MPUC Docket No. P-421, et al./PA-10-456
OAH Docket No. 11-2500-21391-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink

ORDER REGARDING MOTIONS TO COMPEL FILED BY SPRINT, INTEGRA, AND THE COMMUNICATIONS WORKERS OF AMERICA, AND MOTION FOR A SUPPLEMENTAL PROTECTIVE ORDER FILED BY JOINT PETITIONERS

The above matter is pending before the undersigned Administrative Law Judge pursuant to a Notice and Order for Hearing issued by the Minnesota Public Utilities Commission on June 15, 2010.

On August 11, 2010, Sprint filed a Motion to Compel Qwest and CenturyLink (the Joint Petitioners) to respond to seventeen Information Requests. By letter dated August 20, 2010, Sprint notified the Administrative Law Judge that the Joint Petitioners had subsequently provided supplemental responses to several of its Information Requests and that only two Information Requests remained in dispute. On August 25, 2010, the Joint Petitioners filed their response to Sprint's Motion to Compel regarding these two Information Requests.

On August 16, 2010, the Communications Workers of America (CWA) filed a Motion to Compel the Joint Petitioners to respond to eight Information Requests. On August 23, 2010, Integra Telecom filed a Motion to Compel the Joint Petitioners to respond to one Information Request. On August 31, 2010, the Joint Petitioners filed their Response to the Motions to Compel of CWA and Integra and a Motion for a Supplemental Protective Order. On September 2, 2010, the CWA filed a Reply Brief regarding its Motion to Compel.

On September 8, 2010, oral argument regarding all three Motions to Compel was heard in the Large Conference Room at the Public Utilities Commission.

On September 13, 2010, Sprint, T-Mobile, and Cbeyond Communications filed a Joint Response Opposing the Joint Petitioners' Motion for Supplemental Protective Order. On the same date, Integra, the CWA, and the CLEC Coalition also filed Responses in Opposition to the Joint Petitioners' Motion for Supplemental Protective Order. The Joint Petitioners filed their Reply Brief regarding the Motion for Supplemental Protective Order on September 15, 2010.

The OAH record with respect to the Motions closed on September 17, 2010, when the last submission pertaining to the Motions was received.

Based on all of the files and proceedings in this matter, and for the reasons set forth in the Memorandum below, the Administrative Law Judge issues the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. Sprint's Motion to Compel the Joint Petitioners to respond to Sprint Information Requests 13 and 14 is **GRANTED.** The Joint Petitioners shall provide information responsive to Sprint-13 and Sprint -14 by 4:30 p.m. on Wednesday, September 22, 2010.

2. Integra's Motion to Compel the Joint Petitioners to respond to Request 143 of Integra's Second Set of Information Requests is **GRANTED.** The Joint Petitioners shall provide information responsive to Integra-143 by 4:30 p.m. on Wednesday, September 22, 2010 (assuming that recipients have executed Appendix C of the Supplemental Protective Order by that time).

3. CWA's Motion to Compel the Joint Petitioners to respond to its Information Requests 1-4, 15, and 24 is **GRANTED.** CWA's Motion to Compel the Joint Petitioners to respond to its Information Requests 5-6 is **GRANTED IN PART AND DENIED IN PART,** as discussed in the Memorandum below. The Joint Petitioners shall provide information responsive to CWA-1 – CWA-4, 15, and 24 by 4:30 p.m. on Wednesday, September 22, 2010, and information responsive to CWA-5 and CWA-6, as modified below, by 4:30 p.m. on Friday, September 24, 2010 (assuming that recipients have executed Appendix C of the Supplemental Protective Order by those times).

4. The Joint Petitioners' Motion for Supplemental Protective Order is **GRANTED IN PART AND DENIED IN PART**, as discussed more fully in the Memorandum below.

5. The information produced in response to this Ruling on the Integra and CWA Motions to Compel shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate. **The Joint Petitioners shall not be required to automatically provide information responsive to this Ruling to all parties.**

6. The Joint Petitioners' request to restrict dissemination of information to certain representatives of the CWA is **DENIED.**

7. The parties shall confer and attempt to reach agreement on what, if any, adjustments are needed to the schedule set forth in the First Prehearing

Order as a result of the required production of the additional information encompassed by this Order. If they are unable to reach agreement, a telephone conference call will be held to consider the matter.

8. **The parties are reminded that Trade Secret Information shall not be emailed, and Highly Sensitive Trade Secret Information and Highly Sensitive Trade Secret Information Subject to Additional Protection (as discussed in the June 15, 2010, Protective Order and the attached Supplemental Protective Order) shall not be efiled or emailed.**

Date: September 21, 2010

_/s/ Barbara L. Neilson_____
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The rules of the Office of Administrative Hearings (OAH) specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed. The OAH rules further state that a party seeking discovery must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery. A party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.[1] Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.[2] It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.[3] Administrative Law Judges at the OAH "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."[4]

The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on" an issue in the case or any matter "that reasonably could lead to other matter that could bear on any issue that is or may be in the case."[5] As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.[6] In administrative proceedings, information sought

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[1] Minn. R. 1400.6700, subp. 2.
[2] *See, e.g., Boldt v. Sanders*, 261 Minn. 160,111 N.W.2d 225 (1961).
[3] *See, e.g., Hickman v. Taylor,* 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson,* 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskervilie v. Baskerville,* 75 N.W.2d 762, 769 (1956).
[4] G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure,* § 8.5.2 at 135 (1998).
[5] *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).
[6] *Boland v. Morrill,* 270 Minn. 86, 132 N.W.2d 711, 719 (1965).

in discovery typically is considered to be relevant if the information "has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."[7] Rule 26.02 makes it clear that "[r]elevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[8] Accordingly, the definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes.[9]

Rule 26.02 of the Minnesota Rules of Civil Procedure also authorizes a court to place limitations on the frequency or extent of use of discovery methods if it finds that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[10]

The application of these discovery standards in the present case must take into consideration the nature of this proceeding and whether the information requested bears on the issues identified by the Commission or could reasonably lead to other matter that could bear on those issues. The Commission indicated in the Notice and Order for Hearing that it concurred with the Joint Petitioners' request for expedited action on their petition, "subject to the requirements of proper record development and informed decision-making," and requested that the Administrative Law Judge submit her report by November 30, 2010, "if that can be done consistent with due process, full evidentiary development, and due deliberation."[11] The Commission specified that the ultimate issue to be addressed in this case is whether the proposed merger is in the public interest under Minn. Stat. §§ 237.23 and 237.74, subd. 12, including:

- Whether the post-merger company would have the financial, technical, and managerial resources to enable the Qwest and CenturyLink Operating Companies to continue providing reliable, quality telecommunications services in Minnesota;
- What impact the transaction would have on Minnesota customers and on competition in the local telecommunications market; and
- What impact the transaction would have on Commission authority.[12]

The Commission's Notice and Order for Hearing thus makes clear its intention that the focus of this proceeding must be on the specific identified issues and that the matter must proceed in an expeditious fashion to the extent consistent with due process principles.

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[7] G. Beck, M. Gossman & L. Nehl-Trueman, Minnesota Administrative Procedure, § 9.2 at 146 (1998).
[8] Minn. R. Civ. P. 26.02(a).
[9] 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), *citing Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).
[10] Minn. R. Civ. P. 26.02(b)(3).
[11] Notice and Order for Hearing at 4-5.
[12] *Id.* at 2.

Sprint's Motion to Compel

In its Motion to Compel, Sprint seeks an order compelling the Petitioners to respond to its Information Requests 13 and 14. Sprint sought the following information from Qwest and CenturyLink in those requests:

> **Sprint 13:** Provide the interstate switched access charges for the 2009 calendar year for each ILEC legal entity in the state imposed on each of the affiliated IXCs that will be part of the proposed merger (e.g., total interstate switched access charges Qwest charged CenturyLink affiliated IXC, total interstate switched access charges CenturyLink charged Qwest affiliated IXC, etc.). Provide the charges separately by IXC and by ILEC legal entity.
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> **Sprint 14:** Provide the total special access charges for the 2009 calendar year for each ILEC legal entity in the state imposed on each of the affiliated IXCs that will be part of the proposed merger (e.g., total intrastate and interstate special access charges Qwest charged CenturyLink affiliated IXC, total intrastate and interstate special access charges CenturyLink charged Qwest affiliated IXC, etc.). Provide the charges separately by IXC and by ILEC legal entity.

In their responses to these Information Requests, CenturyLink and Qwest objected to the requests on the grounds that they were not reasonably calculated to lead to the discovery of admissible or relevant evidence. They indicated that, "[a]s set forth by the Commission in its June 15th Order, the scope of this proceeding is to establish whether the merger of the CenturyLink and Qwest parent companies is in the public interest in Minnesota," and asserted that "[t]his is not the proper forum for determining the proper level of access rates." Subject to and without waiving its objections, CenturyLink responded that CenturyLink and each of its affiliates pay and receive payment from Qwest and each of its affiliates for interstate switched access services and special access services pursuant to the tariffs filed by each entity with the FCC. Qwest similarly noted that Qwest and each of its affiliates pay and receive payment from CenturyLink and each of its affiliates for interstate switched access services and special access services pursuant to the tariffs filed by each entity with the FCC. Qwest further indicated that its intrastate special access charges could be found in its Private Line Transport Services Catalog and provided a website address for that catalog.[13]

In its Motion to Compel, Sprint generally argues that, because CenturyLink and Qwest are major wholesalers of access and interconnection, and are also retailers of the services that use those wholesale inputs, such as long distance and broadband, a broad view must be taken of their operations in order to assess the effect of the merger on competition and whether it is in the public interest. Sprint asserts that discovery regarding access charges is appropriate in light of the Commission's interest in determining whether the proposed transaction might distort or impair competition.

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[13] Sprint Request No. 13 and the Responses from CenturyLink and Qwest are attached to Sprint's Motion to Compel.

