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 UT-100820 COMMISSION STAFF'S RESPONSE TO QWEST'S AND CENTURYLINK'S JOINT MOTION FOR SUPPLEMENTAL PROTECTIVE ORDER

1 Pursuant to the Commission's Notice of Opportunity to Respond to Joint Motion for Supplemental Protective Order issued July 19, 2010, Staff of the Washington Utilities and Transportation Commission (Staff) submits this response. While Staff appreciates the efforts of Qwest and CenturyLink (Joint Applicants) in raising this issue informally with all of the parties before filing their Joint Motion for Supplement to Protective Order (Motion), Joint Applicants have accurately reported that Staff has concerns about Joint Applicants' proposal. Because of these concerns, Staff opposes Joint Applicants' Motion.

2 This issue arises from a data request sent June 9, 2010, by Staff to the Joint Applicants, which requested all materials provided by either Qwest or CenturyLink to the U.S. Department of Justice and/or the Federal Trade Commission under the provisions of the Hart-Scott-Rodino Act. Staff received an initial response June 28, and a follow-up response July 1 with attachments designated respectively as confidential, highly confidential, and "staff only." In Joint Applicants' initial response, they communicated an intention to move for an amended protective order that would cover some of the documents responsive to Staff's data request.

3 In their Motion, Joint Applicants propose creating a new level of confidentiality for competitively sensitive information contained in the following types of documents: strategic business plans and analysis, new product roll-out timelines, and market share information.[1] The proposed term for the new level of confidentiality is "staff eyes only" or "SEO."[2] Documents designated by the Joint Applicants as SEO would be accessible only to Staff and Public Counsel.[3]

4 The "staff eyes only" designation proposed by the Joint Applicants would be a marked departure from past Commission practice. The existing protective order protects the disclosure of both confidential and highly confidential information in this proceeding.[4] It is a standard protective order and provides parties the flexibility to challenge and review an individual document in camera on a case by case basis to determine how it should be disclosed and protected under the order. Generally, the Commission's standard protective order has been adequate for all kinds of Commission proceedings, even for publically contentious proceedings such as the Puget Sound Energy acquisition in 2008.[5] The Commission's review of that acquisition proceeded with the standard protective order covering confidential and highly confidential information.[6]

5 Based on Staff's initial review of the Hart-Scott-Rodino documents, they do appear to contain competitively sensitive information. The contents, however, do not seem any different from materials Staff has reviewed in other proceedings. In past transactions involving telecommunications carrier acquisitions and divestitures, two levels of

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[1] *See* Motion at pp. 3-4, ¶¶ 5.
[2] Motion at p. 1, ¶ 2.
[3] Motion at pp. 1-2, ¶ 2.
[4] Order 1, Protective Order with "Highly Confidential" Provisions (June 2, 2010).
[5] *See In the Matter of the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc. For an Order Authorizing Proposed Transaction,* U-072375, Order 2, Protective Order with "Highly Confidential" Provisions (January 18, 2008).
[6] *Id.*

confidentiality, "confidential," and "highly confidential," have been sufficient. In the most recent of these transactions, the Verizon-Frontier transaction[7] and the CenturyTel- Embarq transaction,[8] the applicants provided Hart-Scott-Rodino filings in discovery without the protection of a "staff eyes only" confidentiality provision. CenturyLink, formerly named CenturyTel, was the acquiring party in one of these recent transactions and did not seek a third level of protection in that proceeding. Joint Applicants have not explained how prior proceedings differed, if at all, from this proceeding.

6 In their Motion, the Joint Applicants state that the Hart-Scott-Rodino "information requested includes information that goes to the very essence of Joint Applicants' anticipated competitive strategies and actions" and that disclosure to competitors "would cause immediate and irreparable harm to Joint Applicants."[9] The language in the existing protective order covering "highly confidential" materials appears to cover just the type of information Joint Applicants reference in their Motion. Specifically, the protective order states that the "case is expected to include sensitive competitive information," and that disclosure of this information "imposes a highly significant risk of competitive harm to the disclosing party or third parties."[10] Nevertheless, Joint Applicants assert, "certain documents are so competitively sensitive that even the 'Highly Confidential' designation in the existing protective order is insufficient to prevent competitive harm if that information is disseminated to competitors."[11] Based on the scant information in Joint Applicants' Motion,

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[7] *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications Corp. For an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc.*, Docket UT-090842.
[8] *In the Matter of the 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 UT-082119.
[9] Motion at p. 2, ¶ 2.
[10] Order 1 at p. 5, ¶ 11.
[11] Motion at p. 1, ¶ 1.

it is difficult to evaluate this assertion or ascertain why the Hart-Scott-Rodino documents in this case might be more sensitive than the content of Hart-Scott-Rodino filings in prior cases.

