

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:

QWEST COMMUNICATIONS
CORPORATION,

Complainant,

vs.

SUPERIOR TELEPHONE COOPERATIVE;
THE FARMERS TELEPHONE COMPANY OF
RICEVILLE, IOWA; THE FARMERS &
MERCHANTS MUTUAL TELEPHONE
COMPANY OF WAYLAND, IOWA;
INTERSTATE 35 TELEPHONE COMPANY,
d/b/a INTERSTATE COMMUNICATIONS
COMPANY; DIXON TELEPHONE COMPANY;
REASNOR TELEPHONE COMPANY, LLC;
GREAT LAKES COMMUNICATION CORP.;
AND AVENTURE COMMUNICATION
TECHNOLOGY, LLC,

Respondents;

DOCKET NO. FCU-07-2

REASNOR TELEPHONE COMPANY,

Counterclaimant,

vs.

QWEST COMMUNICATIONS
CORPORATION AND QWEST
CORPORATION,

Counterclaim Respondents.

**ORDER DENYING MOTION TO COMPEL REDESIGNATION,
DENYING MOTION TO COMPEL PRODUCTION OF DOCUMENTS,
AND GRANTING LIMITED CONFIDENTIAL TREATMENT**

(Issued October 26, 2007)

PROCEDURAL HISTORY

On October 10, 2007, Qwest Communications Corporation (QCC) filed with the Utilities Board (Board) an emergency motion to compel the redesignation of documents produced to QCC during discovery by The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa (Farmers) and to compel the production of additional documents from Farmers. QCC asserts that during the course of a recent proceeding before the Federal Communications Commission (FCC),¹ Farmers misrepresented certain information. QCC claims that in reaching its decision, the FCC specifically relied on these misrepresentations. QCC states that certain documents that Farmers claims are confidential but produced to QCC in response to QCC's discovery in this proceeding demonstrate the misrepresentation, QCC asks the Board to redesignate those documents as non-confidential so that they may be presented to the FCC as part of QCC's request for reconsideration of the FCC Decision. In addition, QCC asks the Board to compel Farmers to produce documents that Farmers has withheld based on a claim of privilege.

In support of QCC's request to redesignate certain documents submitted to QCC by Farmers, QCC states that Section 13 of the protective agreement that was signed by both QCC and Farmers provides that any party may challenge another party's designation of a document as confidential. Specifically, QCC cites the following language of the protective agreement:

Challenge to Designation. In the event that any party disagrees in connection with any filings or presentation of

¹ See In re: Qwest Communications Corp. v. Farmers and Merchants Mutual Tel., FCC File No. EB-07-MD-001 (issued October 2, 2007) (hereafter referred to as "FCC Decision").

evidence before the Iowa Board with the designation of any Documents as "CONFIDENTIAL," the parties shall try first to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the party objecting to such designation shall seek appropriate relief from the Iowa Utilities Board. Until such time as the issue is resolved by the Iowa Board, the Document(s) shall be treated according to its designation as "CONFIDENTIAL."

QCC states that it has attempted in good faith to have Farmers redesignate the documents in question and that Farmers has not agreed to redesignation.

QCC also states that the protective agreement among the parties in this proceeding is premised on the Board's rules and procedures for confidential information. QCC asserts that the only documents that should qualify for protection under the Board's rules are those that contain either trade secrets, pursuant to 199 IAC 1.9(5)"a"(1), or information which "if released, would give advantage to competitors and serve no public purpose," pursuant to 199 IAC 1.9(5)"a"(3). QCC claims that the documents for which QCC seeks redesignation contain neither trade secrets nor competitively sensitive information.