Sprint maintains that questions relating to access revenues are relevant in analyzing the competitive impacts of the merger and considering whether conditions should be imposed. It further argues that access rates and revenues have a direct impact on competition at the wholesale and retail levels and thus are relevant to the issues raised in this proceeding. In particular, Sprint contends that the requested information relating to switched and special access charges is relevant and likely to lead to the discovery of admissible evidence because such information "will demonstrate the amount of access charge savings that the merged company will obtain when access charge payments are merely intracompany payments and are no longer payments from the Qwest entities to the CenturyLink entitles, and vice versa." Sprint asserts that any access savings can have an impact on competition because Qwest and CenturyLink will be able to use the savings to develop and market competitive alternatives in the marketplace. Even though the Joint Petitioners are not seeking to change access rates in this proceeding, Sprint contends that they will have the opportunity to do so as a result of the merger and that a reduction in such costs could affect competition by enabling them to more aggressively price their products.

In support of its motion, Sprint relied in part upon a discovery order issued by the Commission in 2009 in connection with Qwest's petition for approval of its Second Revised Alternative Form of Retail Regulation (AFOR) Plan for 2010-2013.[14] In that proceeding, Sprint sought (among other things) to have Qwest provide: the amount of interstate switched access revenue Qwest generated in Minnesota in 2008 from switching, transport, and carrier common line; the billed interstate access minutes associated with those revenue amounts; and copies of all documents describing or supporting those amounts.[15] Qwest objected to these information requests at least in part based upon a contention that the interstate information requested was irrelevant. Qwest asserted that it was not appropriate to allow inquiry into services that were not at issue in the AFOR proceeding and over which the Commission had no jurisdiction. Qwest also argued that "an AFOR proceeding cannot be used as a vehicle for a fishing expedition to gain information that may be of use in other proceedings, such as the Commission's access reform rulemaking docket."[16] The Commission ultimately ordered Qwest to produce, in table format, information relating to the amount of interstate switched access revenue Qwest generated in Minnesota in 2008 from switching, transport, and carrier common line and the billed interstate access minutes associated with those revenue amounts. The Commission found that these requests were relevant to the subject matter of the proceeding because the information "could be helpful to the Commission in analyzing the reasonableness of 1) the rates that Qwest has proposed to charge in its New AFOR Plan and 2) Qwest's request in this docket for authority to offset, via an increase to local rates, a flat monthly end-use charge or surcharge of equivalent value, any future reductions in access charge elements."[17] The Commission found Sprint's request for "all documents" relating to the amount of interstate switched

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[14] Order Granting Motion to Compel, in Part, and Setting Procedural Timetable in *In the Matter of a Petition by Qwest Corporation for Approval of its Second Revised Alternative Form of Retail Regulation (AFOR) Plan,* PUC Docket No. P-421/AR-09-790 (Oct. 26, 2009).
[15] *Id.* at 3-5.
[16] *Id.* at 2-3.
[17] *Id.* at 4-5.

access revenue and billed interstate access minutes to be overbroad and unduly burdensome, and merely directed Qwest to provide the information in table format.[18]

In opposing Sprint's Motion to Compel, the Joint Petitioners again argue that the information sought by Sprint in Requests 13 and 14 involve interstate services that are subject to regulation by the FCC, not the Minnesota Public Utilities Commission. The Joint Petitioners contend that the information sought by Sprint is not relevant to the determination of any of the issues that are properly in dispute in this proceeding. They assert that access charge payments will not change after the merger. They also emphasized that, as noted in the Joint Petition, the transaction "contemplates a parent-level transfer of control of QCII only" and, after completion of the transaction, "end user and wholesale customers will continue to receive service from the same carrier, at the same rates, terms and conditions and under the same tariffs, price plans, interconnection agreements, and other regulatory obligations as immediately prior to the Transaction . . . ." The Joint Petitioners also pointed out that they had indicated in responses to other Sprint discovery requests that the QC entities and the CenturyLink entities "will continue to charge each other pursuant to switched access and other tariffs and agreements, and reductions in such payments are not part of the synergy savings the companies hope to achieve."[19] Because the Joint Petitioners "are not proposing, and the transaction does not result in any change to access charge rates," the Joint Petitioners assert that access charges are not relevant to the Commission's review and consideration of this merger. They maintained that the Commission did not review or adjust access charges in its prior merger cases involving CenturyLink and Embarq,[20] Frontier and Citizens,[21] or U.S. West and Qwest,[22] and noted that any concerns that Sprint may have regarding intrastate access charge rates could be raised in the Commission's pending rulemaking proceeding pertaining to such rates.[23]

The Administrative Law Judge presiding in the parallel merger proceeding pending before the Oregon Commission recently denied a similar motion to compel filed by Sprint in that case.[24] However, the Administrative Law Judge presiding in the

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[18] *Id.*

[19] Joint Petitioners' Response in Opposition to Motion to Compel at 4; Response to Sprint Information Request No. 47 (attached as Exhibit A to Joint Petitioners' Response).

[20] Docket No. P6441 et al./PA-08-1392.

[21] Docket No. P3131, 5316/PA-02-1991.

[22] Docket No. P-3009, 5096, 421, 3017/PA-99-1192.

[23] *In the Matter of the Request for Comments of the Minnesota Public Utilities Commission Relating to a Rule to Modify State Access Charges*, MPUC Docket No. P-999/R-06-51.

[24] *See* Ruling of Administrative Law Judge Dismissing Sprint's Motion to Compel as Moot in Part and Denying Motion in Part in *In the Matter of CenturyLink, Inc., Application for Approval of Merger between CenturyTel, Inc., and Qwest Communications International, Inc.,* UM 1484 (Sept. 7, 2010) (Judge Arlow ruled that evidence relating to special and interstate access charges that the Joint Petitioners' ILECs charge each others' CLEC affiliates was not reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the Oregon proceeding, reasoning that ILECs are required to "place their competitive operations in fully separated subsidiaries with separate management, technical and financial staffs and operations, so the access charges which they pay to their ILEC affiliate will have the same economic impact upon their operations as they would to an unaffiliated CLEC competitor"). Sprint notified the Administrative Law Judge on September 17, 2010, that it has filed a motion to certify to the Oregon Public Utility Commission the question of whether the Administrative Law Judge erred in denying the motion to compel.

parallel merger proceeding in Washington granted Sprint's motion to compel production of the access charge information.[25]

After careful consideration of the competing arguments of the parties, and in light of the broad definition of relevancy applied in considering motions to compel, the Administrative Law Judge concludes that Sprint has shown that Information Requests 13 and 14 are reasonably calculated to lead to the discovery of information that is relevant to the issues in this proceeding. The potential impact of the merger on access charges and competition is a proper inquiry in this case. Although it is undisputed that the Commission does not regulate interstate access charges, Sprint has demonstrated that the information sought bears on (or could lead to other matter that could bear on) the impact of the merger on Minnesota customers and on competition in the local telecommunications market. Even if separate organizational entities remain in existence after the merger, and even if there is not any current intention to change the access charges to subsidiaries, the manner in which the access charges are recognized or handled after the merger may create efficiencies or cost reductions that could affect competition in Minnesota.

Accordingly, Sprint's Motion to Compel is granted. The Joint Petitioners' Motion for a Supplemental Protective Order did not encompass these documents, and they shall be provided by no later than Wednesday, September 22, 2010, in accordance with the terms of the Protective Order entered by the Commission on June 15, 2010.

Integra's and CWA's Motions to Compel Production of Documents filed under the HSR Act

In its Motion to Compel, Integra seeks an order requiring CenturyLink to produce documents responsive to Request No. 143 of Integra's Second Set of Information Requests:

> **Integra 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 and Qwest under the Hart-Scott-Rodino (HSR) Act with the Department of Justice and the Federal Trade Commission.

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[25] *See* Order Granting in Part and Denying in Part Sprint Nextel Corp.'s Motion to Compel Joint Applicants to Respond to Data Request in *In the Matter of the Joint Application of Qwest Communications International and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp.*, UT-100820 (Sept. 10, 2010) (Judge Friedlander ruled that the Washington Commission's examination of a merger's impact on the public interest includes the impact on competition at the wholesale and retail level, including whether the transaction might distort or impair the development of competition, and determined that the impact of the CenturyLink/Qwest merger on access charges and competition is within the purview of the Commission's examination; Judge Friedlander further found that Joint Applicants' argument that interstate data was irrelevant because the Washington Commission does not regulate interstate telecommunications services was misplaced in light of the ability of a party to request discovery of inadmissible information, including information relating to activities outside the jurisdiction of the Commission, so long as the information is reasonably calculated to lead to admissible evidence).

In its response to this Information Request, CenturyLink stated:

> CenturyLink objects to this request insofar as it is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The filings prepared by CenturyLink as required by the HSR Act are specifically designed to provide the Department of Justice and the Federal Trade Commission the information that it requires to analyze the merger on a national level addressing specific federal antitrust issues. This is not the proper jurisdiction for such an analysis. In addition, the information requested is highly confidential, commercially sensitive information the release of which, particularly to CenturyLink's competitors such as Integra, would cause irreparable competitive harm to CenturyLink, the impact of which would not be mitigated by the terms of the Protective Order.

Similarly, in its Motion to Compel, the CWA seeks to compel Qwest and CenturyLink to respond to two similar Information Requests requesting the companies' filings under the HSR Act:

> **CWA 1.** Please provide all documents submitted by or on behalf of Qwest to the U.S. Department of Justice and the Federal Trade Commission pursuant to the requirements of the Hart-Scott-Rodino Anti-Trust Improvements Act, as amended.
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> **CWA 2.** Please provide all documents submitted by or on behalf of CenturyLink to the U.S. Department of Justice and the Federal Trade Commission pursuant to the requirements of the Hart-Scott-Rodino Anti-Trust Improvements Act, as amended.

In their responses to these CWA Information Requests, Qwest and CenturyLink objected to providing the requested documents on the same grounds that were noted in response to Integra's Request No. 143.

To date, CenturyLink has not produced any of the HSR documents in the Minnesota proceeding.

