilities Commission v. MCI Telecommunications Corp., 132 NC App 625 (1999).[3] The service quality reports are valuable to AT&T and WorldCom, these parties maintain, and would be even more valuable to ILECs, which could and likely would use the information to

[3] These cases do not support the proposition that a trade secret has value *to the owner*. The first case decides a trade secret matter based on the California version of the Uniform Trade Secrets Act, which defines trade secret as the Oregon statute does: as something having *independent* economic value from not being generally known. AT&T/WorldCom attempt to develop a subjective standard for the trade secret determination with their concept of "value to the owner." This reading is unsupported by the statutory text and in fact runs counter to the phrase "independent economic value" in the statute. The case involves a customer database, information much more specific than what is reported to the Commission under OAR 860-023-0055. The second case also involves a version of the Uniform Trade Secrets Act and also involves much more specific information, including business plans, than that here required by the Commission.

further undermine these competitors' efforts to enter Oregon's local markets.

AT&T/WorldCom contend that a commitment to maintaining service quality is essential for new entrants into the local telecommunications market. Customers will switch back to the incumbents if they are unhappy with the service they receive. Service quality information is therefore highly valuable to companies. The same information in the ILECs' hands could damage or destroy CLECs' ability to compete, AT&T/WorldCom argue. The ILECs will be able to incorporate any negative service quality information into their advertising campaigns to tarnish the reputations of the CLECs. CLECs are especially vulnerable to negative advertising, AT&T/WorldCom maintain.

AT&T/WorldCom submit that much of the ILECs' advertising in the past 18 months has focused on competitors' service quality. These advertisements suggest that CLEC customers will experience more inconvenience than customers who choose Qwest, and that customers will experience substantial delays when they switch to CLEC service. AT&T/WorldCom also point out that Qwest used the Federal Communications Commission's (FCC) recently published information on service quality in its advertising campaigns, touting the fact that Qwest had been ranked No. 1 in customer service and mentioning some more specific measures as well, for instance that Qwest had the fewest reported service troubles in the country and the fastest repair service in the country.

According to AT&T/WorldCom, the advertisements that they offer include many examples of Qwest advertising generally criticizing CLEC service quality in some instances and using FCC ratings to bolster its own image in others. AT&T/WorldCom argue that if Qwest is already attacking the CLECs with the information it does have, it is likely that Qwest will use the much more granular information that published service quality data would provide.

If the Commission publishes the CLECs' service quality reports, AT&T/WorldCom fear, the ILECs will be able to sharpen their negative advertisements by pointing to any specific service quality failures by ILECs in Oregon in an effort to support their allegations that the CLECs cannot be trusted. This, according to AT&T/WorldCom, would irreparably damage the reputations of the CLECs, and would be especially damaging to nascent competitors who are trying to win customers and develop the systems and processes required to serve those customers.

AT&T/WorldCom believe that Staff has failed to support its position with evidence. Staff sent out data requests to the parties to ask if they planned to use service quality reports in their marketing efforts. The CLEC parties stated they would not use the reports in their future marketing efforts. CLECs, as new entrants to the market, must concentrate on building their own reputations as opposed to criticizing others, so they would not use ILEC service quality data. However, AT&T/WorldCom note, neither ILEC would make a commitment to not using CLECs' service quality data. Verizon responded that it would determine whether to use the data depending on what its competitors do, and Qwest did not answer the question.

AT&T/WorldCom argue that the ILECs will also be able to use the service quality reports information to tailor their own business plans to target those areas where the CLECs seem to be experiencing problems, according to AT&T/WorldCom. Because carriers must report held orders and trouble reports on a wire center basis, the information in the service quality reports will reveal not only where the CLECs are entering the local market but also the types of problems they are having in each wire center. ILECs can then easily step up their own marketing and provisioning efforts in those wire centers.

AT&T/WorldCom also take issue with Staff's survey, which found that competition was greatest in areas where the incumbent was providing good service. AT&T/ WorldCom point out that CLECs target metropolitan areas first and then move outward. For this reason, the CLECs have not used ILEC service quality reports to target areas where ILECs have poor service. But ILECs maintain ubiquitous networks in their service territories and can easily step up marketing and provisioning efforts in areas where CLECs are experiencing problems. Such granular information will let the ILECs fine tune their win back efforts to identify customers who may have had frustrating provisioning experiences, even if caused by the ILEC.

