BEFORE THE WASHINGTON STATE 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. 100820 PUBLIC COUNSEL RESPONSE IN OPPOSITION TO JOINT APPLICANTS' MOTION FOR "STAFF EYES ONLY" SUPPLEMENT TO PROTECTIVE ORDER

1. Pursuant to the Commission's Notice of Opportunity to Respond to Joint Motion For Supplemental Protective Order (Notice), issued July 19, 2010, Public Counsel files this Response to Qwest's and CenturyLink's Joint Motion For Supplement To Protective Order (Joint Motion), filed July 15, 2010. Public Counsel recommends that the motion be denied.

2. The Joint Applicants' proposed "Staff Eyes Only" (SEO) Protective Order would permit Public Counsel attorneys, staff, and experts to have access to the specially protected material.[1] Notwithstanding this access, Public Counsel opposes the motion because it conflicts with important public policy considerations, establishes a poor precedent, is unsupported and unnecessary, and would impose undue administrative burdens on the Commission and parties. Public policy in Washington requires that, with limited exceptions, state government be

[1] *See* Joint Applicants' proposed "Protective Order with 'Highly Confidential' And 'Staff Eyes Only' Provisions, ¶ 25. Commission Staff is permitted equivalent access.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

conducted in public.[2] Public proceedings and public records are to be open. While confidentiality is permitted in certain circumstances, these instances are to be narrowly construed.[3] Consistent with these principles, in Washington Utilities and Transportation Commission (UTC) proceedings, the Commission requires that "[p]arties must strictly limit the amount of information they designate as confidential or highly confidential."[4] This case involves a change of control in Washington's largest incumbent telecommunications company with major potential economic and communications ramifications for millions of Washington telecommunications customers, both residential and business. The Commission's task of determining whether this change of control is in the public interest[5] must be conducted to the maximum extent possible in public. These important considerations are not obviated by the simple expedient of allowing Public Counsel and Commission Staff special access to the SEO information.

3. Public Counsel is not aware of a prior case where the Commission has adopted restrictions of this breadth, nor have Joint Applicants cited one. The proposed SEO Protective Order goes significantly further than the order cited in the Joint Motion.[6] Allowing this new type of protective order, in Public Counsel's view, creates a dangerous precedent. Once allowed, there is a risk that this extraordinary level of protection will be routinely sought in future proceedings in both energy and telecommunications cases, creating further potential areas of

[2] Chapter 42.30 RCW (Open Meetings); Chapter 42.17 RCW (Public Records).
[3] *Brouillet v. Cowles Publishing*, 114 Wn.2d 778 (1990).
[4] WAC 480-07-423(1).
[5] RCW 80.12.020; WAC 480-143-170.
[6] Joint Motion, ¶ 2.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

dispute in litigation and additional administrative complexity, while tending to further limit the openness of Commission cases to the public.

4. The SEO Protective Order is unnecessary. The Commission's existing form of "Highly Confidential Protective Order" was adopted expressly in response to increasing company requests for enhanced protection for competitively sensitive information. As the Commission rules state: "[t]he "highly confidential" designation is reserved for information, the dissemination of which, for example, poses a *highly significant risk of competitive harm* to the disclosing party without enhanced protections provided in the commission's protective order."[7] The protective order in this proceeding contains the following language:

> Intervenors in this proceeding may include competitors, or potential competitors. Moreover, information relevant to the resolution of this case is *expected to include sensitive competitive information*. Parties to this proceeding may receive discovery requests that call for the disclosure of highly confidential documents or information, the disclosure of which *imposes a highly significant risk of competitive harm* to the disclosing party or third parties [.][8]

5. The existing protective order contains extensive protections for the benefit of the disclosing party, including for example, limitation of disclosure to outside counsel and experts (as opposed to company employees),[9] employment restrictions listed in Exhibit C for those outside recipients,[10] and the right to object to disclosure to specific attorneys or consultants.[11] There is no need to construct a third layer of protection on top of this one, already designed for

[7] WAC 480-07-423(3)(b)(emphasis added).
[8] Order 01, ¶ 11.
[9] Order 01, ¶ 14.
[10] *Id*.
[11] Order 01, ¶ 16.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

this specific purpose.

