BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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 Corporation	DOCKET NO. 10-049-16 QWEST'S AND CENTURYLINK'S REPLY TO THE JOINT CLEC RESPONSE TO JOINT MOTION FOR PROTECTIVE ORDER

Qwest Communications International, Inc. and CenturyLink, Inc. ("the Joint Applicants") hereby reply to the Joint CLEC response to the Joint Applicants' motion for the entry of a protective order governing highly-confidential and competitively-sensitive information. The Joint Applicants respectfully submit that the Commission should reject the Joint CLECs' opposition to the motion, and thus that it should enter the proposed protective order that is attached as Attachment A to the motion.

DISCUSSION

I. THE PROTECTIVE ORDER IN DOCKET 10-049-22 IS NOT ADEQUATE HERE

The Joint CLECs recognize that a protective order for highly-confidential information is appropriate. However, they advocate for the protective order that the Commission recently issued in Docket No. 10-049-22. That protective order is not adequate here for several reasons.

Preliminarily, the CLECs note that the protective order in Docket No. 10-049-22, which is Qwest's 2010 non-impaired wire center proceeding pursuant to the FCC's *Triennial Review Remand Order* ("*TRRO*"), was issued at the "request of Qwest." (Response, p. 2.) However, they fail to explain this is because Qwest and numerous CLECs who were parties to the Commission's original *TRRO* non-impaired wire center proceeding, Docket No. 06-049-40, and who are also parties here, had reached a *settlement agreement* which the Commission approved. See July 31, 2007 *Report and Order* in Docket No. 06-049-40. The settlement agreement *requires* that Qwest recommend to the Commission that it issue a particular form of a protective

order for any subsequent *TRRO* wire center proceedings.[1] That protective order had been based on a protective order in Minnesota.

More importantly, the issues in the *TRRO* wire center dockets are vastly different from the issues in this merger proceeding, and the highly-confidential information in those wire center dockets is vastly different from the highly-sensitive *national competition, marketing and business strategy* information in this docket. Thus, the issues and the highly-confidential information here warrant the additional protections the Joint Applicants seek.

For example, the highly-confidential data in the *TRRO* wire center dockets generally deal with the *number* of "business lines" (as defined in the *TRRO*) that a particular CLEC may have in a *particular wire center* in Utah, or certain technical information regarding a CLEC's "fiber-based collocation" in a *particular Utah wire center*. Here, however, the types of highly-confidential and highly-sensitive *competitive* information that the Joint Applicants seek protection for are certain documents submitted in the Applicants' confidential Hart-Scott-Rodino ("HSR") filings with the United States Department of Justice.[2] These highly-confidential and highly-sensitive HSR documents include:

- strategic business plans and analysis;
- customer profile information, including market segmentation;
- product characteristics and product availability information that are not otherwise commonly known;
- churn data;
- marketing and retention strategies;
- market shares and trends;

[1] This Commission has had four *TRRO* wire center dockets: (1) Docket No. 06-049-40 (the original non-impaired wire center docket that led to a settlement agreement between Qwest and numerous CLECs in various states, including Utah, and which set procedures for future wire center proceedings, including the use of a particular Minnesota-based protective order); (2) Docket No. 07-049-30 (2007 wire center list updates), (3) Docket No. 08-049-29 (2008 wire center list updates) and (4) Docket No. 10-049-22 (2010 wire center list updates). All of the subsequent (update) dockets have used the Minnesota-based protective order that was required in the settlement agreement that the Commission approved in Docket No. 06-049-40.

[2] The Joint Applicants recently received antitrust clearance from the Department of Justice.

- penetration rates;
- product development and trends;
- product rollout and launch dates;
- marketing plans;
- financial assumptions and projections relating to specific product rollouts and market launches;
- company staffing and sales approach by product and market area; and
- long-range company strategic plans.

Such highly-confidential and highly-sensitive *national marketing and business strategy* information is far more sensitive than any *wire center-specific* numerical or collocation data that is at issue in the wire center dockets.

Moreover, even in the *TRRO* wire center dockets that the CLECs advocate, there is essentially "Staff's Eyes Only" information that has only been provided to the Division of Public Utilities ("Division") and not to CLECs.[3] And here, the information the Joint Applicants seek to protect is far more sensitive than wire center data in the *TRRO* dockets.