AT&T/WorldCom argue that all CLEC services depend to some degree on ILEC performance or infrastructure. Therefore, the reporting requirements virtually guarantee that a certain number of service quality violations reported by the CLECs will have been caused solely by the ILECs' failure to perform required obligations or to deliver high quality service to the CLEC. There are, admittedly, exceptions for reporting the percentage of commitment dates met and for trouble reports; in those instances the rules allow a carrier to omit instances that are the fault of another party.

AT&T/WorldCom contend that the service quality reports will grant the ILECs a competitive advantage as providers of the CLECs' underlying facilities. Most competitive providers are substantially or totally dependent on the ILECs for the service quality that they deliver to their own end users. Whether a CLEC is offering service via UNE-P, resale, or UNE-loop, it counts on the ILEC to provide and maintain significant aspects of its service. Even if the CLEC has its own loops, the ILEC plays a significant role in the CLECs' provisioning process and can interfere with the success of the CLEC in converting the customer and in the CLEC's ability to provide high quality, timely service. When the ILEC fails to deliver in a timely fashion, the CLEC can find itself in apparent violation of the Commission's service quality rules.

Even if the ILEC provides and maintains services for the CLEC in conformance with the Commission's retail service quality standards, ILEC behavior may still force the CLECs into an apparent violation of the standards, AT&T/WorldCom contend. The standards do not allow extra time for the CLECs, who must coordinate the provisioning and maintenance of service with the ILEC and the end user. If the ILEC takes the full six days allotted to it by the rules to provide a UNE loop, the CLEC will apparently be in violation of the six day provisioning standard. The same reasoning applies to the time allocated to trouble reports. If the ILEC does not clear reports it causes in the allotted time, the CLEC will be in apparent violation

of the service quality standard.

AT&T/WorldCom argue that it is already in the ILECs' economic interest to provide the CLECs with substandard service quality. The ILECs are fully aware that every instance of late provisioning or response to trouble calls is bound to result in an unhappy CLEC customer. If the ILECs know that the poor service they provide to CLECs will show up as violations in CLEC service quality reports, on which the ILECs can then capitalize in their marketing and advertising efforts, they will have additional incentive to deliver poor service quality to CLECs. Publication of the reports would allow the ILECs to identify where CLECs would be vulnerable to ILEC efforts to exacerbate service quality problems.

Integra, a small, privately held company, filed a request for a waiver from retail telecommunications service measurement and reporting requirements on October 13, 2000. Docket UM 996 was opened to deal with Integra's request. Staff and Integra settled the case by agreeing that Integra would provide service quality reports on two of the required measurements: access to business representatives and blocked calls. Integra argues that its service quality reports, and those of all other carriers, are trade secrets and should not be posted. Integra contends that the information and measurements the carriers file has economic value to Integra and its Oregon operations. Integra argues that it uses the information to monitor its performance and the level of service delivered to its customers. Integra uses the information to correct problems in its current network and to develop market areas where the needs for its services are greatest. Integra also uses the information to analyze its relationships with and the services it receives from all its vendors, including Qwest and Verizon.

According to Integra, the information in the reports forms the basis of its financial, personnel, network development, and short and long term growth planning and decisions. The information includes detailed data on Integra's processes, plans, tools, equipment, market size and area, network, and problems or issues the company has. It is easy to tell from the reports where a small company like Integra is operating and what it is doing.

Publication of the reports, Integra asserts, would allow a competitor to copy Integra's network, determine its marketing and sales strategies, and target their own plans based on perceived problem areas and the location and performance of Integra's switches and other equipment. Integra's vendors could use the information to target areas in which to reject orders to harm Integra by slowing provisioning intervals and responses to trouble tickets in areas of perceived problems.

Like AT&T/WorldCom, Integra argues that its services rely on services from Qwest and Verizon, and that the information in Integra's reports will be affected by the service the company receives from the ILECs.

