

Kevin K. Zarling
CenturyLink
400 W. 15th Street, Suite 315
Austin TX 78701
512-867-1075 (office)
512-472-0524 (fax)
Kevin.K.Zarling@CenturyLink.com

Attorney for CenturyLink, Inc.

Alex M. Duarte
Qwest Law Department
310 SW Park Avenue, 11th Floor
Portland, OR 97205
503-242-5623 (office)
503-242-8589 (fax)
Alex.Duarte@qwest.com

Attorney for Qwest Communications
International, Inc.

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 REVIEW,
REHEARING AND/OR
CLARIFICATION OF THE
COMMISSION'S PROTECTIVE ORDER,
OR, IN THE ALTERNATIVE, MOTION
FOR *IN CAMERA* REVIEW

Pursuant to R746-100-11F, Qwest Communications International, Inc. and CenturyLink, Inc. (hereafter "the Joint Applicants") hereby move for review, rehearing and/or clarification of the Commission's August 18, 2010 protective order, or, in the alternative, for *in camera* review of certain highly-confidential and competitively-sensitive documents that are at issue in a dispute between the Joint Applicants and the "Joint CLECs."¹

BACKGROUND AND SUMMARY OF THIS MOTION

This motion is necessitated by two recent key events.

First, on August 18, 2010, the Commission issued its protective order in this proceeding after the Joint Applicants had filed a motion for the entry of a protective order on July 21, 2010. However, although the Joint Applicants' motion had requested a higher-level of confidentiality protection for certain highly-confidential and competitively-sensitive documents, the

¹ The Joint CLECs are a consortium of CLECs that have intervened in this docket, as well as numerous merger approval dockets in other states. These CLECs are as follows: Integra Telecom of Utah, Inc., McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services, and XO Communications Services, Inc.

Commission did not address this higher-level of confidentiality protection when it issued the protective order, *without comment or analysis*, on August 18th. These highly-confidential and competitively-sensitive documents consist of certain documents that the Joint Applicants filed with the United States Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) pursuant to the Hart-Scott-Rodino Act (“HSR documents”), and which would be disclosed only to the Division of Public Utilities (“Division”) and the Office of Consumer Services (“OCS”), but not to any CLECs or other non-Utah governmental parties. These documents have otherwise been referred to as “Staff’s Eyes Only” (or “SEO”) documents.

Second, the Joint Applicants learned just this *past Thursday*, September 16, 2010, for the first time, that the Joint CLECs are demanding certain withheld HSR documents, and learned the next day (Friday, September 17, 2010) that the CLECs intend to file a motion to compel on Monday, September 20, 2010 regarding such documents.² The CLECs do so despite that (1) the Joint Applicants filed their application for merger approval in May 2010, (2) the Joint CLECs did not commence discovery until July 6, 2010, and (3) although the Joint Applicants objected to production of these documents two months ago, on *July 20, 2010*, it is *just now* that the CLECs seek these documents. Moreover, the CLECs do so despite that they have already filed more

² Although at the time they prepared this motion, the Joint Applicants had not yet seen the CLEC motion to compel, they understand that it will deal with only *one* data request, No. 143, of the more than *180* data requests the Joint CLECs have propounded, and to which the Joint Applicants have responded. (Other parties, including the DPU, OCS, the U.S. Department of Defense and the Salt Lake Community Action Program, have propounded more than 50 data requests, to which the Joint Applicants have responded.)

Joint CLEC data request No. 143 seeks the following:

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.

The Joint Applicants objected on several grounds, such as relevance and the fact that the request seeks highly-confidential, commercially-sensitive information, the release of which, particularly to their competitors, would cause irreparable competitive harm to them. The Joint Applicants noted that these documents, which are required by the HSR Act, are specifically designed to provide to the DOJ and FTC the information that they require to analyze the merger on a national level addressing specific federal antitrust issues under the Clayton Act, and thus this proceeding is not the proper jurisdiction for such an analysis.

than 400 pages of testimony, and that the hearing in this case is a little more than a month away.³ The Joint Applicants intend to respond to the Joint CLECs' motion to compel in due course. Nevertheless, the Joint CLECs' recent actions, and the subsequent motion to compel, have necessitated the Joint Applicants' filing of this motion for review, rehearing or clarification.

Finally, the Joint Applicants will also address their request for an *in camera* review by the Administrative Law Judge in more detail in their response to the Joint CLECs' motion to compel. Nevertheless, in the alternative, the Joint Applicants seek in this motion for the Administrative Law Judge to conduct an *in camera review* of the subject disputed documents.