Relevancy of HSR Documents

Based on brief document descriptions provided by CenturyLink in connection with an *in camera* review performed in the Arizona proceeding, Integra argues that a number of documents included in CenturyLink's filing under the HSR Act are potentially relevant to the wholesale issues in which Integra and other CLECs in this matter are interested. Integra contends that these documents address CenturyLink's plans relating to wholesale markets, potential product offerings and opportunities in unspecified "market segments," CenturyLink's staffing and sales approach regarding Enterprise Business marketing, and the impact on CenturyLink revenues of intrastate access reductions. Integra asserts that these documents may be relevant to wholesale customers, CenturyLink's plans for the wholesale market, or the potential impact that financial pressures on the merged company may have on wholesale services.

CWA similarly argues with respect to its Information Requests 1 and 2 that it is likely that the filings made by the Joint Petitioners under the HSR Act contain information that is directly relevant to the issues involved in this proceeding, such as basic information about the companies and the transaction; analyses of the costs and benefits of the proposed transaction; issues addressed by officers, directors, and advisors when deciding whether or not to enter into the proposed transaction; the financial fitness of CenturyLink; synergy savings that may be produced by the proposed transaction; and potential impacts on employment, pricing, and in-state services. The CWA asserts that CenturyTel and Embarq provided their HSR files to the CWA without objection in connection with the 2008 proceedings in Pennsylvania involving the merger of CenturyTel and Embarq to form CenturyLink.[26] The CWA also noted that, in 1999, the Montana Public Service Commission compelled Qwest to produce its HSR filings in connection with the Qwest-U.S. West merger proceedings.[27] Moreover, the CWA contends that the Joint Petitioners provided their HSR filings to staff and public counsel in the pending proceeding before the Washington Utilities and Transportation Commission, which suggests that the Joint Petitioners agree that the information is relevant.

In response to the Integra and CWA motions to compel seeking access to the HSR documents, the Joint Petitioners contend that the HSR information is not relevant to the issues in the current proceeding because it addresses how CenturyLink intends to compete after the merger, and not the impact that the merger itself would have on Minnesota customers or local competition. They indicated that the HSR documents disclose such matters as the Joint Petitioners' "plans for developing and rolling out competitive products" and "analyses of competition in their markets and how to successfully meet that competition in the future."[28] They further stated that the HSR documents include "detailed and specific data relating to customer profile information including market segmentation, churn data, marketing and retention strategies, market shares and trends, penetration rates, product development and trends, product rollout and launch dates, marketing plans, financial assumptions and projections relating to specific product rollouts and market launches, company staffing and sales approach by product and market area, and long-range company strategic plans."[29] They argue that the HSR documents "have already served their required purpose" because Federal Trade Commission and the U.S. Department of Justice have completed their analysis of the documents and have determined that the proposed merger does not require any further anti-trust review.[30] They further contend that the Commission's consideration in the present proceeding relies upon an analysis of the local telecommunications marketplace, and not a consideration of potential impact on the entire national economy, and argue that the subject matter of the present case thus is separate and distinct from that considered by the FTC and DOJ under the HSR Act.

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[26] See Ex. 3 attached to CWA's Motion to Compel.
[27] *Joint Application of Qwest Communications Corporation, et al., and US West Communications, Inc.*, 1999 Mont. PUC LEXIS 121 (Dec. 14, 1999).
[28] Joint Petitioners' Response to Motions to Compel at 4.
[29] *Id.* at 9; *see also* Affidavit of Jeff Glover, ¶ 3, and Affidavit of Timothy J. Goodwin, ¶ 3 (attached as Attachments 2 and 3 to Joint Petitioners' Motion for Supplemental Protective Order).
[30] Response at 8; *see* 75 Fed. Reg. 47810.

Finally, the Joint Petitioners indicated that they are unaware of any instance in which HSR filings have been produced or considered by the Commission in evaluating a telecommunications or other merger approval request. They acknowledge that such information was produced in the Pennsylvania CenturyTel/Embarq merger but asserted that the disclosure was made under very stringent confidentiality protections. The Joint Petitioners acknowledge that they have produced HSR documents in the parallel proceeding in Washington involving the CenturyLink/Qwest merger, but emphasize that the protective order in that proceeding limits disclosure of "highly confidential information" including HSR information to parties' outside counsel and outside experts. The Joint Petitioners indicated in their Response in Opposition to the CWA and Integra motions that "the HSR documents or other confidential information discussed in this Motion have only been produced to outside counsel/outside experts or regulatory 'staff eyes only' in other states considering this transaction consistent with the disclosure protections requested in this Response and the accompanying Motion for Supplemental Protective Order."[31]

The Administrative Law Judge concludes that Integra Information Request 43 and CWA Information Requests 1 and 2 are reasonably calculated to lead to the discovery of information that is relevant to the issues raised in this proceeding. Based upon the Joint Petitioners' description of the contents of the HSR documents, it appears that the documents contain information that bears on (or could lead to other matter that could bear on) the impact of the transaction on Minnesota customers and on competition in the local marketplace. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Remainder of CWA's Motion to Compel

In its Motion to Compel, the CWA also argued that the Joint Petitioners should be compelled to produce documents responsive to six other Information Requests: CWA Requests 3, 4, 5, 6, 15, and 25. These requests are discussed below.

Appendices to the Merger Agreement (CWA Information Request No. 3)

In Request No. 3, the CWA requested the following information:

> **CWA 3.** Please provide all non-public documents which are part of the April 21, 2010 Agreement and Plan of Merger Among Qwest Communications International, Inc., CenturyTel, Inc. and SB44 Acquisition Company, including any attachments, appendices and disclosure letters.

The Joint Petitioners objected to this request on the grounds that "the information requested is highly confidential, commercially sensitive information the release of which would cause irreparable harm to [the Joint Petitioners], such that even the Protective Order would not be sufficient to mitigate the impact."

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[31] *Id.* at 11, n. 15.

In its Motion to Compel, the CWA points out that the public portion of Articles III of the merger agreement states that CenturyLink and Merger Sub "jointly and severally represent and warrant to Qwest that the statements contained in this Article III are true and correct except as set forth in the CenturyLink SEC Documents filed and publicly available after January 1, 2010 . . . or in the disclosure letter delivered by CenturyLink to Qwest at or before the execution and delivery by CenturyLink and Merger Sub of this Agreement . . . . The CWA maintains that a similar caveat by Qwest appears at the beginning of Article IV of the merger agreement. Accordingly, Articles III and IV contain representations that can be contradicted or nullified by information contained in the non-public disclosure letters. The CWA argues that the true nature of the merger agreement cannot be known without access to the non-public attachments, and urges that the production of those documents be compelled.

In their response in opposition to the Motion to Compel, the Joint Petitioners indicated that the information responsive to this request consists of due diligence letters prepared for Qwest and CenturyLink as a basis for their consideration of approval of the merger. They contend that the letters contain attorney-client privileged information, information concerning third parties that they are prohibited by law or contract from disclosing, and one note describing a new product line. They maintain, without further explanation, that "this information is extraordinarily sensitive information which would cause irreparable harm to the Joint Petitioners if improperly used or disclosed."[32] However, Joint Petitioners stated that they would be prepared to produce copies of these documents (with privileged information, third-party information, and the product line notation redacted) under the "outside counsel/outside experts" designation they urge in their Motion for Supplemental Protective Order.

The Administrative Law Judge concludes that the information sought in CWA 3 is reasonably calculated to lead to the discovery of information that is relevant to the issues raised in this proceeding. Because Qwest and CenturyLink are asking for approval of the transaction, it is logical that the entire merger agreement (except material appropriately deemed privileged) should be produced in order for the Commission and the parties to understand the full nature of that agreement. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Presentations to Boards of Directors and Other Documents (CWA Information Requests 5 and 6)

In Requests 5 and 6, the CWA sought information relating to specific presentations that were made to the Joint Petitioners' Boards of Directors and other documents that were referenced in the Joint Petitioners' proxy statement filed with the Securities and Exchange Commission:

> **CWA 5.** To the extent not provided in the Hart-Scott-Rodino filings, please provide all materials developed by or for CenturyTel and/or Qwest for presentation to their respective Board of Directors and the separate

[32] Joint Petitioners' Response to Motions to Compel at 14.

Qwest Transaction committee (including backup documentation and underlying computations), and notes taken at the following meetings, as identified in the June 4, 2010 CenturyLink S-4 filing:

a) The November 18, 2009 CenturyLink Board of Directors meeting (p. 34).

b) Mr. Post's January 9, 2010 communication with CenturyLink Board of Directors (p. 34).

c) The January 19, 2010 CenturyLink Board of Directors [sic] (p. 34).

d) The February 17 and 18, 2010 Qwest Board of Directors meeting (p. 34).

e) The February 23, 2010 CenturyLink Board of Directors meeting (p. 35).

f) The March 15, 2010 joint special meeting of the Qwest Board of Directors and transaction committee, including the presentations by Mr. Mueller and Lazard (p. 36).

g) The March 18, 2010 Qwest Board of Directors meeting, including management's updated presentation regarding Qwest's long-range plan (p. 36).

h) The March 22, 2010 meeting of the Qwest Board of Directors transaction committee, including the presentation by Lazard (p. 36).

i) The March 29, 2010 meeting between the Qwest transaction committee and representatives of Perella Weinberg (p. 37).

j) The March 31, 2010 meeting of the Qwest Board of Directors and Qwest senior management, including reports by Mr. Mueller and Qwest management (p. 37).

k) The April 1, 2010 meeting between the Qwest transaction committee and representatives of Perella Weinberg, including Perella Weinberg's report (p. 37).

l) The April 4, 2010 meeting between the Qwest transaction committee and representatives of Perella Weinberg, including any Perella Weinberg report (p. 37).

m) The April 5, 2010 meeting of the Qwest Board of Directors, including the Perella Weinberg presentation and the report that Lazard provided to the Board prior to this meeting (p. 37-38).

n) The April 5, 2010 telephone conversation between members of the Qwest transaction committee and Mr. Mueller (p. 38).

o) The April 12, 2010 meeting of the CenturyLink Board of Directors (p. 38).

p) The April 14 and 15, 2010 meeting of the Qwest Board of Directors, including Qwest management's update and Qwest's financial advisors "detailed presentation of the strategic rationale for the proposed combination with CenturyLink, including potential opportunities for synergies" (p. 39).

q) The April 19, 2010 meeting between Patrick J. Martin (Qwest's lead independent director and chairman of the transaction committee) and Mr. Post (p. 39).

r) The April 19, 2010 meeting of the CenturyLink Board of Directors, including management's detailed review of their "due diligence findings" and "various sensitivity analyses," CenturyLink's financial advisors' review of "the potential impact of the transaction," and Mr. Post's report (p. 39).

s) The April 21, 2010 meeting of the CenturyLink Board of Directors, including any reports or analyses from its senior management and its financial advisors (p. 40).

t) The April 21, 2010 meeting of the Qwest Board of Directors, including any reports or analyses from its senior management and its financial advisors (p. 40).

