ORDER NO. 10-291
ENTERED 07/30/10

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1484

In the Matter of CENTURYLINK, INC., Application for Approval of Merger between CenturyLink, Inc., and Qwest Communications International, Inc.	HIGHLY CONFIDENTIAL PROTECTIVE ORDER

DISPOSITION: MOTION FOR HIGHLY CONFIDENTIAL PROTECTIVE ORDER ADOPTED AS MODIFIED

I. SUMMARY

In this order, we issue a protective order establishing procedures for the disclosure and protection of information identified as being "highly confidential."

II. INTRODUCTION

On May 24, 2010, CenturyLink, Inc. (CenturyLink or Applicant), filed a request for a General Protective Order with the Public Utility Commission of Oregon (Commission). The Commission granted the request by Order No. 10-192, entered May 26, 2010.

On June 21, 2010, CenturyLink filed a Motion for a Highly Confidential Protective Order (Motion) with the Commission to govern the production and use of information the Applicant deemed "highly confidential," and included a draft of its proposed order. On June 24, 2010, Joint CLECS[1] filed an Opposition to CenturyLink's Motion for Highly Confidential Protective Order (Opposition). CenturyLink filed a Response to the Opposition (Response) on July 7, 2010, and on that same day, Qwest Corporation (Qwest) filed a Joinder that "fully supports" the CenturyLink Response. On July 12, 2010, Joint CLECs supplemented their Opposition by providing a copy of an amended Protective Order

[1] The Joint CLEC parties are tw telecom of oregon llc; Covad Communications Company; XO Communications Services, Inc.; Integra Telecom of Oregon, Inc.; Advanced TelCom, Inc.; Electric Lightwave, LLC; Eschelon Telecom of Oregon, Inc.; Oregon Telecom Inc.; and United Telecommunications Inc., d/b/a Unicom; Priority One Telecommunications, Inc.; and Charter Fiberlink OR-CCVII LLC.

issued by the Minnesota Public Utilities Commission on June 15, 2010, as part of its review of the instant transaction.

The sole issue in dispute between the Applicant and Joint CLECs is which classes of individuals should be granted access to highly confidential information.

The CenturyLink Motion. Applicant seeks greater protection for certain information it claims to be competitively sensitive. Applicant states that it has received discovery requests:

> that would require it to provide highly sensitive information, including information regarding non-regulated services that, if disclosed to its competitors without strict protections, would seriously compromise its competitiveness in Oregon * * *.
>
> However, as a remedial measure for some of this category of information, CenturyLink asserts that it is, at a minimum, critical that this information not be shared with any employees of companies who compete with CenturyLink including in-house attorneys and experts. * * *.
>
> [The Washington Utilities and Transportation Commission] does not allow highly confidential information to be provided to in-house experts or counsel. The highly confidential provisions proposed by CenturyLink in the attached draft Order mirror the language used by the WUTC in its protective orders. See Order No. 02 in UT-082119 * * *.[2]

The Joint CLEC Opposition. Joint CLECs claim that the order proposed by the Applicant is overly restrictive and would require parties with limited resources, including Joint CLECs, to engage outside experts in order to review the designated information. Joint CLECs argue that such a requirement is unduly burdensome and expensive, as only outside counsel and outside experts could view testimony identified as highly confidential.[3] Joint CLECs recommend the adoption of the less restrictive Highly Confidential Protective Order No. 09-271 adopted by the Commission in docket UM 1431 which permits access to in-house personnel who are not involved various product-related endeavors and only under certain "need-to-know" circumstances. Joint CLECs also recommend the adoption of provisions found in Order No. 10-216, the Amended Protective Order in docket UM 1486, a mechanism which would allow smaller companies, whose employees might be engaged in proscribed areas of interest, to seek resolution from the Administrative Law Judge in the event the disclosing party refuses to provide the requested authorization.[4]

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[2] Motion at 1-2 citing *In the Matter of the Joint Application of Embarq Corporation and CenturyTel, Inc., for Approval of Transfer of Control of United Telephone Company of the Northwest, d/b/a Embarq and Embarq Communications, Inc.* Applicant also cites to a protective order issued in the Frontier/Verizon transaction.
[3] Opposition at 1-2.
[4] *Id.* at 2-3.

