

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Joint Petition for
Approval of Indirect Transfer of Control of
Qwest Operating Companies to
CenturyLink

**ORDER REGARDING MOTIONS TO
COMPEL FILED BY SPRINT, INTEGRA,
AND THE COMMUNICATIONS WORKERS
OF AMERICA, AND MOTION FOR A
SUPPLEMENTAL PROTECTIVE ORDER
FILED BY JOINT PETITIONERS**

The above matter is pending before the undersigned Administrative Law Judge pursuant to a Notice and Order for Hearing issued by the Minnesota Public Utilities Commission on June 15, 2010.

On August 11, 2010, Sprint filed a Motion to Compel Qwest and CenturyLink (the Joint Petitioners) to respond to seventeen Information Requests. By letter dated August 20, 2010, Sprint notified the Administrative Law Judge that the Joint Petitioners had subsequently provided supplemental responses to several of its Information Requests and that only two Information Requests remained in dispute. On August 25, 2010, the Joint Petitioners filed their response to Sprint's Motion to Compel regarding these two Information Requests.

On August 16, 2010, the Communications Workers of America (CWA) filed a Motion to Compel the Joint Petitioners to respond to eight Information Requests. On August 23, 2010, Integra Telecom filed a Motion to Compel the Joint Petitioners to respond to one Information Request. On August 31, 2010, the Joint Petitioners filed their Response to the Motions to Compel of CWA and Integra and a Motion for a Supplemental Protective Order. On September 2, 2010, the CWA filed a Reply Brief regarding its Motion to Compel.

On September 8, 2010, oral argument regarding all three Motions to Compel was heard in the Large Conference Room at the Public Utilities Commission.

On September 13, 2010, Sprint, T-Mobile, and Cbeyond Communications filed a Joint Response Opposing the Joint Petitioners' Motion for Supplemental Protective Order. On the same date, Integra, the CWA, and the CLEC Coalition also filed Responses in Opposition to the Joint Petitioners' Motion for Supplemental Protective Order. The Joint Petitioners filed their Reply Brief regarding the Motion for Supplemental Protective Order on September 15, 2010.

The OAH record with respect to the Motions closed on September 17, 2010, when the last submission pertaining to the Motions was received.

Based on all of the files and proceedings in this matter, and for the reasons set forth in the Memorandum below, the Administrative Law Judge issues the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. Sprint's Motion to Compel the Joint Petitioners to respond to Sprint Information Requests 13 and 14 is **GRANTED**. The Joint Petitioners shall provide information responsive to Sprint-13 and Sprint -14 by 4:30 p.m. on Wednesday, September 22, 2010.
2. Integra's Motion to Compel the Joint Petitioners to respond to Request 143 of Integra's Second Set of Information Requests is **GRANTED**. The Joint Petitioners shall provide information responsive to Integra-143 by 4:30 p.m. on Wednesday, September 22, 2010 (assuming that recipients have executed Appendix C of the Supplemental Protective Order by that time).
3. CWA's Motion to Compel the Joint Petitioners to respond to its Information Requests 1-4, 15, and 24 is **GRANTED**. CWA's Motion to Compel the Joint Petitioners to respond to its Information Requests 5-6 is **GRANTED IN PART AND DENIED IN PART**, as discussed in the Memorandum below. The Joint Petitioners shall provide information responsive to CWA-1 – CWA-4, 15, and 24 by 4:30 p.m. on Wednesday, September 22, 2010, and information responsive to CWA-5 and CWA-6, as modified below, by 4:30 p.m. on Friday, September 24, 2010 (assuming that recipients have executed Appendix C of the Supplemental Protective Order by those times).
4. The Joint Petitioners' Motion for Supplemental Protective Order is **GRANTED IN PART AND DENIED IN PART**, as discussed more fully in the Memorandum below.
5. The information produced in response to this Ruling on the Integra and CWA Motions to Compel shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate. **The Joint Petitioners shall not be required to automatically provide information responsive to this Ruling to all parties.**
6. The Joint Petitioners' request to restrict dissemination of information to certain representatives of the CWA is **DENIED**.
7. The parties shall confer and attempt to reach agreement on what, if any, adjustments are needed to the schedule set forth in the First Prehearing

Order as a result of the required production of the additional information encompassed by this Order. If they are unable to reach agreement, a telephone conference call will be held to consider the matter.