6. The existing Highly Confidential Protective Order provisions have been employed in a wide range of important cases involving highly sensitive competitive information and have been sufficient for the purpose. Examples include the CenturyTel/Embarq merger,[12] the Verizon/MCI[13] and Verizon/Frontier[14] mergers, a major Qwest competitive classification docket,[15] and the PSE/Macquarie sale docket.[16] Joint Applicants in this case have not explained how the information at issue in this case is any more sensitive or deserving of protection than information in these other proceedings, much of it of a very similar nature.[17] Joint Applicants have cited no instance in which the terms of Highly Confidential Protective Order were violated or in which competitive harm took place from improper disclosures by any party.

7. In addition to the foregoing concerns, the Joint Motion is inadequately supported. The Commission's rules require that a request for issuance of a Highly Confidential Protective Order must be "supported by a sworn statement that sets forth the specific factual or legal basis for the requested level of protection and an explanation of why the standard protective order is

---

[12] *Joint Application of Embarq Corporation and CenturyTel, Inc., For Approval of Transfer of Control of United Telephone Company of the Northwest, d/b/a Embarq and Embarq Communications, Inc.*, Docket No. UT-82119, Order 02.

[13] *Joint Petition for Declaratory Order on Behalf of Verizon Communications, Inc., and MCI, Inc., Disclaiming Jurisdiction Over, or in the Alternative, a Joint Application, for Approval of Agreement and Plan of Merger*, Docket No. UT-050814, Order 02.

[14] *In the Matter of the Joint Application of Verizon Communications Inc, and Frontier Communications Corporation, For an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest Inc.*, Docket No. UT-090842, Order 01.

[15] *In The Matter of the Petition of Qwest Corporation for Competitive Classification of Business service in Specified Wire Centers*, Docket No. UT-000883, Second Supplemental Order.

[16] *In the Matter of the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For an Order Authorizing Proposed Transaction*, Docket No. U-072375, Order 02.

[17] Hart-Scott-Rodino documents were requested in discovery and produced in the Verizon/Frontier and CenturyTel merger dockets in Washington without any motion for extraordinary SEO protection. As noted above, both dockets had Highly Confidential Protective Orders.

inadequate."[18] While the rules neither provide for nor prescribe the support required for an SEO Protective Order, presumably at least as much is required as for a "Highly Confidential Protective Order." Joint Applicants provide no sworn statement and rely upon a brief motion containing little more than generalities in support of their request. The motion contains an offer to make more information available to the Commission "if such a submission would aid in a decision."[19] Joint Applicants overlook that they have the burden here to establish that added protection is necessary. This burden is not met by a thinly supported motion and a general offer to provide more information if requested.

8. The timing of the motion also raises questions. Joint Applicants knew or should have known at the time their application was filed, and certainly by the time of the prehearing conference on June 1, that they would be making a Hart-Scott-Rodino filing with the Department of Justice and/or Federal Trade Commission. It would have been reasonable to anticipate that these documents would be the subject of discovery. At the prehearing conference, however, when Qwest counsel was asked about the need for a protective order, Qwest counsel stated only: "Yes, Your Honor, and anticipating some discovery questions, we would also like the protective order to be issued to cover highly confidential material."[20] No mention was made at that time of the need for unusual SEO protections for certain information. The filing of the motion at this time simply introduces more delay and administrative burden to the case.

[18] WAC 480-07-423(2). The issuance of a Highly Confidential Protective Order in this case was not objected to by the parties so this level of showing was not made. TR. 11:10-12:1.

[19] Joint Motion, ¶ 6.

[20] TR. 11:16-19.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

9. Finally, Public Counsel opposes the motion on the ground that the level of protection proposed would create challenges to the Commission and parties in conducting the hearing, filing briefs, and issuing an order. There is no precedent for the procedural tasks that would be required in dealing with three different levels of protection. While avoiding administrative burden or complexity is not alone a reason to reject otherwise warranted protection, the imposition of additional restrictions must be strongly justified and shown to be necessary. Joint Applicants have failed to carry that burden here.

10. For the foregoing reasons, Public Counsel recommends that the Joint Motion be denied.

11. DATED this 27th day of July, 2010.

ROBERT M. McKENNA
Attorney General

Simon J. ffitch
Senior Assistant Attorney General
Public Counsel

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744