

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, LLC

Counterclaimant,

vs.

QWEST COMMUNICATIONS
CORPORATION AND QWEST
CORPORATION,

Counterclaim Respondents.

**ORDER DENYING MOTION TO STRIKE, GRANTING CROSS-MOTION, IN PART,
AND GRANTING REQUESTS FOR CONFIDENTIAL TREATMENT**

(Issued May 20, 2008)

I. MOTION TO STRIKE

On April 14, 2008, Superior Telephone Cooperative; Farmers Telephone Company of Riceville, Iowa (Farmers – Riceville); Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; Great Lakes Communications Corp. (Great Lakes); and Dixon Telephone Company (collectively referred to as the Respondents) filed a motion to strike certain deposition testimony filed under seal by Qwest Communications Corporation (QCC) on March 17, 2008. The Respondents state that on March 17, 2008, QCC filed transcripts of testimony from 26 depositions as exhibits to the direct testimony of Mr. Jeffrey Owens. The Respondents assert that QCC attached the transcripts in their entirety, rather than only the relevant excerpts from those transcripts. The Respondents claim that the inclusion of the non-cited portions of the deposition testimony as exhibits is overinclusive and therefore should be stricken. The Respondents request in the alternative that if the Board does not strike the non-cited testimony, the Board maintain those portions of the testimony as confidential or allow the Respondents an opportunity to further designate the appropriate portions of the testimony as confidential.

On April 25, 2008, QCC filed a response to the Respondents' motion to strike. QCC asserts that the witnesses whose deposition testimony was attached to QCC's testimony are QCC's witnesses. QCC states that the deposition testimony is additional pre-filed testimony that reinforces and supports QCC's positions in addition to being factual sources for QCC's written testimony. QCC argues that the law

contemplates the submission of deposition testimony as a part of QCC's direct case and that the testimony is proper as submitted. In addition, QCC states that it has no objection to the Respondents' suggestion that they be allowed to further designate appropriate portions of the deposition testimony as confidential should the Respondents' motion to strike be denied.

The Board understands that the deposition testimony submitted by QCC in support of its initial testimony on March 17, 2008, is filed in support of QCC's initial testimony. However, it is not clear that the deposition testimony of these witnesses who were produced by Respondents, some of whom may have been deposed pursuant to subpoenas, are properly considered QCC's own witnesses. Nevertheless, it appears the deposition testimony submitted by QCC is relevant to QCC's complaint, reinforces and supports QCC's position, and therefore should not be stricken at this time. QCC explains that when a witness cites a specific page of the deponent's testimony, the explanation of the details or the context of the answer may take several pages before and after the cited page. The Board agrees with QCC that the deposition testimony as submitted provides the Board with a more complete record by providing context. Therefore, the Board will deny the Respondents' motion to strike.

With respect to the Respondents' request that the non-cited portions of the deposition testimony be permanently withheld from public inspection, the Board finds that this general request does not comply with Iowa Code § 22.7 or the Board's rules regarding the confidential treatment of public records. The Board notes that QCC

does not object to the Respondents' alternative suggestion that they be allowed an opportunity to further designate specific portions of the deposition testimony as confidential. The Board will allow the Respondents 30 days from the date of this order to request that specific portions of the 26 depositions submitted as exhibits to the direct testimony of QCC witness Owens be maintained as confidential. That request should substantially comply with the requirements of Iowa Code § 22.7 and 199 IAC 1.9.

II. CROSS-MOTION

On March 17, 2008, QCC filed its direct testimony and exhibits, portions of which were filed under seal pursuant to confidentiality agreements. On March 31, 2008, the Respondents filed a request with the Board asking that QCC's testimony and exhibits that were filed under seal be withheld from public inspection and seeking additional time to review the QCC's testimony and specifically identify those portions of the record that should be withheld from public inspection pursuant to Iowa Code § 22.7.

On April 14, 2008, the Respondents filed a supplement to their March 31, 2008, request, which specifically identified the portions of the QCC testimony and exhibits that the Respondents requested be withheld from public disclosure. The portions of the QCC testimony and exhibits sought to be withheld are attached to the Respondents' April 14, 2008, filing as Exhibit A.

Also on April 14, 2008, QCC filed a response to the Respondents' March 31, 2008, request and a cross-motion seeking the redesignation of selected portions of the deposition testimony of Farmers – Riceville and Great Lakes. Specifically, QCC seeks redesignation of three excerpts of testimony contained in the confidential deposition of Farmers – Riceville witnesses and 11 excerpts of testimony contained in the confidential deposition of Great Lakes' witnesses.