Commission Staff argues that the carriers have not shown that their reports constitute trade secrets under the OTSA. They concentrated on presenting arguments to support their assertion that the reports have potential value. Staff submitted into evidence its survey of

the parties, asking if they had used the reports in any of their marketing plans in the past and whether they had plans to use the reports in the future. Verizon responded that its use of the reports would depend on the competitors' use, and Qwest stated that it had no current plans to use the data, but was silent about future plans.

Staff also introduced into evidence the Commission's surveys of competition over the past three years. The surveys show that there is competition in Oregon in areas where the prior or current service quality is better than average. From this evidence Staff argues that no one uses the reports to target or enter markets where the service quality is inferior. Competition occurs mainly where current service quality is good. Staff argues that its evidence disproves the parties' speculation that the reports will be used to target areas for competitive entry.

Staff suggests that since the parties have failed to make their case that the reports are trade secrets, the Commission post the service quality reports and allow the parties to return for further consideration of this issue when they have sufficient evidence of a report's economic value to show that it is a trade secret under the OTSA.

The carrier parties assert, according to Staff, that the economic value of the reports lies in a competitor's ability to use the reports in marketing services to gain, retain, or win back customers. No party, Staff argues, presented evidence that a competitor had actually used a report in this fashion. Each party instead focused on the potential use by competitors.

Staff argues that as the carriers use the term, "potential" is far too broad. According to Staff, the OTSA reflects a balancing of equities. It restricts free competition and access to information and should therefore be applied prudently and wisely. Staff cites to *American Can v. Mansukhani*, 742 F2d 314, 329 (7th Cir. 1984), where the court stated that "The primary purpose of the trade secret law is to encourage innovation and development, and the law should not be used to suppress legitimate competition." Further, the court noted that "Trade secret protection should not extend beyond the limits needed to protect genuine trade secrets." *Id*. Similarly, in *Minnesota Mining & Manufacturing Company v. Pribyl*, 259 F3d 587, 595 (7th Cir. 2001), the court declared:

> Because the purpose of the trade secret law is to encourage innovation and development, protection should not extend beyond the limits needed to protect genuine trade secrets. . . The umbrella of trade secret classification should not be deployed to suppress legitimate competition. . . . As such, the plaintiff must do more than direct the court to a broad area of technology and assert that something there must have been secret and misappropriated. The plaintiff must point to concrete secrets (citation omitted).

Staff contends that the carrier parties have tried to maintain that potential value is anything that is merely possible. Staff asks the Commission to reject these arguments.

In addressing the parties' arguments with specificity, Staff begins with AT&T/WorldCom's position. Staff argues that AT&T/WorldCom's case rests solely on speculation. Staff asserts that AT&T/WorldCom have failed to provide evidence about any negative attack on competitor service by ILECs. The advertisements AT&T/WorldCom present are not specifically targeted at a given competitor and are about service quality only in the most general sense. The advertisements imply that Qwest is a better choice than its competitors for reasons of service quality and performance, but Staff argues that such advertisements are no indicator that the ILECs would use service quality data in their future advertising.

In addressing Integra's case, Staff argues that it goes beyond the case the other carriers make for trade secret protection for their service quality data. The other parties appear to argue that the main potential use of the reports is in marketing services. Integra claims an even greater value for its reports in asserting that the information contains a blueprint of Integra's business in Oregon. Staff argues that Integra simply makes this unsupported claim and that the Commission should not attend to it.

Verizon's and Qwest's cases fail, according to Staff, because they make many of the same arguments as AT&T/WorldCom and also fail to support their positions with evidence.

Resolution. We have reviewed the evidence and the parties' arguments. It is clear that no carrier is currently making use of the service quality reports in advertising or marketing campaigns. It is also clear that the service quality reports have not influenced CLEC market entry decisions, because as Staff's survey shows, competitors have entered the market in areas where service quality is high. Therefore our focus must be on the potential value of the service quality reports.

AT&T/WorldCom have submitted a large sheaf of advertisements in support of their position that if ILECs advertise as they now do, they will very likely make use of the more detailed service quality information available on the website in future advertising campaigns. We are not persuaded. The advertisements refer to competitors' service quality in a very general way. They neither name competitors nor do they invoke specific measures of competitors' service quality.