CWA 6. To the extent not provided in the Hart-Scott-Rodino filings, please provide copies of all materials developed in preparation for or exchanged at, and notes taken at the following meetings or telephonic conversations, as described in the S-4:

a) The Qwest management September 2009 "periodic review and assessment of Qwest's financial strategic alternatives" (p. 33).

b) The October 2, 2009 meeting between Glen F. Post, III and Edward A. Mueller (p. 34).

c) The November 11, 2009 meeting between CenturyLink and Qwest senior management teams (p. 34).

d) November and December 2009 telephone conversations between Mr. Post and Mr. Mueller (p. 34).

e) The December 20 and December 21, 2009 meetings between Mr. Post and Mr. Mueller (p. 34).

f) The telephone conversation occurring "on or about February 26, 2010" between Mr. Post and Mr. Mueller (p. 35).

g) The March 2, 2010 discussion between Mr. Post and Mr. Mueller (p. 35).

h) The March 5, 2010 meeting between certain of CenturyLink's financial advisors and representatives of Qwest's financial advisor, Lazard (p. 35).

i) The March 8, 2010 communication between certain of CenturyLink's financial advisors and Lazard (p. 35).

j) The March 8, 2010 communication between Mr. Post and Mr. Mueller (p. 35).

k) The "non-public information" exchanged by CenturyLink and Qwest as "part of their respective due diligence investigations" (p. 35).

l) The March 11, 2010 Qwest senior management presentation to members of CenturyLink's senior management (p. 35).

m) The March 12, 2010 telephone call from Mr. Post to Mr. Mueller (p. 35).

n) The March 16, 2010 telephone conversation among Lazard, Deutsche Bank and Morgan Stanley (p. 36).

o) The March 23, 2010 presentation by members of Qwest senior management to members of CenturyLink senior management and CenturyLink financial advisors (p. 37).

p) The March 26, 2010 discussion between Mr. Post and Mr. Mueller (p. 37).

q) The April 1, 2010 meeting between the senior management of Qwest and CenturyLink, including CenturyLink's presentation to Qwest management and its financial advisors (p. 37).

r) The telephone calls and in-person meetings during the week of April 5, 2010 among experts for Qwest and CenturyLink to discuss various due diligence matters (p. 38).

s) The April 7, 2010 discussion between Mr. Post and Mr. Miller (p. 38).

t) The April 8, 2010 discussion between Mr. Post and Mr. Miller (p. 38).

u) The April 9, 2010 discussion between Mr. Post and Mr. Miller (p. 38).

v) The April 12, 2010 discussion between Mr. Post and Mr. Miller (pp. 38-39).

The Joint Petitioners initially objected to CWA-5 and CWA-6 on the ground that the request for "all" documentation relating to the referenced items is overly broad, unduly burdensome and excessively time consuming. They also objected to the requests insofar as the information requested is highly confidential, commercially sensitive information, and claimed that the release of the information would cause irreparable harm if the provisions of the current Protective Order are not revised. Finally, they contended that the substance of the referenced meetings is accurately and fairly disclosed in the S-4 and amended S-4 filings that were made on July 16, 2010, and alleged that "risking disclosure or misuse of this most sensitive information is not required in order to provide the Commission with full and fair information concerning the consideration of the proposed merger."

The CWA contends that the documents requested in Information Requests 5 and 6 appear to reflect critical points of analysis and decision that contributed to the Joint Petitioners' decision to enter into the merger agreement and may disclose the expectations and analyses of the officers and directors of CenturyLink and Qwest concerning the financial effects of the transaction; anticipated synergy savings; changes to pricing or service quality; integration processes and timelines; and other relevant aspects of the proposed transaction. CWA contended that it is evident from the summaries in the proxy statement filed with the SEC that the documents are relevant to such issues as financial fitness, synergy savings, and operational systems integration. It asserted that the Joint Petitioners are required to produce the full documents and not merely summaries. In response to CWA's Motion to Compel, the Joint Petitioners continue to argue that these inquiries are overreaching, burdensome and unnecessary in light of the information that has already been disclosed in the S-4. They contend that the CWA has not demonstrated the potential relevance of these requests to the issues in this proceeding, and assert that the requests are merely a "fishing expedition."

The Administrative Law Judge concludes that CWA Information Requests 5 and 6 are reasonably calculated to lead to the discovery of admissible evidence because the requested documents contain information that bears on (or could lead to other matter that could bear on) whether the post-merger company would have the financial, technical, and managerial resources to enable the Qwest and CenturyLink Operating Companies to continue providing reliable, quality telecommunications services in Minnesota, and potential effects of the transaction upon Minnesota consumers and competitors. However, both requests are overly broad and unduly burdensome with respect to (1) the request for "all materials" relating to the described events, since that request potentially would encompass drafts that were ultimately not used, and (2) the request for all notes taken at the specified meetings or during the specified telephone conversations, since compliance with that request would necessitate approaching each

attendee or participant to obtain their informal notes. Therefore, the Motion to Compel is granted only with respect to production of the final version of materials developed by or for CenturyTel and/or Qwest for presentation to their respective Board of Directors and the separate Qwest Transaction committee or exchanged on the specified dates and by the specified individuals (including backup documentation and underlying computations); and formal minutes or reports relating to the specified meetings or conversations. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Financial Models and Forecasts (CWA Information Requests 4 and 15)

CWA's Information Requests 4 and 15 sought certain information relating to financial forecasts for the Joint Petitioners after the merger:

> **CWA 4.** Please provide fully enabled copies of any computer spreadsheet models, developed by or for CenturyLink and/or Qwest, projecting the future operating and financial prospects of the combined firms.
>
> **CWA 15.** The CenturyLink S-4, at page 95, presents a summary of an internal financial forecast prepared by Qwest management for Qwest on a standalone basis, for the years 2010 through 2013. To the extent not previously furnished, please provide full copies of the spreadsheet models, analyses and backup documents and calculations for these forecasts.

The Joint Petitioners objected to CWA-4 and CWA-15 on the grounds that the information sought is highly confidential, commercially sensitive information the release of which would cause irreparable harm to CenturyLink and/or Qwest. They also asserted that the CWA's request in CWA-4 for "any" computer spreadsheet models was overly broad and unduly burdensome. Qwest further maintained that the internal financial forecasts requested in CWA-15 "were not prepared with the assistance of, or reviewed, compiled or examined by, independent accountants," and "were not prepared with a view toward public disclosure [or] . . . with a view toward compliance with published guidelines of the SEC, the guidelines established by the American Institute of Certified Public Accountants for preparation and presentation of financial forecasts, or GAAP." Accordingly, Qwest argued that "information beyond what was provided in the S-4 and amended S-4 statement is not relevant or helpful to the Commission's consideration of the proposed transaction."

The CWA asserted that the requested information is relevant to show the financial effects of the merger and explained that it seeks fully-enabled electronic spreadsheet files rather than printed copies because the electronic files would allow the parties to evaluate the underlying assumptions and formulas used in the model. The CWA acknowledged that the financial models are highly confidential and noted that it did not object to their designation as such under the Protective Order. While the Joint Petitioners are willing to provide outside counsel and outside experts with copies of the financial documents that were shared with the Boards of Directors and are relevant to the proceeding, they objected to providing a fully-enabled computer tool. They contend that the electronic version would not be relevant because it would contain information and manipulations that were not provided to the Boards of Directors or officers.

The Administrative Law Judge is persuaded that CWA Information Requests 4 and 15 are reasonably calculated to lead to the discovery of admissible evidence. It is evident that the requested information is relevant to whether the post-merger company would have the financial resources to enable the Qwest and CenturyLink Operating Companies to continue providing reliable, quality telecommunications services in Minnesota. Because the issues in this proceeding include the financial effects of the merger and not merely what the directors and officers of the Joint Petitioners were told,

the CWA's request for a fully-enabled electronic version of the spreadsheet files is reasonable to permit discovery of the assumptions and formulas used in preparation of the forecasts. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Projected Free Cash Flow and Dividend Policy (CWA Information Request 24)

CWA's Information Request No. 24 sought information relating to the merged companies' free cash flow and expected dividend policy:

> **CWA 24.**[33] Regarding the "Strategic Considerations" cited under the CenturyLink Board of Directors' "Reasons for the Merger," the CenturyLink S-4 at page 41 lists as one of the "significant strategic opportunities" provided by the proposed merger, "the expectation that the combined company will have a strong financial profile, with unadjusted pro forma 2009 revenues of $19.8 billion and free cash flow of $3.4 billion, anticipated positive impacts on CenturyLink's free cash flow per share upon the closing of the proposed merger (exclusive of integration costs), a sound capital structure, and an improved payout ratio with no anticipated change in CenturyLink's policy of returning significant dividends to shareholders . . ."
>
> a) Please provide any documents, analyses, models or notes not already furnished, regarding the projected free cash flow of the combined companies and why that obviates any anticipation of a change in CenturyLink's policy of returning significant dividends to shareholders.
>
> b) Has CenturyLink evaluated the circumstances under which a reduction in dividends might be indicated? If yes, please explain.
>
> c) Has CenturyLink performed any sensitivity analyses of the project performance of the combined companies as such performance could impact the sustainability of CenturyLink's dividend policy? If yes, please explain and please provide copies of any such analyses.