8. **The parties are reminded that Trade Secret Information shall not be emailed, and Highly Sensitive Trade Secret Information and Highly Sensitive Trade Secret Information Subject to Additional Protection (as discussed in the June 15, 2010, Protective Order and the attached Supplemental Protective Order) shall not be efiled or emailed.**

Date: September 21, 2010

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The rules of the Office of Administrative Hearings (OAH) specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed. The OAH rules further state that a party seeking discovery must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery. A party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.¹ Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.² It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.³ Administrative Law Judges at the OAH "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."⁴

The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on" an issue in the case or any matter "that reasonably could lead to other matter that could bear on any issue that is or may be in the case."⁵ As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.⁶ In administrative proceedings, information sought

¹ Minn. R. 1400.6700, subp. 2.

² See, e.g., *Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961).

³ See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson*, 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (1956).

⁴ G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 8.5.2 at 135 (1998).

⁵ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

⁶ *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711, 719 (1965).

in discovery typically is considered to be relevant if the information "has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."⁷ Rule 26.02 makes it clear that "[r]elevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."⁸ Accordingly, the definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes.⁹

Rule 26.02 of the Minnesota Rules of Civil Procedure also authorizes a court to place limitations on the frequency or extent of use of discovery methods if it finds that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."¹⁰

The application of these discovery standards in the present case must take into consideration the nature of this proceeding and whether the information requested bears on the issues identified by the Commission or could reasonably lead to other matter that could bear on those issues. The Commission indicated in the Notice and Order for Hearing that it concurred with the Joint Petitioners' request for expedited action on their petition, "subject to the requirements of proper record development and informed decision-making," and requested that the Administrative Law Judge submit her report by November 30, 2010, "if that can be done consistent with due process, full evidentiary development, and due deliberation."¹¹ The Commission specified that the ultimate issue to be addressed in this case is whether the proposed merger is in the public interest under Minn. Stat. §§ 237.23 and 237.74, subd. 12, including:

- Whether the post-merger company would have the financial, technical, and managerial resources to enable the Qwest and CenturyLink Operating Companies to continue providing reliable, quality telecommunications services in Minnesota;
- What impact the transaction would have on Minnesota customers and on competition in the local telecommunications market; and
- What impact the transaction would have on Commission authority.¹²

The Commission's Notice and Order for Hearing thus makes clear its intention that the focus of this proceeding must be on the specific identified issues and that the matter must proceed in an expeditious fashion to the extent consistent with due process principles.

⁷ G. Beck, M. Gossman & L. Nehl-Trueeman, *Minnesota Administrative Procedure*, § 9.2 at 146 (1998).

⁸ Minn. R. Civ. P. 26.02(a).

⁹ 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), citing *Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).

¹⁰ Minn. R. Civ. P. 26.02(b)(3).

¹¹ Notice and Order for Hearing at 4-5.

¹² *Id.* at 2.

Sprint's Motion to Compel

In its Motion to Compel, Sprint seeks an order compelling the Petitioners to respond to its Information Requests 13 and 14. Sprint sought the following information from Qwest and CenturyLink in those requests:

Sprint 13: Provide the interstate switched access charges for the 2009 calendar year for each ILEC legal entity in the state imposed on each of the affiliated IXCs that will be part of the proposed merger (e.g., total interstate switched access charges Qwest charged CenturyLink affiliated IXC, total interstate switched access charges CenturyLink charged Qwest affiliated IXC, etc.). Provide the charges separately by IXC and by ILEC legal entity.

Sprint 14: Provide the total special access charges for the 2009 calendar year for each ILEC legal entity in the state imposed on each of the affiliated IXCs that will be part of the proposed merger (e.g., total intrastate and interstate special access charges Qwest charged CenturyLink affiliated IXC, total intrastate and interstate special access charges CenturyLink charged Qwest affiliated IXC, etc.). Provide the charges separately by IXC and by ILEC legal entity.

In their responses to these Information Requests, CenturyLink and Qwest objected to the requests on the grounds that they were not reasonably calculated to lead to the discovery of admissible or relevant evidence. They indicated that, "[a]s set forth by the Commission in its June 15th Order, the scope of this proceeding is to establish whether the merger of the CenturyLink and Qwest parent companies is in the public interest in Minnesota," and asserted that "[t]his is not the proper forum for determining the proper level of access rates." Subject to and without waiving its objections, CenturyLink responded that CenturyLink and each of its affiliates pay and receive payment from Qwest and each of its affiliates for interstate switched access services and special access services pursuant to the tariffs filed by each entity with the FCC. Qwest similarly noted that Qwest and each of its affiliates pay and receive payment from CenturyLink and each of its affiliates for interstate switched access services and special access services pursuant to the tariffs filed by each entity with the FCC. Qwest further indicated that its intrastate special access charges could be found in its Private Line Transport Services Catalog and provided a website address for that catalog.¹³

