

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Joint Application of)
Qwest Communications International, Inc.) DOCKET NO. 10-049-16
and CenturyTel, Inc. for Approval of Indirect)
Transfer of Control of Qwest Corporation,)
Qwest Communications Company, LLC and) REPORT AND ORDER
Qwest LD Corporation)

ISSUED: October 6, 2010

By The Commission:

This matter is before the Commission on Qwest and CenturyLink’s Joint Motion for review, rehearing, and/or Clarification of the Commission’s Protective Order. Commission staff inadvertently issued a standard protective order in this matter on August 18, 2010. The Commission grants the Joint Applicants’ Motion, and issues the following Order on the Joint Applicants’ current Motion.

The parties’ specific arguments are detailed in their moving and responding papers. The Commission only summarizes their positions below.

On July 22, 2010, the Joint Applicants moved for the entry of a protective order (PO) protecting confidential information, highly confidential information, and also requesting the Commission allow dissemination of some information under a Staff Eyes Only (SEO) provision. Information subject to an SEO provision could be disclosed to the Division of Public Utilities (Division) and the Office of Consumer Services (OCS), but “not to CLECs or other non-governmental parties.” *Joint Applicants’ Motion for Protective Order*, p.1.¹ The Joint Applicants

¹ The Joint Applicants represent to the Commission that the SEO documents are “limited to the following types of documents: strategic business plans and analysis; new product roll-out timelines; market share information. Such

attached a proposed PO as Attachment A. The Joint Applicants suggested two other states allowed such an SEO provision. The Joint Applicants stated that the Joint CLECs would object to the SEO provision because administrative concerns regarding the SEO designation would interfere with the filing of witness testimony and briefs. The Joint Applicants also suggested that the proposed SEO documents would be of “limited or no relevance to the issues that the Commission will be considering here” *Joint Applicants’ Motion for Protective Order*, p.4. It concluded that the additional SEO provision would encourage disclosure while protecting the Joint Applicants from possible competitive harm.

The Joint CLECs responded to the Joint Applicants’ Motion on July 27, 2010. They did not oppose the entry of a PO containing confidential and highly confidential provisions, but did oppose the inclusion of any SEO provisions. They also asked the Commission to deny the Joint Applicants’ request to use the PO included as Attachment A and instead use the PO used by the Commission in Docket No. 10-049-22, *In the Matter of the Qwest Corporation Petition for Commission Approval of 2010 Additions to Non-Impaired Wire Center List (Wire Center Proceeding)*. The Joint CLECs contend the entry of a PO similar to that used in the wire center proceeding provides reasonable access to highly confidential information without burdening the Joint CLECs in various ways. The Joint CLECs also point to an order in Minnesota that allows in-house personnel to view highly confidential information, contending the provision in Utah should be the same, especially where the personnel viewing the information will be the same.

information is contained, for example, in the Joint Applicants’ Hart-Scott-Rodino (HSR) filing with the United States Department of Justice.” *Joint Applicants’ Motion for Protective Order*, p.3.

The Joint CLECs contend the Commission should deny any SEO provisions. They contend any such provision would be inconsistent with the principles of due process and undermine the Joint CLECs' ability to protect their interests. The Joint CLECs distinguish a purported Washington proceeding where only staff had access to some information, stating that that proceeding allowed staff to aggregate sensitive data and then provide it to various companies. The Joint CLECs contend all parties there had some access to the information, while here, the Joint Applicants propose excluding the Joint CLECs from all of the information covered under an SEO provision.

The Joint CLECs also contend that an SEO provision would, as a practical matter, prevent parties from determining whether information was properly designated under the SEO provision, and would prevent them from determining whether such information affects their interests.

The Joint CLECs also contend that permitting the SEO provision would put the Commission in a position of possibly making a decision on the final outcome of this matter, based on information available to only some of the parties. The Joint CLECs contend the Joint Applicants have provided no justification for such a possibility.

