

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

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 Corporation

Docket No. 10-049-16

INTEGRA'S MOTION TO COMPEL

INTRODUCTION

Integra Telecom of Utah, Inc. (“Integra”) respectfully submits this motion to compel Joint Applicants Qwest Communications International, Inc. (“Qwest”) and CenturyTel, Inc. (“CenturyLink”) (collectively, “Joint Applicants”) to produce documents responsive to (1) Integra Information Request No. 143,¹ which seeks the production of documents filed by Joint Applicants pursuant to the Hart-Scott-Rodino Act (“HSR Documents”) and (2) Integra Information Request No. 156,² which seeks production of Joint Applicants’ responses to any other party’s data requests, and therefore encompasses HSR information produced to DPU in response to DPU data requests.³ CenturyLink and Qwest have both objected to producing HSR

¹ Trincherro Decl., ¶¶ 2, 3, Exs. 1, 2.

² Trincherro Decl., ¶ 4, Ex. 3.

³ Trincherro Decl., ¶ 5, Ex. 4 (attaching DPU Set 1, Requests 1.3 and 1.4).

documents, with their objections based on relevance and confidentiality.⁴ In proceedings pending in Arizona and Washington, Joint Applicants have provided the respective commissions with a general description of at least some of the HSR documents and, based upon that general description, it is apparent that certain of the withheld documents are relevant to matters at issue in this case. Although Integra has propounded discovery intended to produce evidence bearing on how the merged company will address a wide variety of issues relating to wholesale service, CenturyLink's responses mostly repeat the mantra "[i]ntegration planning is in the early stages and decisions have not been made at this time" and provide nothing in the way of further information. Joint Applicants' description of the HSR documents indicate that they concern precisely the type of planning that they have, thus far, denied engaging in.

To the extent that Joint Applicants have concerns about the confidentiality of those documents, those concerns are fully addressed by the protective order in this case, which is similar to orders this Commission has used in previous proceedings. That protective order already restricts highly confidential information to a select group of attorneys and experts who must certify that they are bound by the protective order, and disclosure is prohibited as to "persons engaged in strategic or competitive decision making for any party, including the sale or marketing of products or services on behalf of any party."⁵ Joint Applicants' general and unsupported assertions regarding the potential harm that might result from production of documents do not outweigh Integra's right to discovery of information relevant to the issues in

⁴ The Joint Applicants' responses to Request No. 143 differed in that CenturyLink refused to produce any documents responsive to this request, arguing that doing so would cause irreparable competitive harm that could not be mitigated by a protective order, while Qwest noted its intention to seek "an appropriate protective order for the limited disclosure of such documents." Trinchero Decl., ¶¶ 2, 3, Exs. 1, 2. This Commission issued a protective order on August 18; subsequent to that Order's issuance, both Joint Applicants have again objected to producing any HSR documents pursuant to Request No. 156. Trinchero Decl ¶ 6, Ex. 5.

⁵ Protective Order, ¶3.

this case, particularly in light of the protection for Joint Applicants' confidentiality interests provided by the protective order.

MOTION TO COMPEL

Pursuant to Utah Rule of Civil Procedure 37(a), Integra moves to compel production of documents responsive to Integra's Information Requests, Request No. 143, which seeks the production of documents filed by CenturyLink and Qwest pursuant to the Hart-Scott-Rodino Act ("HSR documents"), together with the reasonable expenses incurred in obtaining this order, including attorney fees, pursuant to Rule 37(a)(4)(A).

Pursuant to Utah Rule of Civil Procedure 37(a), Integra moves to compel production of documents responsive to Integra's Information Requests, Request No. 156, which seeks the production of responses to any other party's data request, which in turn encompasses HSR documents produced in response to DPU Set 1, Request Nos. 1.3 and 1.4, together with the reasonable expenses incurred in obtaining this order, including attorney fees, pursuant to Rule 37(a)(4)(A).

