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 QWEST'S AND CENTURYLINK'S REPLY TO OTHER PARTIES' RESPONSES TO REQUEST FOR *IN CAMERA* REVIEW OF HIGHLY SENSITIVE DOCUMENTS

1 Pursuant to the schedule previously established, the Joint Applicants herby reply to the responses filed by various parties in opposition to the pending request that the Administrative Law Judge conduct an *in camera* review of select documents provided by Joint Applicants in response to WUTC Staff Data Request 2-13. The documents were identified in Attachments to the Joint Applicants' motion.

2 Joint Applicants believe that they have offered a reasonable way to proceed with evaluating the documents and determining if they must be produced to the various intervenors, a way that was suggested in the Commission's prior order declining to modify the protective order, and that is supported by the Commission's procedural rules.

3 Staff and Public Counsel oppose the motion on the same general grounds as they opposed the earlier motion to modify the protective order. In particular, Staff is concerned about the

administrative burden that might be created by three tiers of confidentiality. However, administrative burden, even if were to exist, should not trump the Joint Applicants' legitimate concerns about confidentiality. Administrative burdens can be addressed and overcome - improper disclosure of extraordinarily sensitive confidential information cannot be addressed and overcome. Furthermore, the concerns raised about the documents at issue must be considered in the context of the fact that Staff has had these documents since the end of June, and Public Counsel has had them since the end of July. However, neither party asserts that the documents will actually be used in testimony, or even that they are relevant to any contested issue in this case.

4 The Joint CLECs raise a number of issues in their opposition. Beyond whether *in camera* review should be granted, the primary issues concern the number of documents at issue, and the method for conducting the review.

The Number of Documents at Issue is Not Large

5 Joint CLECs state that the requested *in camera* review would still deny the Joint Respondents access to "a large amount of data." They further state that Joint Applicants have "produced only a small subset of the requested information" and that "Joint Respondents have still not received the majority of the documents owed under their pending requests." All of these contentions are inaccurate. As can be seen from the indexes originally provided to the parties and the Commission in Joint Applicants' July 16 motion, Qwest's HSR filing included 82 documents. Qwest originally claimed "SEO" protection for 22 of those documents and has since reduced the number of documents that are the subject of this motion to 15. CenturyLink's HSR filing included 37 documents. CenturyLink originally claimed SEO protection for 17 documents, and has since reduced the number of documents that are the subject of this motion to 13. Thus, "the majority" of the documents have clearly been

produced. In Qwest's case, the documents it seeks to protect comprise approximately 250 pages, out of a total of approximately 900 pages for this single data request. In CenturyLink's case, the documents it seeks to protect comprise approximately 392 pages, out of a total of approximately 978 pages for this single data request. The majority of the pages are in a single document, the Market Research Presentation. The nature and character of that document can quickly be determined with just several minutes of review.

6 In the context of overall discovery, the number of documents for which special protection is sought is even smaller. In Washington, Joint Applicants have received 149 Data Requests from Staff; 181 Data Requests from Integra; 47 Data Requests from Sprint; 47 Data Requests from Public Counsel; 48 Data Requests from Charter; and 27 Data Requests from DOD/FEA. All together, Joint Applicants estimate that these constitute over 1,000 requests including subparts. Joint Applicants have produced thousands of pages of documents in response to these requests. Thus, the *in camera* review is for a *very* limited number of documents.

The Method for Conducting the Review

7 Joint CLECs next argue that the method for conducting the review would deprive them of the ability to challenge the confidentiality designation. This is absurd. Joint Applicants have offered the precise method that the Joint CLECs requested in their opposition to the July motion – Joint Applicants have offered to allow outside counsel access to the documents for review, in order to either (a) determine that they would not seek further access; or (b) prepare for the *in camera* process. Joint CLECs refused this offer, demanding instead that copies of the documents be produced.

8 Under Joint Applicants' proposal, access to the documents would take place in either Qwest or CenturyLink offices, and could thus occur in Seattle, Olympia, Vancouver, Portland,

Minneapolis, or some other city of the Joint CLECs' choosing, so long as Qwest or CenturyLink has an office in that city. In a position that is modified from what Joint Applicants stated in their motion, outside counsel would be permitted to take notes to facilitate their review, analysis, and argument. Given that all of the outside counsel who have filed a position on this motion are in one of the listed cities, and given that Joint Applicants have not attempted to impose a time limit on the review, it does not appear that the concerns raised by Joint CLECs are valid. They claim that they would be disadvantaged by this method, but they do not say how. Joint Applicants, on the other hand, have shown that it is precisely the act of copying and distributing these documents that causes the risk of inadvertent disclosure and the harm from that disclosure that has been previously described.

9 Furthermore, many of these documents are presentations or other Power Point-type documents, not single-spaced Word documents or dense spreadsheets. This is relevant because the time to review many of them would not be great.

10 Joint Applicants have asked counsel for the Joint CLECs to at least conduct an initial review on premises, so that they could see for themselves that an on-premises review would be workable, but they have refused to do so.

11 Joint CLECs further argue that the "*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 meaningful way. . . .Joint Respondents could hardly 'meaningfully' participate with such impediments imposed upon their access to this information."

12 This argument is a straw man - resolving this problem is the purpose of *in camera* review. If the Commission decides the information is germane and could be disclosed with protections, the Joint CLECs will be able to "meaningfully" participate. This argument are inappropriately assumes that this information is "meaningful" to a determination of whether the merger is in the public interest, when in fact one of Joint Applicants' primary arguments is that the information simply does not bear on that issue at all.

Joint Applicants' Motion is Permitted Under the Discovery Rules

13 This Commission should not be mislead by the Joint CLECs' arguments regarding WAC 480-07-810(3). Joint CLECs argue that granting Joint Applicants' motion would "reward the Joint Applicants for failing to follow proper procedure under Washington law" and go on to argue that Joint Applicants were required to file a petition for interlocutory review in order to challenge the original ruling on the motion to modify the protective order. Joint CLECs would be right, if Joint Applicants were in fact challenging that order. However, that is not the case. Joint Applicants accepted that ruling, and are now pursuing a different path toward protection of specific documents as opposed to a blanket modification to the protective order. Thus, the relief sought is not the same. This course of action is clearly permitted under WAC 480-07-420, as cited and discussed in Joint Applicants' motion.

14 Joint Applicants are not requesting a modification to the protective order, but rather move for *in camera* review of a smaller set of documents, in an effort to protect the highly sensitive information contained in those documents, and for which the Highly Confidential designation does not offer sufficient protection.

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