The carriers argue that potential value means anything that could come about. We do not accept such an open textured reading of the statute. We find that the evidence fails to show a reasonable possibility that the content of the service quality reports will be used in advertising. We conclude that the carriers have not shown that the service quality reports have potential value in competitors' advertising.

As to use of the information in marketing, the CLECs argue that the past is not a good predictor of the future in the case of the service quality reports, because CLEC service quality data have not yet been published. Because CLECs and ILECs are differently situated, the CLECs argue, the ILECs may make use of the data in ways that the CLECs have not. Again we find that the evidence presented is speculative and not persuasive. AT&T/WorldCom argue

that they must first suffer harm to make the case that service quality reports are trade secrets. Based on this record, we do not find it likely that they will suffer harm at the hands of other carriers from publication of the service quality data. If they do, we invite them to refile their case that the service quality data constitute trade secrets.

We reject Integra's argument that the service quality reports give its competitors a blueprint of its operations. That contention is unsupported and not credible on its face.

Verizon argues that its service quality reports have value because they have an effect on its reputation with the public, and a reputation is of value to a company. We do not consider this to be an argument in favor of trade secret status for the data. The value of a company's own reputation does not constitute independent value, as required by the statute, but is an instance of value to the owner, which AT&T/WorldCom also unsuccessfully argue. *See* Footnote 3 above.

The CLECs object to publication of their service quality data in part because they depend on ILECs for some or all of the services they provide or resell to customers. They are concerned that through no fault of their own, the service quality reports will reflect poorly on their performance. ORS 759.450(6) allows a carrier to show that another carrier has caused its poor performance. The Commission's rules also allow a carrier to exclude trouble reports that resulted from causes beyond its control. OAR 860-023-0055(5)(a). To obtain relief for exclusions that are not listed, a carrier makes a request of Staff and states its reasons for the requested exclusion. CLECs will have the opportunity to have their service quality data exempted under the appropriate circumstances, so that the posted data accurately reflect the quality of service a CLEC offers.

We conclude that the service quality reports of all carriers are not trade secrets; publication of the reports of some, any, or all carriers would therefore not violate the OTSA.

Telecommunications Act Issues:

8. **Would publication of the service quality reports of any, some, or all telecommunications carriers violate Section 253(a) of the Telecommunications Act of 1996?**
9. **Would it violate Section 253(a) of the Telecommunications Act for the Commission to publicly disclose some carriers' (ILECs') service quality reports while failing to publicly disclose the service quality reports of other carriers (CLECs)?**

Section 253 of the Act provides in part:

> (a) In General.—No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

> (b) State Regulatory Authority.—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Verizon argues that publishing all carrier's results would not violate Section 253(a), despite the CLECs' arguments to the contrary. Section 253(b), Verizon contends, requires that any posting rules be the same for CLECs and ILECs. The CLECs' claim that posting their results would cause them competitive harm has no basis under law. Section 253(a) is directly aimed at state rules that might foreclose altogether any entry, blocking competitive services. Nothing of the sort exists with a rule that requires that service quality results be made public.

According to Verizon, the CLECs want the Commission to confuse "being disadvantaged" if their poor results are disclosed with the word "prohibition." Verizon agrees that if a carrier provides poor service it will likely be disadvantaged in the market, but it will not be foreclosed in any fashion based on any state rule or law. **Qwest** also argues that under Section 253(a), the Commission must publish all carriers' service quality results or none.

AT&T/WorldCom argue that publication of the CLECs' reports would violate Section 253. That section, AT&T/WorldCom argue, preempts any law or policy that would have a prohibitive effect on competition. Section 253 plays a central role in the federally mandated restructuring of the industry by prohibiting state and local regulations from creating barriers to entry into the telecommunications market, these carriers assert. AT&T/WorldCom contend that Section 253(a) imposes a substantive limitation on the authority of state and local governments to regulate telecommunications. According to AT&T/WorldCom, courts have interpreted Section 253 broadly to prohibit and preempt state and local regulations that constitute barriers to competitive telecommunications providers' entry into the market. Many competitive carriers have successfully demonstrated that local government franchise requirements create unlawful barriers to entry in violation of Section 253(a).

