[Service Date August 3, 2010]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of	)	DOCKET UT-100820
	)	
QWEST COMMUNICATIONS INTERNATIONAL INC. AND CENTURYTEL, INC.	)	ORDER 08
	)	ORDER DENYING JOINT APPLICANTS' REQUEST TO SUPPLEMENT PROTECTIVE ORDER WITH CREATION OF ADDITIONAL PROTECTED CATEGORY OF INFORMATION
For Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp.	)	
. . . .	)	

1 **PROCEEDING.** On May 13, 2010, Qwest Communications International Inc. (QCII) and CenturyTel, Inc. (CenturyLink) filed a joint application with the Washington Utilities and Transportation Commission (Commission) for expedited approval of the indirect transfer of control of QCII's operating subsidiaries, Qwest Corporation, Qwest LD Corp., and Qwest Communications Company LLC (collectively Qwest) to CenturyLink (collectively with QCII, Joint Applicants).

2 **JOINT MOTION TO SUPPLEMENT PROTECTIVE ORDER.** On July 16, 2010, Joint Applicants filed a request to create a new protected category for information deemed so highly sensitive as to warrant dissemination only to the Commission's regulatory staff (Commission Staff or Staff) and the Public Counsel Section of the Washington Office of the Attorney General (Public Counsel). Joint Applicants have stylized the additional protected category as "Staff's Eyes Only" (SEO).[1]

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[1] The Joint Motion appears to arise from a data request Staff sent to Joint Applicants seeking materials filed by the Joint Applicants in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). The HSR Act, 15 U.S.C. § 18a, *et seq.*, requires that parties to large mergers or acquisitions notify the Federal Trade Commission (FTC) and the Department of Justice by filing a premerger notice. 15 U.S.C. § 18a(a). The FTC has determined that the notice should come in the form of the Notification and Report Form (the NRF). 16 C.F.R. § 803.1(a). The NRF requires the disclosure of a plethora of information including, *inter alia*: a description of the transaction, the most recent proxy statement and Form 10-K, a list of previous acquisitions, et cetera. 16 C.F.R. § 803 – Appendix.

3 Joint Applicants contend that the information requested "goes to the very essence of Joint Applicants' anticipated competitive strategies and action."[2] According to Joint Applicants, the disclosure of this information to their competitors would result in irreparable harm.[3]

4 Joint Applicants argue that the Commission had previously created an SEO protected category in Order 07 of Docket UT-030614.[4] They point out that Colorado has also allowed parties to request a special designation that limits the dissemination of information to Commission staff and the office of consumer counsel.[5]

5 Joint Applicants state that the special designation would only apply to certain types of documents, such as: strategic business plans and analysis, new product roll-out timelines, and market share information.[6] Joint Applicants assert that they have already provided the information to Staff and Public Counsel.[7] They contend that a sampling of the documents in question can be provided for *in camera* review, if necessary, as well as a log of the privileged information could be distributed to the parties.[8] Joint Applicants have attached copies of the indexes listing the information provided to Staff and Public Counsel under confidential seal.[9]

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[2] Joint Applicants' Motion, ¶ 2.

[3] *Id.*

[4] *Id.*

[5] *Id.*, ¶ 3 (citing to 4 Colo. Code Reg. 723-1 § 1100(a)(III) and *Public Serv. Co., v. Trigen-Nations Energy Co.,* 982 P.2d 36 (1999).

[6] *Id.*, ¶ 5.

[7] *Id.*, ¶ 6.

[8] *Id.*

[9] *Id.*

6 Joint Applicants acknowledge that the other parties to the matter have concerns regarding this new classification and its administration.[10] They argue that such concerns can be easily addressed; and even if they couldn't, the parties' administrative concerns do not outweigh Joint Applicants' concerns regarding disclosure.[11] Joint Applicants contend that the information is of little or no relevance to this proceeding, and it is unlikely that any of the information will be introduced into the record.[12] They maintain that, if Commission Staff does introduce the information, the protocol for redacting the information is well known by the parties.[13]

7 **OPPOSITION TO JOINT MOTION.** On July 26, 2010, the Commission received a joint response from Charter Fiberlink WA-CCVII; Covad Communications Company; Integra Telecom of Washington, Inc.; McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services; Pac-West Telecomm, Inc.; tw telecom of Washington, llc; and XO Communications Services, Inc. (collectively Joint CLECs). Joint CLECs oppose Joint Applicants' Motion and argue that creating this additional protected category would be "inconsistent with due process and would undermine other parties' ability to protect their interests."[14] They contend that the proceeding Joint Applicants rely on, Docket UT-030614, was markedly different that the instant matter.[15] According to Joint CLECs, the Commission Staff in that docket were provided with a collection of highly sensitive data from individual companies and responsible for disseminating the aggregated information in a confidential form to the other parties.[16] Joint CLECs point out that the parties in Docket UT-030614 were

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[10] *Id.*, ¶ 7.

[11] *Id.*

[12] *Id.*, ¶ 8.