GOOD FAITH EFFORT TO RESOLVE DISCOVERY DISPUTE

Integra made a good-faith effort to resolve these matters informally by conferring by telephone with counsel for both CenturyLink and Qwest on September 16, but the parties were unable to resolve the dispute that is the subject of this motion.

BACKGROUND FACTS

At issue in this motion are CenturyLink and Qwest's responses to Integra Information Requests, Request No. 143, which provides as follows:

143. Refer to page 6 of CenturyTel Inc.'s Form S-4, dated June 4, 2010. Provide a copy of the requisite notice, report forms, and any other documents (including supplemental filings) filed by

CenturyLink or Qwest under the Hart-Scott-Rodino (HSR) Act
with the Department of Justice and the Federal Trade Commission.

CenturyLink Objections:

CenturyLink objects to this request insofar as it is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The filings prepared by CenturyLink as required by the HSR Act are specifically designed to provide the Department of Justice and the Federal Trade Commission the information that it requires to analyze the merger on a national level addressing specific federal antitrust issues. This is not the proper jurisdiction for such an analysis. In addition, the information requested is highly confidential, commercially sensitive information the release of which, particularly to CenturyLink's competitors such as Integra, would cause irreparable competitive harm to CenturyLink, such that even if the Commission issues a protective order, it would not be sufficient to mitigate the impact.⁶

Qwest Objections:

Qwest objects to this request insofar as it is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The filings prepared by Qwest as required by the HSR Act are specifically designed to provide the Department of Justice and the Federal Trade Commission the information that it requires to analyze the merger on a national level addressing specific federal antitrust issues under the Clayton Act. This is not the proper jurisdiction for such an analysis. In addition, the information requested is highly confidential, commercially sensitive information the release of which, particularly to Qwest's competitors such as Integra, would cause irreparable competitive harm to Qwest, the impact of which would not be mitigated by the terms of any Protective Order that may be issued in this proceeding. Given the highly-confidential and competitively [sic] sensitive nature of these documents, Qwest intends to file a motion for the entry of an appropriate protective order for the limited disclosure of such documents.⁷

Also at issue are Joint Applicants' responses to Integra Information Request, Request No. 156, which seeks "a copy of your response to any other party's data request(s), whether that response

⁶ Trincherio Decl., ¶ 2, Ex. 1 (CenturyLink Response to Integra Information Request, Request No. 143).

⁷ Trincherio Decl., ¶ 3, Ex. 2 (Qwest Response to Integra Information Request, Request No. 143).

was made prior to or after the date of this request.”⁸ Integra’s Request No. 156 thus encompassed DPU Requests No. 1.3 and 1.4, to which HSR documents were responsive.⁹ CenturyLink responded on behalf of both Joint Applicants, agreeing to provide such responses “[t]o the extent not otherwise objectionable.”¹⁰

Integra has not received any of the requested HSR documents. Joint Applicants instead filed a motion seeking a protective order, including a request for further protection of HSR documents by designating them for “Staff Eyes Only” (SEO), which request this Commission implicitly denied when it issued its August 18 Protective Order containing “confidential” and “highly confidential” designations, but omitting any SEO designation.¹¹ Despite issuance of that Order on August 18, 2010, Integra has still received no HSR documents. On September 2, Joint Applicants’ respective counsel sent correspondence reasserting their objections to producing any HSR information.¹² Specifically, Joint Applicants, in response to Request No. 156, objected to producing to Integra any information already produced to DPU pursuant to staff’s Data Requests Nos. 1.3 and 1.4.¹³ Joint Applicants explained: “the information requested is highly-confidential, competitively-sensitive information, the release of which, particularly to the Joint Applicants’ competitors such as Integra, would cause irreparable harm to the Joint Applicants, such that the Commission’s Protective Order is not sufficient to mitigate the impact.”¹⁴

⁸ Trincherro Decl., ¶ 4, Ex. 3 (CenturyLink Response to Integra Information Request, Request No. 156).

⁹ Trincherro Decl., ¶ 5, Ex. 4 (DPU Set 1, Request Nos. 1.3 and 1.4).

