

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, GRANTING
CROSS MOTION TO COMPEL, DENYING CROSS MOTION FOR
REDESIGNATION OF CONFIDENTIAL DOCUMENTS, DENYING CROSS MOTION
FOR PROTECTIVE ORDER, AND GRANTING REQUESTS
FOR CONFIDENTIAL TREATMENT**

(Issued December 10, 2008)

**I. MOTION FOR PROTECTIVE ORDER, CROSS MOTION TO COMPEL,
CROSS MOTION TO REDESIGNATE DOCUMENTS AS
NON-CONFIDENTIAL, AND CROSS MOTION
FOR PROTECTIVE ORDER**

A. Background

On September 17, 2007, Superior Telephone Cooperative; The Farmers Telephone Company of Riceville (Farmers), Iowa; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, and non-parties All American Telephone Company, Inc.; e-Pinnacle Communications, Inc.; Chase Communications; and OmniTel Communications (collectively Movants) filed with the Utilities Board (Board) a request for a protective order prohibiting CLEC Connect, LLC (CLEC Connect), and any of its agents from disclosing a document in its possession and ask that the Board direct CLEC Connect to return the document to Movants and destroy all copies of the document, including electronic copies.

In support of their motion, Movants state that the document at issue is a memorandum prepared by Movants' counsel that sets out litigation strategy against AT&T Communications of the Midwest, Inc., and TCG Omaha (collectively AT&T) in a case pending in the federal district court of New York. Movants state that their counsel forwarded the memorandum to its client, Farmers, to provide legal advice regarding Farmers' claims against AT&T in New York; Farmers in turn forwarded the memorandum to Bright Technologies (Bright) to further the common interest between Farmers and Bright in the New York proceeding. Movants state that without authorization from Farmers or the other Movants, Bright forwarded the memorandum to CLEC Connect. Movants assert that Qwest Communications Corporation (QCC)

served a subpoena on CLEC Connect demanding that CLEC Connect produce the memorandum.

Movants argue that the memorandum is protected by the common interest doctrine of the attorney-client privilege and is not subject to production. Movants further argue that because neither Farmers nor the other Movants authorized Bright's disclosure of this document to CLEC Connect, the memorandum retains its privileged status under the common interest doctrine. Movants assert that they are entitled to a protective order prohibiting CLEC Connect from producing this memorandum to QCC and ordering the return or destruction of all copies of the document in CLEC Connect's possession.

On October 2, 2007, QCC filed a response to the Movants' motion as well as a cross motion to compel the production of withheld documents and a cross motion to redesignate confidential documents as non-confidential. Regarding its response, QCC states that the memorandum in question has been extensively disclosed to third persons outside any common legal interest with Movants. QCC asserts that the common interest doctrine is intended to protect communications between parties who have agreed to share their attorney communications in furtherance of pursuing a common legal interest; it does not apply when there is no agreement or when a member of the common interest agreement discloses the document to third parties.

Regarding its cross motion to compel the production of withheld documents, QCC states that counsel for Reasnor Telephone Company, LLC (Reasnor), and non-party Sully Telephone Association, Inc. (Sully), created an e-mail message regarding the back-dating of a contract between Sully and A-Plus Conferencing, an affiliate of

One Rate Conferencing (One Rate), and then sent that message to counsel for One Rate during contract negotiations. QCC states that One Rate turned over the document in discovery and does not claim that it is privileged, but that Reasnor claims that the document is protected by the attorney-client privilege. QCC argues that the attorney-client privilege does not extend to the e-mail because Sully's counsel sent the message to One Rate, the opposing party during contract negotiations. QCC states that even though Sully and One Rate were working together to achieve a commercial goal, that fact, by itself, cannot establish an identity of interest between the parties. QCC also asserts that the attorney work product doctrine does not apply to the e-mail message because an attorney's opinions are only protected if they are provided only to clients and maintained as confidential. QCC claims that because the e-mail message was produced by One Rate during discovery, and because One Rate does not claim that the e-mail message is privileged, the attorney work product doctrine no longer applies.

Regarding the redesignation of confidential materials, QCC asks the Board to direct the Movants to produce the memorandum and Reasnor and Sully to produce the e-mail and as non-confidential documents. QCC also asks the Board to provide some guidance regarding the type of material that can be designated as confidential pursuant to the protective agreement entered into among the parties in this action. QCC asserts that neither the memorandum nor the e-mail message is competitively sensitive; the memorandum regards the Movants' public litigation against AT&T and the message contains no trade secrets or competitively-sensitive information.