Similarly, AT&T/WorldCom argue that the FCC has preempted both state and local regulations where they have created a barrier to entry. AT&T/WorldCom maintain that while courts rule that clear barriers to entry such as exclusive franchises are unlawful, Section 253 does not require that a bar be insurmountable before the FCC must preempt it. This section prohibits regulations with an anticompetitive effect.

AT&T/WorldCom argue that posting CLEC service quality data would lead to three specific types of acts by ILECs: stepping up their own marketing efforts in those geographic locations where CLECs are experiencing apparent service quality difficulties; intentionally delivering to CLECs poor or poorer service quality in provisioning and maintenance of underlying facilities; and targeting such poor quality provisioning and maintenance to CLECs in those areas where they are already experiencing difficulties. Such behavior by the ILECs could, AT&T/WorldCom argue, substantially hamper or halt CLEC competitive entry.

Staff, agreeing with Verizon, contends that nothing in Section 253(a) prohibits publication of all carriers' reports. Staff supports its position by referring to *AT&T v. City of Eugene*, 177 Or App 379, 408 (2001), in which the court first noted:

> Precisely what constitutes a violation of Section 253(a) is not spelled out in the statute itself. From the text of the statute, however, this much is clear. First, if a local government regulation expressly prohibits a provider from offering telecommunications services, section 253(a) may be violated. Second, even if the regulation does not expressly prohibit the provision of telecommunications services, it may be sufficiently burdensome as to effectively accomplish the same result. *Id.* at 407-408.

The court went on to observe: "In determining whether a local ordinance has the effect of prohibiting the provision of telecommunications services, the FCC considers 'whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.* at 408. Finally, the court reviewed the evidence AT&T had presented in support of its case that the challenged local ordinance had the effect of prohibiting the provision of telecommunications services. The court was not impressed by AT&T's argument, which the court found "amounts to little more than speculation about the possible effect of the city's telecommunications ordinance on the industry in general." *Id.* at 409-410.

According to Staff, AT&T/WorldCom has not shown how the Commission's policy of posting carriers' reports is sufficiently burdensome under the City of Eugene test to prohibit the provision of telecommunications services. Staff argues that Section 253(a) does not protect a carrier from itself. As Verizon observed: "The CLECs want the Commission to confuse 'being disadvantaged' if their poor results are disclosed with the word 'prohibition.'" Verizon agrees that if a carrier provides poor service it likely will be disadvantaged in the market, but it certainly will not be foreclosed in any fashion based on any state rule or law. The disadvantage arises from the carrier's own conduct.

In a similar manner, according to Staff, AT&T/WorldCom predict that they will have poor service quality only due to the actions of other carriers. While this assumption is questionable, AT&T/WorldCom have not shown how such an occurrence would involve state action prohibited by Section 253(a). Moreover, as discussed above, the Commission allows a carrier to dispute the fairness and accuracy of the results contained in the reports.

Finally, Staff argues that Section 253(b) provides an express limitation to Section 253(a). The court in *City of Eugene* described Section 253(b) as a safe harbor from the reaches of Section 253(a). *Id.* at 406. Section 253(b) preserves state authority over the quality of telecommunications services. Because of the existence of Section 253(b), Section 253(a) has minimal effect in the area of consumer protection and service quality. Staff argues that the Commission's website posting program, which Staff proposes should treat all carriers the same, clearly falls within the safe harbor protection of Section 253(b).

Staff reserves the right to analyze further the issue of whether all carriers should be treated the same, if a carrier makes a better showing or presents more compelling arguments for special treatment than AT&T/WorldCom and Integra have here. On this record, however, Staff contends that a Commission decision to treat all carriers equally does not violate Section 253(a).

Resolution. We agree with Staff's arguments on this issue, point by point. First, the *City of Eugene* case sets out a standard for evaluating whether government action violates Section 253(a). AT&T/WorldCom argue that in *City of Eugene*, the issue was whether local ordinances were burdensome and the issue here is whether CLECs are competitively disadvantaged by the website posting of their service quality reports. Although the facts are different, the standard the court articulated applies to either circumstance: "In determining whether a local ordinance has the effect of prohibiting the provision of telecommunications services, the FCC considers 'whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.* at 408.