[13] *Id.*

[14] Joint CLECs Response, ¶ 2.

[15] *Id.*, ¶ 3.

[16] *Id.*

still able to see the information in its aggregated form, just not the individual parts received by Staff in order to compile the data.[17]

8 Joint CLECs assert that the request fails to resolve how parties other than Staff or Public Counsel would be able to challenge the designation of information as SEO if the other parties cannot review the information.[18] They add that even the privilege log that Joint Applicants' have offered would not provide the parties with enough specificity and detail to make the determination to challenge the designation.[19]

9 Joint CLECs argue that the Joint Applicants have not seriously considered the consequences if Commission Staff or Public Counsel do decide to introduce the information in question into the record.[20] They maintain that the Commission would be forced to resolve the issues in the case based on evidence that most of the parties did not have access to or the chance to rebut.[21]

10 Joint CLECs suggest that, if Joint Applicants believe that specific portions of the HSR Act filing warrant additional protection that the highly confidential protective order does not provide, Joint Applicants should request an *in camera* review of those specific documents only.[22] Even then, they stress that outside counsel for the parties should be allowed to view the documents so "the Commission is fully informed of the nature and potential impact of those documents on all parties."[23]

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[17] *Id.*

[18] *Id.*, ¶ 4.

[19] *Id.*

[20] *Id.*, ¶ 5.

[21] *Id.*

[22] *Id.*, ¶ 6.

[23] *Id.*

11 On July 27, 2010, Commission Staff, Public Counsel, Cbeyond Communications LLC (Cbeyond) and Level 3 Communications, LLC (Level 3), and Sprint Nextel Corporation (Sprint) and T-Mobile West Corporation (T-Mobile) filed responses to Joint Applicants' Motion. Staff argues that Joint Applicants' request is a marked departure from the Commission's typical practices and procedures.[24] While Staff acknowledges that the information provided in response to its data request does contain competitively sensitive information, Staff contends that the language in the protective order relating to highly confidential data appears to cover such information.[25]

12 Staff asserts that both of the most recently adjudicated telecommunications acquisition cases, the CenturyTel – Embarq transaction[26] and the Verizon – Frontier transaction,[27] involved the disclosure of the HSR Act information within the context of discovery without the necessity of an SEO protected category.[28] In fact, the former case concerned CenturyLink's, formerly known as CenturyTel, Inc., acquisition of another telecommunications carrier.[29] Staff maintains that Joint Applicants have failed to indicate why a protected category is now needed and why the HSR Act information disclosed in this case is any more sensitive than that which was disclosed in the prior two acquisition dockets.[30]

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[24] Commission Staff's Response, ¶ 4.

[25] *Id.*, ¶ 5, 6. Specifically, Staff cites to the cautionary note within the protective order which states that the "case is expected to include sensitive competitive information," and that dissemination of the information "imposes a highly significant risk of competitive harm to the disclosing party or third parties." *Id.*, ¶ 6 (citing to Order 01, ¶ 11).

[26] Docket UT-082119.

[27] Docket UT-090842.

[28] Commission Staff's Response, ¶ 5.

[29] *Id.*

[30] *Id.*, ¶ 6.

13 Like the Joint CLECs, Staff discredits the Joint Applicants' argument that the Commission has established an additional SEO protected category in a previous docket.[31] Staff asserts that, in Docket UT-030614, the Commission required CLECs to provide sensitive information such as the number of customer locations served and the type of facilities used by CLECs in each Qwest wire center.[32] The information was initially restricted to Staff, who then removed any trace of company specifics and pooled the information before making it available to the other parties under confidential seal.[33]

14 Staff notes that none of the intervenors, their counsel, or experts would view any portion of the SEO documents.[34] This, according to Staff, would prevent the intervenors from providing their perspectives on the information.[35] In addition, Staff declares that Joint Applicants' request would impose an unmanageable burden upon Staff to maintain and file documents with three levels of confidentiality.[36]

15 Public Counsel asserts that the proposal conflicts with the state policy of disclosure and open government.[37] Public Counsel states that a transaction of this magnitude, "a

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[31] *Id.*, ¶ 8.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*, ¶ 9.

[36] *Id.*, ¶ 10. As Sprint and T-Mobile note, Staff and Public Counsel would have to prepare four sets of documents, i.e., testimony, if the Commission approved Joint Applicants' request. Sprint and T-Mobile's Response, ¶ 7. The first set would be completely unredacted for the benefit of the Commissioners, the administrative law judge, Staff, and Public Counsel. *Id.* The second set would redact the SEO information but not the highly confidential or confidential information on behalf of the parties' outside counsel and consultants. *Id.*, ¶ 9. The third set would have the SEO information as well as the highly confidential information redacted but still contain the confidential information for use by those parties and their representatives who signed the confidential agreement. *Id.*, ¶ 10. The fourth set would have the SEO information, the highly confidential information, and the confidential information redacted from the filing. *Id.*, ¶ 8.

