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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 RESPONSE TO INTEGRA'S MOTION TO COMPEL, AND REQUEST FOR *IN CAMERA* REVIEW

Pursuant to R. 746-100-4.D., Qwest Communications International, Inc. and CenturyLink, Inc. (hereafter "the Joint Applicants") hereby respond to the motion to compel that Integra Telecom of Utah ("Integra") filed on September 20, 2010. The Joint Applicants further request an *in camera* review of the documents still in dispute in the motion to compel, which is also a request they made in their pending September 20, 2010 motion for review, rehearing and/or clarification of the Commission's August 18, 2010 protective order.

The Joint Applicants respectfully submit that the Commission or Administrative Law Judge should review both Integra's motion to compel and the Joint Applicants' September 20, 2010 motion in tandem because the issues raised in Integra's motion to compel and in the Joint Applicants' motion are intertwined, as they essentially deal with the same issues. Namely, they deal with Integra's request for certain irrelevant and highly-sensitive and commercially-sensitive documents that the Joint Applicants submitted to the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), as required for those federal agencies' review of federal antitrust issues under the Hart-Scott-Rodino Anti-Trust Improvements Act

(“HSR Act”)¹ for this merger. These documents are collectively referred to as “the HSR documents.” In fact, the main issues for decision in each motion have to do with the extremely sensitive nature of the documents at issue, and their lack of relevance to the issues in this case. To be clear, Integra’s motion seeks production of all HSR documents that the Joint Applicants filed with the DOJ and the FTC. As explained below, the Joint Applicants will agree to produce the majority of HSR documents that have been previously withheld based on the Joint Applicants’ relevance objections. The Joint Applicants still object to producing a very small number of HSR documents, which have been previously characterized as “Staff Eyes Only” (“SEO”) documents. However, the Joint Applicants would be willing to produce the SEO HSR documents if additional protections are put in place for those documents.

PERTINENT PROCEDURAL HISTORY

The Joint Applicants filed their application for expedited approval of their proposed merger on May 19, 2010. It was not until July 1, 2010, however, that Integra submitted its first set of data requests, consisting of 156 data requests, not including subparts.² The Joint Applicants timely responded to the data requests on July 20, 2010, at which time they objected to the production of any HSR documents in their responses to Integra data request No. 143.³

Specifically, CenturyLink objected as follows:

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.

¹ See 15 U.S.C. §§ 15-19. The Joint Applicants received DOJ antitrust clearance in July 2010.

² The Joint Applicants did not receive the data requests until July 6, 2010, however, because Integra did not serve them electronically, and only served them by mail, on the Thursday before the 4th of July holiday.

³ Integra’s motion to compel also seeks the production of HSR documents that were provided to the Division of Public Utilities (“DPU”) in response to DPU data request Nos. 1.3 and 1.4. (See Integra Motion, p. 1.) Qwest has already provided Integra with the certain confidential and highly-confidential HSR documents that had previously been provided to the DPU. See fn. 7, *infra*. As discussed in Section II *infra*, the Joint Applicants will provide Integra with the majority of highly-confidential HSR documents, which will include all HSR documents that have been shared with the DPU by both Qwest and CenturyLink, thus rendering moot Integra’s motion with respect to the HSR documents provided to the DPU in response to the DPU’s data requests Nos. 1.3 and 1.4.

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.

Qwest objected to this data request as follows:

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 to 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-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.

On July 21, 2010, the Joint Applicants filed a motion for the entry of a protective order.⁴

The CLECs opposed the motion on July 26, 2010, and the Joint Applicants replied to the opposition on July 29, 2010. Thereafter, on August 20, 2010, the Commission issued a protective order. However, the Commission did not issue any written order that described the

⁴ The Joint Applicants explained that they were seeking the Commission to enter a protective order governing highly-confidential and competitively-sensitive information, including certain documents requested in this matter in discovery that are so competitively-sensitive and confidential that the Commission's standard confidentiality rule, R. 746-100-46, was not sufficient to prevent competitive harm if that information was disseminated to competitors. (Motion, pp. 1-2.)

Specifically, the Joint Applicants explained that the protection they sought included an additional category of highly-confidential and competitively-sensitive documents designated as "Staff's Eyes Only" (or "SEO") review. This meant that such information would be disclosed only to the Division and the OCS, but not to any CLECs or other non-Utah governmental parties. (Motion, pp. 1-2.) The Joint Applicants explained that as to the SEO provisions, the requested protective order would be limited to the types of documents that are contained, for example, in the Joint Applicants' HSR filings with the DOJ, such as:

- Strategic business plans and analysis;
- New product roll-out timelines; and
- Market share information. *Id.*, p. 3.

protective order. Nor did the Commission discuss or address any of the parties' arguments, or resolve the SEO issues in dispute between the parties.⁵

In the meantime, from July 20, 2010 until about September 1, 2010, after the CLECs had filed voluminous testimony, Integra utterly failed to follow up regarding production of any of these HSR documents in Utah. Then, about September 1st, Integra requested any highly-confidential documents that the Joint Applicants had provided to the Division of Public Utilities ("DPU") now that there was a protective order in place, to which the Joint Applicants responded. (See September 2, 2010 letter from Kevin Zarling and Alex Duarte to Mark Trincherro, Exhibit 5 to the Declaration of Mark Trincherro.) However, it was not until Thursday, September 16, 2010, the business day before it filed its motion to compel (and weeks after the Joint CLECs had filed more than 400 pages of testimony on August 30, 2010), that Integra's counsel indicated, *for the first time*, that Integra intended to file a motion to compel in Utah if the Joint Applicants did not produce any withheld HSR documents.⁶

In any event, since neither Integra nor the CLECs had demanded the HSR documents until September 16th, despite the Joint Applicants' July 20, 2010 objections to production of such documents, the Joint Applicants had determined there was no need to seek review or rehearing or clarification of the Commission's August 18, 2010 protective order. However, when Integra finally demanded these documents on September 16, 2010, and stated that it would file a motion to compel if the Joint Applicants did not produce them, the Joint Applicants had no

⁵ Moreover, the protective order that the Commission issued referred to the "wire center dockets," and thus appeared to be the same protective order that the Commission had previously issued, *without any parties' dispute*, in Docket No. 10-049-22. In fact, there was not only no discussion or analysis of the issues in dispute, but not even a recognition that the Joint Applicants had sought SEO protection. The protective order, therefore, was not responsive to the issues that the Joint Applicants raised in their July 21, 2010 motion.