QCC also asks that the Board redesignate certain requests by Interstate 35 Telephone Company, d/b/a Interstate Communications Company (Interstate), to retroactively back-date contracts. QCC asserts that each of these requests have been produced as confidential pursuant to the protective agreement among the parties and QCC argues that the documents should be produced as public because the information was already produced by One Rate.

On October 12, 2007, Sully filed a resistance to QCC's cross motion to compel the production of withheld documents and a cross motion for a protective order for the e-mail message at issue. In support of its resistance, Sully states that the e-mail message was a communication made during cooperation between the attorney representing A-Plus Conferencing and the attorney representing Sully and Reasnor. Sully states that the message was prepared by Reasnor's attorney in anticipation of litigation and is opinion work product. Sully argues that it entered into a protective agreement with QCC and that as part of that agreement, the disclosure of confidential information "shall not be deemed a waiver by the disclosing party of any privilege" and that the parties to the agreement "agree not to assert any such waiver." Sully asserts that as a result of this protective agreement, the e-mail message remains protected by the attorney-client privilege and that the privilege has not been waived by One Rate's inadvertent release of the document.

On October 16, 2007, the Movants filed a reply to QCC's response and a resistance to QCC's cross motions. Movants again assert that the memorandum at issue is protected from disclosure by the attorney-client privilege and work product doctrine and that those protections have not been waived. In addition, Movants

argue that the language of the protective agreement among the Movants and QCC describing protected documents is broader than the terms QCC proposes in its cross motions. The Movants state that the parties to the protective agreement did not limit protection under the agreement to trade secrets and competitively-sensitive information; rather, the agreement allows for the producing party to designate a document as confidential if that party believes the information therein is confidential or proprietary. The Movants argue that the terms of the protective agreement are clear and that QCC has not provided any basis for the redesignation of the memorandum or the e-mail message as non-confidential. In addition, the Movants argue that QCC is prohibited by the protective agreement from using the memorandum or the e-mail message in other actions.

On October 23, 2007, QCC filed an opposition to Sully's cross motion for protective order as well as a reply supporting its cross motions. QCC again asserts its previous argument, stating that the Board should compel the production of an e-mail message from counsel for Sully and Reasnor to the counsel for One Rate and A-Plus Conferencing and asks that the document be produced as a public document. QCC states that the disclosure of this message to a third-party during contract negotiations waives any argument of privilege that may apply. QCC argues that the attorney-client privilege does not apply to the message because it is not a communication between a lawyer and client; rather, it is a communication between a lawyer and opposing counsel. QCC also argues that the e-mail message was an exchange that was made during contract negotiations and that such exchanges are not protected by the privilege. Finally, QCC asserts that the common interest

doctrine, relied upon by the Movants and by Sully, is an extension of the attorney-client or attorney work product privileges and is not a separate privilege. QCC states that even if the common interest doctrine applied, Sully cannot demonstrate the requisite elements.

On October 26, 2007, QCC filed a reply to the Movants' response to QCC's cross motions generally restating its previous arguments, but states in response to the Movants' October 16, 2007, reply that the protective agreement only limits the use of confidential information to this proceeding. QCC argues that the memorandum and e-mail message should be submitted as non-confidential and, therefore, be available for use in other proceedings.

On October 30, 2007, Sully filed a reply to QCC's October 23 opposition to Sully's request for a protective order, generally restating its previous arguments.

On November 1, 2007, QCC filed a surreply to Sully's October 30 reply, generally restating its previous arguments.

B. Discussion

1. The Movants' Motion for Protective Order

The Movants ask that the Board enter a protective order that prohibits CLEC Connect from disclosing a memorandum that is in its possession. According to the information presented by the parties, the memorandum was prepared by counsel for Movants, who then forwarded the memorandum to Farmers, which in turn forwarded the memorandum to Bright (a non-party) for the purpose of furthering a common legal interest, and Bright then forwarded the memorandum to CLEC Connect. The Movants assert that the memorandum is protected by the common interest doctrine

of the attorney-client privilege because it was prepared in anticipation of litigation and was shared between parties with a common legal interest. Movants also assert that because no party authorized Bright's disclosure of the document to CLEC Connect, the memorandum retains its privileged status under the common interest doctrine.

In contrast, QCC asserts that neither the common interest doctrine nor the attorney-client privilege applies to the memorandum because it has been distributed to third parties, thereby waiving any claim of privilege. Moreover, QCC states that a common legal interest does not exist here because there was no agreement between Bright and Farmers to pursue a common interest.