[37] Public Counsel's Response, ¶ 2.

change in control in Washington's largest incumbent telecommunications company with major potential economic and communications ramifications for millions of Washington telecommunications customers," requires that the process be conducted in full public view where possible.[38]

16 Public Counsel argues that Joint Applicants have failed to cite any cases where the Commission has gone to the lengths requested here.[39] Public Counsel alleges that creating an additional protected category could produce a slippery slope because there is the risk that this SEO designation will be sought in many future cases across the industries that the Commission regulates.[40]

17 Cbeyond and Level 3 concur and argue that the circumstances surrounding UT-030614 were different than the case at hand.[41] They assert that, in Docket UT-030614, Staff had requested that all CLECs, whether parties or not, be required to file sensitive information about the customers they served.[42] Cbeyond and Level 3 state that this docket is not dealing with sensitive information from non-parties.[43] Further, they agree that the protective order currently in effect, which contains protections for highly confidential information, is sufficient to safeguard the information.[44]

18 Cbeyond and Level 3 contend that no party should have to rely on the judgment of an opposing party in making the decision regarding whether information will adversely

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[38] *Id.*

[39] *Id.*, ¶ 3.

[40] *Id.*

[41] Cbeyond and Level 3's Response, at 2.

[42] *Id.*

[43] *Id.*

[44] *Id.*, at 3.

affect its own interests.[45] In addition, they argue that the parties not privy to the information have no way of defending against it should it be introduced into evidence.[46]

19 Sprint and T-Mobile point out that the highly confidential protective order already limits disclosure of sensitive competitive information to outside counsel and outside consultants who agree not to be involved in competitive decision making involving the sensitive information for two years.[47] Further, Sprint and T-Mobile maintain they need the information in the HSR Act filing that Joint Applicants' have claimed is of little or no relevance.[48] They assert that the information is needed "to understand how the merger will impact the services [Sprint and T-Mobile] buy from the Joint Applicants."[49] For that matter, information relating to access charges and wholesale arrangements should, according to Sprint and T-Mobile, be made more accessible as confidential information, not less.[50]

20 **COMMISSION DECISION.** We find Joint Applicants' arguments unpersuasive and deny their request. Joint Applicants' list of documents that they believe should be designated as SEO does not, in and of itself, demonstrate the need for a new and extremely restrictive protected category of information. Joint Applicants have failed to demonstrate why the intervenors should be denied access to such a large amount of data and have failed to explain how the intervenors could be expected to challenge a designation of SEO if neither they nor their outside counsel or consultants could view the data.

21 Joint Applicants' request has the potential to deprive the intervenors of any meaningful participation in the Commission's decision in this docket. Were the

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[45] *Id.*

[46] *Id.*, at 4.

[47] Sprint and T-Mobile's Response, ¶ 2. See also Protective Order, Order 01, ¶ 14a.

[48] *Id.*, ¶ 5.

[49] *Id.*

[50] *Id.*, ¶ 6.

Commission to grant the request and Staff or Public Counsel introduce the information into the record, we could formulate a decision based upon evidence that neither the intervenors nor their outside counsel or consultants would have seen or had the opportunity to rebut.

22 Further, Joint Applicants have presented no evidence to show that the protections already afforded in the existing highly confidential protective order are insufficient.

23 Contrary to Joint Applicants' argument, the situation in Docket UT-030614 is distinguishable from the instant case. In Docket UT-030614, the Commission reviewed Qwest's application for the competitive classification of its basic business exchange telecommunications services.[51] This review required the Commission to examine whether customers had "reasonably available alternatives."[52]

24 Staff in Docket UT-030614 requested that the Commission require each CLEC in Washington to provide sensitive market information to establish whether customers had reasonably available alternatives to Qwest.[53] The Commission granted Staff's motion and directed Staff to compile the CLEC information in one document while preserving the confidentiality of the data.[54] In the instant docket, Commission Staff is not requesting data from non-party CLECs. In addition, Qwest's recommendation that Commission Staff should again be the clearinghouse for Qwest's own confidential information is unrealistic. Budget cuts and hiring freezes have already placed a significant burden upon Staff without the added responsibility of governing the dissemination of another party's sensitive data.

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[51] *In the Matter of the Petition of Qwest Corporation for Competitive Classification of Basic Business Exchange Telecommunications Services*, Docket UT-030614, Order 05, Order Granting in Party Staff Motion for Production of Information/Establishing Terms of Additional Protective Order, ¶ 1.

[52] Docket UT-030614, Commission Staff Motion Requesting the Commission Order CLECs to Produce Information, ¶ 2.

[53] *Id.*, ¶ 4.

[54] Docket UT-030614, Order 05, ¶ 33.

25 The Commission finds that the Joint Applicants' Motion should be denied.

ORDER

26 **THE COMMISSION ORDERS That** the joint motion filed by Qwest Communications International Inc. and CenturyTel, Inc., seeking to supplement the protective order with the creation of an additional protected category of information is denied.

Dated at Olympia, Washington, and effective August 3, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.