⁶ In its motion, Integra admits that it was not until "September 16 [that] Integra counsel specifically urged CenturyLink and Qwest to produce the HSR documents." (Integra Motion, p. 15.) Thus, it is incorrect to say that there had been "extensive communications with Integra's counsel" in Utah. (*Id.*) The bottom line is that in Utah, Integra did not request or push for HSR documents after the Joint Applicants' July 20, 2010 objections until two months later, on September 16, 2010.

choice but to seek reconsideration or clarification of the August 18, 2010 protective order, and seek *in camera* review of these documents. Thus, the Joint Applicants did so on September 20, 2010, the same day that Integra filed the motion to compel.⁷

The procedural history is important because it strongly suggests that Integra's motion to compel is not really motivated by any real substantive concern about these HSR documents, but rather, to distract the Joint Applicants from preparation for the hearing later this month and to possibly seek a delay in the procedural schedule if they are even remotely successful with their motion. However, if these HSR documents were so important to its substantive position here, Integra would *not* have waited *two full months* after the Joint Applicants objections, and only about five weeks before the hearing, to file a motion to compel. This is especially so given that Integra and the Joint CLECs were able to file more than *400 pages* of testimony, and hundreds of pages of discovery (after propounding hundreds of data requests, with multiple subparts), a full three weeks *before* Integra filed its motion to compel. Therefore, it appears rather obvious that the motion to compel is more of a strategic ploy to cause burden and delay in the proceeding than a quest for any relevant documents that are central to the CLECs' case, which has been almost exclusively centered on the wholesale issues and wholesale systems that they have discussed in their 400-plus pages of testimony. At a very minimum, Integra sat on its hands and delayed resolution of this issue, and waited until almost the eleventh hour to seek these documents, after filing extensive testimony, and about a month before the hearing. The Joint Applicants

⁷ Integra also served a second voluminous set of data requests (Nos. 157 to 189) on September 17, 2010, to which the Joint Applicants promptly and timely responded on October 1, 2010.

Also, on October 1, 2010, Qwest provided to Integra certain highly-confidential HSR documents (Nos. 4(c)-22, 4(c)-30, 4(c)-34, 4(c)-41, 4(c)-49, 4(c)-50, 4(c)-62, 4(c)-63) that it had previously provided to the Division of Public Utilities ("DPU") in response to DPU data requests Nos. 1.3 and 1.4. (See Attachment 3, October 1, 2010 letter from Alex Duarte to Mark Trinchero.) Qwest had also previously provided the CLECs with certain confidential HSR documents (Nos. 4(c)-24 and 4(c)-56) on August 11, 2010. (*Id.*)

respectfully submit that the Commission should be leery of this motion given the procedural history that has unfolded and the circumstances here.

ARGUMENT

I. THE HSR DOCUMENTS ARE NOT RELEVANT TO THIS PROCEEDING

The standard of review for the Joint Applicants' proposed transaction as provided in Utah Code Ann., §§ 54-4-28, 54-4-29 and 54-4-30, is whether the merger is in the "public interest." Integra's motion, however, does not explain how the information it believes is in the HSR documents is related to the issues that will guide the Commission's review of this proceeding. Integra's motion does cite specific concerns that it says entitle it to discovery and, specifically, to discovery of the HSR documents. These concerns can be accurately summarized as concerns over whether the post-merger company will be able and willing to meet its obligations to provide *UNEs and wholesale services* to CLECs. (Integra Motion, pp. 9-12.) The motion refers to Integra's concern that CenturyLink's stated intent to realize its forecasted synergy savings might lead to reduced service to wholesale customers. It must be understood that, in context, the wholesale services that Integra and the other CLECs are concerned about are the interconnection, UNEs, and resale, and the ordering and provisioning systems that support those services pursuant to Section 251 of the federal Telecommunications Act of 1996 ("the Act"). In other words, Integra's "concerns" and issues in this proceeding do not extend to the post-merger company's plans for its retail markets and services (e.g., mass market consumer services, small business services, enterprise business services, payphone services, switched access services, broadband services, IPTV services, etc.).

That Integra and the other CLECs are focused on wholesale interconnection and integration issues is also demonstrated by Integra's recitation in its motion of the other data requests that Integra has propounded. (Integra Motion, pp. 10-11.) A primary theme of Integra's

motion to compel is its apparent disbelief that decisions have not yet been made concerning details relating to integration of systems and processes associated with provisioning wholesale services to CLECs. For example, at pages 9-12 of its motion, Integra discusses 21 detailed aspects of systems and process integration that Integra inquired about in some of its 180 non-HSR-related data requests directed to the Joint Applicants. Integra seems dismayed that decisions have not yet been made concerning these detailed aspects of systems and process integration, despite the fact that the transaction has not yet closed and will not close for months.⁸ Instead, Integra speculates that the decisions have in fact been made and are hidden somewhere within the HSR documents for which the Joint Applicants seek “Staff’s Eyes Only” (“SEO”) protection or *in camera* review. This is an amazing leap in logic, especially since these documents were prepared before the merger agreement was even signed. There is nothing in the HSR documents that bears on the CLECs’ primary concern as expressed in their pleadings.

Further, the Joint Applicants note that the reasons that the FTC and DOJ require the HSR documents is to assist them in performing their statutorily-required task of reviewing the merger on a national level for any specific federal antitrust violations, primarily under the Clayton Act. *See* 15 U.S.C. §§ 15-19. This analysis includes a review for price discrimination; exclusive dealings or “tying;” a substantial reduction in national competition; and a review of directors. *See id.* The HSR Act only requires that pre-merger notification HSR documents be filed for mergers that are, among other things, valued at a minimum of \$50 million, and only by and from persons with certain net and total assets, because the HSR Act was designed to cover mergers that affect the entire national economy. *See* 15 U.S.C. § 18(a); *Mattox v. Federal Trade Commission*, 752 F.2d 116, 122 (5th Cir. 1985).