In support of its motion to compel the production documents from Farmers that Farmers has withheld as privileged, QCC states that some of the documents concern contract negotiations with a third party and that the attorney-client privilege does not apply to such documents. In addition, QCC states that the common interest doctrine does not protect the communications because such communications to the opposing party in a transaction are not communications in furtherance of a common legal interest. QCC also states that the attorney work product doctrine does not apply to these documents because attorneys' opinions are only protected if they are provided

to clients and maintained as confidential; once the opinions are disclosed to third parties, any possible protection is not available. QCC also asserts that the crime-fraud exception pierces any privilege that Farmers asserts because the documents at issue were allegedly used in the furtherance of a fraud against the FCC.

On October 11, 2007, QCC filed with the Board a request to shorten the time allowed to Farmers to respond to QCC's motion. The Board issued an order on October 17, 2007, pursuant to 199 IAC 7.12, giving Farmers ten days from the date the motion was filed to submit a response.

On October 18, 2007, Farmers filed a motion to strike QCC's motion from the record and a resistance to QCC's October 10, 2007, motion. Farmers asserts that QCC's motion is prohibited by the parties' protective agreement and the documents in question are confidential and subject to protection under the protective agreement. Farmers states that the protective agreement specifically limits the use of such documents to this proceeding and prohibits their use in other proceedings. In addition, Farmers asserts that the additional documents sought to be compelled by QCC are protected by the attorney-client privilege and the attorney work product doctrine and that the crime-fraud exception has no application to this case.

In support of its response to QCC's motion for redesignation, Farmers states that the documents in question were properly designated as confidential under the protective agreement and that the protective agreement provides broad protection of confidential documents in order to facilitate the free exchange of documents during discovery. Farmers cites to Paragraph 10 of the protective agreement, which provides:

Persons obtaining access to Stamped Confidential Documents or Confidential Information under this Protective Agreement shall use the information solely for the preparation and conduct of this proceeding and any subsequent judicial proceeding directly related to this proceeding and, except as provided herein, shall not use such information for any other purpose, including business, governmental, commercial, or other administrative, regulatory, or judicial proceeding.

Farmers asserts that the parties that signed the protective agreement intended that confidential documents produced during discovery could only be used in this proceeding before the Board and could not be used in any other proceeding.

Farmers also argues that the language of Paragraph 13 of the protective agreement, which QCC relied upon in its motion, provides that any request for redesignation is limited to situations where a party is submitting a confidential document in connection with a filing or presentation of evidence in the proceeding before the Board. Farmers asserts that QCC's motion is improper because the request was not made "in connection with any filings or presentation of evidence before the Board" as required by the protective agreement.

Farmers also argues that the Board should deny QCC's request to compel the production of information that is privileged. Farmers states that QCC seeks communications between Farmers and its lawyers, which are protected by the attorney-client privilege and the attorney work product doctrine. Farmers asserts that the communications between Farmers and its counsel are protected unless QCC meets the burden of establishing that Farmers waived the privilege and QCC has not presented evidence of such a waiver. Farmers also argues that QCC cannot avail itself of the crime-fraud exception because its claim is based solely on "temporal

proximity" and speculation that the communications are related to a crime or fraud. Farmers states that such speculation does not meet the burden required to allow QCC to avail itself of the exception.

On October 22, 2007, QCC filed a reply to Farmers' response, wherein QCC generally restates its earlier arguments. QCC asserts that the protective agreement specifically allows the Board to designate the documents in question as public, that the documents at issue are not trade secrets worthy of protection, and that the Board should pierce any applicable protective agreements to prevent a fraud from being perpetrated on the FCC by Farmers.

In addition, on October 22, 2007, Sprint Communications Company L.P. (Sprint) filed a statement in support of QCC's motion to redesignate certain materials. Sprint states that the evidence obtained in QCC's proceeding before the Board also appears to be directly relevant to other arguments Sprint and others are making in federal court. Sprint asserts that the public interest is not served if Farmers can hide behind a private protective agreement to make it difficult for regulators to understand the true extent of the alleged access charge manipulation. Sprint states that the multi-jurisdictional relevance of this case makes this a unique situation and the Board's obligation to the public interest trumps Farmers' interest in keeping its discovery hidden from other regulators.

