

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the 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 Corp.

Docket No. UT-100820

CLEC'S REPLY IN SUPPORT OF
MOTION TO COMPEL

INTRODUCTION

Joint Applicants maintain that Staff Eyes Only treatment is needed for select documents that are so “extremely sensitive” that they cannot be disclosed to the CLECs’ outside counsel and experts pursuant to this Commission’s protective order. Yet on September 22, Joint Applicants filed motions in the Minnesota merger proceeding in which they agreed to provide copies of these same documents to intervenors’ outside counsel and outside experts. The outside counsel and experts in Minnesota and Washington overlap. Joint Applicants are therefore refusing to do here what they have already offered to do in Minnesota, and their arguments of harm upon disclosure fall flat. This Commission should grant the CLECs’ motion to compel on that basis alone.

Even without the inconsistent position between different jurisdictions, this Commission should grant the motion to compel. Joint Applicants' response sets up an elaborate scheme for designating and redesignating the confidentiality of various Hart-Scott-Rodino (HSR) documents, admitting that some "can now be downgraded to 'Highly Confidential.'" They appear oblivious to what the CLECs have argued and what this Commission has already decided. Joint Applicants are offering a false compromise, agreeing to continue seeking Staff Eyes Only treatment for only a portion of the HSR documents when in fact they have already lost that argument. It is now their obligation to produce documents due and owing under the existing protective order and pursuant to the relevant discovery requests.

ARGUMENT

A. Joint Applicants have already agreed in the Minnesota proceeding to produce the very documents they refuse to produce in the Washington proceeding.

The Minnesota Public Utility Commission's ("Minnesota Commission") Protective Order allows certain in-house personnel to review highly confidential documents.¹ On September 21, the Minnesota Commission granted motions to compel Joint Applicants to produce disputed documents pursuant to the existing Protective Order and a new Supplemental Protective Order, the latter of which grants a heightened trade secret designation but still allows production of such documents to both in-house and outside counsel and experts.² The next day, September 22, Joint Applicants moved for reconsideration of the decision. In that motion, Joint Applicants agreed to produce the majority of documents as ordered, but maintained that some of the documents

¹ Trinchero Decl., ¶¶ 2, 3, Exs. 1, 2.

² *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, MPUC Docket No. P-421, et al./PA-10-456 (Sept. 21, 2010) (concluding that HSR documents are relevant and may be produced under both the June 15 Protective Order and the September 21 Supplemental Protective Order); *see also* Trinchero Decl., ¶ 3, Ex. 2.

originally requested to be “Staff Eyes Only” were still “too extraordinarily sensitive to release under the terms of the Supplemental Protective Order,” and therefore would be produced only “to the outside counsels and outside experts of the Interveners.”³ Those documents include HSR document numbers 10, 23, 33, 35, and 36 (in unredacted form) and numbers 4, 9, 13, 15, 16, and 37 (in redacted form).⁴ Thus, Joint Applicants have offered to provide copies of these same HSR documents to outside counsel and experts in Minnesota, but continue to refuse to produce these same HSR documents to outside counsel and experts, many of whom are the same persons, in this case.

This disclosure to outside counsel and experts is exactly what the CLECs seek in this proceeding. Despite their new position in Minnesota, Joint Applicants filed their response in this proceeding six days later, insisting that the CLECs’ outside counsel may not have copies of HSR documents 10, 23, 33, 35, and 36, among others.⁵ These are the very same documents that Joint Applicants have offered to provide to outside counsel and experts in Minnesota. The position is unsustainable. The CLECs’ outside counsel and experts in Minnesota and Washington overlap one another.⁶ The documents are the same in both states. There is no reason that disclosure is appropriate in Minnesota but exceedingly harmful to Joint Applicants in Washington. Moreover, the very offer to provide copies to outside counsel and experts in Minnesota obliterates whatever secrecy Joint Applicants were trying to maintain. Joint Applicants must produce all HSR documents to CLECs pursuant to this Commission’s protective order.

³ Trincherro Decl., ¶ 4, Ex. 3, pp. 3-4.

⁴ *Id.* at p. 4.

⁵ Qwest’s and CenturyLink’s Answer to Joint CLECs’ Motion to Compel, ¶¶ 9-10.

⁶ Trincherro Decl., ¶ 5.

B. Joint Applicants owe documents in response to pending discovery requests.

This Commission's August 3 Order concluded that the CLECs should not be deprived of the HSR documents and also declined Joint Applicants' offer of an *in camera* review.⁷ Ignoring that Order, Joint Applicants again seek "an *in camera* review of the SEO HSR documents," as if such an SEO category exists. It does not exist, as directly decided in this Commission's August 3 Order. The fact that Joint Applicants still "believe that they have offered a reasonable way to proceed" and believe that "there is still the issue of the extremely sensitive nature of the documents" is irrelevant, because those issues were decided nearly two months ago.

Minds may differ as to whether the disputed documents are relevant and whether they are hyper-confidential. Joint Applicants' response belies that point. After strenuously objecting to production of the HSR documents because of their categorical extreme sensitivity, Joint Applicants now admit that *some* of the HSR documents "can now be downgraded" to (a) Highly Confidential with limited redactions or (b) Highly Confidential with no redactions, while others will (c) remain "Staff Eyes Only."⁸ In other words, there are shades of gray in the sensitivity of the information. Joint Applicants cannot unilaterally decide what is too confidential to produce, particularly in light of this Commission's previous conclusions. Joint Applicants must produce all documents due and owing pursuant to pending discovery requests. This is especially true given the Joint Applicants' offer to provide copies of the very same "Staff Eyes Only" documents to outside counsel and experts in the Minnesota proceeding.

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⁷ *In the Matter of the Joint Application of Qwest Communications International, Inc. and CenturyTel, Inc.*, Docket UT-100820, Order 08, ¶¶ 5, 20-25 (Aug. 3, 2010) (hereinafter, "Order 08").

⁸ Qwest's and CenturyLink's Answer to Joint CLECs' Motion to Compel, ¶¶ 9-10.

CONCLUSION

More than eight weeks after this Commission denied Joint Applicants' request for supplemental protection, Joint Applicants continue to withhold documents and to argue that copies of certain documents will not be produced to outside counsel and experts. At the same time, Joint Applicants have agreed to produce these same documents to many of the same outside counsel and experts in the Minnesota proceeding. Joint Applicants' arguments are untenable. This Commission should grant the CLECs' motion to compel production of documents.

Respectfully submitted this 1st day of October, 2010.

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