In its Motion to Compel, Sprint generally argues that, because CenturyLink and Qwest are major wholesalers of access and interconnection, and are also retailers of the services that use those wholesale inputs, such as long distance and broadband, a broad view must be taken of their operations in order to assess the effect of the merger on competition and whether it is in the public interest. Sprint asserts that discovery regarding access charges is appropriate in light of the Commission's interest in determining whether the proposed transaction might distort or impair competition.

¹³ Sprint Request No. 13 and the Responses from CenturyLink and Qwest are attached to Sprint's Motion to Compel.

Sprint maintains that questions relating to access revenues are relevant in analyzing the competitive impacts of the merger and considering whether conditions should be imposed. It further argues that access rates and revenues have a direct impact on competition at the wholesale and retail levels and thus are relevant to the issues raised in this proceeding. In particular, Sprint contends that the requested information relating to switched and special access charges is relevant and likely to lead to the discovery of admissible evidence because such information "will demonstrate the amount of access charge savings that the merged company will obtain when access charge payments are merely intracompany payments and are no longer payments from the Qwest entities to the CenturyLink entities, and vice versa." Sprint asserts that any access savings can have an impact on competition because Qwest and CenturyLink will be able to use the savings to develop and market competitive alternatives in the marketplace. Even though the Joint Petitioners are not seeking to change access rates in this proceeding, Sprint contends that they will have the opportunity to do so as a result of the merger and that a reduction in such costs could affect competition by enabling them to more aggressively price their products.

In support of its motion, Sprint relied in part upon a discovery order issued by the Commission in 2009 in connection with Qwest's petition for approval of its Second Revised Alternative Form of Retail Regulation (AFOR) Plan for 2010-2013.¹⁴ In that proceeding, Sprint sought (among other things) to have Qwest provide: the amount of interstate switched access revenue Qwest generated in Minnesota in 2008 from switching, transport, and carrier common line; the billed interstate access minutes associated with those revenue amounts; and copies of all documents describing or supporting those amounts.¹⁵ Qwest objected to these information requests at least in part based upon a contention that the interstate information requested was irrelevant. Qwest asserted that it was not appropriate to allow inquiry into services that were not at issue in the AFOR proceeding and over which the Commission had no jurisdiction. Qwest also argued that "an AFOR proceeding cannot be used as a vehicle for a fishing expedition to gain information that may be of use in other proceedings, such as the Commission's access reform rulemaking docket."¹⁶ The Commission ultimately ordered Qwest to produce, in table format, information relating to the amount of interstate switched access revenue Qwest generated in Minnesota in 2008 from switching, transport, and carrier common line and the billed interstate access minutes associated with those revenue amounts. The Commission found that these requests were relevant to the subject matter of the proceeding because the information "could be helpful to the Commission in analyzing the reasonableness of 1) the rates that Qwest has proposed to charge in its New AFOR Plan and 2) Qwest's request in this docket for authority to offset, via an increase to local rates, a flat monthly end-use charge or surcharge of equivalent value, any future reductions in access charge elements."¹⁷ The Commission found Sprint's request for "all documents" relating to the amount of interstate switched

¹⁴ Order Granting Motion to Compel, in Part, and Setting Procedural Timetable in *In the Matter of a Petition by Qwest Corporation for Approval of its Second Revised Alternative Form of Retail Regulation (AFOR) Plan*, PUC Docket No. P-421/AR-09-790 (Oct. 26, 2009).

¹⁵ *Id.* at 3-5.

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 4-5.

access revenue and billed interstate access minutes to be overbroad and unduly burdensome, and merely directed Qwest to provide the information in table format.¹⁸