DISCUSSION

Motion for Redesignation of Confidential Documents

QCC argues that the protective agreement, which was signed by QCC and Farmers, allows the Board to redesignate confidential material exchanged during the course of discovery in this proceeding. QCC claims that the parties did not intend to limit the Board's authority to determine what documents should be released publicly. QCC bases its request for redesignation on Paragraph 13 of the protective agreement, which allows a party to challenge another's designation of a document as being confidential. QCC also claims that the documents at issue do not contain any trade secret information or competitively sensitive information and therefore should not be designated as confidential.

Farmers asserts that the protective agreement provides broad protection of confidential documents and that QCC is attempting to violate the agreement by asking the Board to redesignate the documents for use in another administrative proceeding. Farmers also claims that according to the protective agreement, any request for redesignation should be limited to situations where a party is submitting a confidential document in connection with a filing or presentation of evidence in the proceeding before the Board. Farmers also claims that pursuant to Paragraph 10 of the protective agreement, QCC agreed that the confidential documents would be used "solely for the preparation and conduct of this proceeding . . . and shall not use such information for any other purpose, including . . . other administrative, regulatory, or judicial proceedings." Finally, Farmers asserts that the documents at issue were

properly designated as confidential under the protective agreement and should therefore remain as such.

The Board has reviewed the documents submitted by QCC and Farmers and agrees with Farmers that the protective agreement provides broad protection of confidential documents obtained during the discovery process of this proceeding. The Board also agrees with Farmers that Paragraph 10 of the protective agreement expressly provides that the use of confidential information obtained during discovery in this proceeding shall only be used for the purpose of preparation and conduct of this proceeding and that such information shall not be used for any other purpose, including other administrative, regulatory, or judicial proceedings. Thus, the Board must deny QCC's request insofar as it seeks the redesignation of confidential documents for use in another regulatory proceeding before the FCC.

The Board also finds that Paragraph 13 of the protective agreement, on which QCC relies, does not apply to this situation. As QCC suggests, Paragraph 13 allows any party that disagrees "in connection with any filings or presentation of evidence before the Board" with the designation of any documents obtained during discovery as confidential, the party may seek appropriate relief from the Board. The Board agrees with Farmers that pursuant to this paragraph, any request for redesignation is limited to situations where a party is submitting a confidential document in connection with a filing or presentation of evidence before the Board, not to the FCC. The Board does not find QCC's response to Farmers' explanation persuasive. While the confidential documents at issue were submitted to the Board in connection with a filing, that filing was QCC's motion for redesignation. The Board does not agree with

QCC that the submission of confidential documents in connection with a request to redesignate those documents as non-confidential is the kind of submission that was contemplated by the protective agreement; if it were, the limitation quoted in the first sentence of this paragraph would be meaningless.

The Board also finds that Farmers properly designated the documents in question as being confidential pursuant to the protective agreement. The protective agreement allowed a party to designate as confidential any documents considered by that party to be confidential or proprietary. The Board agrees with Farmers that the confidentiality of the documents at the time of production is governed by the parties' protective agreement, not the Board's rules governing public disclosure of agency records or trade secrets. Only when the documents are filed with the Board in a manner directly relevant to the Board's proceedings will the Board's rules apply. Moreover, the Board notes that this protective agreement was neither Board-sanctioned nor an agreement form provided by the Board, but rather was negotiated and signed by the participants in this proceeding. Therefore, for the above stated reasons, the Board denies QCC's motion to redesignate the requested documents as non-confidential.

Motion to Compel the Production of Documents

QCC asks that the Board compel Farmers to produce documents to QCC that Farmers has withheld on the basis of privilege. QCC asks for two categories of communications: (1) communications regarding contracts and contract negotiations; and (2) communications among Farmers and its lawyers about backdating contracts and invoices. QCC claims that the attorney-client privilege does not apply to either

category of documents, as asserted by Farmers. QCC also claims that neither the common interest doctrine nor the attorney work product doctrine protects these communications. QCC asserts that the crime-fraud exception pierces the claimed privilege and allows the Board to order the immediate production of the documents or order Farmers to produce a privilege log for the Board's review.