The Board has reviewed all of the arguments presented by the Movants and QCC and finds that the memorandum is not protected by the common interest doctrine or attorney-client privilege. The Board agrees with QCC that the common interest doctrine protects communications between parties who have agreed to share their attorney communications in furtherance of pursuing a common legal interest. There is no evidence here that an agreement was reached between Farmers and Bright to share communications regarding the federal proceedings in New York. Rather, it appears that Farmers and Bright enjoyed a common business or monetary interest in the New York proceeding, a relationship that is not protected by the common interest doctrine. Moreover, the memorandum at issue passed from Farmers, where it may have been protected by the attorney-client privilege, to Bright, a non-party to this proceeding, and then again to One Rate, another non-party to this proceeding. The Board finds that the memorandum is not protected by attorney-

client privilege or the common interest doctrine and the Movants' motion for protective order is therefore denied.

2. QCC's Cross Motion to Compel

QCC filed a cross motion to compel the production of an e-mail message generated by counsel for Reasnor and Sully and sent to One Rate during contract negotiations between Sully and One Rate. QCC states that One Rate turned the document over to QCC during discovery and does not claim privilege. QCC states that Sully has refused to answer questions about the document on the basis that it is privileged and asks that the Board compel Sully and Reasnor to produce the document as non-confidential.

Sully argues that the message is protected by the attorney-client privilege as it is the opinion work product of its counsel prepared in anticipation of litigation. Sully states that the e-mail at issue is the opinion work of its counsel's representation of Reasnor, Sully, and several non-parties to this proceeding and did not lose its protection even though it was included in an e-mail that was part of negotiating a contract amendment for Sully.

The Board has reviewed the arguments presented regarding this issue and finds that the e-mail message is not protected by attorney-client privilege. The message in question was disclosed to a third party, who in turn disclosed the document as non-confidential during discovery. Any privilege that may have attached to this document was waived and no longer applies. Therefore, the Board will direct Sully and Reasnor to produce a copy of this e-mail message to QCC within seven days of the date of this order. QCC's cross motion to compel is granted.

3. QCC's Cross Motion for Redesignation of Confidential Documents

QCC filed a cross motion requesting that the Movants produce the memorandum and Reasnor and Sully produce the e-mail message as non-confidential documents. QCC asserts that neither the memorandum nor the e-mail is competitively sensitive; the memorandum regards the Movants' public litigation against AT&T and the e-mail contains no trade secrets or competitively-sensitive information. QCC also asks that the Board redesignate requests by Interstate to retroactively back-date contracts. QCC asserts that each of these requests have been produced as confidential pursuant to the protective agreement among the parties and QCC argues that the documents should be produced as public because the information was already produced by One Rate.

The Movants and Sully argue that the language of the protective agreement describing protected documents is broader than the terms QCC proposes in its cross motion. The Movants and Sully assert that the parties to the protective agreement did not limit protection under the agreement to trade secrets and competitively sensitive information; rather, the agreement allows for the producing party to designate a document as confidential if that party believes the information therein is confidential or proprietary. The Movants and Sully argue that the terms of the protective agreement are clear and that QCC has not provided any basis for the redesignation of the memorandum as non-confidential. In addition, the Movants and Sully argue that QCC is prohibited by the protective agreement from using the memorandum in other actions.

The Board has reviewed the arguments presented by the parties and finds that the parties' protective agreement provides broad protection of confidential documents obtained during the discovery process of this proceeding. In the preceding section, the Board has determined this information is discoverable, but that does not determine its confidential status. The protective agreement allows a party to designate as confidential any documents considered by that party to be confidential or proprietary. The Board agrees with the Movants and Sully that 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. Therefore, the Board will deny QCC's cross motion to have the memorandum and e-mail produced as non-confidential and will deny QCC's request to have all requests for the back-dating of contracts be redesignated as non-confidential. 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 cross motion to redesignate documents as non-confidential.

4. Sully's Cross Motion for Protective Order

Sully filed a cross motion asking the Board to issue a protective order requiring QCC to return the e-mail message identified in the previous discussions to its counsel and to direct QCC to destroy all copies of the document. Sully argues that the message cannot be disclosed because it is privileged and QCC should be

required to return or destroy it to prevent further disclosure. QCC argues that Sully should be required to disclose the e-mail because it is not protected by privilege.

Previously in this order, the Board found that any privilege that may have attached to the e-mail in question no longer applies and that Sully and Reasnor are directed to disclose the document to QCC. Therefore, the Board will deny Sully's cross motion for protective order as moot.

II. REQUESTS FOR CONFIDENTIAL TREATMENT

A. September 17, 2007, Motion

On September 17, 2007, the Movants filed a request for confidential treatment of certain material attached to their motion for protective order, specifically information contained in the affidavit of Ronald Laudner and references to that affidavit found in the body of the motion for protective order. Movants assert the information is covered under a protective agreement among the Movants and QCC.