In opposing Sprint's Motion to Compel, the Joint Petitioners again argue that the information sought by Sprint in Requests 13 and 14 involve interstate services that are subject to regulation by the FCC, not the Minnesota Public Utilities Commission. The Joint Petitioners contend that the information sought by Sprint is not relevant to the determination of any of the issues that are properly in dispute in this proceeding. They assert that access charge payments will not change after the merger. They also emphasized that, as noted in the Joint Petition, the transaction "contemplates a parent-level transfer of control of QCII only" and, after completion of the transaction, "end user and wholesale customers will continue to receive service from the same carrier, at the same rates, terms and conditions and under the same tariffs, price plans, interconnection agreements, and other regulatory obligations as immediately prior to the Transaction" The Joint Petitioners also pointed out that they had indicated in responses to other Sprint discovery requests that the QC entities and the CenturyLink entities "will continue to charge each other pursuant to switched access and other tariffs and agreements, and reductions in such payments are not part of the synergy savings the companies hope to achieve."¹⁹ Because the Joint Petitioners "are not proposing, and the transaction does not result in any change to access charge rates," the Joint Petitioners assert that access charges are not relevant to the Commission's review and consideration of this merger. They maintained that the Commission did not review or adjust access charges in its prior merger cases involving CenturyLink and Embarq,²⁰ Frontier and Citizens,²¹ or U.S. West and Qwest,²² and noted that any concerns that Sprint may have regarding intrastate access charge rates could be raised in the Commission's pending rulemaking proceeding pertaining to such rates.²³

The Administrative Law Judge presiding in the parallel merger proceeding pending before the Oregon Commission recently denied a similar motion to compel filed by Sprint in that case.²⁴ However, the Administrative Law Judge presiding in the

¹⁸ *Id.*

¹⁹ Joint Petitioners' Response in Opposition to Motion to Compel at 4; Response to Sprint Information Request No. 47 (attached as Exhibit A to Joint Petitioners' Response).

²⁰ Docket No. P6441 et al./PA-08-1392.

²¹ Docket No. P3131, 5316/PA-02-1991.

²² Docket No. P-3009, 5096, 421, 3017/PA-99-1192.

²³ *In the Matter of the Request for Comments of the Minnesota Public Utilities Commission Relating to a Rule to Modify State Access Charges*, MPUC Docket No. P-999/R-06-51.

²⁴ See Ruling of Administrative Law Judge Dismissing Sprint's Motion to Compel as Moot in Part and Denying Motion in Part in *In the Matter of CenturyLink, Inc., Application for Approval of Merger between CenturyTel, Inc., and Qwest Communications International, Inc.*, UM 1484 (Sept. 7, 2010) (Judge Arlow ruled that evidence relating to special and interstate access charges that the Joint Petitioners' ILECs charge each others' CLEC affiliates was not reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the Oregon proceeding, reasoning that ILECs are required to "place their competitive operations in fully separated subsidiaries with separate management, technical and financial staffs and operations, so the access charges which they pay to their ILEC affiliate will have the same economic impact upon their operations as they would to an unaffiliated CLEC competitor"). Sprint notified the Administrative Law Judge on September 17, 2010, that it has filed a motion to certify to the Oregon Public Utility Commission the question of whether the Administrative Law Judge erred in denying the motion to compel.

parallel merger proceeding in Washington granted Sprint's motion to compel production of the access charge information.²⁵

After careful consideration of the competing arguments of the parties, and in light of the broad definition of relevancy applied in considering motions to compel, the Administrative Law Judge concludes that Sprint has shown that Information Requests 13 and 14 are reasonably calculated to lead to the discovery of information that is relevant to the issues in this proceeding. The potential impact of the merger on access charges and competition is a proper inquiry in this case. Although it is undisputed that the Commission does not regulate interstate access charges, Sprint has demonstrated that the information sought bears on (or could lead to other matter that could bear on) the impact of the merger on Minnesota customers and on competition in the local telecommunications market. Even if separate organizational entities remain in existence after the merger, and even if there is not any current intention to change the access charges to subsidiaries, the manner in which the access charges are recognized or handled after the merger may create efficiencies or cost reductions that could affect competition in Minnesota.

Accordingly, Sprint's Motion to Compel is granted. The Joint Petitioners' Motion for a Supplemental Protective Order did not encompass these documents, and they shall be provided by no later than Wednesday, September 22, 2010, in accordance with the terms of the Protective Order entered by the Commission on June 15, 2010.

Integra's and CWA's Motions to Compel Production of Documents filed under the HSR Act

In its Motion to Compel, Integra seeks an order requiring CenturyLink to produce documents responsive to Request No. 143 of Integra's Second Set of Information Requests:

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

²⁵ See Order Granting in Part and Denying in Part Sprint Nextel Corp.'s Motion to Compel Joint Applicants to Respond to Data Request in *In the Matter of the Joint Application of Qwest Communications International and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp.*, UT-100820 (Sept. 10, 2010) (Judge Friedlander ruled that the Washington Commission's examination of a merger's impact on the public interest includes the impact on competition at the wholesale and retail level, including whether the transaction might distort or impair the development of competition, and determined that the impact of the CenturyLink/Qwest merger on access charges and competition is within the purview of the Commission's examination; Judge Friedlander further found that Joint Applicants' argument that interstate data was irrelevant because the Washington Commission does not regulate interstate telecommunications services was misplaced in light of the ability of a party to request discovery of inadmissible information, including information relating to activities outside the jurisdiction of the Commission, so long as the information is reasonably calculated to lead to admissible evidence).