CenturyLink objected to CWA-24 on the grounds that the request for specific information regarding CenturyLink's future dividends is not relevant to the subject matter of this proceeding or reasonably calculated to lead to the discovery of admissible evidence. CenturyLink further objected on the grounds that the information requested is highly confidential, competitively sensitive information the release of which would cause irreparable harm.

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[33] During the motion argument, the CWA acknowledged that its motion papers contained a typographical error and clarified that its Motion to Compel related to Request No. 24, not 25.

The CWA argues that the information requested in CWA-24 is directly related to the financial fitness of the proposed acquiring company, whether it will be able to maintain its investment grade bond rating, and how it will weigh its obligations to the public as opposed to the desires of its shareholders and related issues. The CWA contends that these Information Requests are relevant to the financial fitness of CenturyLink and will permit the Commission to evaluate whether Qwest will suffer financial harm as a result of the transaction. It asserts that an examination of the financial information developed by Qwest and CenturyLink and presented to their boards during the timeframe when the decision to enter into the transaction was made is an appropriate starting point for the assessment of the financial effects of the merger.

The Joint Petitioners assert that the information responsive to CWA-4 and CWA-15 contains extremely detailed analysis and information about the Joint Petitioners' projected financial situation, and that disclosure of this information to competitors and other adversaries would potentially jeopardize their ability to execute their business plans and compete effectively. However, they indicated that, if the information were disclosed only to the parties' outside counsel and outside experts as proposed in their Motion for Supplemental Protective Order, the information would be adequately protected. In any event, Joint Petitioners argued that they should not be required to produce "fully enabled" copies of computer spreadsheets. They noted that the spreadsheets reflect the actual information provided to the board and maintain that the CWA has not demonstrated any need to obtain "fully enabled" electronic versions that could be manipulated by CWA or other parties.

With respect to CWA-24, the Joint Petitioners argue that whether CenturyLink pays a dividend, the amount of the dividend, and the effect of the merger on the dividend "are matters between CenturyLink and its shareholders" and contend that CenturyLink's dividend policy is irrelevant to any of the issues delineated by the Commission in the Notice of Hearing.

The Administrative Law Judge concludes that the information requested in CWA Information Request No. 24 is relevant to whether the post-merger company would have the financial resources to enable the Operating Companies to continue providing reliable, quality telecommunications services in Minnesota and, as such, is reasonably calculated to lead to the discovery of admissible evidence. As discussed in further detail below, the information provided shall be governed by the Protective Order previously entered in this case on June 15, 2010, and the attached Supplemental Protective Order, as appropriate.

Protective Order Issues

Protective Order Currently in Place

The Protective Order that is now in effect in this proceeding was issued by the Commission on June 15, 2010, when the Notice of and Order for Hearing was issued, and was the result of negotiations between the Joint Petitioners and the Department of Commerce. It is very similar to the other Protective Orders that generally have been issued in telecommunications proceedings in Minnesota.

The Protective Order has two categories of protection for "Trade Secret Information" and "Highly Sensitive Trade Secret Information." Trade Secret Information is defined as data that is the subject of reasonable efforts to maintain its secrecy and "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."[34] The Protective Order limits access to Trade Secret information to: "(1) attorneys employed or retained by the party in the Proceedings and the attorneys' staff; (2) experts, consultants and advisors who need access to the material to assist the party in the Proceedings; (3) only those employees of the party who are directly involved in these Proceedings, provided that no such employee is engaged in the sale or marketing of that party's products or services."[35]

Highly Sensitive Trade Secret Information is described in the Protective Order as including "information regarding the market share of, number of access lines served by, or number of customers receiving a specified type of service from a particular provider or other information that relates to a particular provider's network facility location detail, revenues, costs, and marketing, business planning or business strategies."[36] A party is authorized to designate "certain competitively sensitive" trade secret information as Highly Sensitive Trade Secret Information based upon a good faith determination that the party "would be competitively disadvantaged by the disclosure of such information to its competitors."[37] The Protective Order indicates that the designation must be limited to "information that truly might impose a serious business risk if disseminated without the heightened protections provided in this section."[38] The Order permits disclosure of Highly Sensitive Trade Secret Information to "(1) a reasonable number of in-house attorneys who have direct responsibility for matters relating to Highly Sensitive Trade Secret Information; (2) three in-house experts; and (3) a reasonable number of outside counsel and outside experts."[39] The Protective Order further requires that Highly Sensitive Trade Secret Information "may not be disclosed to persons engaged in strategic or competitive decision making for any party, including, but not limited to, the sale or marketing or pricing of products or services on behalf of any party."[40]

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[34] Minn. Stat. § 13.37, subd. 1(b); June 15, 2010, Protective Order at 2, 5.
[35] June 15, 2010, Protective Order at 3.
[36] *Id.* at 7.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 8.
[40] *Id.* at 8.

The June 15, 2010, Protective Order contains a small company exception for companies with less than 5,000 employees that permits disclosure of Trade Secret Information and Highly Sensitive Trade Secret Information to (1) the company's counsel or, if not represented by counsel, a member of the company's senior management; (2) the company's employees and witnesses; and (3) independent consultants acting under the direction of the company's counsel or senior management" who are directly engaged in the proceeding.[41] However, the Order specifies that such persons "**do not** include individuals primarily involved in marketing activities for the company" unless prior authorization from the party producing the information is obtained or the Administrative Law Judge or Commission so orders.[42]

Joint Petitioners' Motion for Supplemental Protective Order

The Joint Petitioners indicated in their Response to the Integra and CWA Motions to Compel as well as in their separate Motion for a Supplemental Protective Order that their primary objection to the Integra and CWA Information Requests involved in these Motions to Compel is that much of the information sought[43] contains extremely sensitive proprietary business and competitive information that "goes to the heart of Joint Petitioners' financial status and market strategies."[44] The Joint Petitioners maintain that disclosure of such information is not sufficiently protected by the Protective Order that is currently in place. Specifically, the Joint Petitioners maintain that if the information responsive to the Integra and CWA Information Requests is disseminated to competitors or other adversarial intervenors in this docket without further protections, those parties will have knowledge of Joint Petitioners' most confidential commercial strategies. They point out that, under the current Protective Order, in-house counsel, in-house experts, and officers and employees of companies falling within the small company exception would have access to the information. In the view of the Joint Petitioners, the fact that many of the Intervenors fall within the small business exception to the current Protective Order creates an unreasonably high potential for inadvertent or intentional misuse of the information they provide.

The Joint Petitioners allege that, even if the designated individuals are not involved in marketing or competitive decision-making at the present time, there is no assurance that these employees do not have an indirect role in those areas or that they will not become involved in those areas in the future. They further argue that no adequate recourse would be available if sensitive information was disclosed in violation

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[41] *Id.* at 10.
[42] *Id.* at 10 (emphasis in original).
[43] In Attachments 1 and 2 to the Joint Petitioners' Response to the Motions to Compel filed by the CWA and Integra, CenturyLink briefly describes 27 HSR documents that it believes should be restricted to disclosure to parties' outside counsel and outside experts only, and 12 HSR documents it believes should be restricted to disclosure to DOC and Commission staff only, upon request. In Attachment 3, Qwest listed its HSR documents with a column designating the confidential category of each document. Of the documents on Qwest's list, 33 were identified as involving Trade Secret Information; 42 were identified as involving Highly Sensitive Trade Secret Information; and 6 were identified as requiring "Staff Eyes Only" protection. The Joint Petitioners contended in their Motion for Supplemental Protective Order that the majority of the documents responsive to the remainder of CWA's Information Requests involved in the Motion to Compel should be restricted to disclosure to outside counsel and outside experts. Motion for Supplemental Order at 6.
[44] Motion for Supplemental Protective Order at 2.

of the Protective Order. They contend that the requirement in the First Prehearing Order that discovery responses be served on all parties to the proceeding will compound the potential for harm, and allege that the harm they will experience by virtue of disclosure will far exceed the value of the information to the Intervenors' limited interest in this case.

To address these concerns, Joint Petitioners argued that two additional categories of protection should be added to the Protective Order previously issued by the Commission in this matter: a "Staff Eyes Only" category that would be disclosed only to the DOC and the Commission staff upon request; and an "outside counsel/outside expert" category that would permit disclosure only to the DOC, Commission staff, and the designated outside counsel and outside expert of other parties. The Joint Petitioners asserted that these additional protections are necessary to adequately protect the information requested by CWA and Integra, as well as similar information that may continue to be requested in discovery in this proceeding. They proposed that the "outside counsel/outside expert" category apply to "information that discloses highly sensitive and specific financial metrics and current and projected business and operational plans and analyses of the Joint Petitioners and of the merged company."[45] They believe that this category would provide adequate protection for much of the information encompassed in the CWA and Integra Motions to Compel, but contend that some of the information would require the more restrictive SEO protection, such as analyses of competition in the Joint Petitioners' markets and for the merged company, the merged companies' future strategic plans to meet that competition, and specific information relating to the development and rollout of new products.[46] Joint Petitioners anticipate that the "SEO" category would include "a limited subset of the HSR Documents" that "disclose how Joint Petitioners compete or intend to compete in the market, including information relating to Joint Petitioners' plans for product development, product rollout, and the development of competitive responses."[47] They contend that the additional SEO protection would allay Joint Petitioners' concerns that disclosure to competitors and adversaries would place them at a competitive disadvantage. They further argue that DOC and Commission staff would be in the best position to determine if this information is relevant to the Commission's analysis.

