

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 FOR PROTECTIVE ORDER

(Issued November 24, 2008)

On October 27, 2008, Qwest Communications Corporation (QCC) filed with the Utilities Board (Board) a motion for a protective order against depositions of Mr. Randy Struthers and Ms. Betty Lee. QCC states that Mr. Struthers and Ms. Lee, two of QCC's technicians, inspected the central offices of Great Lakes Communications Corp. and Superior Telephone Cooperative (collectively "Respondents") on October 14, 2008, which included taking several photographs. QCC states that it produced the photographs to the Respondents. QCC also states that on October 14, 2008, the Respondents noticed the depositions of Mr. Struthers and Ms. Lee to take place on October 29, 2008. QCC asserts that upon receipt of the notices, its counsel contacted Respondents' counsel to state that the depositions would be a waste of time because the information sought was either contained in the photographs that QCC agreed to produce or was privileged.

QCC states that it seeks a protective order against these two depositions because the Respondents already have all non-privileged, relevant information from the inspections and the only other information that can be retrieved from the depositions is protected by attorney-client privilege or is protected work product. QCC also states that these depositions are cumulative, unduly burdensome, and intruding on QCC's privileged information.

On October 31, 2008, the Respondents filed a reply in opposition to QCC's motion. The Respondents state that they are not requesting information that may properly be deemed privileged, but rather are seeking to depose Mr. Struthers and

Ms. Lee as to their personal impressions obtained during their inspections. The Respondents assert that the attorney work product doctrine chiefly protects the "mental impressions, conclusions, opinions or legal theories" of counsel. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). The Respondents state that they seek the observations of Mr. Struthers and Ms. Lee during their inspections, not the notes, memoranda, or summaries based on Mr. Struthers' and Ms. Lee's observations. The Respondents argue that the independent observations of fact witnesses are not the same as the mental impressions of their attorneys and to shield Mr. Struthers and Ms. Lee from deposition would deprive Respondents of their right to confront evidence.

The Respondents also argue that QCC has waived its attorney-client privilege regarding these depositions. The Respondents state that QCC has relied on the impressions of Mr. Struthers and Ms. Lee in testimony and in its October 27, 2008, motion to the Board. The Respondents assert that QCC cannot rely on the observations and impressions of Mr. Struthers and Ms. Lee and yet shield them from the Respondents.

The Board has reviewed QCC's motion and the Respondents' reply and finds that the Respondents are entitled to depose Mr. Struthers and Ms. Lee regarding their independent observations of their inspections of the Respondents' central offices on October 14, 2008. The Board agrees with the Respondents that they are entitled to access to these witnesses, whose impressions have been relied upon by

QCC in its rebuttal testimony, and finds that Mr. Struthers' and Mr. Lee's observations during the inspection are not protected by attorney-client or work product privileges. Therefore, the Board will direct QCC to make Mr. Struthers and Ms. Lee available for deposition.

IT IS THEREFORE ORDERED:

1. The motion for protective order filed by Qwest Communications Corporation on October 27, 2008, is denied.
2. Qwest Communications Corporation is directed to make Mr. Randy Struthers and Ms. Betty Lee available for deposition by Respondents Great Lakes Communications Corp. and Superior Telephone Cooperative.

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 24th day of November, 2008.