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 CLECS'RESPONSE TO QWEST'S AND CENTURYLINK'S REQUEST FOR *IN CAMERA* REVIEW OF HIGHLY SENSITIVE DOCUMENTS AND REQUEST FOR ORAL ARGUMENT

I. INTRODUCTION

1. On August 3, 2010, this Commission denied a motion by Joint Applicants Qwest Communications International, Inc. ("Qwest") and CenturyTel, Inc. ("CenturyLink") (collectively, "Joint Applicants") to supplement the existing protective order with a third layer of protection labeled "Staff's Eyes Only," and to allow *in camera* review of such documents to establish their exceptionally sensitive nature.[1] Despite that Order, Joint Applicants have failed to produce the majority of the requested documents and now essentially ask this Commission to reconsider its earlier decision, again moving for *in camera* review of the same sensitive documents. Because Joint Applicants' motion fails to address any of the concerns detailed in the August 3 Order, it should be denied for all the same reasons that the original motion was denied.

[1] *In the Matter of the Joint Application of Qwest Communications International Inc. and CenturyTel, Inc.*, Docket UT-100820, Order 08 (Aug. 3, 2010) (hereinafter "Order 08"); Qwest's and CenturyLink's Joint Motion For Supplement to Protective Order, ¶ 6 (agreeing to submit documents for *in camera* review).

II. DISCUSSION

2. As a threshold matter, the Notice of Opportunity to Respond to Joint Motion for *In Camera* Review asks whether Joint Applicants' motion is ripe, given that Joint Applicants have not indicated that any party besides Commission Staff has requested the information. While Joint Applicants' motion is inappropriate for all the reasons discussed below, the Joint CLECs and Level 3 (together with Cbeyond, collectively, "Joint Respondents") did in fact request the disputed documents. Integra's First Set of Information Requests directly requested this information in Data Request No. 143, asking for "the requisite notice, report forms, and any other documents (including supplemental filings) filed by CenturyLink or Qwest under the Hart-Scott-Rodino (HSR) Act...."[2] More broadly, the Joint CLECs and Level 3[3] earlier requested copies of all documents that Joint Applicants provided in response to all other parties' data requests, which encompasses the disputed HSR documents that Staff requested in Staff Data Request Nos. 13 and 133.[4] Joint Applicants' motion thus again seeks to avoid disclosing requested documents. In fact, because the Integra, Joint CLEC and Level 3 requests for this information were pending when the Commission issued its August 3 Order on the Joint Applicants' original motion, Joint Applicants needed to produce these documents immediately thereafter. But Joint Applicants did not produce *any* of the HSR documents to Integra, the other Joint CLECs, or Level 3 until August 23, 2010, and even then produced only a small subset of

[2] Trinchero Decl., ¶ 2, Ex. 1 ("143. Refer to page 6 of CenturyTel Inc's Form S-4, dated June 4, 2010. Provide a copy of the requisite notice, report forms, and any other documents (including supplemental filings) filed by CenturyLink or Qwest under the Hart-Scott-Rodino (HSR) Act with the Department of Justice and the Federal Trade Commission").

[3] Data Request No. 1 to Qwest and Data Request No. 2 to CenturyLink were sent on June 14, 2010. Cbeyond's petition for late intervention was granted on June 24, 2010. To avoid unnecessary duplication, and because outside counsel for Level 3 and Cbeyond was the same, a separate blanket data request was not sent on behalf of Cbeyond.

[4] Trinchero Decl., ¶ 3, Ex. 2.

the requested information.[5] Instead of fulfilling their clear discovery obligations, Joint Applicants have ignored this Commission's Order, spending time and resources drafting a duplicative motion rather than producing documents. More than one month after the August 3 Order, Joint Respondents have still not received the majority of the documents owed under their pending requests.[6]

3 In its July 16, 2010 motion, Joint Applicants sought to prohibit anyone other than Staff and Public Counsel from reviewing documents that "are so competitively sensitive and confidential that even the 'Highly Confidential' designation in the existing protective order is insufficient...."[7] The requested protection was a "Staff Eyes Only" (SEO) designation. Additionally, Joint Applicants' original motion offered to submit SEO documents to the Administrative Law Judge for *in camera* review.[8] This Commission denied that motion, declining to conduct a document-by-document *in camera* review to determine whether each warranted special treatment as some "new and extremely restrictive protected category of information."[9] Instead, the Commission held there was no authority or persuasive reason for withholding data from intervenors nor for preventing intervenors from challenging the confidential designation.