⁸ The Joint Applicants have repeatedly explained in testimony and in responses to data requests that in the transaction, CenturyLink will be acquiring *all* of Qwest’s systems and process intact, and therefore, no systems or

In contrast, this Commission's statutorily-mandated task is to examine if the merger is consistent with the public interest *in Utah*. That means that the Commission's standard of review is applicable to considering *Utah operating entities*. The Commission's consideration relies upon an analysis of the Utah local telecommunications marketplace and the ultimate effect that the transaction will have on that local, intrastate marketplace. The federal agencies and this Commission, therefore, are obligated to examine two different subject matters, operate under two distinct jurisdictions, and have two distinct areas of expertise in merger review.

Thus, the Joint Applicants specifically compiled the HSR documents to provide to the FTC and DOJ information to assist them in their examinations of the merger for federal antitrust law violations. The HSR documents do not generally provide any analysis or information that is specific to Utah, nor could such information be accurately deduced from the HSR documents. They are not, therefore, relevant to this proceeding. Such information relevant to the local telecommunications marketplace, if it exists in the HSR documents, would only come from a fishing expedition by Integra through highly-sensitive materials for information that could be more directly obtained from other sources. Because the HSR documents are not relevant to the Commission's own merger-review responsibility, but do contain heightened confidential commercial and financial information and analysis that could cause significant irreparable harm to the Applicants if they were to be released to competitors and potential adversaries, the harm of disclosing these documents greatly outweighs any benefit of producing them. Nonetheless, as described below, the Joint Applicants will agree to produce most of the HSR documents.

Accordingly, the Joint Applicants respectfully submit that the Commission should deny Integra's motion to compel regarding the few HSR documents that still remain in dispute.

process conversion need take place before or at closing. Instead, system and process conversions can take place post-merger at a prudent pace.

II. THE JOINT APPLICANTS WILL PRODUCE MOST OF THE HSR DOCUMENTS

The Commission should now be well aware of the Joint Applicants' concerns about disclosing highly-competitively sensitive information to its competitors that have intervened in this docket. The Joint Applicants' pleadings in connection with their requested protective order, and their subsequent motion for review or rehearing, and request for *in camera* review, make clear the sensitivity with which the Joint Applicants view the disclosure of HSR information.

A. Background regarding the withholding of HSR documents

In addition, as is evident from the various pleadings in this proceeding, the issues of relevance and confidentiality of the HSR documents has been actively debated in most of the jurisdictions reviewing the merger. There also have been ongoing discussions between the Joint Applicants and Integra and other CLECs in these various state commission proceedings. At the time that the Joint Applicants first submitted their initial request for *in camera* inspection in another proceeding (Washington) where the issue had been addressed before it has arisen in Utah, CenturyLink had identified 13 documents in its HSR package for which it was seeking "Staff Eyes Only" treatment. Likewise Qwest had identified 15 documents in its HSR package for which it was seeking "Staff Eyes Only" treatment. However, given subsequent discussions and ongoing developments in various states, and in the spirit of compromise, the Applicants have advised Integra that they are willing to modify their requested treatment of HSR documents.⁹

B. Applicants' agreement to re-designate and produce most HSR documents

Integra's data request No. 143 puts at issue more than 100 HSR documents submitted to the DOJ and the FCC by the Joint Applicants. The documents that the Joint Applicants are

⁹ While the Joint Applicants believe their willingness to compromise on their objections is laudable, they also anticipate that Integra CLECs will denigrate such flexibility as an indication that the objections were not well taken. The Joint Applicants contend that any such negative assertions would only be indicative of how negatively Integra views the concept of "compromise." It is not at all unusual for a party to compromise on its perfectly legitimate objections, and a decision to compromise can be based on many factors.

prepared to submit for *in camera* review are only *the most sensitive* of HSR documents for which they were seeking a special treatment of “Staff Eyes Only” (“SEO”) disclosure. The majority of HSR documents that the Joint Applicants produced are still irrelevant to this proceeding, and are still competitively sensitive even if the Joint Applicants did not initially view them as SEO-type documents. However, in balancing Integra’s insistence on discovery with the protections afforded by the current protective order, and in order to narrow the issues and in the spirit of compromise, the Joint Applicants have decided to produce the vast majority (approximately 90 percent) of the HSR documents under the “Highly-Confidential” provision of the current protective order. The Joint Applicants will produce these documents, subject to and without waiving their original relevance objection. However, leaves the HSR documents that the Joint Applicants had originally deemed to be SEO documents, and the Joint Applicants still object to producing those documents.

1. CenturyLink’s re-designated SEO HSR documents

Specifically, of the 13 documents that CenturyLink originally deemed SEO documents, CenturyLink will re-designate, or “downgrade,” *four* documents (Nos. 9, 24, 25 and 37) as “Highly-Confidential” under the Highly-Confidential provision of the current protective order. Further, CenturyLink will re-designate *four* other HSR documents (Nos. 4, 13, 15 and 16) as Highly-Confidential with limited redactions, and it explains what information it has redacted, and the reasons why, in section III, *infra*.¹⁰ As CenturyLink explains in section III, these limited redactions are of information that is being withheld because CenturyLink contends the information is irrelevant and, based on the competitive sensitivity of the information, disclosure

¹⁰ When the Joint Applicants first approached Integra about HSR documents in other states, CenturyLink considered 12 documents to be so competitively sensitive as to be subject to a Staff Eyes Only designation (and one additional document was proposed to have certain pages redacted as SEO). Of those original 13 “SEO” HSR documents, the one with redactions has been completely classified as Highly Confidential, three others have been

also presents a significant risk of competitive harm to it. Finally, CenturyLink continues to object to the production of *only five* HSR documents (Nos. 10, 23, 33, 35 and 36). CenturyLink explains why these documents are not relevant to the proceeding and are not reasonably calculated to lead to the discovery of admissible evidence, and thus should not be produced (or if produced, should be produced solely on an SEO basis, or with additional protections, as explained below), in section III, *infra*.¹¹ A revised listing of these 13 CenturyLink HSR documents is attached hereto as Attachment 1.