On July 29, 2010, the Joint Applicants filed their reply. They contend the wire center proceeding PO is insufficient here. They also contend an order originally issued in Docket No. 06-049-40, and reached pursuant to a stipulation, required Qwest to submit a particular form of a PO for subsequent wire center proceedings. Additionally, Joint Applicants note that the issues in a wire center proceeding "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.” *Joint Applicants’ Motion for Protective Order*, p.2.

The Joint Applicants further argued the SEO provision should be added. They contend the nature of the documents that would be covered by the SEO provision are of “such competitive sensitivity” (Joint Applicants state the documents detail how the merged companies intend to compete) that they should be protected by the SEO provision. Joint Applicants contend the documents’ contents, even if inadvertently disclosed, would damage the Joint Applicants’ ability to effectively compete and that such damage would be “immediate, substantial, and irreparable.” *Id.* at p.5. The Joint Applicants argue the documents are not relevant to these proceedings, but would only be of use to a CLEC for competitive purposes, and should not be provided to them. The Joint Applicants further contend the SEO provision would minimize discovery disputes.

A STAFF EYES ONLY PROVISION IS NOT PROPER

The Commission finds an SEO provision in a PO is not proper. Besides the basic due process concerns (providing privileged information to some parties but withholding it from others), the Commission has other concerns. First, the Commission agrees with the Joint CLECs that an SEO provision could put the Commission in a difficult position of basing a decision regarding this Joint Application on information disclosed only to the Division and the OCS, but not to the Joint CLECs. Such a situation would limit the Commission’s ability to obtain a

complete understanding as to whether the proposed merger is in the public interest, without adequate input from all parties.

Second, the Commission finds that allowing the Joint Applicants to designate information for staff-eyes-only, would permit less disclosure of information that might be relevant to these proceedings, as the Joint Applicants would have an incentive to designate information as protected by the SEO provision, and leave the Joint CLECs without adequate recourse to challenge such designation.

Finally, a review of the proposed PO shows little distinction between the type of information covered by the Highly Confidential provisions and that covered by the proposed SEO provisions. For example, the Highly Confidential provision would protect “highly-confidential documents or information, the disclosure of which imposes a highly significant risk of competitive harm to the disclosing party or third parties” if “disseminated without the heightened protections provided” *Joint Applicants’ Motion for Protective Order, Attachment A, ¶C.11-12*. The proposed SEO provision protects the “highly-confidential and competitively-sensitive” information *Id. at ¶ D.22*, “the disclosure of which imposes a highly significant risk of competitive harm to the disclosing party or third parties” which dissemination without proper protection “might impose a serious business risk. . . .” *Id. at ¶23*. These different provisions protecting two apparently different types of information are practically the same. The Commission finds the Highly Confidential provision provides sufficient protection for the type of information sought to be protected by a proposed SEO provision. Therefore a proposed SEO provision is not proper here.

FORM OF THE PROTECTIVE ORDER

The Commission agrees with the Joint Applicants that the PO submitted by them as Attachment A should be the form that is the basis of the PO in this docket. The proposed PO suggested by the Joint CLECs---the one used in the wire center proceeding, does not adequately serve the needs of the underlying subject matter. The Joint Applicants are correct in that the subject underlying “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.” Approving Attachment A as a basis for a PO allows for the greater protection needed by the Joint Applicants, while still allowing the Joint CLECs to obtain information that will allow them to adequately protect their interests through outside counsel/experts who have been retained specifically to protect such interests. Therefore, the Joint Applicants should resubmit the Attachment A PO, except that references to any SEO provision should be deleted. No other alterations should be made, except minor formatting/grammatical corrections or changes.

ORDER

1. The Joint Applicants’ Motion is granted in part and denied in part as explained above. The Joint Applicants shall, within 5 days of the issuance of this order, submit a PO based on Attachment A, except that references to any SEO provision shall be deleted. No other alterations shall be made, except minor formatting/grammatical corrections or changes;

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2. Once that PO is submitted, the Commission will vacate its previously entered PO (issued August 18, 2010), and the new Errata PO will replace it.

DATED at Salt Lake City, Utah, this 6th day of October, 2010.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 6th day of October, 2010, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#68975