¹⁰ Trincherro Decl., ¶ 4, Ex. 3.

¹¹ *Compare* Qwest’s and CenturyLink’s Joint Motion For Entry Of Protective Order for Highly Confidential Information (requesting a three-tier confidentiality designation scheme, with the most restrictive “Staff’s Eyes Only” designation used for certain confidential information) *with this Commission’s* Protective Order (designating a two-tier system for confidential and highly confidential information, without use of the “Staff’s Eyes Only” category).

¹² Trincherro Decl., ¶ 6, Ex. 5.

¹³ *Id.*, p.1.

¹⁴ *Id.* (emphasis added).

Thus, Joint Applicants continue their attempts to avoid their discovery obligations, even after this Commission and others have denied requests for extra protection of HSR documents.¹⁵ For example, on August 11, CenturyLink sought *in camera* inspection of HSR documents as part of its “Staff Eyes Only” request in the Qwest/CenturyLink Merger Docket pending in Arizona. Arizona’s Commission roundly rejected the motion, finding no need for “this new and highly restrictive designation” and noting that SEO status could prevent the intervenors “from participating in the proceeding in a meaningful manner.”¹⁶ Washington’s Commission based its denial of SEO designation on multiple grounds, including that such protection “has the potential to deprive the intervenors of any meaningful participation in the Commission’s decision in this docket.”¹⁷

This same concern is present here: that Integra will be unable to meaningfully participate in the proceeding without access to relevant documents. As part of the Arizona and Washington filings, CenturyLink provided a very general, very brief description of the documents for which it was seeking special “Staff Eyes Only” protection. It is Integra’s understanding that the listed documents were included as part of CenturyLink’s filing under the Hart-Scott-Rodino Act and would, therefore, be responsive to Integra’s Request No. 143, and to Request No. 156 by virtue of DPU’s requests seeking HSR information. Further, it is apparent from the general descriptions provided that a number of these documents are potentially relevant to the wholesale issues that are of greatest concern to Integra in this matter.¹⁸ These documents include the following:

¹⁵ CenturyLink and Qwest have also sought SEO protection in Washington, Arizona and Colorado. The request has been denied in Washington and Arizona, and was granted on an interim basis in Colorado with respect to specifically identified documents.

¹⁶ Trincherro Decl., ¶ 7, Ex. 6.

¹⁷ Trincherro Decl., ¶ 8, Ex. 7.

¹⁸ Trincherro Decl., ¶ 9, Ex. 8.

HSR #	Title	Description
13	Wholesale Overview	Presentation containing highly confidential and competitively sensitive data, including carrier proprietary information, regarding marketing plans, product development, pending sales, and trends in the Wholesale marketplace
15	2010-2013 Long Range Plan Review	Analysis of CenturyLink's Long Range Plan containing highly confidential, material, non-public information and competitively sensitive data regarding marketing plans, product development, and trends in the Consumer, Mass Markets, IPTV, Enterprise, and Wholesale markets
24	Message regarding impact of access rate reductions	E-mail message containing a competitively sensitive internal assessment of impact on CenturyLink revenue from various hypothetical intrastate access rate reductions
25	Message regarding potential product opportunities	E-mail message containing highly confidential and competitively sensitive information regarding possible opportunities for product expansion in Qwest markets
33	11 Markets Research Presentation	Market research survey commissioned by CenturyLink and containing proprietary, highly confidential and competitively sensitive market data research regarding potential product offerings and customer preferences in various markets
37	Segmentation: Local and National	Report containing highly confidential and competitively sensitive data regarding CenturyLink's Enterprise Business marketing strategy, including specific metrics specifying the company's staffing and sales approach by product/region/and revenue generation targets by sales representative.
9		Redaction of certain pages (19, 27, 35) purportedly containing highly confidential and competitively sensitive projections of revenue from specific products and market segments for the period 2010 through 2013

In addition to CenturyLink’s submitted list, Qwest provided an even more vague description of withheld information in the Washington proceeding.¹⁹ Integra is unable to determine which of the listed documents may be relevant, and therefore requests all documents to be produced. Yet even from these extremely imprecise descriptions, it appears that at least the following documents may be highly relevant:

HSR #	Description
4c-39	CenturyLink document – contains detailed information concerning CenturyLink business plans, strategies, and performance.
4c-42	CenturyLink document – contains detailed information concerning CenturyLink operations plans, strategies, and performance.
4c-44	CenturyLink document – contains detailed information concerning all aspects of CenturyLink business plans, strategies, and performance.
4c-46	CenturyLink document – contains detailed information concerning CenturyLink strategies and plans.
4c-48	CenturyLink document – contains detailed information regarding networks, equipment, business and marketing strategies regarding IPTV (video over internet protocol).
4c-53	CenturyLink document – contains detailed information regarding CenturyLink operations, performance, and strategies.
4c-82	CenturyLink document containing detailed information regarding CenturyLink marketing and sales strategies.

¹⁹ Trincherro Decl., ¶ 9, Ex. 8.

ARGUMENT

I. The Requested Documents Fall Easily Within the Broad Scope Of Permissible Discovery

Utah law provides for a broad scope of discovery. *Roundy v. Staley*, 1999 UT App 229, 984 P.2d 404 (Utah App. 1999) (noting that Utah’s discovery rules promote “full disclosure of all relevant testimony and evidence”); *Glacier Land Co., L.L.C. V. Claudia Klawe & Assoc., L.L.C.*, 2006 UT App 516, 154 P.3d 852 (Utah App 2006) (lauding discovery rules for making adversarial proceedings “less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent”). The applicable rules permit informal discovery as well as formal discovery pursuant to the Utah Rules of Civil Procedure. R746-100-8.²⁰ Those rules allow parties “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Utah R. of Civ. Pro. 26(b)(1). “Relevant evidence” is in turn defined to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Utah ER 401. The documents sought by this motion meet the liberal standard for discovery.

Integra relies on Qwest to provide interconnection and related wholesale products and services that they use to serve their customers. In order to investigate facts relevant to its concerns with the proposed merger, Integra propounded extensive discovery, including a number

²⁰ In fact, this Commission’s rules allow even broader discovery than that allowed under the Utah Rules of Civil Procedure, in that trial preparation materials and the opinions, conclusions, and data of retained experts are discoverable without restriction. R746-100-8(C)(2).

of requests seeking information regarding CenturyLink's post-merger plans relating to wholesale services. For most questions regarding CenturyLink's plans relating to wholesale services, however, CenturyLink provided the boilerplate response that, although it did "not anticipate immediate changes," "[i]ntegration planning is in the early stages and decisions have not been made at this time." Examples of requests to which CenturyLink provided this, or a similarly noncommittal, response include requests concerning CenturyLink's post-merger plans relating to:

- Changes to Qwest Operations Support Systems ("OSS") (Integra Information Request, Request No. 23);
- How CenturyLink will make pre-ordering functions available to CLECs (Integra Information Request, Request No. 26);
- Locations and hours of operation of departments processing Access Service Requests and Local Service Requests (Integra Information Request, Request No. 28);
- Changes in Qwest legacy systems regarding repair commitments (Integra Information Request, Request No. 31);
- Changes in Qwest legacy trouble reporting systems (Integra Information Request, Request No. 32);
- Locations and planned hours of operation of departments processing trouble reports for wholesale service (Integra Information Request, Request No. 33);
- Billing platforms (Integra Information Request, Request No. 34b);
- Qwest wholesale performance plans (Integra Information Request, Request No. 61);
- Changes to Firm Order Commitment dates (Integra Information Request, Request No. 64);
- Staffing at Qwest wholesale and CLEC support centers (Integra Information Request, Request No. 67);