QCC also seeks to designate as public selected portions of the deposition testimony of witnesses for Aventure Communication Technology, LLC (Aventure), stating that Aventure has not filed a specific request for confidential treatment of any portion of QCC's testimony or exhibits as required by 199 IAC 1.9(6).

QCC states that it seeks to designate the deposition testimony as public so that it can provide the information to the Federal Communications Commission (FCC) in pending dockets. QCC asserts that Aventure, Great Lakes, and Farmers – Riceville have presented these categories of information publicly to the FCC, but either misrepresented the facts or failed to disclose all of the relevant facts to the FCC. QCC therefore requests that the deposition extracts be deemed public. QCC argues that Iowa Code § 22.7 provides that the Board may only protect information from public review if it meets one of the exceptions provided in that statute, in this case trade secrets or competitively sensitive information. Iowa Code § 22.7(3). QCC maintains that Aventure, Great Lakes, and Farmers – Riceville have not demonstrated that the identified testimony is a trade secret or competitively sensitive.

On April 21, 2008, Great Lakes and Farmers – Riceville filed a response to QCC's cross-motion stating that the April 14, 2008, supplement filed by the Respondents indicates that Great Lakes and Farmers – Riceville seek confidential treatment of only one of the 14 excerpts that QCC requested for redesignation. Great Lakes and Farmers – Riceville state that this single excerpt contains ten lines that were included in its April 14, 2008, supplement as part of a larger section of testimony discussing confidential contract terms.¹ Great Lakes and Farmers – Riceville state that they will withdraw their claim of confidentiality as to this portion of Great Lakes' deposition because those specific lines of testimony do not disclose the confidential contractual terms.

On May 2, 2008, QCC filed a request to have Aventure's deposition testimony designated as public information. QCC states that pursuant to the Board's procedural schedule, a response was due from Aventure on or before April 21, 2008, and that Aventure failed to timely respond. QCC asks that the Board find Aventure's deposition testimony is public information pursuant to 199 IAC 7.12.

On May 7, 2008, Aventure filed a resistance to QCC's cross-motion. Aventure states that when QCC filed its cross-motion on April 14, 2008, Aventure was in the process of changing counsel in this case.

The Board has reviewed QCC's cross-motion and the response filed by Farmers – Riceville and Great Lakes regarding the excerpts of testimony contained in certain deposition testimony filed as exhibits to QCC's initial testimony and finds that

¹ The excerpt in question is found at Great Lakes deposition page 43, line 22, through page 44, line 6.

the request is moot because of the April 21, 2008, filing by Great Lakes and Farmers – Riceville. Therefore, the portions of the deposition testimony of witnesses for Farmers – Riceville as specified by QCC on April 14, 2008, will be released for public inspection.

The Board has also reviewed QCC's cross-motion regarding Aventure's deposition testimony as well as Aventure's response. The Board agrees that Aventure should have replied to QCC's cross-motion on or before April 21, 2008. However, the Board also understands Aventure's special circumstance regarding its change of counsel and therefore will accept Aventure's late-filed resistance.

Aventure's resistance, however, does not satisfy the procedures outlined in 199 IAC 1.9(6) regarding requests for material or information that should be withheld from public inspection. Aventure's resistance does not provide a specific legal basis under Iowa Code § 22.7 for withholding the deposition testimony from inspection, nor does the resistance provide specific facts to support a legal basis. Moreover, Aventure's resistance was not supported by an affidavit executed by a corporate officer with personal knowledge of the alleged confidential information as required by 199 IAC 1.9. Therefore, the Board proposes to release Aventure's deposition testimony, which was submitted by QCC on March 17, 2008, pursuant to 199 IAC 1.9(8)"b"(3).

In accordance with the Board's rules, Aventure will be afforded 14 days from the date of this order to either file a more specific request for confidential treatment with the Board that substantially complies with 199 IAC 1.9(6) or seek injunctive relief

from a court of competent jurisdiction. If a specific request for confidential treatment or injunctive relief is not requested within this period, Aventure's deposition testimony will be produced for inspection. If a proper request for confidential treatment is filed with the Board within 14 days, the deposition testimony will continue to be treated as a confidential record until the Board rules on the request.