PERTINENT PROCEDURAL HISTORY

A. The Joint Applicants' Motion for a Protective Order

On July 21, 2010, the Joint Applicants filed a motion for the entry of a protective order, a copy of which was attached with the motion. 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

³ The Joint CLECs' motion to compel appears to be little more than an attempt to disrupt the Joint Applicants' preparations of their rebuttal testimony and for the upcoming hearing next month in this proceeding, as well as merger proceedings in other states, and/or to thereafter presumably seek a delay of the procedural schedule.

protective order would be limited to the types of documents that are contained, for example, in the Joint Applicants' Hart-Scott-Rodino ("HSR") filings with the U.S. DOJ, such as:

- Strategic business plans and analysis;
- New product roll-out timelines; and
- Market share information. *Id.*, p. 3.⁴

The Joint Applicants also noted that other state utility commissions, such as in Washington and Colorado, had previously entered protective orders that had similar protections. Motion, p. 2. They also offered to have the documents available for an *in camera* inspection. *Id.*, p. 3. As part of that offer, and to clarify the nature of the SEO documents, the Joint Applicants attached to their motion as confidential attachments copies of the Applicants' indices to their HSR filings. *Id.*; see also Confidential Attachments B-1 and B-2 to the original motion.

B. The Joint CLECs' Response to the Motion

On July 26, 2010, the Joint CLECs responded to the motion for a protective order. They argued in part that they had no objection to a protective order that contained a higher-level of protection for highly-confidential information, such as the type of protective order that has been issued in the Commission's proceedings analyzing petitions for non-impaired wire centers pursuant to the FCC's *Triennial Review Remand Order* ("TRRO"), such as Docket No. 10-049-22. Response, pp. 2-3. However, they objected to the request for SEO protections. *Id.*, pp. 3-6. They also argued such procedure would raise due process and procedural concerns. *Id.*, pp. 4-6.

C. The Joint Applicants' Reply

Thereafter, the Joint Applicants replied on August 29, 2010. They discussed numerous reasons why the protective order for the non-impaired wire center proceeding, Docket 10-049-22, was not sufficient for the competitively-sensitive information at issue here. Reply, pp. 1-4.

This discussion included a more detailed description of the HSR documents at issue, and their competitive sensitivity. *Id.*, pp. 2-3. They also discussed the numerous reasons why the Commission should issue an SEO protective order, including the fact that another commission had issued a similar protective order in a telecommunications merger docket in the past. *Id.*, pp. 4-6. The Joint Applicants also showed why the Joint CLECs' arguments about procedural issues and due process were overstated. *Id.*, pp. 6-7.

D. The Commission's August 18, 2010 Protective Order

On August 18, 2010, the Commission issued its protective order. However, the Commission did not issue any written order that described the protective order. Nor did the Commission discuss or address any of the parties' arguments, or resolve the SEO issues in dispute between the parties. 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.

ARGUMENT

It is unclear whether the Commission's issuance of the protective order on August 18, 2010 was meant to be a denial of the Joint Applicants' motion for the entry of a protective order with Staff's Eyes Only protections, or whether the lack of any written discussion, analysis or resolution of the disputed issues was merely an oversight by the Commission. Either way, the Joint Applicants respectfully submits that the Commission should either review or rehear its August 18, 2010 order, and/or clarify such order.

⁴ The Joint Applicants received DOJ antitrust clearance in July 2010.

I. THE COMMISSION SHOULD REVIEW OR REHEAR ITS PROTECTIVE ORDER

In the event the Commission intended to deny the motion for Staff's Eyes Only protection, the Joint Applicants respectfully request that the Commission review or rehear its order. There are numerous reasons why review or rehearing is appropriate and necessary.

First, the HSR documents at issue are extremely confidential and competitively-sensitive. They pertain to *how the merged company intends to compete post-merger*. The types of highly-confidential and highly-sensitive documents the SEO provision is intended to protect include:

- strategic business plans and analysis;
- customer profile information, including market segmentation;
- product characteristics and product availability information that are not otherwise commonly known;
- churn data;
- marketing and retention strategies;
- market shares and trends;
- penetration rates;
- product development and trends;
- product rollout and launch dates;
- marketing plans;
- financial assumptions and projections relating to specific product rollouts and market launches;
- company staffing and sales approach by product and market area; and
- long-range company strategic plans. See e.g., Reply, pp. 2-3.⁵

Such highly-confidential and highly-sensitive *national marketing and business strategy* information is far more sensitive than any *wire center-specific* numerical or collocation data that is at issue in the wire center dockets, and that was the basis for the protective order that the Commission did issue on August 18th. See e.g., Reply, pp. 3.

The Joint CLECs argued that the protective order that the Commission issued in Qwest's

⁵ As they explained, because the HSR documents at issue disclose in significant detail how the merged company intends to compete *after the merger*, the Joint Applicants do not even believe the documents are relevant in this proceeding. Indeed, the only conceivable reason for an intervenor CLEC to request access to them would be for competitive purposes, especially since the documents tend to reveal the very essence of the merged company's plans for product development, product roll-out and the development of competitive responses. Thus, even if the Commission were to determine these documents are relevant, such documents should clearly be protected from the Joint Applicants' competitors' review. See e.g., Reply, pp. 5-6.