2. Qwest's re-designated SEO HSR documents

Likewise, of the 15 documents that Qwest originally deemed SEO documents, Qwest will re-designate, or “downgrade,” *eight* documents (Nos. 4(c)-37, 4(c)-39, 4(c)-42, 4(c)-57, 4(c)-61, 4(c)-65, 4(c)-69, 4(c)-71 and 4(c)-76) as “Highly-Confidential” under the Highly-Confidential provision of the current protective order. Further, Qwest continues to seek complete “SEO” treatment for *only six* HSR documents (Nos. 4(c)-44, 4(c)-46, 4(c)-48, 4(c)-53, 4(c)-81 and 4(c)-82). However, Qwest notes that three of these documents (Nos. 4(c)-44, 4(c)-46 and 4(c)-53) are the same as four of the HSR documents at issue (Nos. 13, 15, and 35 and 16, respectively) for CenturyLink, and thus Qwest will refer to CenturyLink’s explanation for these documents.

Qwest explains why these documents are not relevant to the proceeding and are not reasonably calculated to lead to the discovery of admissible evidence, and thus should not be produced (or if

completely classified as Highly-Confidential, and for four such documents, CenturyLink proposes only limited redactions as a result of relevance objections. See § III, *infra*.

¹¹ In the motion to compel, Integra draws attention to seven CenturyLink HSR documents as being potentially relevant in this proceeding. (See Integra Motion, at pp. 6-7.) However, as shown above, CenturyLink has now re-designated (or “downgraded”) four of the documents (Nos. 24, 25, 37 and 9) to Highly-Confidential status based upon the discussion above. (See also Attachment 1.) Further, as shown above, CenturyLink has now re-designated two of the documents (Nos. 14 and 15) to Highly-Confidential with limited redaction. (See also Attachment 1.) Thus, of these seven documents that Integra mentions, CenturyLink continues to seek complete “Staff Eyes Only” treatment for only one of the documents (No. 33). As discussed more fully in section III, *infra*, this document, which deals with retail markets, consists of extremely sensitive market research, much of which was commissioned to a third-party researcher and that CenturyLink paid for. Likewise, *in camera* inspection of CenturyLink Documents Nos. 4, 13, 14 and 15 will show that the redacted material is similarly not relevant.

produced, should be produced solely on an SEO basis), in section III, *infra*.¹² A revised listing of these 15 Qwest documents is attached hereto as Attachment 2.¹³

III. THE REVISED LIST OF HSR DOCUMENTS THAT ARE STILL IN DISPUTE

A. The Commission should deny the motion based on its timing and nature

Preliminarily, the timing of the motion and the nature of Integra's intervention weigh heavily in favor of denying its motion. Integra has failed to timely exercise its choice to move the Commission to compel production.

Specifically, despite Integra claiming not to have the information that it asserts is important to its case, Integra and the other Joint CLECs were nevertheless able to file more than 400 pages of testimony based largely on thousands of pages of discovery responses that the Joint Applicants provided to more than 200 intervenor data requests (not including subparts and responses to other parties' requests). Further, Integra and the CLECs filed their testimony on August 30, 2010, nearly *six weeks* after receiving the pertinent discovery responses and objections. Given the length and scope of the CLECs' testimony, and the remarkable gap between receipt of the discovery in question and the filing of their testimony, Integra must have thoroughly reviewed the Joint Applicants' discovery responses and objections during that time.

¹² With respect to Qwest's HSR package, Integra's motion draws attention only to Documents Nos. 4(c)-39, 4(c)-42, 4(c)-44, 4(c)-46, 4(c)-48, 4(c)-53, and 4(c)-82. (See Motion, at p. 8.) These documents are documents within Qwest's HSR package that were authored by CenturyLink. However, as shown above, the Applicants have now re-designated two of them (Nos. 4(c)-39 and 4(c)-42) to Highly-Confidential status based upon the discussion above. (See also Attachment 1.) As to the remaining documents, the Joint Applicants will treat them as follows:

Document No. 4(c)-42 - this document is the same as CenturyLink No. 17, treated as Highly-Confidential;

Document No. 4(c)-44 - consists of documents contained in CenturyLink Nos. 13, 14, 15, and 17, as well as Qwest No. 4(c)-46, and will be treated consistently with those documents;

Document No. 4(c)-48 - the same as CenturyLink No. 35, not disclosed;

Document No. 4(c)-53 - the same as CenturyLink No. 16 (see Attachment 1); and

Document No. 4(c)-82 - the same as CenturyLink No. 36, not disclosed.

Of the remaining documents that continue to be withheld, they contain information that is highly-sensitive, as described generally above, and in more detail below in section III, and thus are not relevant to the issues here.

¹³ For clarification, Qwest states that *all* of these documents are CenturyLink-authored documents. Thus, to the extent that CenturyLink has offered to disclose some of these documents either as Highly-Confidential, or Highly-Confidential with redactions, Qwest will treat those documents consistently with those designations.

Integra was granted intervention on the condition that it not unreasonably burden the record or delay the proceedings. This motion does both, and for data that is extraordinarily sensitive and not relevant to Integra's case.

Integra's argument that the lack of such documents could prevent it "from participating in the proceeding in a meaningful way" (Motion, p. 6) is not credible. Integra has waited until this late date to seek the documents it now claims that it so desperately needs. Integra received the Joint Applicants' discovery responses to its data request No. 143 on July 20, 2010. The Joint Applicants can only surmise that either Integra intentionally waited to file the motion or that it was so consumed disputing similar discovery in other states that it simply neglected to do so in Utah. In either case, if not having this information was really so detrimental to Integra's case, it would not have waited until just weeks before the hearing (two months after receiving the responses) to challenge the Joint Applicants' objections to providing the information.

Accordingly, allowing the motion now will only serve to unreasonably burden the record and delay the proceeding. The motion should therefore be dismissed on these grounds.