III. REQUESTS FOR CONFIDENTIAL TREATMENT

On April 14, 2008, the Respondents filed a request that certain portions of the testimony and exhibits submitted by QCC on March 17, 2008, specifically identified in Exhibit A attached to their request, be treated as confidential material pursuant to 199 IAC 1.9(5). The Respondents assert that the identified portions of QCC's testimony and exhibits contain confidential business information relating to the Respondents, including contract provisions, correspondence, invoices, payment records, accounts receivable, revenue figures, rate calculations, traffic summaries, and other sensitive financial information. The Respondents state that this information constitutes trade secrets and they support their request for confidentiality with affidavits by corporate officers.

Iowa Code § 22.7(3) provides confidential treatment for trade secrets which are recognized and protected as such by law. The material submitted by QCC and identified by the Respondents includes specific information regarding confidential business information, including contracts, correspondence, and communication with accountants.

The Board finds that the request and affidavits support a finding that the identified portions of QCC's testimony and exhibits constitute trade secrets under Iowa Code § 550.2(4) as they derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by a person able to obtain economic value from its disclosure, and the information is the subject of reasonable efforts to maintain its secrecy. The Board finds that this information, if released, would provide an advantage to the Respondents' competitors. Therefore, the Board will maintain the identified documents and information as confidential under the provisions of Iowa Code § 22.7(3) as requested by the Respondents on April 14, 2008.

Also on April 14, 2008, QCC filed a request for confidential treatment of information and documents submitted in support of QCC's combined response and cross-motion to designate certain deposition testimony as public. QCC states that the information contained in Exhibits 1 through 5, attached to QCC's combined response and cross-motion, is also the subject of QCC's cross-motion to designate that information as public. The Board has determined in this order that the information contained in Exhibits 1 through 5 of QCC's combined response and cross-motion are to be released for public inspection. Therefore, the Board will review QCC's request for confidential treatment insofar as it relates to Exhibits 6 through 8 of the combined response and cross-motion.

QCC states that Exhibits 6 through 8 attached to its combined response and cross-motion contain information that should be kept confidential pursuant to

protective agreements. QCC states that this information was produced by the Respondents and various subpoenaed persons who designated this information as confidential pursuant to a protective agreement signed by the participants. The material for which confidentiality was requested was filed in a separate envelope and marked confidential.

Iowa Code § 22.7(3) provides confidential treatment for trade secrets that are recognized and protected as such by law. QCC's request indicates that the material referenced in its cross-motion has been designated as confidential pursuant to a protective agreement that applies to these participants.

The Board finds that the request for confidential treatment of Exhibits 6 through 8, submitted by QCC in support of its combined response and cross-motion on April 14, 2008, supports a finding that the information constitutes a trade secret under Iowa Code § 550.2(4) as it derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by a person able to obtain economic value from its disclosure, and it is the subject of reasonable efforts to maintain its secrecy. Therefore, the Board will hold Exhibits 6 through 8 attached to QCC's combined response and cross-motion filed on April 14, 2008, as confidential under the provisions of Iowa Code § 22.7(3), as requested by QCC April 14, 2008.

IV. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The motion to strike filed by Superior Telephone Cooperative; Farmers Telephone Company of Riceville, Iowa; Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; Great Lakes Communications Corp.; and Dixon Telephone Company on April 14, 2008, is denied as described in this order.

2. Superior Telephone Cooperative; Farmers Telephone Company of Riceville, Iowa; Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; Great Lakes Communications Corp.; and Dixon Telephone Company may request that specific portions of the deposition testimony attached as exhibits to the direct testimony of witness Jeffrey Owens be designated confidential within 30 days of the date of this order.

3. The cross-motion filed by Qwest Communications Corporation on April 14, 2008, is granted, in part, as described by this order.

4. The identified portions of the deposition testimony of Farmers Telephone Company of Riceville, Iowa, and Great Lakes Communication Corp., as described in the cross-motion filed by QCC on April 14, 2008, shall be made available for public inspection.

5. Aventure Communication Technology, LLC, shall be afforded 14 days from the date of this order to either file a more specific request for confidential

treatment with the Board or a request for injunctive relief, as described in this order. If a specific request for confidential treatment or motion for injunctive relief is not requested within this period, the deposition testimony of Aventure Communication Technology that is the subject of QCC's cross-motion filed April 14, 2008, shall be made available for public inspection without further action by the Board.

6. The requests for confidential treatment filed by Superior Telephone Cooperative; Farmers Telephone Company of Riceville, Iowa; Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; Great Lakes Communications Corp.; and Dixon Telephone Company on April 14, 2008, and Qwest Communications Corporation on April 14, 2008, are granted as described in this order. The information requested shall be held confidential by the Board 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

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 20th day of May, 2008.