- Measures to ensure the protection of CLEC customer information from being used in CenturyLink’s retail operation (Integra Information Request, Request No. 68);
- Availability of up-to-date escalation information, contact information, and account manager information (Integra Information Request, Request No. 71);
- Changes to Qwest’s Standard Interval Guide (Integra Information Request, Request No. 82 and 83);
- Changes to Qwest’s Product Catalogs (“PCATs”) (Integra Information Request, Request No. 91);
- Changes to Qwest’s collocation application or collocation procedures (Integra Information Request, Request No. 108);
- Changes to Qwest’s loop hot cut process (Integra Information Request, Request No. 112);
- Extending existing interconnection agreements in Qwest legacy territory (Integra Information Request, Request No. 117);
- Modifications to Qwest’s Change Management Process (Integra Information Request, Request No. 118);
- Headcount reductions in support centers/staff servicing CLEC customers in Qwest legacy territory (Integra Information Request, Request No. 136);
- Moving functions currently supporting CLEC wholesale customers in Qwest legacy territory to new location (Integra Information Request, Request No. 137).

Anticipating that there might be some areas where CenturyLink had not completed its decision making, Integra also asked CenturyLink to describe its process and procedures for making and implementing integration decisions, anticipated timelines, and any existing preliminary plans. CenturyLink responded to this question, too, with its standard response that “System integration plans for the proposed transaction with Qwest have not been fully developed.” (Integra Information Request, Request No. 51). In other words, CenturyLink would have Integra believe

that it has no plans for the future, and is unable to even say when such planning will begin, when it will be completed, or what it will involve.²¹

The lack of any detail regarding the most basic aspects of how the post-merger Qwest will service wholesale customers is very concerning. The upshot of CenturyLink's discovery responses is that virtually every aspect of Integra's relationship with Qwest is up in the air as a result of the merger. Although CenturyLink repeatedly states that no immediate changes are anticipated, CenturyLink's response to Request No. 51 suggests that it has not yet done any of the analysis and planning that would be necessary for it to make such an assertion. These responses do nothing to allay the concerns of Integra and other CLECs that the post-merger pursuit of "synergies" will result in a deterioration of wholesale service availability and quality.

Seen in the context of these inadequate responses, Integra's need for documents being sought by this motion is clear. Based upon CenturyLink's description in the Washington and Arizona proceedings, two of the documents (13 and 15) concern, at least in part, CenturyLink's plans relating to wholesale markets. Three other documents (25, 33 and 9) relate to potential product offerings and opportunities in unspecified "market segments." To the extent wholesale is one of the markets, such information is obviously relevant. However, even if these documents do not refer to the wholesale market, this omission may be relevant to whether CenturyLink views wholesale customers as an opportunity to be cultivated or a burden to be reduced, if not eliminated. Another document concerns CenturyLink's staffing and sales approach regarding Enterprise Business marketing (Document 37). Again, it is unclear whether this would include wholesale customers, but, even if it does not, the document may help to illuminate, by that omission, CenturyLink's plans for the wholesale market. Finally, one document concerns the

²¹ CenturyLink's Response cross-references the Response to Request No. 40, which names some leadership personnel but does not provide the further requested detail.

impact on CenturyLink revenues of intrastate access reductions (Document 24). This document is relevant to CLEC concerns about financial pressures on the merged company and the potential impact of these pressures on wholesale services.

Because of the vagueness of Qwest's chart describing withheld documents in the Washington proceeding, Integra is unable to articulate precisely how each document would be relevant. However, Integra believes that these documents may have relevance similar to that of the CenturyLink documents described above, and, therefore, asks this Commission to order their production so that Integra may meaningfully participate in this proceeding with respect to all relevant information.