B. October 1, 2007, Motion

On October 1, 2007, QCC filed a request for confidential treatment of certain information included in its response to the Movants' motion for protective order and QCC's cross motion to compel and cross motion for redesignation of confidential material. QCC states that the information was produced by Interstate and by other non-parties to this action, identified as One Rate, Sully, OmniTel Communications, and Phil Chavez, and has been designated as confidential under protective agreements entered into for this action. QCC also states that a protective order

issued by a Texas state court requires the information obtained from One Rate to be treated as confidential.

C. October 12, 2007, Motion

On October 12, 2007, Sully filed a request for confidential treatment of certain information contained in its resistance to QCC's cross motions and its own cross motion for protective order. Sully asserts the materials are covered under a protective agreement between Sully and QCC and a protective order issued by a Texas state court, both of which require that the information be treated as confidential.

D. October 23, 2007, Motion

On October 23, 2007, QCC filed a supplement to its earlier request for confidential treatment of certain information contained in its response to Movants' motion for protective order and QCC's cross motions. Specifically, QCC seeks confidential treatment of information identified as confidential in the body of its response and Exhibit 21, attached to its response. QCC states that the information has been designated as confidential under protective agreements entered into for this action. QCC also states that a protective order issued by a Texas state court requires the information obtained from One Rate to be treated as confidential.

E. October 26, 2007, Motion

On October 26, 2007, QCC filed a request for confidential treatment of certain information identified as confidential and submitted in support of its reply to the Movants' response to QCC's cross motions. QCC states that the information has been designated as confidential under protective agreements entered into for this

action. QCC also states that a protective order issued by a Texas state court requires that any information obtained from One Rate to be treated as confidential.

F. October 30, 2007, Motion

On October 30, 2007, Sully filed a request for confidential treatment of information submitted in support of its reply to QCC's opposition to Sully's motion for protective order. Specifically, Sully seeks confidential treatment of its supplemental appendix and the e-mail contained in Burns' Exhibit 16. Sully states that the materials are covered under a protective agreement between Sully and QCC and a protective order issued by a Texas state court, both of which require that the information be treated as confidential.

G. November 1, 2007, Motion

On November 1, 2007, QCC filed a request for confidential treatment of certain information identified as confidential and submitted in support of its surreply to Sully's October 30, 2007, filing. QCC states that the information has been designated as confidential under protective agreements entered into for this action. QCC also states that a protective order issued by a Texas state court requires that any information obtained from One Rate to be treated as confidential.

H. Discussion

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 information, pursuant to protective agreements and unilateral designations of confidentiality. Under these circumstances, the Board has not required affidavits for requests for temporary confidential treatment of information belonging to other parties, and the Board will grant all such requests for temporary confidential treatment to allow the party that has designated the information as confidential to file a request for permanent confidential treatment. All such requests should be filed within 14 days of the date of this order, if they have not been filed already.

In each of these requests described above, the Board finds that the request for confidential treatment 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. The Board finds that this information, if released, would provide an advantage to competitors. Therefore, the Board will grant the various requests under the provisions of Iowa Code § 22.7(3).

III. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The motion for protective order filed by Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, and non-parties All American Telephone Company, Inc.; e-Pinnacle Communications, Inc.; Chase Communications; and OmniTel Communications on September 17, 2007, is denied as described in this order.

2. The cross motion to compel the production of documents filed by Qwest Communications Corporation on October 2, 2007, is granted as described in this order.

3. The cross motion for the redesignation of confidential documents filed by Qwest Communications Corporation on October 2, 2007, is denied as described in this order.

4. The cross motion for protective order filed by Sully Telephone Association, Inc., on October 12, 2007, is denied as described in this order.

5. The request for confidential treatment filed by Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, and non-parties All American Telephone Company, Inc.; e-Pinnacle Communications, Inc.; Chase Communications; and OmniTel Communications on September 17, 2007, is granted.

6. The request for confidential treatment filed by Qwest Communications Corporation on October 1, 2007, is granted.

7. The request for confidential treatment filed by Sully Telephone Association, Inc., on October 12, 2007, is granted.

8. The request for confidential treatment filed by Qwest Communications Corporation on October 23, 2007, is granted.

9. The request for confidential treatment filed by Qwest Communications Corporation on October 26, 2007, is granted.

10. The request for confidential treatment filed by Sully Telephone Association, Inc., on October 30, 2007, is granted.

11. The request for confidential treatment filed by Qwest Communications Corporation on November 1, 2007, is granted.

12. All of the information described in the requests for confidential treatment that are being granted shall be held confidential and shall not be made part of the public record unless the Board orders otherwise.

UTILITIES BOARD

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 10th day of December, 2008.