B. The Commission must balance benefit of disclosure to risk of harm

However, even if the Commission were to disregard the context in which Integra filed the motion, the application of the balancing standard set forth in the motion requires that the Commission deny the motion. In determining relevance, it is appropriate to balance the benefit of disclosure to the requesting party with the risk of harm to the disclosing party. The Commission's deliberations are generally conducted in accordance with the Rules of Evidence applied in the courts in Utah. The Commission must determine whether evidence, even if relevant, should be excluded from disclosure. Rule 403 of the Utah Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or misleading the jury, or by

considerations of undue delay, waste or time, or needless presentation of cumulative evidence.” Utah R. Evid. 403. This doctrine is not limited to situations in which there is a possibility that the evidence would be prejudicial at trial—it also applies for evidence that risks violations of confidentiality and trade secrets.¹⁴ As discussed below, and as an *in camera* inspection will reveal, the limited number of HSR documents remaining that Integra seeks to compel production of are not relevant and should not be produced in discovery.

Integra also relies on other state commission rulings on similar discovery issues to distract the Commission from the real issue – whether the documents in question are relevant to their case and whether, balancing the potential harm to the Joint Applicants against the relevance (or lack thereof), the documents should be produced. This Commission is not bound by decisions by other commissions, which are governed by different standards under state-specific rules and law.¹⁵

Finally, although a protective order can mitigate the risk of disclosure, the risk of disclosure (even inadvertently) still exists and can be a factor in judging the relevance of requested information. See e.g., *In re Qwest Corp.*, Order No. 03-533, 2003 WL 24038510 (Oregon PUC 2003) (applying the probative value versus unfair prejudice balancing test and analyzing the limit on disclosure of trade secrets in the context of a motion to compel a data response). The risk of competitive harm to the Joint Applicants from disclosure of irrelevant HSR information is significant. As discussed below, and as an *in camera* inspection will reveal,

¹⁴ See e.g., *Mo. Pub. Serv. Comm'n v. Mo. Pipeline Co.*, Case No. GC 2006-0378, 2006 WL 3733309, at *2 (Mo. PSC 2006) (“In deciding whether a party should be allowed to discover certain information, the court, or administrative agency, must weigh ‘the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay, waste of time, cumulateness, or violations of confidentiality.’”); *YMCA of the Rockies v. Pub. Serv. Co. of Colo.*, Case No. 05F167G, R0608951, 2005 WL 1994293 (Colo. PUC 2005) (requiring the Colorado PUC to analyze the probative value of evidence, even though the Colorado Commission, similar to Utah, is not strictly bound by the technical rules of evidence).

¹⁵ Moreover, state commissions have ruled both ways on whether the HSR documents in question should be disclosed to Integra and the Joint CLECs. The Colorado Public Utilities Commission, for example, recently entered an order adopting CenturyLink’s proposal prohibiting Joint CLECs in Colorado from access to the most highly sensitive HSR documents that Integra now seeks in this proceeding. (See Attachment 4.)

the limited number of HSR documents remaining that Integra seeks to compel production of are not relevant and should not be produced in discovery.

C. CenturyLink’s revised list of withheld HSR documents, and reasons therefor

As noted in section II, *supra*, CenturyLink is still withholding five CenturyLink HSR documents in their entirety, and four HSR documents with limited redactions. Since CenturyLink has offered to submit these documents for *in camera* review, the Administrative Law Judge can review the specific documents in detail to confirm that these documents should not be produced, or if so, only under SEO treatment. CenturyLink will reference the documents using the index and description of SEO documents in Attachment 1 filed with this response.

1. HSR Document No. 10- Broadband Marketing and Strategy

This two-page document is an analysis of market share, trends and marketing strategy for broadband services in legacy CenturyTel and Embarq territories. Broadband deployment is not a subject over which the Commission has jurisdiction, nor is it directly implicated by the merger review criteria in Utah Code Ann., §§ 54-4-28, 54-4-29 and 54-4-30. In addition, broadband market share information is not at all related to the type of wholesale and interconnection issues that Integra and the other CLECs have raised in this proceeding, either in their testimony, their proposed “conditions,” or their other discovery. Such information, however, is obviously extremely competitively-sensitive insofar as it reveals CenturyLink’s actual broadband market share and market share of new broadband customers in specific geographic markets. Moreover, there is no Utah-specific data in this document. All of the geographic markets that are analyzed are not in Utah. Consequently, this document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink’s relevance objection.

2. HSR Document No. 23- IPTV Qwest Market Business Case Sensitivities

This document contains financial assumptions and projected market rollout information for IPTV in various Qwest markets. Similar to HSR Document No. 10, this document involves an analysis of a service over which the Commission has no jurisdiction and that is not directly implicated by the merger review criteria in Utah Code Ann., §§ 54-4-28, 54-4-29 and 54-4-30. The document includes information on key assumptions regarding capital expenditures, average revenue per customer, marketing costs, network upgrade costs, market-specific revenue projections, and more. This type of information related to business case scenarios for a possible rollout of IPTV is not information that is relevant to the issues that Integra and the other CLECs in this proceeding have raised, but such information is very competitively-sensitive. Further, much of the information is either multi-state in nature, and certainly does not relate to Utah. Consequently, this document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

3. HSR Document No. 33- Proprietary Market Research Data

HSR Document No. 33 contains extensive (more than 200 pages) of market research survey data that CenturyLink commissioned and that contains proprietary, highly-confidential and competitively-sensitive market data research regarding potential product offerings and customer preferences in various product and geographic markets. Substantively, this market research data focuses on customer preferences for retail voice, Internet and video services that are not relevant to the wholesale interconnection and integration issues that Integra and the CLECs have raised. Neither does this "customer preference" market research data relate to the merger review criteria in Utah Code Ann., §§ 54-4-28, 54-4-29 and 54-4-30. The data is multi-state in nature, and where specific geographic markets are mentioned, they are outside of Utah (e.g., pp. 15, 60, 80). Consequently, this document is not relevant to this proceeding, and its

highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

4. HSR Document No. 35- IPTV Market Study and Financial Projections

As with HSR Document No. 23 discussed above, HSR Document No. 35 deals with IPTV, a service over which the Commission has no jurisdiction, and which is not related to the wholesale interconnection and integration issues that Integra and the CLECs have raised. CenturyLink provided HSR Document No. 35 to Qwest during the merger "due diligence" process, and it contains highly-confidential and competitively-sensitive market projections and financial data regarding CenturyLink's IPTV offerings. The information is multi-state in nature, and is limited to CenturyLink's existing territory, so it does not include any Utah-specific data. Consequently, this document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

