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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Joint Application of
Qwest Communications International, Inc.,
and CenturyTel, Inc., for Approval of Indirect
Transfer of Control of Qwest Corporation,
Qwest Communications Company LLC, and
Qwest LD Corp.

Docket No. 10-049-16

JOINT CLEC RESPONSE TO
MOTION FOR PROTECTIVE ORDER

Integra Telecom of Utah, Inc., McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services, and XO Communications Services, Inc. (collectively “Joint CLECs”) provide the following response to the motion of CenturyLink, Inc., and Qwest Communications International, Inc. (collectively “Applicants”) for entry of a protective order for highly confidential information (“Motion”). The Joint CLECs do not object to entry of a protective order for highly confidential information, but such an order should be the same as the order the Commission recently issued in the Qwest 2010 Wire Center Proceeding, Docket No. 10-049-22, which permits disclosure of such information to eligible in-house personnel, as well as outside counsel and experts. The Commission, moreover, should refuse to create a “Staff Eyes Only” category of protection.

DISCUSSION

A. The Commission Should Enter the Same Protective Order as the Protective Order Issued in Docket No. 10-049-22.

The Applicants have proposed that the Commission enter a protective order that would establish protection for highly confidential information. The Joint CLECs do not object to entry of an appropriate protective order for highly confidential information, but the protective order the Applicants propose would limit disclosure of such information to outside counsel and outside experts only. This is considerably more restrictive than the Protective Order the Commission just issued – at the request of Qwest Communications (“Qwest”) – to protect highly confidential information in Qwest’s 2010 Wire Center Proceeding, Docket No. 10-049-22 (a copy of which is attached to this Response as Exhibit A). That order permits a reasonable number of in-house counsel and up to five in-house experts, as well as outside counsel and experts, to have access to highly confidential information. Such restrictions provide ample protection to highly confidential information without unduly increasing the burden and cost of participation to the parties in this proceeding.

The Applicants have opposed permitting in-house personnel to have access to highly confidential information, claiming in a similar dispute in Oregon that such disclosure limitations do not adequately recognize the competitively sensitive nature of highly confidential information or adequately reduce the risk of improper disclosure and the resulting competitive harm. The Applicants, however, fail to explain why their highly confidential information is any more sensitive or poses any greater risk of harm from improper disclosure than the competitive carriers’ highly confidential information at issue in the Qwest 2010 Wire Center Proceeding, Docket No. 10-049-22.

The Applicants have also pointed out that the protective order in the Washington Commission proceeding to review the proposed transaction limits disclosure to outside counsel and experts.¹ The Applicants, however, conveniently ignore the protective order issued by the Minnesota Commission (a copy of which is attached to this Response as Exhibit B), which the Applicants proposed in conjunction with the Department of Commerce in that state and which permits disclosure of highly confidential information to eligible in-house personnel. Again, the Applicants do not explain why in-house personnel for parties in Minnesota may review highly confidential information while in-house personnel for parties in Utah may not – particularly when the information and the personnel will likely be the same in many, if not most, instances.

The protective order the Commission issued in the Qwest 2010 Wire Center Proceeding, Docket No. 10-049-22, adequately protects highly confidential information without being unduly restrictive and is comparable to the protective order that the Applicants proposed and the state commission adopted in Minnesota. The Commission, therefore, should issue the same protective order in this docket.

B. The Commission Should Not Create a “Staff Eyes Only” Category of Nondisclosure.

The Applicants also seek to include provisions in the proposed highly confidential protective order to authorize them to disclose certain information solely to the Division of Public Utilities (“Division”) and the Office of Consumer Services (“OCS”). The Joint

¹ The Joint CLECs are also parties in the Washington proceeding and note that the Administrative Law Judge in that case entered that order without seeking comment from the parties, and depending upon how the Applicants designate information as highly confidential information in that state, parties have reserved their right to seek to amend the Washington protective order to authorize eligible in-house personnel to review highly confidential information.

CLECs have serious concerns with any process in which information that is responsive to data requests or otherwise relevant to this proceeding is disclosed to some parties but not others. Such a process is fundamentally inconsistent with due process and would undermine other parties' ability to protect their interests in this proceeding.

The Applicants acknowledge that the Commission has not previously established a "Staff Eyes Only" level of nondisclosure but seek to buttress their motion by comparing it to a prior Washington Commission proceeding in which certain competitively sensitive information was provided only to Commission Staff. That proceeding, however, presented unique circumstances that are not applicable here. In that case, Washington Staff was charged with aggregating highly sensitive data received from individual companies and making the aggregated data available as a confidential document. All parties thus had access to the data as a whole but not to its component parts. Here, in sharp contrast, the Applicants propose to disclose (and, indeed, apparently have disclosed) information to the Division and OCS to which no other party will have access in any form whatsoever. The Joint CLECs are not aware of any prior proceeding in Utah or Washington in which the state commission has permitted such selective disclosure.

The Applicants' proposal also raises procedural issues. The current Commission rule includes a process for parties to challenge a party's designation of information as confidential. Those provisions as incorporated into the proposed protective order would be meaningless to information designated as "Staff Eyes Only" because a party without access to the information cannot possibly assess whether it has been properly designated. The Applicants have offered to provide a privilege log "to aid the other parties' ability to determine the validity of the SEO designation," Motion at 3, but a bare description of a

particular document is unlikely to enable a party without access to the documents themselves to make that determination.² Parties other than the Division and OCS thus would be in the untenable position of having no ability to determine whether information designated as “Staff Eyes Only” is properly designated as such, much less whether that information affects their interests.

The Applicants also fail to address how the Commission would or could consider such information when making a decision on the merits of the Application if the Division or OCS chose to include “Staff Eyes Only” information as part of the record. The Applicants dismiss such concerns by claiming that these circumstances are unlikely and that even if they occur, “it would be a fairly simple matter to redact the information and submit a redacted filing.” Motion at 4. The Applicants miss the point. Under these circumstances, unlikely or not, the Commission would be asked to determine whether the proposed transaction is in the public interest based on a record that includes information to which only the Commission, Staff, and Public Counsel have access. The Applicants fail to offer sufficient justification for such closed-door decision-making.

The Commission has reviewed several merger proceedings in the past and has never found it necessary to establish a “Staff Eyes Only” level of nondisclosure, including for Hart Scott Rodino filings. If the Applicants have a good faith belief that parts of their Justice Department filing are unique and warrant limitations on disclosure

² A description such as “Correspondence from John Smith to Jane Doe,” for example, may be sufficient to demonstrate that the document is subject to the attorney-client privilege if Jane Doe is John Smith’s counsel, but such a description does not give any indication of – much less demonstrate – whether the document contains such competitively sensitive information that it should not be disclosed to parties other than the Division and OCS.

beyond highly confidential restrictions, the appropriate procedure would be to have the Commission conduct an *in camera* review of specific documents on an individual case basis to determine the extent to which access to those documents should be further limited. Even under that procedure, however, outside counsel for the other parties should be permitted access to the documents to ensure that the Commission is fully informed of the nature and potential impact of those documents on all parties in this proceeding. The Commission, however, should not enter a protective order that creates an entirely new level of nondisclosure that gives the Applicants virtually unfettered discretion to designate information that they will disclose only to the Division and OCS.

CONCLUSION

For the foregoing reasons, if the Commission enters a protective order for highly confidential information, the Commission should issue the same protective order as it issued in the Qwest 2010 Wire Center Proceeding, Docket No. 10-049-22, and the Commission should not create a new level of nondisclosure for information provided solely to the Division and OCS.

Dated this 26th day of July 2010.

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