Integra, the CWA, the CLEC Coalition, Sprint, T-Mobile, and Cbeyond opposed modification of the Protective Order that is already in place in this proceeding. They argued that the same type of protective order has been successfully used in several previous dockets and provides adequate safeguards for confidential or highly sensitive documents. They emphasized that the Joint Petitioners themselves proposed the Protective Order that was entered in this case. They asserted that the limitations sought by the Joint Petitioners would adversely affect due process and open meeting requirements. Moreover, Integra asserts that the Joint Petitioners have merely made generalized allegations of potential harm and have not borne their burden to show specific evidence of the potential for serious injury that would stem from disclosure of the documents. Sprint expressed a similar view during the motion argument and indicated that there is no need to supplement or change the Protective Order, and no

[45] Motion for Supplemental Protective Order at 6.
[46] Joint Petitioners' Response to Integra and CWA Motions to Compel at 13.
[47] *Id.* at 7.

reason to conclude that it will fail in this situation. The CLEC Coalition supported the motions to compel production of the HSR documents and argued that restricting access to outside counsel and outside experts would defeat the ability of the Coalition to engage in a meaningful review of those documents. It also noted that Qwest and many other parties have produced extremely sensitive competitive information under the terms of the Protective Order that is currently in effect without any reported problems. If further limitations are placed on access, the CLEC Coalition indicated that it would not object to limiting access to outside counsel, outside consultants, in-house counsel, and no more than three non-attorney in-house regulatory personnel. During the September 8, 2010, motion argument, the CWA indicated that no in-house person at CWA has signed or will sign the Protective Order acknowledgments in this proceeding, so the only CWA representatives who will have access to any type of confidential information will be outside counsel and one outside consultant.[48]

Dr. Kevin O'Grady, who has been with the Commission since 1996, commented during the motion argument that the Commission has a long history of dealing with very sensitive information and he is not aware that any breaches of the standard Protective Orders issued in the telecommunications area have occurred. He noted that the Commission staff finds it beneficial if counsel and employees of the parties who have greater expertise are able to provide their analysis and evaluation of the information involved in pending cases and thereby assist them in understanding the various facets of the case.[49]

CenturyLink's request that the SEO designation be added to the protective order has been denied in parallel proceedings in Washington,[50] Oregon,[51] and Arizona.[52] To the knowledge of the parties and the Administrative Law Judge, the only exception is in Colorado, where the SEO designation was added on an interim basis.[53] At the request of Joint Petitioners, protective orders that have been issued in Washington, Oregon, Colorado, and Montana have restricted the disclosure of "highly confidential" information to parties' outside counsel and outside experts. However, the Administrative Law Judge

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[48] Transcript of September 8, 2010, Motion Argument at 30.

[49] Transcript of September 8, 2010, Motion Argument at 49.

[50] Order Denying Joint Applicants' Request to Supplement Protective Order with Creation of Additional Protected Category of Information in *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 (Aug. 3, 2010) (attached to CWA's Motion to Compel as Ex. 5), at 8-

[51] Highly Confidential Protective Order in *In the Matter of CenturyLink, Inc., Application for Approval of Merger between CenturyLink and Qwest Communications International, Inc.*, Docket UM 1484, Order No. 10-291 (July 30, 2010)

[52] Procedural Order of Administrative Law Judge issued in *In the Matter of the Joint Notice and Application of Qwest Corporation, Qwest Communications Company, LLC, Qwest LD Corp., Embarq Communications, Inc. d/b/a Century Link Communications, Embarq Payphone Services, Inc. d/b/a CenturyLink, and CenturyTel Solutions, LLC for Approval of the Proposed Merger of their Parent Corporations, Qwest Communications International Inc., and CenturyTel, Inc.*, Docket No. T-01051B-10-0194 et al. (Aug. 23, 2010) (attached to August 24, 2010, letter from counsel for Integra).

[53] Interim Order (1) Granting Motion for Protective Order on an Interim Basis and Shortening Response Time Thereto; and (2) Shortening Response Time to Motion to Amend in *In the Matter of the Joint Application of Qwest Communications International, Inc. and CenturyLink, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, El Paso County Telephone Company,* Qwest Communications Company, LLC and Qwest LD Corp., 10A-350T (Sept. 3, 2010).

presiding in the parallel proceeding in Arizona recently denied the request of Qwest and CenturyLink to limit review of documents designated as "Highly Confidential" to outside counsel and outside consultants. Judge Martin determined that the suggested approach was "untenable in this situation involving multiple jurisdictions, multiple entities, in-house counsel, local counsel and regional counsel" and noted that restricting access to a very limited number of individuals "may prevent the intervenors from being able to develop and advocate their positions." She concluded that Qwest and CenturyLink had not adequately demonstrated that the protections afforded by the "Confidential" and "Highly Confidential" designations typically used in Arizona protective orders were insufficient, and emphasized that the "Highly Confidential" designation in prior Arizona Commission protective orders required that individuals reviewing the information not be engaged in strategic or competitive decision making for any party including the sale or marketing or pricing of products or services on behalf of any party. She found that this protection was adequate and that an exception for small companies was not needed because a majority of the intervenors in that proceeding were Arizona Class A utilities.[54]

The Administrative Law Judge finds that Integra and the CWA have demonstrated their need for the requested information, particularly because the Joint Petitioners' responses to other Information Requests designed to obtain information about the impact of the merger have lacked detail and substance. This view is supported by prefiled testimony filed on behalf of the Department of Commerce noting that "CenturyLink's [discovery] responses do not appear to be adequately detailed or complete to allow clear analysis for the Commission of the impact of the merger on wholesale customers."[55] After considering the parties' arguments, the Administrative Law Judge concludes that the Joint Petitioners have not demonstrated a need for the unprecedented limitations on disclosure they have proposed. The practical effect of the limitations they seek would deprive the private party Intervenors and their counsel and experts of any opportunity whatsoever to review documents designated as "SEO," and would limit review of information designated "outside counsel/outside party" in a fashion that would prevent outside attorneys and outside experts from consulting with the party that retained them about what, if any, significance the information has in this proceeding. It would be unreasonable to limit outside counsel and outside experts in this fashion, and would hinder their ability to effectively represent their clients. Moreover, as emphasized by Commission staff, private party Intervenors have significant expertise, play an important role in developing the evidentiary record, and provide valuable input for the Commission's consideration.

Although the Joint Petitioners have not shown that the extreme limitations on disclosure sought in their Motion are warranted, they have adequately demonstrated that they have legitimate concerns about the potentially broad disclosure of certain documents to employees of companies that fall within the Small Company exception set forth in Section 4 of the current Protective Order. During the motion argument, there was general agreement that a number of the Intervenors in the current proceeding

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[54] *Id.* at 3-4. Judge Martin's Procedural Order was limited in scope to the form of the protective order to be imposed and did not address further arguments made by Qwest and CenturyLink that certain documents were irrelevant and should be excluded from discovery.

[55] Direct Testimony of Bruce L. Linscheid at 18.

would fall within that exception.[56] It appears that all of the Intervenors involved in this case are represented by outside counsel,[57] so the terms of the June 15, 2010, Protective Order permitting disclosure to a member of the company's senior management if the company is not represented by counsel would not come into play. However, the Small Company exception in the June 15 Protective Order would more broadly permit disclosure to "the company's employees and witnesses" who are "not primarily involved in marketing activities for the company" (unless the parties agree otherwise or the Commission or Administrative Law Judge so orders). The Joint Petitioners have shown that the potential dissemination of the information responsive to the CWA and Integra Motions to Compel to this broad a segment of their competitors' workforce could be problematic in light of the extremely sensitive nature of this information.

Under the circumstances, in order to strike an appropriate balance between the Intervenors' need for the information and Joint Petitioners' confidentiality concerns, the Administrative Law Judge has determined that it is appropriate to grant the Joint Petitioners' Motion in part and issue a Supplemental Protective Order which will apply where appropriate to documents produced in response to this Ruling on the Integra and CWA Motions to Compel. The Supplemental Protective Order, which is attached hereto, modifies the Small Company exception set forth in Section 4 of the June 15 Protective Order along the lines of the alternative approach suggested by the CLEC Coalition. It also takes into consideration that the small companies involved in this proceeding are represented by outside counsel and deletes the language that would otherwise permit a member of the company's senior management to review the information. Accordingly, where small companies are concerned, the attached Supplemental Protective Order will limit disclosure of the information designated as "Highly Sensitive Trade Secret Information Subject to Additional Protection" produced in response to the Integra and CWA Motions to Compel to a reasonable number of outside attorneys; a reasonable number of outside consultants; a reasonable number of in-house attorneys who have direct responsibility for matters relating to Highly Sensitive Trade Secret Information; and no more than three non-attorney in-house regulatory personnel. The Supplemental Protective Order will continue to specify that such persons should not be primarily involved in marketing activities for the company, absent agreement or an order to the contrary.

The Administrative Law Judge is not persuaded that the Joint Petitioners have demonstrated a need to change the approach set forth in Section 3 of the June 15 Protective Order governing disclosure to companies that do not fall within the Small Company exception. Section 3 restricts disclosure to in-house attorneys, three in-house experts, and a reasonable number of outside counsel and outside experts, and clearly prohibits disclosure to persons engaged in strategic or competitive decision making for any party. The Administrative Law Judge concludes that this portion of the June 15 Protective Order already includes adequate protection for the information produced in response to this Order.

Propriety of Restrictions on Disclosure to CWA Representatives

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[56] Transcript of September 8, 2010, Motion Argument at 55-56.
[57] *Id.* at 53-54.

In their response to the Motions to Compel and their Motion for Supplemental Protective Order, the Joint Petitioners urge that CWA's outside counsel, Scott Rubin, and CWA's outside expert witness, Randy Barber, not be permitted to have access to the information produced in response to the Integra and CWA Motions to Compel under any circumstances due to their past conduct in Oregon and Pennsylvania. Joint Petitioners do not object to CWA's local Minnesota counsel having access to the information upon execution of the appropriate certificate.