Only AT&T/WorldCom argue that posting CLECs' service quality reports would violate Section 253(a).[4] AT&T/WorldCom's reasoning entails the unvoiced assumption that their service quality reports would reflect problems not of their making (AT&T/WorldCom refer to ILECs making marketing efforts where CLECs are experiencing "apparent" service quality difficulties). As Staff has noted, CLECs may apply for exclusion of poor service quality results due to another carrier's fault. Thus website posting will reflect the CLECs' own service quality. We also note that the CLECs have not presented evidence sufficient to convince us that ILECs will behave in the manner CLECs describe. On this record, therefore, we conclude that AT&T/WorldCom's argument about how it would be competitively disadvantaged by posting service quality reports fails. AT&T/WorldCom have not shown how posting their service quality reports would materially inhibit or limit the ability of any competitor or potential

[4] Section 253(b), as a safe harbor statute, cannot be violated.

competitor to compete in a fair and balanced legal and regulatory environment. The website posting will reflect the service quality the CLECs offer, as it will reflect the service quality of every other carrier in a competitively neutral fashion.

Moreover, as Staff has argued, we conclude that Section 253(b) limits the effect of Section 253(a). Website posting of CLECs' service quality reports advances the Section 253(b) goals of consumer protection and preservation of high quality telecommunications service. These goals serve to foster rather than inhibit competition.

We conclude that posting all carriers' service quality reports would not violate Section 253. Posting some carriers' service quality reports could well violate that section, but because we conclude that all carriers' reports should be published, we do not develop that argument here.

Issue 10. Is it in the public interest to publish CLEC service quality reports?

Qwest argues that both Congress and the Oregon Legislature have manifested an intent to open the local telecommunications market to competition. *See generally* 47 USC 251 et seq.; ORS 759.050. In a competitive but somewhat regulated market, the public's right to know must be balanced against Qwest's right to compete on equal footing with its competitors. Thus the public interest requires posting of CLEC service quality reports if ILECs' service quality reports are posted. The public interest, however, does not require disclosure of granular wire center specific service quality data. Qwest had agreed to accommodate the public interest by releasing statewide aggregated service quality data. The public interest requires no more.

Qwest argues that the release of the wire center specific service quality data may be against the public interest. Today's business climate requires access to adequate telecommunications services. Such access often guides investment decisions by businesses. A business may choose not to invest in a specific community if management perceives telecommunications services to be inadequate. Such a misinformed choice could be detrimental to the local economy. Qwest has in the past submitted that the proper use of service quality data should satisfy the public that Qwest's overall quality in Oregon is comparable to that in other states (which it is) and to allow Qwest and the Commission to identify areas that need improvement without undue hardship to the local economy or Qwest's competitive interests.

Verizon contends that disclosure of any service quality reports is likely to be harmful to the public interest.

AT&T/WorldCom argue that the public interest weighs in favor of maintaining the confidentiality of the CLEC service quality reports. Even if it were permissible for the Commission to apply the public interest test to trade secret information, it would find that public interest mandates the protection of the CLEC service quality reports. Congress, the FCC, and this Commission have all declared that competition in local telecommunications markets is in the public interest. If Staff publishes the CLECs' service quality reports, they will be handing the ILECs critical competitive information that they can use to burden or halt CLEC competitive entry. Second, the Oregon Legislature, through the OTSA and OPRL, has declared a public interest in protecting confidential and competitively valuable commercial information.

AT&T/WorldCom contends that the public will be better served by fruits of competition--a variety of services at lower prices and better service quality--than by information on CLECs' service quality reports.

Integra maintains that publication of CLECs' service quality reports will give the public little help in selecting service providers. Misuse of the data by the ILECs, on the contrary, will harm the public. Integra argues that competition in the marketplace will be the test for whether the CLECs can provide the service the public requires. If not, the public has the choice of other providers, including the ILECs. Publication of the service quality reports may be misleading with companies having short histories and for smaller companies. Compared to companies with 50,000 or more access lines, the impact of one customer on the reports for smaller companies may be devastating.

Staff argues that it is in the public interest to publish the CLECs' service quality reports. AT&T/WorldCom and Integra argue that competition is just getting started, so the Commission should not interfere with it. They further argue that the ILECs control the network and will take actions that unfairly affect a CLEC's service quality reports.