The CenturyLink Response. CenturyLink asserts that "the joint CLECs' claims fail to account for the critically sensitive nature of the confidential information and the intensely competitive environment in which CenturyLink and other providers operate."[5] [6] Noting the decline in ILEC access lines due to competition from CLECs and a variety of other communications service providers, CenturyLink claims that "the competitive landscape would be unfairly skewed if this highly sensitive information were to find its way to CenturyLink's competitors." The Applicant asserts that the Joint CLECs have made no showing of having only limited resources, as they have been active participants in numerous dockets; furthermore, Applicant is concerned that the smaller competitors are the ones most likely to have employees whose responsibilities overlap with proscribed areas of authority and interest. Moreover, most, if not all, of the Joint CLECs have intervened in the Washington State proceeding and have therefore signed the WUTC protective order agreement, which covers information common to both states. Thus, the incremental financial and logistical burden is slight as most of the experts and counsel are identical; the parties likely pool and share the costs and burdens.[7]

The Joint CLEC Supplement. Joint CLECs supplemented their Opposition by providing a copy of an amended protective order issued by the Minnesota Public Utilities Commission in its review of the instant transaction and noted at page 2 that the Minnesota order permits parties to designate in-house counsel and in-house experts to have access to highly sensitive trade secret information.

III. DISCUSSION

In adopting protective orders, the Commission seeks to strike a balance that permits the broadest possible discovery consistent with the need to protect confidential information. The more sensitive and potentially competitively damaging documents are, the more stringent the protection of such documents needs to be. In this case, the only aspect of the proposed Highly Confidential Protective Order in contention is which classes of individuals may be designated by the parties to receive information classified as "highly confidential."

Applicant and Qwest seek the following language, derived from the WUTC orders:

> 6. Parties who seek access to or disclosure of Highly Confidential documents or information must designate one or more outside counsel and one or more outside consultant, legal or otherwise, to receive and review materials marked "Highly Confidential * * *." In-house experts and attorneys shall not be designated. For each person for whom access to Highly Confidential information is

[5] Response at 1.

[6] On July 7, 2010, Qwest Corporation (Qwest) filed a Joinder that "fully supports" the CenturyLink Response, asserting that the "small company" exception to which it acceded in docket UM 1486 was part of a global settlement and under circumstances inapposite to the instant proceeding. A non-impairment proceeding might have a financial impact on a small CLEC, but no such impact was demonstrated in the Joint CLEC Opposition.

[7] *Id.* at 2-4, citing Section C of Order 01 in WUTC Docket UT-100820, the Washington proceeding governing the instant transaction.

> sought, parties must submit to the party that designated the material as Highly Confidential and file with the Commission the Highly Confidential Information Agreement * * * certifying that the person requesting access to Highly Confidential Information:
>
> a. Is not now involved, and will not for a period of two years involve themselves in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information with respect to the pricing, marketing, and sales of [retail] telecommunications services in the state of Oregon [Washington];[8]

Joint CLECs propose that we adopt language contained in Highly Confidential Protective Order No. 09-271 of the recent application for indirect transfer of control of Verizon Northwest Inc. from Verizon Communications, Inc., to Frontier Communications Corporation in docket UM 1431. In paragraph 6 to that order, we stated that, in order for a party to gain access to designated information, the party had to certify that the person requesting access:

> Has a need to know for the purpose of presenting its party's case in this proceeding and is not engaged in developing, planning, marketing, or selling products or services or determining the costs thereof to be charged or potentially charged to customers;

Joint CLECs further ask the Commission to consider and adapt language from docket UM 1486, *In the Matter of Qwest Corporation Petition for Commission Approval of 2010 Addition to Non-impaired Wire Center List*, Modified Protective Order No. 10-216, which stated in pertinent part under paragraph 1. (c) Persons Entitled to Review, as follows:

> (3) Each party that receives Confidential Information pursuant to this Order must limit access to such Confidential Information to (1) attorneys employed or retained by the party in TRRO Proceedings and the attorneys' staff; (2) experts, consultants and advisors who need access to the material to assist the party in TRRO Proceedings; (3) only those employees of the party who are directly involved in these TRRO Proceedings, provided that counsel for the party represents that no such employee is engaged in the sale or marketing of that party's products or services.