2010 *TRRO* non-impaired wire center proceeding, Docket No. 10-049-22 (which is the protective order that the Commission ultimately issued, without comment), “adequately protects highly-confidential information.” Response, p. 3. However, as the Joint Applicants noted, the issues in the *TRRO* wire center dockets are vastly different from the issues in this merger proceeding, and the highly-confidential information in those wire center dockets is vastly different from the highly-sensitive *national competition, marketing and business strategy* information in this docket. See Reply, p. 2. Moreover, even in the *TRRO* wire center dockets that the CLECs advocated, there is essentially “Staff’s Eyes Only” information that has only been provided to the DPU and not to CLECs, and that this information is far more sensitive than wire center data in the *TRRO* dockets. *Id.*, p. 3, fn. 3.

Further, the competitive sensitivity of such HSR documents is so extremely high that the risk of even *inadvertent disclosure* to intervenor CLECs who might use such information to the Joint Applicants’ competitive disadvantage is simply too great and not acceptable. The damage to the Joint Applicants and the merged company’s ability to effectively compete after merger had closed would be immediate, substantial and irreparable. See e.g., Reply, p. 5.

In their response, the Joint CLECs noted that this Commission may not have issued a similar protective order before. Response, p. 4. However, the nature and types of documents at issue, involving the merger of two telecommunications companies who *compete against the intervenors*, are clearly of such competitive sensitivity that SEO protections are appropriate here. See Reply, p. 4. Moreover, as the Joint Applicants explained, another commission (in Montana) had likewise employed a similar process in a telecommunications merger docket. *Id.*, p. 5. Indeed, the Montana Commission went one step further and restricted disclosure of select competitive information to only its staff and the state consumer counsel and experts. *Id.*

The CLECs’ final argument was that an SEO protective order would raise due process

and procedural issues. Response, pp. 4-6. These arguments are overstated, however. This is especially so because this Commission is well-versed in dealing with confidential documents in the record of any proceeding, and because an SEO procedure would result in fewer discovery disputes or arguments about delay. Indeed, from a practical standpoint, an SEO procedure will likely result in fewer discovery disputes or arguments about delay, especially with an *in camera* review. *Id.*, p. 6. Moreover, the Joint Applicants have offered to provide a privilege log and brief summary of the pertinent HSR documents to the CLECs. Reply, pp. 6-7.

Further, as they did in their motion and reply, the Joint Applicants again offer to provide the documents to the Administrative Law Judge for an *in camera* review. See Section III, *infra*. The judge could then review the applicable documents and make the appropriate determination as to the requested disclosure of a particular document. See Reply, pp. 6-7; Motion, p. 3.

Finally, the Joint Applicants note that the Joint CLECs' recent actions, including a very recent demand for certain HSR documents, and their motion to compel, now necessitate that the Commission review, rehear or reconsider these issues. This is especially so given that the motion to compel comes *after* the Joint CLECs have already filed more than *400 pages* of testimony, without having such documents, and it is now only a little more than one month prior to the hearing. This review by the Commission is also necessary despite the fact that the Joint CLECs' motion comes almost *four months* after the Joint Applicants filed their merger approval petition, *two months* after the Joint Applicants objected to the production of such documents, and *one month* after the protective order was issued. In short, the recent CLEC actions make review or rehearing of the Commission's August 18, 2010 protective order necessary and appropriate.

II. THE COMMISSION SHOULD CLARIFY ITS PROTECTIVE ORDER

Further, in the event the issuance of the *TRRO* wire center proceeding protective order, without a discussion of the issues presented in the Joint Applicants' July 21st motion, was an

merely oversight by the Commission, the Joint Applicants respectfully submit that the Commission should clarify its August 18th order. The Commission should clarify that the requested Staff's Eyes Only protections which the Joint Applicants seek are appropriate and necessary for all of the reasons discussed here, and in the motion and reply. This is especially so because of the extreme competitive sensitivity of the HSR documents, and because the intervenors that request such documents are the Joint Applicants' *own competitors*.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD CONDUCT AN *IN CAMERA* INSPECTION

Finally, in the alternative, the Joint Applicants respectfully renew their offer, and request, for the Administrative Law Judge to conduct an *in camera* review of the highly-confidential and competitively-sensitive HSR documents that are at issue in the Joint CLECs' motion to compel. The Joint Applicants intend to respond in more detail to the Joint CLECs' motion to compel at the appropriate time. Nevertheless, as part of this motion, the Joint Applicants submit that the Administrative Law Judge should conduct an *in camera* review of the documents in dispute. There is precedent for doing so in other state utility commissions' reviews of this same merger transaction, including the Arizona and Montana commissions. 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, and/or should be protected from disclosure from the Joint Applicants' competitors due to their extreme competitive-sensitivity.

CONCLUSION

For all of these reasons, the Joint Applicants respectfully submit that the Commission should review, rehear or clarify its August 18, 2010 protective order. The Commission should thereafter enter a protective order that has a Staff's Eyes Only provision for the protection of