5. HSR Document No. 36- Consumer Sales Strategy

Once again, the focus of this HSR document, like so many others, is on retail consumer services. Specifically, HSR Document No. 36 provides details about CenturyLink's consumer markets sales strategies, which is highly competitively-sensitive information, and is not relevant to the wholesale interconnection and integration issues that Integra and the CLECs have raised. There are also a few pages that describe CenturyLink's "Enterprise" market sales organization's structure and market segmentation (service to CLECs is not included in the Enterprise market), and this information is equally irrelevant to the issues that Integra and the CLECs have raised. Consequently, this document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

6. HSR Document No. 4, Redacted Pages 9, 10, 11¹⁶ - Churn Data

This document is a report containing highly-confidential and competitively-sensitive retail customer data, broken down by customer segment, with churn data provided by product purchased. The report also discusses marketing and retention strategies, as well as trending data for active Qwest customers. It is Century Link's contention that the information in the entire document is not relevant to the issues in this proceeding. It is, however, another demonstration of CenturyLink's willingness to compromise on this discovery dispute that CenturyLink is willing to produce all but three (3) pages of this document. These pages contain churn data related to retail customers, broken down by retail customer segment and retail product segment (e.g., voice only, bundled voice and Internet access, etc.), and they are in no way relevant to the wholesale interconnection and integration issues that Integra and other CLECs have raised. This information is also not Utah-specific. Consequently, these three redacted pages are not relevant to this proceeding, and their highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

7. HSR Document No. 13, Redacted Pages 7, 8, 9 -Cell Site and Inmate Payphone Data

This HSR Document is titled "Wholesale Overview." However, none of the "wholesale" services or market segments reviewed in the document are relevant to the issues that Integra and the other CLECs have raised. Again, it is CenturyLink's position that *all* of the information in this document is irrelevant to the issues in this proceeding. However, CenturyLink is only objecting to producing three (3) pages that 1) provide information on the number of wireless carrier cell sites that CenturyLink serves, and how many of these sites are served by fiber, broken down by CenturyLink operating region (there is no data for Utah); 2) additional data on wireless

¹⁶ Pages titled: "Monthly Account Churn Rate by Product Set," "Customer HSI Subs Account Churn Feb 2010" and "Monthly Account Churn Rate by Segment."

carrier cell sites being served, the number of sites that CenturyLink has proposed to serve, and estimates of the total market opportunity, again by region (again, no data for Utah), and with specific carrier-customer site-specific information; and 3) state-specific revenue information in the inmate (prison) payphone market (again, there is no data for Utah). All of this information is extremely competitively-sensitive and is clearly unrelated to matters at issue here.

Consequently, these three redacted pages are not relevant to this proceeding, and their highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

8. HSR Document No. 15, Redacted Pages 8, 10, 13, 14, 15, 16, 17, 18, 20, 21, 23, 30, 35, 42, 43, 44, 45, 46, 47

The title of this document is "2010 – 2013 Long Range Plan Review," which on its face signifies the extreme competitive-sensitivity of the information. Once again, CenturyLink contends that none of the information in this document is relevant to the issues that Integra and the other CLECs have raised. Nevertheless, CenturyLink will agree to compromise and produce the vast majority of the document's 47 pages, and is only withholding 19 pages.

It would be too unwieldy to describe the content of every page that CenturyLink objects to providing. However, just a few samples demonstrate that redacted information is not relevant, as follows: system-wide consumer (mass market) average revenue per unit for voice, Internet, and IPTV services (p. 8); system-wide trends in Internet subscribership and related business assumptions (p. 10); system-wide revenue trends and projections for IPTV, as well as IPTV market penetration trends and projections (pp. 14, 15); system-wide Enterprise business market segment revenue trends and projections, broken down by product segment (p. 21); system-wide Wholesale market revenue assumptions, by product group (which does not include any Section 251 interconnection or reciprocal compensation products or revenues) and focused on switched access (p. 23); 2010 and 2013 revenue projections for standalone CenturyLink (i.e., pre-merger),

broken down by product segment (p. 35); and pages that provide CenturyLink system-wide data on consumer mass market revenue projections through 2013; access line trends and projections (including churn and revenue data) through 2013; trends and projections for DSL Internet Access (including churn and revenue data) through 2013; trends and projections for Direct Broadcast Satellite (including churn and revenue data) through 2013; trends and projections for Enterprise business market revenues broken down by product segment through 2013; and trends and projections for Wholesale market revenues by product segment through 2013 (pp. 42-47).

None of this data is Utah-specific, and none of it is relevant to the wholesale interconnection and integration issues that Integra and the other CLECs have raised. Nearly all of this data concerns products and markets that are of absolutely no concern to the CLECs, and even the Wholesale revenue data is not relevant to the CLECs' concerns regarding CenturyLink's expertise in interconnection and Operational Support Systems. Consequently, these 19 redacted pages are not relevant to this proceeding, and their highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

9. HSR Document No. 16, Redacted Pages 23,¹⁷ 24, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 46

The title of this document is "Operations Overview," and it contains highly-confidential and competitively-sensitive market specific data regarding CenturyLink's operating models and marketing plans in the Consumer, Mass Market, and Enterprise markets. Highly-confidential market launch data is included in the presentation for upcoming product rollouts. None of the information for these market segments is relevant to the wholesale interconnection and integration concerns that Integra and the other CLECs have raised. Of the 48 pages included in this document, CenturyLink will compromise and thus produce 34 pages with a Highly-

Confidential designation, but CenturyLink objects to providing 14 pages of information that is both irrelevant and extremely competitively-sensitive.