7 The Joint Applicants also have not adequately explained the risk of harm from disclosure of competitively sensitive Hart-Scott-Rodino documents to the intervenors' legal counsel or experts as well as to the intervenors themselves. The argument that competitive harm cannot be prevented under the existing protective order assumes that the intervenors, their experts, or their legal counsel will misuse the documents at issue. By seeking to exclude not only the intervenors but also their experts and counsel, Joint Applicants impugn the integrity of the individuals who have signed the confidentiality agreements on behalf of intervenors in this proceeding.

8 The only Commission proceeding that the Joint Applicants cite in support of their proposed "staff eyes only" designation[12] is distinguishable from the instant proceeding in that the information ultimately was made available to all parties in the past proceeding. The cited proceeding concerned a petition filed in 2003 by Qwest for competitive classification of certain business telecommunications services.[13] To determine whether these services were subject to effective competition, the Commission ordered Competitive Local Exchange Carriers (CLECs) to produce information including the number of lines, the number of customer locations served, the type of services provided and the type of facilities used by CLECs in each Qwest wire center.[14] This information was restricted initially to

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[12] *See* Motion at pp. 1-2, ¶ 2.
[13] *In the Matter of the Petition of Qwest Corporation for Competitive Classification of Basic Business Exchange Telecommunications Services*, Docket UT-030614.
[14] *Id.*, Order 6, Order Requiring Disclosure of Information (June 30, 2003) at pp. 1-3, ¶¶ 3-6. It is worth noting that the Commission articulated and itemized the particular type of data that would be accorded special protection when it ordered its disclosure.

Commission Staff.[15] Staff removed company identifiers, and the aggregated data was then made available to all of the carriers, including Qwest,[16] designated as "confidential."[17] Under the Joint Applicants' proposal, in contrast, none of the intervenors, their experts, or their counsel would ever receive access to the portions of the Hart-Scott-Rodino filings or any other materials the Joint Applicants designated as "staff eyes only."

9 Lack of access to materials could silence the CLECs and similarly situated intervenors. While it is possible that the information Joint Applicants seek to protect is not vital to the CLECs' cases, it would be inappropriate and overly burdensome for Staff to make that kind of a determination for another party. The intervening parties with their various interests bring different perspectives to the case and can assist the Commission in obtaining a more comprehensive view of the transaction. In order to contribute their analysis and perspectives to the proceeding, the CLECs and similarly situated intervenors need to be able to develop and advocate their positions; and in order to do that, all parties require access to the same information.

10 Additionally, Staff is concerned about the administrative burdens of managing and filing documents with three different levels of protection. The "highly confidential" designation already exists for materials that are especially competitively sensitive, and filing testimony and briefing with redactions for two levels of confidentiality is already significantly burdensome. Joint Applicants dismiss these "administrative concerns," and assert "it would be a fairly simple matter to redact the information and submit a redacted

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[15] *Id.* Order 6 at p. 3, ¶ 6. In Order 12, Order Granting Request for Reconsideration or Clarification (August 6, 2003) at p. 3, ¶ 12, the Commission decided that "Public Counsel should be permitted to receive and review highly confidential information on the same basis as Commission Staff."
[16] *See id.*, Order 7, Amending Protective Order (June 30, 2003) at p. 3, ¶ 11.
[17] *Id.*, Order 10, Clarifying Confidentiality Status of Aggregated Data (August 4, 2003) at pp. 2-3, ¶¶ 8-9.

filing."[18] For Staff, however, it would be a considerable burden. Staff is concerned also about the potential precedential effect of granting Joint Applicants' Motion. If another level of confidentiality were permitted in this case, it is likely that future parties also would request it. Where precedent exists, future grants become more likely. Such "confidentiality creep," if unchecked, would only increase the significant administrative burden in managing and filing materials redacted for three levels of confidentiality.

11 Staff recognizes that there may be instances in which it is appropriate to block access by competitors to particular types of data. When this did occur, however, in the competitive classification proceeding cited by Joint Applicants, access to the information by all parties was preserved. In their Motion, the Joint Applicants have failed to demonstrate that the existing protections are inadequate or to otherwise justify further restrictions on access in this proceeding. Considering also the sufficiency of standard confidentiality protections for previous mergers, the additional burdens involved in managing a third level of confidentiality, the potential harm to intervenors' ability to advocate their positions if the Motion were granted, and the precedent that likely would result from establishing a third level of confidentiality, Staff opposes Joint Applicants' Motion.

DATED this 27th day of July 2010.

Respectfully submitted,

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[18] Motion at pp. 3-4, ¶¶ 7-8.