[Service date: July 27, 2010]

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.	UT-100820 CBEYOND COMMUNICATIONS LLC, AND LEVEL 3 COMMUNICATIONS, LLC JOINT RESPONSE TO JOINT APPLICANTS' MOTION FOR SUPPLEMENT TO PROTECTIVE ORDER

Pursuant to the Notice of Opportunity to Respond to Joint Motion for Supplemental Protective Order, Cbeyond Communications LLC and Level 3 Communications, LLC ("Cbeyond and Level 3") provide the following response to Qwest's and CenturyLink's Joint Motion for Supplement to Protective Order.

CenturyTel, Inc. and Qwest Communications International, Inc. (collectively "Joint Applicants") seek creation of a category of confidential information designated as "Staff's Eyes Only". Such information would be deemed Competitively Sensitive/Highly Confidential Information and would be disclosed only to Staff and Public Counsel. Such a proposal is highly problematic. It is unnecessary to protect the Joint Applicants' legitimate interests, unnecessarily

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cumbersome, unfair, and presents serious issues of denial of due process. Level 3 and Cbeyond object to the Joint Applicants' proposal and urge the Commission to deny their motion.

DISCUSSION

I. The Joint Applicants' Request for a "Staff Eyes Only" Category of Nondisclosure is Unprecedented and Should Not Be Allowed

The Joint Applicants attempt to justify their proposal for a "Staff Eyes Only" category of nondisclosure by referencing Order No. 7 in Docket UT-030614, a case involving Qwest's petition for competitive classification of its basic business services. But that case was significantly different that this one and does not provide any precedential support for the Joint Applicants' extraordinary request here.

What the Joint Applicants do not mention is that the Commission in the Qwest competitive classification case was dealing with a request from the Staff for an order requiring all CLECs certified in the state, not just those that were parties to the case, to provide sensitive information about the number of customers each served. Given concerns about the reluctance of non-parties to provide commercially sensitive information the Commission ordered that the CLEC information would be provided only to the Staff, which would then mask the identity of the providing CLECs, aggregate the information, and make the aggregated information available to all the parties.

Unlike the Qwest competitive classification case, we are not dealing with the sensitive information of non-parties; it is the information of the Joint Applicants that is at issue here. Moreover, this is not a circumstance where it is possible to make key information available in another form that serves the purposes of the case. In the Qwest competitive classification case all parties had access to the aggregated data as a whole although not to the carrier-specific component parts. Here, the Joint Applicants propose to disclose (and, in fact, have already disclosed) the sensitive information to the Commission Staff and Public Counsel, but no other party will have access to that information in any form whatsoever. The selective disclosure

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arrangement proposed by the Joint Applicants has not been adopted in any prior proceeding in Washington and should not be adopted here.

II. A "Staff Eyes Only" Category of Nondisclosure Is Not Necessary to Protect the Joint Applicants' Legitimate Interests, And Is Unnecessarily Cumbersome, Unfair, and Presents Serious Issues of Denial of Due Process.

Adding a third level of protection so that some documents can be viewed only by Staff and Public Counsel is unnecessary to protect the legitimate interests of the Joint Applicant. The "highly confidential" designation already exists for materials that are especially competitively sensitive. Since access to those highly confidential documents is restricted to outside counsel and experts, the Joint Applicants' sensitive information is protected from being disclosed to their competitors.

Level 3 and Cbeyond have serious due process concerns with any process in which information that is responsive to data requests and otherwise relevant to this proceeding is disclosed to some parties but not others. It would be fundamentally unfair if certain parties to the case were deprived of the opportunity to protect their substantial interests by being denied the opportunity to review information that could impact those interests. Further, no party should be required to rely on the representations of opposing counsel or even counsel for Commission Staff or Public Counsel that the information will not adversely affect its interests. Nor is it the job of Staff or Public Counsel to look after the interests of other parties.

It is also very problematic if, potentially, portions of the Commission decision could be based on evidence that was inaccessible to the majority of parties or their advisors/counsel in this case. The Joint Applicants fail to address how the Commission would or could consider such information when making a decision on the merits.

The Joint Applicants dismiss such concerns by claiming that these circumstances are unlikely because the Hart-Scott-Rodino documents are of limited or no relevance to the issues the Commission will be considering. Such a self-serving assertion misses the point. Without

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seeing the documents and the information they contain, it is impossible to tell whether that is the case. Moreover, the broad descriptions given to the documents by the Joint Applicants in their motion are not helpful.

Level 3 and Cbeyond believe the proposed transaction could raise a serious threat to competition. There is a substantial risk that the merged company will be unable to provision wholesale inputs in compliance with the law and that the merged company will attempt to achieve synergies by reducing wholesale service quality. They are also concerned that the transaction will increase the Joint Applicants' incentive to discriminate against competitors. Without seeing the "Staff Eyes Only" documents no party can tell whether they contain information relevant to these concerns.

Under the scenario urged by the Joint Applicants, unlikely or not, the Commission would be asked to determine whether the proposed transaction is in the public interest based on a record that includes information to which only the Commission, Staff, and Public Counsel have access. Other parties, who have substantial interests in the case, would be denied the opportunity to advise the Commission of the significance of information that may be important to protecting those interests. The Applicants fail to offer sufficient justification for such an extraordinary procedure of decision-making.

The Joint Applicants' proposal raises other procedural issues as well. The current protective order includes a process for parties to challenge a party's designation of information as highly confidential. Those provisions would be meaningless with respect to information designated as "Staff Eyes Only" because a party without access to the information could not possibly assess whether it has been properly designated. Thus, parties other than the Staff and Public Counsel would be in the untenable position of having no ability to determine whether information designated as "Staff Eyes Only" is properly designated as such, much less whether that information affects their interests.

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The Commission has reviewed several merger proceedings in the past and has never found it necessary to establish a "Staff Eyes Only" level of nondisclosure, including for Hart-Scott-Rodino filings. If the Applicants believe in good faith that parts of their filing warrant special limitations on disclosure beyond highly confidential restrictions, the appropriate procedure would be to allow outside counsel for the other parties to review the documents to ensure that the Commission is fully informed of the nature and potential impact of those documents on all parties in the case. The Commission then could conduct a review of specific documents on an individual case basis to determine the extent to which access to those documents should be further limited. The Commission should not enter a protective order that gives the Applicants virtually unfettered discretion to designate information that they will disclose only to the Staff and Public Counsel.

CONCLUSION

For the foregoing reasons, the Commission should not create a new level of nondisclosure for information provided solely to the Staff and Public Counsel, but instead should deny the Joint Applicants' motion for a supplement to the protective order.

RESPECTFULLY SUBMITTED this 27th day of July, 2010.

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I hereby certify that I have this 27th day of July, 2010, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of July, 2010, at Seattle, Washington.

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