Staff is not persuaded by either argument. The CLECs' first argument overlooks the interests of Oregon consumers. Hiding poor service quality results may benefit a particular carrier, but it has a negative impact on competition in general. Competition is best served by the free dissemination of relevant information about what is happening in the marketplace. If a carrier is providing poor service, the solution is for the carrier to improve. The carrier should not seek help from government to keep information from the public. The public, and competition, are best served by knowledge, not by enforced ignorance. *See* Order No. 00-002.

As to CLEC fears of improper conduct by ILECs, Staff characterizes them as speculative and unsupported by evidence in the record. ORS 759.450(6) and the Commission rules expressly allow a carrier to show that another carrier has caused its poor performance. Staff argues that the Commission should not grant CLECs special status with respect to posting their service quality reports.

Resolution. We have discussed above the CLECs' fears that ILECs will skew their service quality results by poor provisioning and poor service of CLEC needs. This record

does not support those fears. We have also discussed the ways in which CLECs can be assured that the service quality reports will reflect their own service quality and not problems caused by other carriers.

We conclude that the public interest favors disclosure of service quality reports. The idea that such disclosure could harm competition seems based in part on the assumption that the reports will not reflect a company's true service quality. As discussed above, the companies have the opportunity to be sure the reports are accurate. We can see no competitive disadvantage in posting reports that accurately reflect the service quality various carriers offer the public. The reports serve both to inform the public in its choice of carriers and to give the carriers an incentive to keep their service quality high. Both effects will aid the development of competition.

Issue 11. Should the Commission post all telecommunications carriers' service quality reports on its website, or none at all?

Qwest argues that if the Commission decides to continue posting its service quality reports, we should also post all carriers' service quality reports. Qwest agrees with the arguments the CLECs make about the confidential nature of telecommunications carriers' service quality data. Qwest disagrees with many of AT&T/WorldCom's arguments about alleged competitive harm based on purported distinctions between ILECs and CLECs. Qwest asserts that it is not fair or equitable to allow the CLECs the competitive advantage of access to ILECs' data and not vice versa. Qwest also notes that the UM 960 stipulation provides that all telecommunications providers must be treated on a comparable basis. Qwest also argues that ORS 759.450 supports its position on this point, and that the Telecommunications Act of 1996 prohibits discriminatory treatment that is not competitively neutral.

Verizon also argues that the Commission should either post the results of all carriers or none. Both state and federal law mandate equal treatment among carriers, according to Verizon. The UM 960 stipulation approved by the Commission in Order No. 00-297 requires that all carriers be treated on a comparable basis to the extent practicable. There is no evidence in the record indicating that posting CLEC service quality data is less practicable than posting ILEC service quality data.

Verizon further contends that CLEC claims that they are at the mercy of ILEC service quality do not reflect the truth that CLECs can be responsible for service quality failures even in a wholesale environment. Further, the service quality rules allow any carrier the opportunity to petition the Commission for specific relief from the reporting requirements.

According to Verizon, carriers hurt by disclosure of service quality reports would have no way to defend themselves against claims that their service was poor in relation to other carriers whose results are not disclosed. This equity argument favors disclosure of the reports of all carriers.

Staff agrees with the ILECs. **AT&T/WorldCom** and **Integra** argue that only ILEC data should be posted because CLECs would be disadvantaged by posting of their service quality data.

Resolution. We agree with Qwest and Verizon that the law (the Telecommunications Act of 1996, ORS 759.450(1), and OAR 860-023-0055) and the equities, as well as the UM 960 stipulation, argue in favor of posting all carriers' service quality reports. We do not agree that CLECs would be disadvantaged by posting of their service quality data, as we have discussed above. We conclude that, since the carriers have not shown their data to be trade secrets, the service quality reports of all carriers should be posted to the website.

CONCLUSIONS

We conclude, based on the record in this case, that the data contained in the service quality reports are not trade secrets. We further conclude that the data of all carriers should be posted to the Commission's website.

ORDER

IT IS ORDERED that the service quality reports of all carriers filed pursuant to OAR 860-023-0055, 860-032-0012, and 860-034-0390 shall be posted to the Commission's website, effective with the next reports filed after service of this order.

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 applicable law.