The Joint Petitioners' request is based primarily on an order issued on August 30, 2010, by Hearing Commissioner Ronald J. Binz in Colorado's proceeding involving the Qwest/CenturyLink merger.[58] Commissioner Binz granted the Joint Petitioners' request to prohibit disclosure of confidential information to Mr. Rubin or Mr. Barber and ruled that the disclosure to the CWA of all ordinarily confidential and highly confidential information in the Colorado proceeding would be limited to Nicholas Enoch (a Colorado attorney), provided he signed the appropriate non-disclosure agreements. In reaching his determination, Commissioner Binz took note of decisions issued in May and October of 2009 by the Washington and Oregon Commissions involving Mr. Rubin and/or Mr. Barber and indicated that he was "especially concerned about repeated and recent violations of protective orders by a licensed attorney, in dockets similar to this one, and the risk of the same occurring here."[59]

In the Washington case,[60] the State Utilities and Transportation Commission on its own motion dismissed the International Brotherhood of Electrical Workers as a party in an asset transfer proceeding involving Embarq and CenturyTel. Mr. Rubin represented the IBEW in that matter. The decision does not mention whether Mr. Barber was involved in that proceeding. In that case, the IBEW entered into a side-agreement with CenturyTel and Embarq in which the companies made a series of labor relations concessions in exchange for the union's agreement to withdraw from state and federal regulatory proceedings and acknowledge that the merger met applicable standards.[61] The Washington Commission expressed concern about IBEW "and its counsel," noting that, "[d]espite IBEW's representations at prehearing that it would keep labor relations out of this case, and its unreasoned argument later that it did so," it was evident that the IBEW had nevertheless "used its status as a party in this proceeding principally, if not exclusively, to extract labor concessions from the Applicants."[62] The Washington Commission indicated that this "undermines the credibility of counsel who

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[58] Interim Order of Colorado Hearing Commissioner Ronald J. Binz Addressing Motions for Protective Order and Related Proceedings in *In the matter of the Joint Application of Qwest Communications International, Inc. and CenturyLink, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, El Paso County Telephone Company, Qwest Communications Company, LLC and Qwest LD Corp.*, 10A-350T (Aug. 30, 2010) (attached to Joint Petitioners' Response to Motion to Compel as Attachment 5).

[59] *Id.* at 7-8.

[60] Final Order of Washington State Utilities and Transportation Commission Approving and Adopting Settlement Agreement; Authorizing Transaction Subject to Conditions; Rescinding Order 03; Approving and Rejecting Side-Agreements; Granting and Denying Pending Requests for Leave to Withdraw; and Dismissing Party in *In the Matter of the Joint Application of Embarq Corp. and CenturyTel, Inc. For Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq and Embarq Communications, Inc.*; UT-082119 (May 28, 2009).

[61] *Id.* at 23.

[62] *Id.* at 24.

made representations to the tribunal that were disingenuous at best."[63] The Commission ultimately rejected the side-agreement between the IBEW and the applicants because it concerned only matters that were outside the Commission's jurisdiction and inappropriate to the proceeding; denied the IBEW's request for leave to withdraw voluntarily; and dismissed IBEW from the proceeding because it had no substantial interest in the subject matter of the proceeding and its participation was not in the public interest.[64]

In the Oregon case,[65] the Public Utility Commission terminated the participation of the IBEW and revoked its party status in a case involving a Verizon/Frontier merger. The decision was based in part on a finding that the IBEW provided information it had obtained from a highly confidential document in the Oregon proceeding to the Pennsylvania Public Utilities Commission and, in so doing, disclosed that information and made it publicly available. Although the Oregon Commission found that the IBEW did not provide the Pennsylvania Commission with the highly confidential documents themselves, it concluded that the IBEW violated the applicable protective order by giving access to information reflecting the contents of those documents. The Oregon Commission also found that IBEW attempted to use the regulatory process to gain information on matters outside the scope of the proceeding by requesting data on labor-related matters. Mr. Rubin was outside counsel in that matter and Mr. Barber was an outside expert. The Oregon Commission also ruled that a copy of the order would be given to the Oregon State Bar and the Pennsylvania State Bar for possible disciplinary action.

The CWA opposed the request to limit access by Mr. Rubin and Mr. Barber. It indicated that the Colorado order was issued prior to the filing of CWA's response to the Joint Petitioners' motion in that case, and stated that it has recently sought reconsideration of that order. According to the CWA's reply brief and Mr. Rubin's presentation during the motion argument on September 8, 2010, Mr. Rubin received access during the Oregon proceeding to a document in which each page was stamped "Highly Confidential." A footnote on a page of particular interest to Mr. Rubin listed the source of the information on that page as coming from public filings with the U.S. Securities and Exchange Commission. Mr. Rubin thereafter filed a pleading in the Pennsylvania PUC proceeding involving the Verizon-Frontier transaction in which he indicated that Verizon had a document in its possession showing that a small group of its stockholders would own more than 20 percent of Frontier if the transaction was consummated. The pleading included an affidavit from Mr. Barber, which Mr. Barber prepared only after Mr. Rubin provided him with a legal opinion that there would be no violation of the Oregon protective order because no confidential information was being used or disclosed. Mr. Rubin emphasized that the pleading he filed in Pennsylvania disclosed only public information contained within a document marked highly

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[63] *Id.* at 25.
[64] *Id.* at 27, 29, 30, 31
[65] Order of Oregon Public Utility Commission Granting Motion, Terminating Intervenor Participation, and Revoking Party Status in *In the Matter of Verizon Communications Inc. and Frontier Communications Corporation, Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc.*, UM 1431 (Oct. 14, 2009) (attached to Joint Petitioners' Response to Motion to Compel as Attachment 4).

confidential. He acknowledged that he made an error in interpreting the Oregon protective order as protecting confidential information, and not the mere existence of a confidential document, and indicated that he would not make that mistake again. Because Mr. Barber simply relied on erroneous legal advice, the CWA argues that he did nothing wrong and should not be precluded from access to documents.

The CWA asserts that neither Verizon nor Frontier took any action to remove Mr. Rubin or Mr. Barber from the other three state proceedings in which they were actively participating at the time, and did not attempt to restrict their access to HSR or other confidential documents in those states. Mr. Rubin stated that he will not make the same mistake again, and asked that producing parties be required to provide public redacted copies of each allegedly highly confidential document. The CWA also argued that the challenge to Mr. Rubin and Mr. Barber having access to highly confidential information is untimely since the Joint Applicants did not raise objections to Mr. Rubin or Mr. Barber seeing confidential documents within three days of their filing of signed Protective Order acknowledgments.

The conduct of the union and counsel reflected in the Washington and Oregon decisions raises concerns and cannot be condoned. However, the Administrative Law Judge is not persuaded that these decisions warrant excluding Mr. Rubin or Mr. Barber from being permitted to review confidential information produced in this docket. The Washington decision did not allege that Mr. Rubin mishandled confidential information, and there is no indication that Mr. Barber was involved in that case. Although the Oregon Commission found that a violation of its protective order had occurred because the IBEW (through the filing of a pleading by Mr. Rubin and an affidavit by Mr. Barber) had disclosed the existence of a highly confidential document in a parallel Pennsylvania proceeding, it appears that the information that was actually disclosed from that document was derived from public sources. Mr. Rubin acknowledged that he erred in his interpretation of the Oregon protective order, and it appears that Mr. Barber (a non-attorney) merely relied on his erroneous advice. Under the circumstances, the Joint Petitioners' request to preclude Mr. Rubin and Mr. Barber from reviewing the confidential information is denied.

B. L. N.

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September 21, 2010

To All Parties as Listed on the E-Docket Service List **BY EFILING, EMAIL AND U.S. MAIL**

Re: *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*
OAH Docket No. 11-2500-21391-2;
PUC Docket No. P-421, et al/PA-10-456

Dear Parties:

Enclosed herewith and served upon you as listed on the E-Docket Service List is the Administrative Law Judge's Orders on the Motions to Compel and for a Supplemental Protective Order and Supplemental Protective Order in the above-entitled matter.

Sincerely,

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Telephone: (651) 361-7845

BLN:nh

Encl.

cc: Docket Coordinator

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
600 NORTH ROBERT STREET
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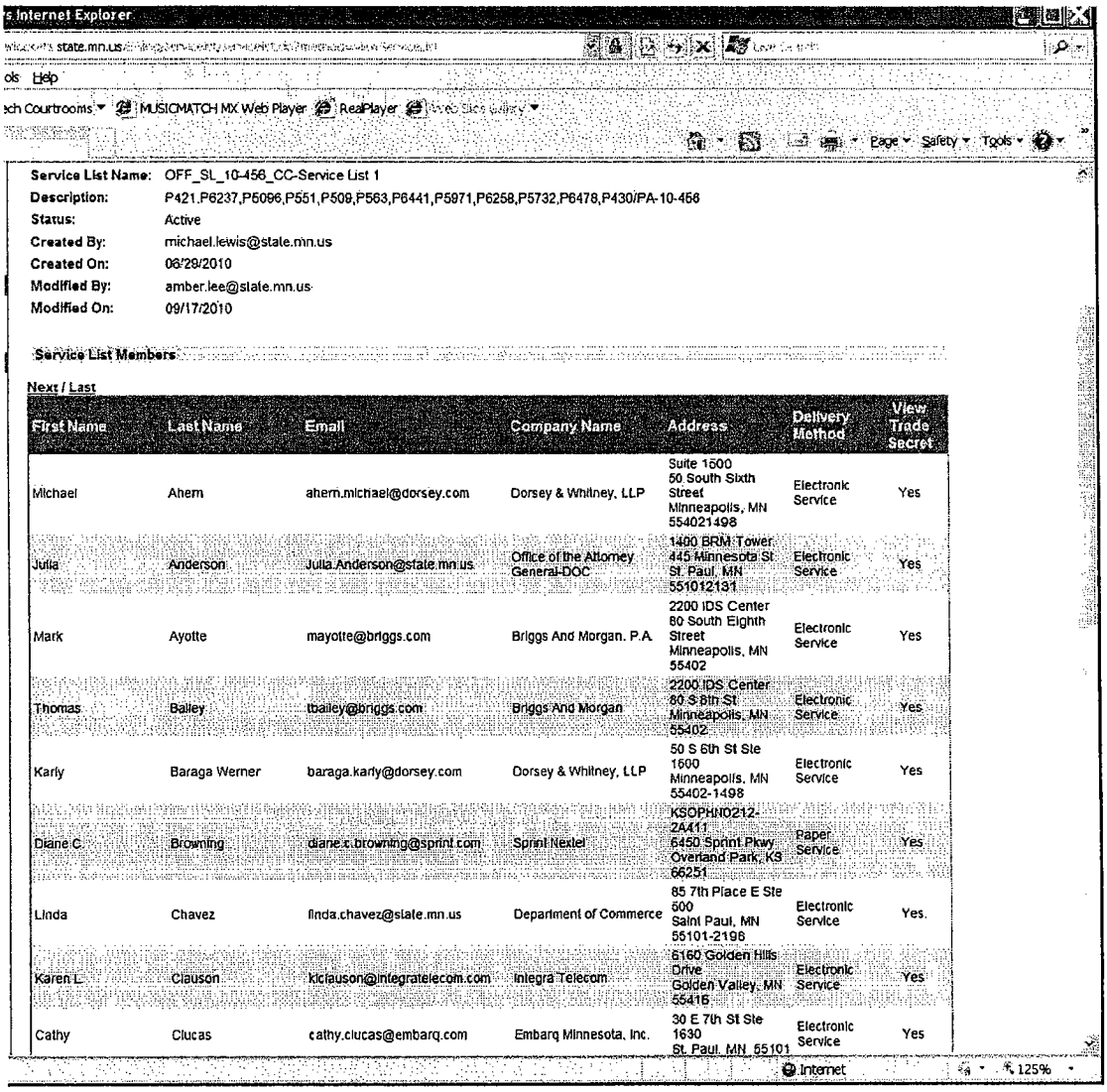
CERTIFICATE OF SERVICE