In its response to this Information Request, CenturyLink stated:

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, the impact of which would not be mitigated by the terms of the Protective Order.

Similarly, in its Motion to Compel, the CWA seeks to compel Qwest and CenturyLink to respond to two similar Information Requests requesting the companies' filings under the HSR Act:

CWA 1. Please provide all documents submitted by or on behalf of Qwest to the U.S. Department of Justice and the Federal Trade Commission pursuant to the requirements of the Hart-Scott-Rodino Anti-Trust Improvements Act, as amended.

CWA 2. Please provide all documents submitted by or on behalf of CenturyLink to the U.S. Department of Justice and the Federal Trade Commission pursuant to the requirements of the Hart-Scott-Rodino Anti-Trust Improvements Act, as amended.

In their responses to these CWA Information Requests, Qwest and CenturyLink objected to providing the requested documents on the same grounds that were noted in response to Integra's Request No. 143.

To date, CenturyLink has not produced any of the HSR documents in the Minnesota proceeding.

Relevancy of HSR Documents

Based on brief document descriptions provided by CenturyLink in connection with an *in camera* review performed in the Arizona proceeding, Integra argues that a number of documents included in CenturyLink's filing under the HSR Act are potentially relevant to the wholesale issues in which Integra and other CLECs in this matter are interested. Integra contends that these documents address CenturyLink's plans relating to wholesale markets, potential product offerings and opportunities in unspecified "market segments," CenturyLink's staffing and sales approach regarding Enterprise Business marketing, and the impact on CenturyLink revenues of intrastate access reductions. Integra asserts that these documents may be relevant to wholesale customers, CenturyLink's plans for the wholesale market, or the potential impact that financial pressures on the merged company may have on wholesale services.

CWA similarly argues with respect to its Information Requests 1 and 2 that it is likely that the filings made by the Joint Petitioners under the HSR Act contain information that is directly relevant to the issues involved in this proceeding, such as basic information about the companies and the transaction; analyses of the costs and benefits of the proposed transaction; issues addressed by officers, directors, and advisors when deciding whether or not to enter into the proposed transaction; the financial fitness of CenturyLink; synergy savings that may be produced by the proposed transaction; and potential impacts on employment, pricing, and in-state services. The CWA asserts that CenturyTel and Embarq provided their HSR files to the CWA without objection in connection with the 2008 proceedings in Pennsylvania involving the merger of CenturyTel and Embarq to form CenturyLink.²⁶ The CWA also noted that, in 1999, the Montana Public Service Commission compelled Qwest to produce its HSR filings in connection with the Qwest-U.S. West merger proceedings.²⁷ Moreover, the CWA contends that the Joint Petitioners provided their HSR filings to staff and public counsel in the pending proceeding before the Washington Utilities and Transportation Commission, which suggests that the Joint Petitioners agree that the information is relevant.

In response to the Integra and CWA motions to compel seeking access to the HSR documents, the Joint Petitioners contend that the HSR information is not relevant to the issues in the current proceeding because it addresses how CenturyLink intends to compete after the merger, and not the impact that the merger itself would have on Minnesota customers or local competition. They indicated that the HSR documents disclose such matters as the Joint Petitioners' "plans for developing and rolling out competitive products" and "analyses of competition in their markets and how to successfully meet that competition in the future."²⁸ They further stated that the HSR documents include "detailed and specific data relating to customer profile information including market segmentation, 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."²⁹ They argue that the HSR documents "have already served their required purpose" because Federal Trade Commission and the U.S. Department of Justice have completed their analysis of the documents and have determined that the proposed merger does not require any further anti-trust review.³⁰ They further contend that the Commission's consideration in the present proceeding relies upon an analysis of the local telecommunications marketplace, and not a consideration of potential impact on the entire national economy, and argue that the subject matter of the present case thus is separate and distinct from that considered by the FTC and DOJ under the HSR Act.

²⁶ See Ex. 3 attached to CWA's Motion to Compel.