4. Specifically, this Commission denied Joint Applicants' July 16 motion for multiple reasons, including that Joint Applicants: (1) failed to demonstrate why the intervenors should be denied access to "such a large amount of data"; (2) failed to explain how the intervenors could challenge the SEO designation without the ability to view the data; (3) could deprive intervenors of "any

[5] Trinchero Decl., ¶ 4, Ex. 3; ¶ 5, Ex. 4. *Also,* Butler Decl., ¶4.
[6] Trinchero Decl., ¶ 6.
[7] Qwest's and CenturyLink's Joint Motion For Supplement to Protective Order, ¶ 1.
[8] *Id.* at ¶ 6 (also agreeing to create a privilege log-type document for the parties' use in challenging the SEO designation).
[9] Order 08, ¶ 20.

meaningful participation" in the Commission's decision and of the opportunity to rebut evidence; (4) failed to demonstrate the insufficiency of the Highly Confidential designation under the protective order; and (5) cited authority that was wholly distinguishable from this case.[10] Each of these enumerated grounds remain present here and thus require denial of Joint Applicants' present motion rather than reversal of this Commission's recent decision.

5. First, the requested *in camera* review would still deny the Joint Respondents access to "a large amount of data." Joint Applicants have stated, both in their motion and in discussions with counsel, that they would not allow Joint Respondents' outside counsel to have copies of the disputed documents in order to argue the pending motion.[11] This is especially egregious given the fact that outside counsel and outside experts are already entitled to have copies of this very material pursuant to the Commission's August 3 Order.[12] Thus, nothing has changed since this Commission's Order—intervenors still lack meaningful access to relevant data and Joint Applicants have still failed to demonstrate why that access should be denied in this case when it is routinely granted in similar dockets.[13]

6. Second, and similarly, the requested *in camera* review would still prevent the Joint Respondents from competently challenging the confidentiality designation. Joint Applicants concede that "some accommodation would have to be made to allow outside counsel for intervening parties to have some form of restricted access to the documents in order to prepare arguments or comments as to their treatment."[14] This only makes sense, because outside counsel could not possibly

---

[10] Order 08, ¶¶ 20-25.
[11] Qwest's and CenturyLink's Request for *In Camera* Review Of Highly Sensitive Documents And Request For Oral Argument, ¶ 8 n.4 (hereinafter "Joint Applicants' Motion for *In Camera* Review"); Trinchero Decl., ¶ 7.
[12] Joint CLECs are filing concurrent with this Response a Motion to Compel a number of these documents.
[13] *See* Order 08, ¶11 (noting Staff's argument that restricting information as requested "is a marked departure from the Commission's typical practices and procedures").
[14] Joint Applicants' Motion for *In Camera* Review, ¶ 8 n.4.

challenge or even understand the validity of confidential treatment without meaningful access to the documents.[15] Although the Joint Respondents strongly oppose this motion altogether, their counsel nonetheless proposed the following compromise process for *in camera* review, in an effort to avoid further litigating this dispute. First, counsel proposed, Joint Applicants would provide copies of the disputed documents to the Joint Respondents outside counsel. Counsel would immediately return any of those documents agreed to be non-relevant. The remaining disputed documents would undergo *in camera* review, with outside counsel immediately returning any information adjudged to be not discoverable or too sensitive for disclosure to outside counsel. The Joint Respondents' outside counsel would, therefore, retain copies only of those relevant documents deemed to be appropriately disclosed.[16] Joint Applicants rejected this offer, refusing to provide copies of any of these documents to outside counsel.[17] Rather, the Joint Respondents' counsels' sole option would be to review voluminous documents at the offices of Joint Applicants' counsel.[18] The Joint CLECs would, thereby, be seriously disadvantaged in their ability to competently challenge the Joint Applicants' claims regarding relevance and competitive sensitivity of the documents. This Commission has recognized that this is unacceptable.[19]

7. Third, *in camera* review would still deprive the Joint Respondents of "meaningful participation" in the Commission's decision and prevent its rebuttal of evidence during the proceedings. The Commission could base its ultimate decision on evidence that the intervenors have never seen and that their outside counsel once briefly viewed in an office but could not analyze in any

[15] Order 08, ¶¶ 14, 20-21.
[16] Trinchero Decl, ¶ 8.
[17] Trinchero Decl, ¶ 9.
[18] *Id.*
[19] Order 08, ¶ 20.

meaningful way. This would be evidence to which the intervenors would be unable to present rebuttal testimony. The Joint Respondents could hardly "meaningfully" participate with such impediments imposed upon their access to this information.