Farmers asserts that with respect to the first category of documents, Farmers believes it has produced all communications regarding the parties' contracts or contract negotiations. Farmers also maintains that the documents identified but not produced in response to the second category, i.e., the communications between Farmers and its attorneys, are protected by the attorney-client privilege and the attorney work product doctrine. Farmers claims that these communications are protected unless QCC can meet the burden of establishing that Farmers waived the privilege and that QCC has not presented any evidence of such a waiver. Farmers also asserts that QCC has not met the burden of proving the crime-fraud exception so as to overcome the attorney-client privilege or the attorney work product doctrine.

The Board finds that the attorney-client privilege and the attorney work product doctrine are important interests, as reflected in the protection extended to documents "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Iowa R. Civ. P. 1.503(3). The Board finds that the communications between Farmers and its counsel are protected. QCC has not presented any persuasive evidence that demonstrates Farmers waived its privileges and the Board does not agree with QCC's assertion that the crime-fraud exception pierces the privilege in this instance. The Board agrees with Farmers that QCC's

claim for the crime-fraud exception is based only on the fact that the documents are dated in temporal proximity to other actions and speculation between the communication and the alleged fraud. Speculation and temporal proximity do not satisfy the requirements that QCC must meet in order to warrant production of the privileged documents. The Board will also deny QCC's request for a privilege log based on the above-stated reasons.

Requests for Confidentiality

On October 11 and October 22, 2007, QCC filed requests for confidential treatment of certain documents submitted in support of QCC's motion for redesignation and motion to compel. The material for which confidentiality was requested was filed in a separate envelope and marked confidential; the information is, in fact, the documents that QCC sought to have redesignated.

Iowa Code § 22.7(3) provides confidential treatment for trade secrets that are recognized and protected as such by law. The requests indicate that the material submitted by QCC includes information provided to QCC by Farmers. QCC states that Farmers has designated the information as confidential pursuant to a protective order that applies to discovery in this proceeding.

Board rule 199 IAC 1.9(6)"b" provides that in a request for confidential treatment, the facts underlying the legal basis for the request shall be supported by an affidavit executed by a corporate officer with personal knowledge of the specific facts. Therefore, the Board generally requires an affidavit from an officer of the company where the documents originated to attest to the confidential nature of the information.

The Board has recognized the unusual circumstances in this case whereby QCC and the respondents in this matter have obtained access to confidential documents from several non-parties pursuant to an executed protective agreement. Previously, the Board has accepted an affidavit from QCC's attorneys attesting to the confidential nature of the information as substantial compliance with 199 IAC 1.9(6) in this matter.

In this situation, however, it is understandable that QCC would not want to attest to the confidentiality of information that it seeks to have redesignated as non-confidential. Therefore, the Board will hold the information submitted by QCC in support of its motion for redesignation and motion to compel as confidential for 14 days following the issuance of this order and allow Farmers to submit an affidavit attesting to the confidential nature of the information. If no affidavit is submitted in that time, the document, and the information they contain will be released to the public record.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The "Motion to Compel Redesignation of Documents Produced by Farmers & Merchants of Wayland and to Compel Production of Documents" filed by Qwest Communications Corporation on October 10, 2007, is denied as described in this order.

2. The motion to strike filed on October 18, 2007, by The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa, is denied as described in this order.

3. The requests for confidentiality filed by Qwest Communications Corporation on October 11, 2007, and October 22, 2007, are granted for a period of 14 days following the issuance of this order.

4. The information shall be held confidential by the Board for 14 days following the issuance of this order subject to the provisions of 199 IAC 1.9(8)"b"(3).

UTILITIES BOARD

/s/ John R. Norris

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 26th day of October, 2007.