

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
JOINT MOTION FOR ENTRY OF
PROTECTIVE ORDER FOR
HIGHLY CONFIDENTIAL
INFORMATION

Qwest Communications International, Inc. and CenturyLink, Inc. (hereafter “the Joint Applicants”) hereby move the Commission to enter a protective order governing highly confidential and competitively-sensitive information. In support of their motion, the Joint Applicants state that certain documents requested in this matter are so competitively-sensitive and confidential that the Commission’s standard confidentiality rule, R. 746-100-46, is not sufficient to prevent competitive harm if that information is disseminated to competitors. Thus, the Joint Applicants seek entry of a protective order for additional protection as described below.

DISCUSSION

The Joint Applicants are seeking the entry of a protective order that would encompass *three* categories of confidential documents; namely, (1) *confidential* documents and information that are of the type typically covered under standard protective orders or the Commission’s recent confidentiality rule, R. 746-100-46, (2) *highly-confidential* documents and information that require a higher level of protection due to their competitive nature, and (3) a category of confidential information designated as “Staff’s Eyes Only” (or “SEO”) review. Such SEO information would be deemed Competitively-Sensitive/Highly-Confidential Information and would be disclosed only to the Division of Public Utilities (“Division”) and the Office of Consumer services (“OCS”), but not to the CLECs or other non-governmental parties. Although Qwest is not aware that the Commission has previously entered into a similar three-tiered protective order (at least not in telecommunications dockets), Qwest notes that the Washington Utilities and Transportation Commission (“Washington Commission”) has previously recognized

the creation of a “Staff Eyes Only” category in one of its telecommunications dockets

(Docket UT-030614). Specifically, in Order No. 7 in Docket UT-030614, the

Commission stated:

The company-specific market-sensitive data filed in response to the Commission’s Order is of the type that might impose a serious business risk if disseminated without heightened protections and should be designated “Highly Confidential.” *Access to this data will be limited to Commission Staff* who have executed the confidentiality agreement attached to this Protective Order. (Emphasis added.)¹

Although the Joint Applicants do not contemplate the Division or the OCS having to sign a protective order due to the Commission’s confidentiality rule, R. 746-100-46, such an approach as to the non-governmental parties is even more justified in a case such as this one. This is especially so because the information requested here includes information that goes to the very essence of Joint Applicants’ *anticipated competitive strategies and actions*. As such, it has very high competitive value, and if even inadvertently disclosed to competitors, it would cause immediate and irreparable harm to the Joint Applicants. There is currently pending with the Washington Commission a motion for entry of such a protective order, similar to the one that is presented with this motion, in that Commission’s review of this merger transaction.

Further, at least one other state besides Washington that is considering this transaction already allows an SEO designation. Colorado permits a party to request a “highly confidential” designation by motion, and typically restricts the distribution of the information to the commission staff and the office of consumer counsel. *See, e.g.*, 4 Colo. Code Reg. 723-1 § 1100(a)(III), and *Public Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 36 (1999).

Prior to the filing of this motion, undersigned counsel sent an email asking counsel for the parties on their positions on this issue. Counsel representing most CLEC intervenors stated the CLECs cannot agree to a Staff’s Eyes Only designation. Neither the Division nor the OCS expressed opposition to the SEO concept. The Joint Applicants and the Joint CLECs, however,

have agreed that the Joint Applicants will provide confidential (but not highly-confidential or SEO-type documents) to the CLECs, pursuant to Commission Rule 746-100-46 and a non-disclosure agreement between them, on an *interim basis* pending resolution of these issues.

Attached to this motion and labeled Attachment A is the Protective Order that the Joint Applicants request the Commission enter in this docket. As to the SEO provisions, that Order would create an additional category of information, limited to the following types of documents:

- Strategic business plans and analysis
- New product roll-out timelines
- Market share information

Such information is contained, for example, in the Joint Applicants' Hart-Scott-Rodino ("HSR") filings with the United States Department of Justice.²

The Joint Applicants can provide more information to the Commission regarding the highly-sensitive nature of these disclosures in oral argument on this motion, or in a confidential or *in camera* submission, if such a submission would aid in a decision. Specifically, the Joint Applicants are willing to submit a sample of the SEO documents to the Administrative Law Judge for *in camera* review. The Joint Applicants are also willing to identify the documents in a "privilege log" type format to aid in the other parties' ability to determine the validity of the SEO designation. Further, to clarify the nature of the SEO documents, attached to this motion as Confidential Attachments B-1 and B-2 are copies of the Applicants' indices to their HSR filings.

The comments that the Joint Applicants anticipate from the CLECs, based on discussions about an SEO protective order in Washington, pertain to their expressed concerns with the ability to administer the SEO designation in connection with the filing of testimony and briefs. With all due respect, however, the Joint Applicants believe that those administrative concerns can be

¹ The WUTC Order No. 7 in Docket UT-030614 can be found at <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/4af97b0c04991bc088256d550078ff69!OpenDocument>.

² The Joint Applicants received antitrust clearance from the Department of Justice last week.

addressed fairly simply. More importantly, even if the concerns were arguably burdensome, they would not trump the Joint Applicants' legitimate concerns about disclosure of such competitively-sensitive documents.

In the Joint Applicants' view, the SEO information is of limited or no relevance to the issues that the Commission will be considering here, and thus the Joint Applicants do not believe it is likely such SEO information will even make its way into the record in this docket. Further, even if the Division or the OCS were to want to include such documents in the record, it would be a fairly simple matter to redact the information and submit a redacted filing. Redaction is often required for Confidential and Highly-Confidential information in regulatory proceedings such as this one, and thus the parties are familiar with both the requirements and the process.

CONCLUSION

Entering a protective order to govern confidential, highly-confidential and highly-sensitive competitive information like HSR documents under a Staff's Eyes Only process as set forth in Attachment A is consistent with the public interest. Such a protective order will encourage disclosure, while simultaneously also offering the Joint Applicants additional assurances that their highly-sensitive and highly-confidential competitive information will not be disclosed in a way that might result in competitive harm.

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CENTURYLINK

Respectfully submitted.
QWEST

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