Case Title: *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*	OAH Docket No. 11-2500-21391-2 PUC Docket No. P-421, et al/ PA-10-456

Michael Lewis certifies that on the 21st day of September, 2010 (eFiling and email) and the 22nd day of September, 2010 (U.S. Mail), he served true and correct copies of the attached Administrative Law Judge's Orders on the Motions to Compel and for a Supplemental Protective Order and Supplemental Protective Order, by serving them as indicated on the attached E-docket Service List.



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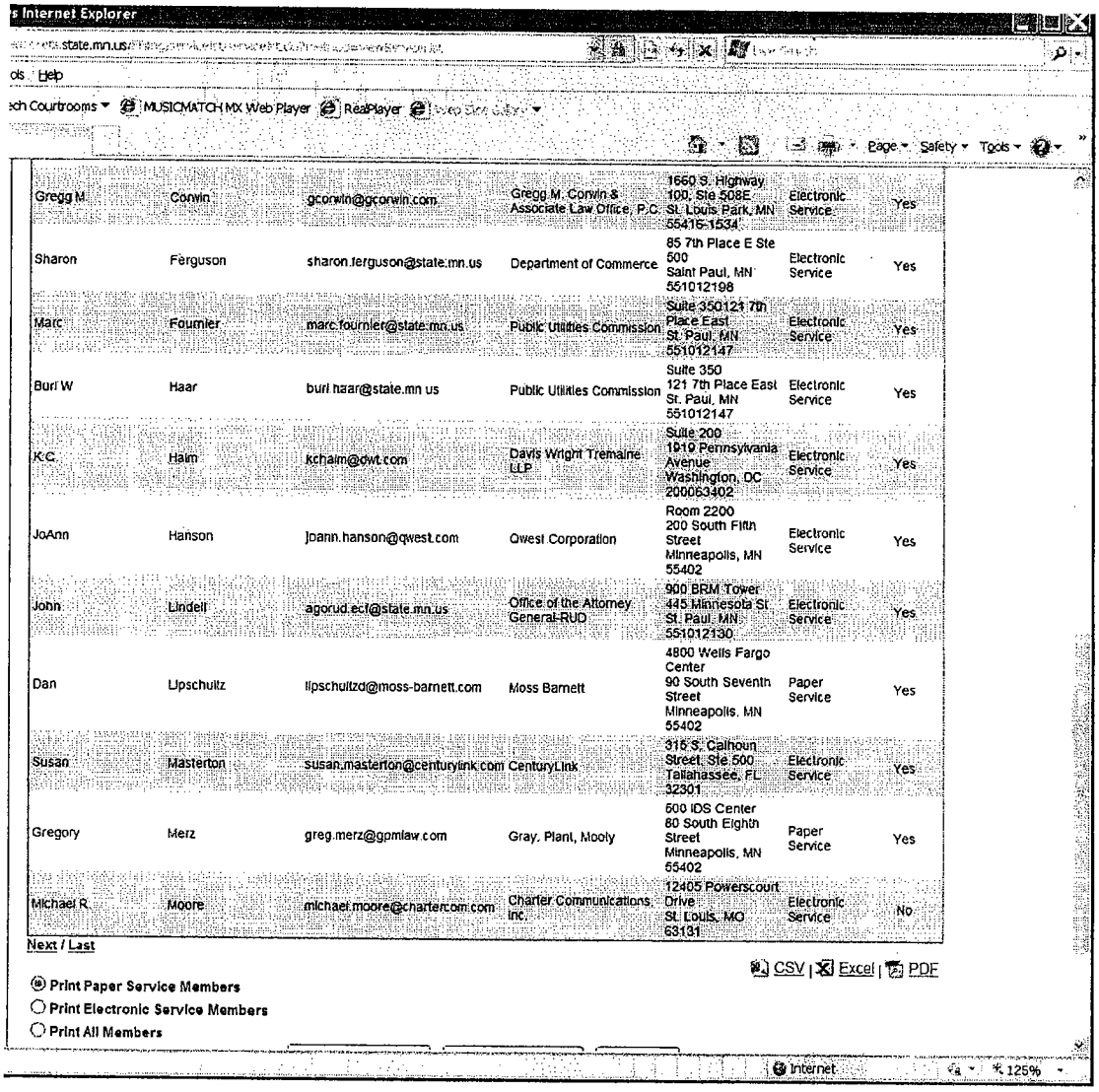

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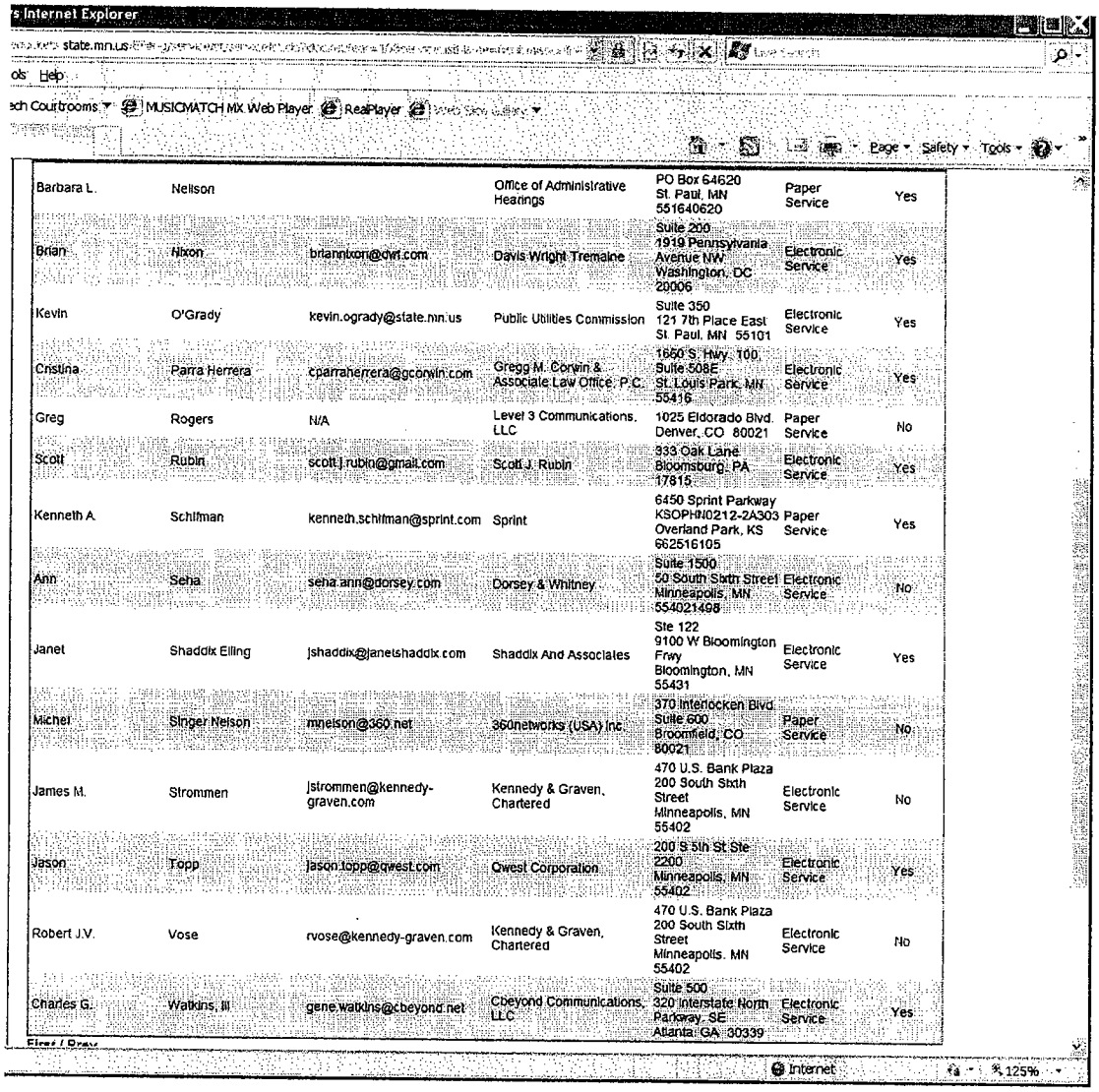

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