8. Fourth, the current motion again fails to establish the insufficiency of the protective order's Highly Confidential designation. Joint Applicants urge only that these are "the most highly sensitive HSR Documents," again attempting to create an additional layer of confidentiality without explaining why the Highly Confidential designation is insufficient.[20] In fact, the Highly Confidential designation was specifically designed to protect competitively sensitive information, limiting disclosure to outside counsel and outside consultants who certify that they will not to be involved in competitive decision-making involving the sensitive information for two years.[21] There is no showing that this protection is inadequate.

9 Fifth, Joint Applicants point to no further authority in support of their position. Rather, they claim that this information is somehow more competitively sensitive than that disclosed in other dockets. Again, however, this Commission has already ruled that the information is subject to disclosure without resort to a time-consuming, document-by-document analysis. And even if the documents warranted a special review to determine their sensitivity, intervenors cannot meaningfully evaluate or challenge their confidential treatment without adequate access to the information, as this Commission has already ordered.

10. Finally, Joint Applicants' original motion expressly offered to submit the disputed documents to the Administrative Law Judge for *in camera* review.[22] That offer carries no more persuasive weight now than it did in the July 16 motion. WAC 480-07-420 grants the presiding office

[20] Joint Applicants' Motion for *In Camera* Review, ¶ 1.
[21] Order 08, ¶ 11 n.25, ¶19; Protective Order, Order 01, ¶ 14a.
[22] Qwest's and CenturyLink's Joint Motion For Supplement to Protective Order, ¶ 6.

discretion to "permit discovery on such terms and conditions as are just." This Commission has already outlined the terms and conditions that are just in the context of this proceeding. With no reason to reverse its earlier ruling, this Commission should again deny the request.

11. Joint Applicants should not be rewarded for disobeying a clear Order of this Commission. Joint Applicants have been on notice that the Joint Respondents wanted the HSR information, and, as of August 3, Joint Applicants have known of their clear obligation to produce such information. Nonetheless, they have continued to fight the issue in defiance of this Commission's Order.

12. Nor should this Commission reward the Joint Applicants for failing to follow proper procedure under Washington law. Pursuant to WAC 480-07-810(3), a party seeking review of an interlocutory order *must* file a petition and serve it on other parties within ten days after service of the underlying order or issuance of the ruling for which the party requests review. Joint Applicants missed this mandatory 10-day deadline, but now urge the Commission to in effect reconsider its earlier Order under the guise of a new motion. This is inappropriate. Joint Applicants do not seek anything in this motion beyond the relief this Commission already rejected in its August 3 Order. Joint Applicants' improper attempt at a procedural end-run to correct its failure to meet the 10-day deadline for review of the original decision should be rejected.

III. CONCLUSION

13. Joint Applicants previously moved the Commission to amend the protective order to provide for a special "Staff Eyes' Only" confidentiality designation, offering to submit documents for *in camera* review to establish their highly sensitive nature. This Commission denied the motion, declining to pick through individual documents to determine their sensitivity. Joint Applicants now abandon the their request to modify the protective order , but again move for *in camera*

review of the same documents in an effort to again protect these same documents from disclosure beyond Staff and Public Counsel, the same remedy sought in the prior motion this Commission denied. The Commission should not countenance this thinly veiled request to overturn its previous Order. For the reasons outlined in its August 3 Order denying the Joint Applicants' prior motion, this Commission should now deny the motion before it.

DATED this 15th day of September, 2010.

DAVIS WRIGHT TREMAINE LLP

By: _____

MARK TRINCHERO, OSB # 883221
1300 SW Fifth Avenue, Suite 2300
Portland, Oregon 97201
P: 503-778-5298
F: 503-778-5299
Email: marktrinchero@dwt.com

Attorneys for Joint CLECs

ATER WYNNE LLP

By: Arthur A. Butler by MPT

ARTHUR A. BUTLER, WSB #04678
Email: aab@aterwynne.com
Telephone: (206) 623-4711
Facsimile: (206) 467-8406

Of Attorneys for Level 3 Communications, LLC and Cbeyond Communications LLC