²⁷ *Joint Application of Qwest Communications Corporation, et al., and US West Communications, Inc.*, 1999 Mont. PUC LEXIS 121 (Dec. 14, 1999).

²⁸ Joint Petitioners' Response to Motions to Compel at 4.

²⁹ *Id.* at 9; see also Affidavit of Jeff Glover, ¶ 3, and Affidavit of Timothy J. Goodwin, ¶ 3 (attached as Attachments 2 and 3 to Joint Petitioners' Motion for Supplemental Protective Order).

³⁰ Response at 8; see 75 Fed. Reg. 47810.

Finally, the Joint Petitioners indicated that they are unaware of any instance in which HSR filings have been produced or considered by the Commission in evaluating a telecommunications or other merger approval request. They acknowledge that such information was produced in the Pennsylvania CenturyTel/Embarq merger but asserted that the disclosure was made under very stringent confidentiality protections. The Joint Petitioners acknowledge that they have produced HSR documents in the parallel proceeding in Washington involving the CenturyLink/Qwest merger, but emphasize that the protective order in that proceeding limits disclosure of “highly confidential information” including HSR information to parties’ outside counsel and outside experts. The Joint Petitioners indicated in their Response in Opposition to the CWA and Integra motions that “the HSR documents or other confidential information discussed in this Motion have only been produced to outside counsel/outside experts or regulatory ‘staff eyes only’ in other states considering this transaction consistent with the disclosure protections requested in this Response and the accompanying Motion for Supplemental Protective Order.”³¹

The Administrative Law Judge concludes that Integra Information Request 43 and CWA Information Requests 1 and 2 are reasonably calculated to lead to the discovery of information that is relevant to the issues raised in this proceeding. Based upon the Joint Petitioners’ description of the contents of the HSR documents, it appears that the documents contain information that bears on (or could lead to other matter that could bear on) the impact of the transaction on Minnesota customers and on competition in the local marketplace. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Remainder of CWA’s Motion to Compel

In its Motion to Compel, the CWA also argued that the Joint Petitioners should be compelled to produce documents responsive to six other Information Requests: CWA Requests 3, 4, 5, 6, 15, and 25. These requests are discussed below.

Appendices to the Merger Agreement (CWA Information Request No. 3)

In Request No. 3, the CWA requested the following information:

CWA 3. Please provide all non-public documents which are part of the April 21, 2010 Agreement and Plan of Merger Among Qwest Communications International, Inc., CenturyTel, Inc. and SB44 Acquisition Company, including any attachments, appendices and disclosure letters.

The Joint Petitioners objected to this request on the grounds that “the information requested is highly confidential, commercially sensitive information the release of which would cause irreparable harm to [the Joint Petitioners], such that even the Protective Order would not be sufficient to mitigate the impact.”

³¹ *Id.* at 11, n. 15.

In its Motion to Compel, the CWA points out that the public portion of Articles III of the merger agreement states that CenturyLink and Merger Sub “jointly and severally represent and warrant to Qwest that the statements contained in this Article III are true and correct except as set forth in the CenturyLink SEC Documents filed and publicly available after January 1, 2010 . . . or in the disclosure letter delivered by CenturyLink to Qwest at or before the execution and delivery by CenturyLink and Merger Sub of this Agreement. . . . The CWA maintains that a similar caveat by Qwest appears at the beginning of Article IV of the merger agreement. Accordingly, Articles III and IV contain representations that can be contradicted or nullified by information contained in the non-public disclosure letters. The CWA argues that the true nature of the merger agreement cannot be known without access to the non-public attachments, and urges that the production of those documents be compelled.

In their response in opposition to the Motion to Compel, the Joint Petitioners indicated that the information responsive to this request consists of due diligence letters prepared for Qwest and CenturyLink as a basis for their consideration of approval of the merger. They contend that the letters contain attorney-client privileged information, information concerning third parties that they are prohibited by law or contract from disclosing, and one note describing a new product line. They maintain, without further explanation, that “this information is extraordinarily sensitive information which would cause irreparable harm to the Joint Petitioners if improperly used or disclosed.”³² However, Joint Petitioners stated that they would be prepared to produce copies of these documents (with privileged information, third-party information, and the product line notation redacted) under the “outside counsel/outside experts” designation they urge in their Motion for Supplemental Protective Order.