Again, it is not necessary to describe all the pages in detail here because an *in camera* review will permit the Administrative Law Judge to readily conclude that all of the pages for redaction are irrelevant and should not be produced. For example, the redacted pages include: specifics about CenturyLink's marketing approach to the consumer and mass market segments (p. 23); trends in Internet access (DSL) churn (p. 24); trends in consumer market average revenue per unit (p. 30); and strategic marketing, pricing and product roll out data for IPTV (pp. 32-40). The information is not Utah-specific. Most of this data concerns services over which the Commission has no jurisdiction, and which are not implicated by the merger review criteria in Utah Code Ann., §§ 54-4-28, 54-4-29 and 54-4-30. The data in the redacted pages is irrelevant to the wholesale interconnection and integration concerns that Integra and the other CLECs have raised. Consequently, these 14 redacted pages are not relevant to this proceeding, and their highly-confidential and competitively-sensitive nature weighs in favor of sustaining CenturyLink's relevance objection.

D. Qwest's revised list of withheld HSR documents, and reasons therefor

As noted in section II, *supra*, Qwest is still withholding six HSR documents. Since Qwest has offered to submit these documents for *in camera* review, the Administrative Law Judge can review the specific documents in detail to confirm that these documents should not be produced, or if so, only under SEO treatment. Qwest will reference the documents using the index and description of SEO documents in Attachment 2 filed with this response.

¹⁷ Because HSR Document No. 16 does not contain page numbers, the first redacted page (23) can serve as a landmark for identifying all the pages that CenturyLink objects to providing. The first page to be redacted (23) is titled "Market Approach – Consumer & Mass Market."

1. HSR Document 4(c)-44

This document is similar to CenturyLink HSR Document Nos. 13, 14, 15 and 17. Please see discussion at section III.C.7 and C.8 regarding CenturyLink HSR Document Nos. 13 and 15.

2. HSR Document 4(c)-46

This document is the same as CenturyLink HSR Document No. 35. Please see discussion at section III.C.4.

3. HSR Document 4(c)-48- IPTV offerings and financial impacts

This 15-page document provides an overview of CenturyLink's IPTV offerings and the general financial impacts on the business of deployment. The document includes information about IPTV revenue and penetration growth (pp. 2-3), and includes an IPTV sample market case study regarding revenue growth, dilution, success models and packaging, pricing and offers, including Video on Demand, DVR programming, and applications (pp. 5-15). This document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining Qwest's relevance objection.

4. HSR Document 4(c)-53

This document is the same as CenturyLink HSR Document No. 16. Please see discussion at section III.C.9.

5. HSR Document 4(c)-81- Customer satisfaction tracking research

This 42-page document deals with CenturyLink customer satisfaction tracking research for consumer services. The purpose of the study was to track customer perceptions of legacy Embarq, legacy CenturyTel and the combined CenturyLink, as well as to uncover factors influencing those perceptions, evaluating the competitive threat posed by other providers (especially cable companies), and to determine the propensity to switch to newer telephone technology. The study reached numerous conclusions and made numerous recommendations.

The study included an overall Embarq/CenturyTel/CenturyLink satisfaction analysis (pp. 8-14), including likelihood of customers recommending (or not recommending) these brands, improvements made (p. 15), key driver analysis for fourth quarter 2009 (pp. 16-17), and overall satisfaction with the brands and perceptions of the brands' value for money (pp. 18-20). The study also included an analysis of other provider satisfaction and customer loyalty (pp. 21-27), a potential churn analysis (pp. 28-32), a customer touch point analysis (pp. 33-35), a problem detection analysis (pp. 36-40), and a demographics study (pp. 41-42). Finally, the study made certain consumer sales approach recommendations (pp. 43-44), discussed certain sales channel dynamics, and discussed an Enterprise market competitive analysis. It is clear that this document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining Qwest's relevance objection.

6. HSR Document 4(c)-82- Consumer sales approaches

This 12-page document deals with consumer sales approaches. These approaches include an analysis of sales channel dynamics (pp. 4-6), new incremental channel opportunities under development (p. 7), and an Enterprise market competitive climate analysis (pp. 8-12), including for both legacy CenturyTel and legacy Embarq ILEC and CLEC operations (p. 12). This document is not relevant to this proceeding, and its highly-confidential and competitively-sensitive nature weighs in favor of sustaining Qwest's relevance objection.

IV. THE COMMISSION SHOULD CONDUCT AN *IN CAMERA* REVIEW

The Joint Applicants believe they have offered a reasonable way to proceed with evaluating the documents and determining if they must be produced to Integra. Thus, they respectfully request the Administrative Law Judge to conduct an *in camera* review of the HSR documents still in dispute. This evaluation will enable the Administrative Law Judge to make two sequential decisions that bear on disclosure.

First, after *in camera* review, the Commission may determine that the documents are not relevant to any disputed issues, and are not likely to lead to the discovery of admissible evidence. That determination will close the matter, without further review, since that determination would mean that Joint Applicants have no obligation to produce the documents, even under the admittedly broad relevance standards that govern discovery.

Second, if the Commission determines that the Joint Applicants have not prevailed on their relevance arguments, there is still the issue of the extremely sensitive nature of the documents. This issue also bears on the manner and extent of any required disclosure of the documents, and is thus also addressed in the Joint Applicants' motion for review and rehearing, and for *in camera* review. Thus, there is still the issue about the hyper-confidentiality and sensitivity of these documents. Although a protective order can mitigate the risk of disclosure, the risk of even inadvertent disclosure would unduly harm the Joint Applicants, without any meaningful remedy once the documents have been disclosed. The risk of competitive harm to the Joint Applicants from disclosure of irrelevant HSR information is simply too significant.

The Joint Applicants are confident that if and when the Administrative Law Judge reviews these highly-confidential and competitively-sensitive HSR documents, he will agree that the documents are not relevant to the issues here. Thus, these documents should be protected from disclosure to the Joint Applicants' competitors due to their extreme competitive-sensitivity.

Finally, the Joint Applicants note that they have produced thousands of pages of documents in response to Integra's and other parties' data requests. Thus, the *in camera* review is for a *very* limited number of documents. Moreover, the Joint Applicants have offered to allow outside counsel access to the documents for review, in order to either (a) determine they are not

relevant and thus would not seek further access; or (b) prepare for the *in camera* process.¹⁸ The CLECs refused this offer, however, demanding instead that copies of the documents be produced. The Commission should not grant the motion to compel when Integra had an opportunity to review the disputed documents but did not take advantage of that opportunity.