II. The Protective Order That Is In Place Is Sufficient To Fully Address CenturyLink's Purported Confidentiality Concerns

In addition to its relevance objections, Joint Applicants both objected to producing the HSR documents on the ground that these documents contain "highly confidential, commercially sensitive information." This Commission has already provided adequate protection for these documents by issuing the existing protective order. Despite this, Joint Applicants recently refused to produce HSR documents, stating that "the Commission's Protective Order is not sufficient" to mitigate the harm of releasing this information to Integra.²²

That issue is for the Commission to decide, not Joint Applicants. Here, the potential for harm to Integra from withholding the documents outweighs any risk to Joint Applicants from disclosing them pursuant to the protective order. This reasoning is wholly consistent with that of other jurisdictions considering discovery disputes on the basis of confidentiality. When a party seeks to avoid or limit discovery based on a claim of confidentiality, the courts follow a balancing approach that weighs the harm from disclosure of the allegedly confidential

²² Trincherro Decl., ¶ 6, Ex. 5.

information against the requesting party's need for the information. *See Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 161 F.R.D. 355, 358 (N.D. Ill. 1995); *Kaiser Aluminum & Chemical Corp. v. Phosphate Engineering and Construction, Inc.*, 153 F.R.D. 686, 688 (M.D. Fla. 1994). A claim of harm resulting from disclosure must be based on specific evidence that shows a clearly defined, specific, and substantial harm to the party seeking protection. *Sprinturf, Inc. v. Southwest Recreational Industries, Inc.*, 216 F.R.D. 320, 322 (E.D. Pa. 2003); *See also The Traveler's Insurance Co. v. The Allied-Signal, Inc. Master Pension Trust*, 145 F.R.D. 17 (D. Conn. 1992)(“A demonstration of good cause [to preserve confidentiality of a document] embodies a showing (1) that the documents in question truly are confidential and (2) that disclosures of the documents would cause a “clearly defined and very serious injury.”) “Broad allegations of harm, ‘unsubstantiated by specific examples or articulated reasoning,’ do not meet the requisite level of specificity to show ‘good cause.’” *Sprinturf*, 216 F.R.D. at 322 (citations omitted); *see also Traveler's*, 145 F.R.D. at 17 (denying motion for protective order based on general assertion of prejudice).

The issue here is not whether the documents sought should be publicly disclosed; the issue is whether the protections that are already available are adequate. A protective order has been entered in this docket that provides for protection for documents designated as “Confidential” and an additional level of protection for “Highly Confidential” documents. Documents identified as “Highly Confidential” are permitted to be available only to a small group of designated attorneys and experts, and are explicitly prohibited from disclosure to individuals involved in “strategic or competitive decision making for any party.”²³

CenturyLink's burden here is to show specific evidence of the potential for serious injury. There is no basis, much less specific evidence, on which to conclude that this protective order is

²³ Protective Order, ¶ 3.

insufficient here. Generalized allegations of potential harm cannot overcome the clear relevance of the documents sought by this motion.

III. Joint Applicants Should Be Required To Pay Integra’s Reasonable Expenses and Attorney Fees Incurred In Bringing This Motion.

Utah Rule of Civil Procedure 37(a)(4)(A) provides that, if a motion to compel is granted, the court “*shall*, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees....” Rule 37(a)(4)(A) (providing exceptions where no good faith effort was made to obtain discovery without a motion, where nondisclosure was substantially justified, or where an award of expenses is otherwise unjust) (emphasis added).

The Joint Applicants received Integra’s information requests. They further secured a protective order on August 18, 2010. Yet Joint Applicants still refuse to produce responsive documents due and owing. On September 2, *after* the protective order was in place, Joint Applicants’ respective counsel sent correspondence specifically refusing to produce to Integra the HSR documents that it produced to the DPU because “the Commission’s Protective Order is not sufficient” to mitigate the harm of releasing the documents to Integra.²⁴ On September 16, Integra’s counsel specifically urged CenturyLink and Qwest to produce the HSR documents, but Joint Applicants again refused to do so.²⁵ Joint Applicants have long-since known of their discovery obligations but have refused to comply with those duties, even after extensive communication with Integra’s counsel. If this Commission grants this motion, it is just and appropriate to award the Integra its reasonable expenses, including attorney fees, incurred in bringing this motion.

²⁴ Trincherro Decl., ¶ 6, Ex. 5.

²⁵ Trincherro Decl., ¶ 10.

CONCLUSION

For the foregoing reasons, the Integra respectfully requests that its motion to compel discovery be granted.

DATED this 20th day of September, 2010.

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