The Administrative Law Judge concludes that the information sought in CWA 3 is reasonably calculated to lead to the discovery of information that is relevant to the issues raised in this proceeding. Because Qwest and CenturyLink are asking for approval of the transaction, it is logical that the entire merger agreement (except material appropriately deemed privileged) should be produced in order for the Commission and the parties to understand the full nature of that agreement. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Presentations to Boards of Directors and Other Documents (CWA Information Requests 5 and 6)

In Requests 5 and 6, the CWA sought information relating to specific presentations that were made to the Joint Petitioners' Boards of Directors and other documents that were referenced in the Joint Petitioners' proxy statement filed with the Securities and Exchange Commission:

CWA 5. To the extent not provided in the Hart-Scott-Rodino filings, please provide all materials developed by or for CenturyTel and/or Qwest for presentation to their respective Board of Directors and the separate

³² Joint Petitioners' Response to Motions to Compel at 14.

Qwest Transaction committee (including backup documentation and underlying computations), and notes taken at the following meetings, as identified in the June 4, 2010 CenturyLink S-4 filing:

- a) The November 18, 2009 CenturyLink Board of Directors meeting (p. 34).
- b) Mr. Post's January 9, 2010 communication with CenturyLink Board of Directors (p. 34).
- c) The January 19, 2010 CenturyLink Board of Directors [sic] (p. 34).
- d) The February 17 and 18, 2010 Qwest Board of Directors meeting (p. 34).
- e) The February 23, 2010 CenturyLink Board of Directors meeting (p. 35).
- f) The March 15, 2010 joint special meeting of the Qwest Board of Directors and transaction committee, including the presentations by Mr. Mueller and Lazard (p. 36).
- g) The March 18, 2010 Qwest Board of Directors meeting, including management's updated presentation regarding Qwest's long-range plan (p. 36).
- h) The March 22, 2010 meeting of the Qwest Board of Directors transaction committee, including the presentation by Lazard (p. 36).
- i) The March 29, 2010 meeting between the Qwest transaction committee and representatives of Perella Weinberg (p. 37).
- j) The March 31, 2010 meeting of the Qwest Board of Directors and Qwest senior management, including reports by Mr. Mueller and Qwest management (p. 37).
- k) The April 1, 2010 meeting between the Qwest transaction committee and representatives of Perella Weinberg, including Perella Weinberg's report (p. 37).
- l) The April 4, 2010 meeting between the Qwest transaction committee and representatives of Perella Weinberg, including any Perella Weinberg report (p. 37).
- m) The April 5, 2010 meeting of the Qwest Board of Directors, including the Perella Weinberg presentation and the report that Lazard provided to the Board prior to this meeting (p. 37-38).

- n) The April 5, 2010 telephone conversation between members of the Qwest transaction committee and Mr. Mueller (p. 38).
- o) The April 12, 2010 meeting of the CenturyLink Board of Directors (p. 38).
- p) The April 14 and 15, 2010 meeting of the Qwest Board of Directors, including Qwest management's update and Qwest's financial advisors "detailed presentation of the strategic rationale for the proposed combination with CenturyLink, including potential opportunities for synergies" (p. 39).
- q) The April 19, 2010 meeting between Patrick J. Martin (Qwest's lead independent director and chairman of the transaction committee) and Mr. Post (p. 39).
- r) The April 19, 2010 meeting of the CenturyLink Board of Directors, including management's detailed review of their "due diligence findings" and "various sensitivity analyses," CenturyLink's financial advisors' review of "the potential impact of the transaction," and Mr. Post's report (p. 39).
- s) The April 21, 2010 meeting of the CenturyLink Board of Directors, including any reports or analyses from its senior management and its financial advisors (p. 40).
- t) The April 21, 2010 meeting of the Qwest Board of Directors, including any reports or analyses from its senior management and its financial advisors (p. 40).

CWA 6. To the extent not provided in the Hart-Scott-Rodino filings, please provide copies of all materials developed in preparation for or exchanged at, and notes taken at the following meetings or telephonic conversations, as described in the S-4:

- a) The Qwest management September 2009 "periodic review and assessment of Qwest's financial strategic alternatives" (p. 33).
- b) The October 2, 2009 meeting between Glen F. Post, III and Edward A. Mueller (p. 34).
- c) The November 11, 2009 meeting between CenturyLink and Qwest senior management teams (p. 34).
- d) November and December 2009 telephone conversations between Mr. Post and Mr. Mueller (p. 34).