Finally, the CLECs attempt to distinguish the protective order in Washington by noting that the Administrative Law Judge there did not seek comments from the parties, and that parties have reserved their right to seek to amend the protective order there. However, they do not claim there have been any objections to the Washington order, or that they have sought to amend it for any reason. Further, while the CLECs tout the Minnesota protective order which they attached to their response, they likewise fail to note this order is based on the *standard* protective order in

[3] In those dockets, the Division is the *only* party that is provided with a "masking key" that allows it to determine the identity of each CLEC that has "business lines" at a given wire center. Specifically, the masked aggregate reports show each CLEC with business line data in a particular wire center, identified only by a letter code (i.e., A, B, C, etc.) and not by name. A CLEC who signs the highly-confidential portion of the protective order receives the masked aggregate CLEC data, and its own unmasked data, but not the unmasked data of any other CLEC. For example, in Docket No. 10-049-22, Integra recently signed the highly-confidential portion of the protective order and was provided with its own unmasked data and the masked aggregate CLEC data. This safeguard is in place because CLECs do not want other CLECs to know their specific wire center business line data.

Minnesota,[4] and that it is without prejudice to the parties' ability to object to the individuals having access to highly confidential information. Finally, the CLECs fail to address the Joint Applicants' point (Motion, p. 2) that Colorado also permits a party to request a "highly confidential" designation by motion, and typically restricts the distribution of the information to the commission staff and the office of consumer counsel. *See, e.g.*, 4 Colo. Code Reg. 723-1 § 1100(a)(III), and *Public Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 36 (1999).

Accordingly, although the protective order in Docket No. 10-049-22 is adequate for a *TRRO* wire center proceeding, it is clearly not adequate for this very different proceeding involving the merger of two companies who compete against the intervenor CLECs, often on a multi-state basis, and which involves highly-sensitive competitive marketing and business strategy documents. The Commission should therefore grant the Joint Applicants' motion.

II. THE COMMISSION SHOULD ISSUE A "STAFF'S EYES ONLY" ORDER

The CLECs also oppose the Joint Applicants' request for a "Staff's Eyes Only" provision that would authorize disclosure of certain highly-confidential and highly-sensitive competitive information only to the Division and to the Office of Consumer Services ("OCS"). They argue that such procedure would raise due process and procedural concerns. However, with all due respect, these purported concerns are vastly overstated.

First, the CLECs argue they are not aware of any Commission proceeding in which it permitted "selective disclosure." The Commission may or may not have done so in the past, but the nature and types of documents at issue clearly are of such competitive sensitivity that the Commission should permit "Staff's Eyes Only" disclosure in this proceeding.

[4] Indeed, the similarities between the protective order in Docket No. 10-049-22 and the Minnesota order that the CLECs attached are due to the fact the protective order in Docket No. 10-049-22 is based on a Minnesota protective order originally drafted by the CLECs in the settlement of the original *TRRO* wire center dockets in 2007.

The HSR documents at issue disclose in significant detail how the merged company intends to compete after the merger. The competitive sensitivity of such HSR documents is so extremely high that the risk of even inadvertent disclosure to intervenor CLEC representatives who might use such information to the Joint Applicants' competitive disadvantage is simply not acceptable, as damage to the Joint Applicants and the merged company's ability to effectively compete after merger close would be immediate, substantial and irreparable. (See also, description of the documents in Section I, *supra*.)

Moreover, a Staff's Eyes Only procedure is certainly not unheard of in proceedings of this nature involving the merger of two telecommunications companies who compete against the intervenors in that same proceeding. For example, in the Qwest/U S WEST merger, the Montana Public Service Commission employed a similar process. Specifically, in addition to its customary provisions for confidential information, the Commission went one step further and restricted disclosure of select competitive information to only Commission Staff and the Montana Consumer Counsel staff and experts. The Commission appropriately granted this additional protection for:

> . . . . that information that is not only claimed to be Proprietary Information (trade secret, private, confidential, or privileged commercial and financial information), but that also *discloses how the providing party competes or intends to compete with competitors*. See Order No. 6199a in Montana PSC Docket No. D99.8.200, November 17, 1999, pp. 2-3, ¶ 1(b); *reaffirmed* on Order on Reconsideration, Order No. 6199c, December 22, 1999, p. 6, ¶ 2, Ordering Clause 2. See Attachment 1.[5]

The HSR documents subject to discovery in this case disclose in significant detail how the merged company intends to compete after the merger. As such, the Joint Applicants do not even believe they are relevant to whether the merger is in the public interest and thus should be

[5] See also Order No. 6199c, p. 4, ¶¶ 12, 13 ("the Commission is mindful of the potential for leaks of extremely sensitive information that could result from unfettered disclosure to numerous persons ostensibly qualified

approved. Indeed, the only conceivable reason an intervenor CLEC would want access to them would be for competitive purposes, especially since the documents tend to reveal the very essence of the merged company's plans for product development, product roll-out and the development of competitive responses. However, even if the Commission were to determine these documents to be relevant, such documents should be protected from competitors' review. The Joint Applicants submit that, with current market conditions, such information has even more pronounced competitive value than was the case 10 years ago when the Montana Commission issued its protective order.

The CLECs' purported "procedural issues" are likewise overstated. First, this Commission is well-versed in dealing with confidential documents in the record of any proceeding.[6] Second, the Joint Applicants have offered to provide a privilege log and brief summary of the pertinent HSR documents to the CLECs, and have offered to provide the documents to the Administrative Law Judge for an *in camera* review.

Indeed, from a practical standpoint, a Staff's Eyes Only procedure will result in fewer discovery disputes or arguments about delay. This is especially so because without such a protective order, the Joint Applicants will object to disclosure of such highly-confidential and highly-sensitive documents, which might then lead to a Joint CLEC motion to compel and, ultimately, an *in camera* review of the documents by the Administrative Law Judge before deciding the motion. However, there likely would not be a need for any motions using the Staff's Eyes Only process because, in the event a competitor intervenor wants the Administrative

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to have access under routine protective order requirements," and "[t]he Commission finds it reasonable to allow only the MCC and the Commission staff the access to this particularly limited information"). See Attachment 2.

[6] As the Joint Applicants noted, even if the Division or the OCS were to include such highly-confidential and highly-sensitive competitive documents in the record, it would be a fairly simple matter to redact the information and submit a redacted filing. Redaction is often required for confidential and highly-confidential information in Commission proceedings, and the parties are familiar with both the requirements and the process.

Law Judge to review any particular document (based on the privilege log and summary), the judge can do so and make the appropriate determination as to requested disclosure of a particular document. The process of *in camera* review with the Staff's Eyes Only process and without it would be virtually the same, except that without it, the process would be less efficient.

In short, although the CLECs attempt to raise substantive and procedural concerns about a Staff's Eyes Only process, other commissions, including in Colorado and Montana, have employed this type of procedure without trampling on any party's due process or procedural rights. The CLECs' alleged "concerns" are overstated. More importantly, even if the concerns were arguably relevant, or any procedures were arguably burdensome, they certainly would not trump the Joint Applicants' legitimate concerns about potential disclosure of such competitively-sensitive documents. Indeed, even an inadvertent disclosure of the documents can have devastating effects on the merged company, especially since once the documents have been disclosed, the damage would have been done. Thus, the Commission must balance any such concerns with the extreme competitive harm to the Joint Applicants, at the hands of the very same competitors who not only compete against them in the telecommunications market but have such an interest that they have intervened in this proceeding, that would result if there were any inappropriate or even inadvertent disclosure. Upon weighing those interests, the balance weighs heavily in favor of protecting the confidentiality and competitive sensitivity of these materials over disclosure to the Joint Applicants' competitors.

CONCLUSION

Entering a protective order to govern confidential, highly-confidential and highly-sensitive competitive information like HSR documents under a Staff's Eyes Only procedure as the Joint Applicants have proposed is consistent with the public interest. Such a protective order

will encourage disclosure, while simultaneously also offering the Joint Applicants additional assurances that their highly-sensitive and highly-confidential competitive information will not be disclosed in a way that might result in competitive harm to them.

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Respectfully submitted.

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