In summary, an *in camera* review of the SEO HSR documents will quickly reveal that these documents have no relevance to the systems and process integration issues, or any other issues that Integra or the CLECs have raised in this proceeding. Indeed, Integra and the CLECs were able to file more than 400 pages of testimony, and hundreds of pages of exhibits, without any such documents. This will become readily apparent to the Administrative Law Judge upon *in camera* review, and would have been apparent to Integra if it would have inspected the SEO HSR documents pursuant to Joint Applicants' offer to make them available for inspection.

V. THE JOINT APPLICANTS' ALTERNATIVE PROPOSAL FOR PRODUCTION OF THE REMAINING HSR DOCUMENTS

The Joint Applicants have presented a strong case in support of their relevance objections to producing the remaining HSR documents and certain pages from other HSR documents. As Integra and many of the other CLECs in this proceeding are actively involved in other state proceedings where this merger is being reviewed, disputes over access to these HSR documents have occurred in various states under various forms of protective orders, and with the Joint Applicants having made different compromise proposals to resolve the dispute. To date, no compromise that the Joint Applicants have made to Integra has been satisfactory. Yet, no state commission has yet required the Joint Applicants to produce the remaining SEO-type of HSR documents with only the minimal level of protection afforded Highly-Confidential information

¹⁸ Under the Joint Applicants' proposal, access to the documents would take place in either Qwest or CenturyLink offices, and could thus occur in Seattle, Olympia, Vancouver, Portland, Minneapolis, or some other city of Integra's choosing, so long as Qwest or CenturyLink has an office in that city.

by the current Utah protective order.

Integra also filed a motion to compel production of the HSR documents in the Minnesota merger review proceeding.¹⁹ In that proceeding, the Administrative Law Judge ordered the production of the HSR documents. In response to the Joint Applicants' motion for reconsideration, the Administrative Law Judge in the Minnesota proceeding recently issued a protective order with additional protections that are applicable to the remaining CenturyLink HSR documents (and specific pages) that have been described in Section III.C. *supra*.²⁰ No Qwest HSR documents were at issue in the Minnesota ruling.

In summary, in Minnesota, the Administrative Law Judge limited protection of these highly-sensitive HSR documents to:

a reasonable number of outside attorneys; one outside consultant; and one in-house employee who is not now involved, and will not for a period of two years involve himself or herself in strategic or competitive decision making (including, but not limited to, the sale or marketing or pricing of products or services) with respect to which the documents or information may be relevant by or on behalf of any company or business organization that competes, or potentially competes, with the Joint Petitioners.

Subject to and without waiving their objections to the production of HSR documents, the Joint Applicants would be willing to produce the remaining HSR documents, and specific pages described in Section III.C. *supra*, under the exact same protections ordered in Minnesota.

Although the Joint Applicants' relevance objections are valid and should be sustained, the Joint Applicants present this as an alternative proposal as a compromise for the Administrative Law Judge's consideration. It is the Joint Applicants' belief that if these additional protections are ordered in Utah, then the Joint Applicants' September 20, 2010 motion for review, rehearing

¹⁹ *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, OAH Docket No. 11-2500-21391-2 and PUC Docket No. P-421, et al./PA-10-456.

²⁰ The Minnesota Administrative Law Judge's Order Regarding Joint Petitioners' Motion for Reconsideration was issued on Sept. 30, 2010. (See Attachment 5.) (In Minnesota, there was also a pending motion to compel filed by the CWA (union), and the ALJ's order also addresses that motion.) Contemporaneously, the

and/or clarification of the current protective order could be withdrawn.

VI. INTEGRA'S REQUESTS FOR ATTORNEY'S FEES IS WITHOUT MERIT

Finally, Integra seeks the Joint Applicants to pay for its reasonable expenses and attorney's fees if the Commission grants its motion to compel, citing to Rule 37(a)(4)(A) of the Utah Rules of Civil Procedure. However, that request is utterly without merit.

First, procedurally, the Commission generally relies on its own procedural rules, and the rule that Integra cites applies to a "court," and not to an administrative agency. In addition, Qwest is not aware of any discovery matter in at least the past 10 years where the Commission has awarded attorney's fees and expenses for a discovery motion. The request for attorney's fees is therefore without merit.

Further, the rule specifically provides that it does *not apply* if the movant (Integra) does not make a good faith effort to obtain the disclosure or discovery without court action. That is certainly the case here in several respects. This includes that the Joint Applicants made several compromise offers to produce the information subject to certain reasonable conditions and to a limited group of people, but Integra utterly refused such offers (see discussion at §§ IV. and V., *supra*), and that Integra waited two months before even addressing these issues with the Joint Applicants in Utah. Integra's unwillingness to negotiate a resolution, and the timing of its filing of the motion, is certainly suspect, coming weeks after it filed testimony and weeks before the hearing. Integra has unclean hands, and if anyone should be sanctioned, it should be Integra.²¹

Finally, the rule specifically states that it does not apply if the opposing party's

Minnesota Administrative Law Judge also issued a Second Supplemental Protective Order that provided additional protections for the CenturyLink HSR documents at issue in Utah. (See Attachment 6.)

²¹ Rule 37(a)(4)(B) allows the party *opposing* a motion to compel that is denied to recover reasonable expenses, including attorney's fees. If any reasonable expenses should be granted, they should be granted to CenturyLink and Qwest, who have been forced to defend against this motion to compel at a time when they are preparing testimony and for various hearings in Utah and other states.

nondisclosure, response, or objection was *substantially justified*. Given all of the issues that the Joint Applicants have raised here, which they will not repeat here, that is certainly the case- their nondisclosure and or objections were more than *substantially justified*. Clearly, under the circumstances here, even if the Administrative Law Judge were to compel production for any (or even all) of the documents at issue, the circumstances regarding these highly-competitive and sensitive documents that Integra has no business in seeking for this proceeding in the first place make any award of expenses or fees unjust.

CONCLUSION

For all of these reasons, the Joint Applicants respectfully submit that the Commission should deny Integra’s motion to compel in its entirety. The Commission should sustain the Joint Applicants’ relevance objections to the remaining HSR documents or, in the alternative, order the same additional protections for those HSR documents that were ordered in Minnesota.

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Respectfully submitted,

CENTURYLINK

QWEST



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