- e) The December 20 and December 21, 2009 meetings between Mr. Post and Mr. Mueller (p. 34).
- f) The telephone conversation occurring "on or about February 26, 2010" between Mr. Post and Mr. Mueller (p. 35).
- g) The March 2, 2010 discussion between Mr. Post and Mr. Mueller (p. 35).
- h) The March 5, 2010 meeting between certain of CenturyLink's financial advisors and representatives of Qwest's financial advisor, Lazard (p. 35).
- i) The March 8, 2010 communication between certain of CenturyLink's financial advisors and Lazard (p. 35).
- j) The March 8, 2010 communication between Mr. Post and Mr. Mueller (p. 35).
- k) The "non-public information" exchanged by CenturyLink and Qwest as "part of their respective due diligence investigations" (p. 35).
- l) The March 11, 2010 Qwest senior management presentation to members of CenturyLink's senior management (p. 35).
- m) The March 12, 2010 telephone call from Mr. Post to Mr. Mueller (p. 35).
- n) The March 16, 2010 telephone conversation among Lazard, Deutsche Bank and Morgan Stanley (p. 36).
- o) The March 23, 2010 presentation by members of Qwest senior management to members of CenturyLink senior management and CenturyLink financial advisors (p. 37).
- p) The March 26, 2010 discussion between Mr. Post and Mr. Mueller (p. 37).
- q) The April 1, 2010 meeting between the senior management of Qwest and CenturyLink, including CenturyLink's presentation to Qwest management and its financial advisors (p. 37).
- r) The telephone calls and in-person meetings during the week of April 5, 2010 among experts for Qwest and CenturyLink to discuss various due diligence matters (p. 38).
- s) The April 7, 2010 discussion between Mr. Post and Mr. Miller (p. 38).

- t) The April 8, 2010 discussion between Mr. Post and Mr. Miller (p. 38).
- u) The April 9, 2010 discussion between Mr. Post and Mr. Miller (p. 38).
- v) The April 12, 2010 discussion between Mr. Post and Mr. Miller (pp. 38-39).

The Joint Petitioners initially objected to CWA-5 and CWA-6 on the ground that the request for "all" documentation relating to the referenced items is overly broad, unduly burdensome and excessively time consuming. They also objected to the requests insofar as the information requested is highly confidential, commercially sensitive information, and claimed that the release of the information would cause irreparable harm if the provisions of the current Protective Order are not revised. Finally, they contended that the substance of the referenced meetings is accurately and fairly disclosed in the S-4 and amended S-4 filings that were made on July 16, 2010, and alleged that "risking disclosure or misuse of this most sensitive information is not required in order to provide the Commission with full and fair information concerning the consideration of the proposed merger."

The CWA contends that the documents requested in Information Requests 5 and 6 appear to reflect critical points of analysis and decision that contributed to the Joint Petitioners' decision to enter into the merger agreement and may disclose the expectations and analyses of the officers and directors of CenturyLink and Qwest concerning the financial effects of the transaction; anticipated synergy savings; changes to pricing or service quality; integration processes and timelines; and other relevant aspects of the proposed transaction. CWA contended that it is evident from the summaries in the proxy statement filed with the SEC that the documents are relevant to such issues as financial fitness, synergy savings, and operational systems integration. It asserted that the Joint Petitioners are required to produce the full documents and not merely summaries. In response to CWA's Motion to Compel, the Joint Petitioners continue to argue that these inquiries are overreaching, burdensome and unnecessary in light of the information that has already been disclosed in the S-4. They contend that the CWA has not demonstrated the potential relevance of these requests to the issues in this proceeding, and assert that the requests are merely a "fishing expedition."

The Administrative Law Judge concludes that CWA Information Requests 5 and 6 are reasonably calculated to lead to the discovery of admissible evidence because the requested documents contain information that bears on (or could lead to other matter that could bear on) whether the post-merger company would have the financial, technical, and managerial resources to enable the Qwest and CenturyLink Operating Companies to continue providing reliable, quality telecommunications services in Minnesota, and potential effects of the transaction upon Minnesota consumers and competitors. However, both requests are overly broad and unduly burdensome with respect to (1) the request for "all materials" relating to the described events, since that request potentially would encompass drafts that were ultimately not used, and (2) the request for all notes taken at the specified meetings or during the specified telephone conversations, since compliance with that request would necessitate approaching each

attendee or participant to obtain their informal notes. Therefore, the Motion to Compel is granted only with respect to production of the final version of materials developed by or for CenturyTel and/or Qwest for presentation to their respective Board of Directors and the separate Qwest Transaction committee or exchanged on the specified dates and by the specified individuals (including backup documentation and underlying computations); and formal minutes or reports relating to the specified meetings or conversations. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