In that same order, paragraph 4. Small Company, provides that companies with fewer than 5,000 employees may have a limited number of persons within certain legal, consulting, and

[8] Motion, Attachment at 2. Underlining indicates language not present in WUTC Order No. 02 in UT-082119; brackets indicated language present in the WUTC order, but absent in the attachment.

executive categories with access to highly confidential information provided that "[s]uch persons do not include individuals primarily involved in marketing activities for the company, unless the party producing the information, upon request, gives prior written authorization * * *."

IV. RESOLUTION

With certain modifications, we adapt the CenturyLink-proposed Highly Confidential Protective Order language to our Highly Confidential Protective Order.

Joint CLECs do not dispute Applicant's assertions that restrictions similar to the ones it seeks have been adopted in Washington State. Neither do they dispute that their constituent members, regardless of size, are to a great degree also parties in the Washington proceeding and have actively participated in numerous dockets. Thus, whatever burden might be imposed upon the members of the Joint CLECs by being required to retain outside counsel and experts has already been imposed in Washington and any Oregon impact would be only incremental.[9]

We adapt the language proposed by CenturyLink regarding the issue of eligible recipients, with the exception of the sentence "[i]n-house experts and attorneys shall not be designated" in paragraph 7 which we reject as redundant. In so doing, we maintain consistency with the procedures in the case simultaneously under review in Washington State and avoid the circumstance of an order in one state undermining the conditions imposed in an order adopted in a contiguous jurisdiction with common parties.

We also modify paragraph 10 by adding language to provide for the possibility of a situation arising where outside counsel for a party seeking highly confidential information believes that disclosure of such information to a party's employees is necessary to adequately represent that party's interests requiring an exception to the Highly Confidential Protective Order. If an agreement as to the procedures for disclosing and protecting that information cannot be concluded between the parties holding and seeking such information, counsel may request an *in camera* proceeding with the Administrative Law Judge, who will rule on the request for the exception.

[9] In adapting the Washington state-based language, we also reject the argument that smaller companies should have a lesser standard of separation. We find the rationale to adapt language from paragraph 4 of Order No. 10-216 inapposite to the current proceeding. The subject matter of this proceeding—transfer of control of a corporate parent—affects small companies far less directly than does a wire center designation and the resulting changes in availability and pricing of particular features and functions.

V. ORDER

IT IS ORDERED that the Highly Confidential Protective Order, attached as Appendix A, shall govern the disclosure of highly confidential information in this case.

Made, entered, and effective on July 30, 2010.

Allan J. Arlow
Administrative Law Judge

A party may appeal this order to the Commission pursuant to OAR 860-014-0091.

HIGHLY CONFIDENTIAL PROTECTIVE ORDER
DOCKET NO. UM 1484

Scope of this Order-

1. This order governs the acquisition and use of "Highly Confidential Information" in this proceeding.

Definition-

2. "Highly Confidential Information" is competitively sensitive confidential information that falls within the scope of ORCP 36(C)(7) ("a trade secret or other confidential research, development, or commercial information"), the disclosure of which presents risk of business harm.

Designation and Disclosure of Highly Confidential Information-

3. Intervenors in this proceeding may include competitors, or potential competitors. Moreover, information relevant to the resolution of this case is expected to include sensitive competitive information. Parties to this proceeding may receive discovery requests that call for the disclosure of Highly Confidential documents or information, the disclosure of which imposes a highly significant risk of competitive harm to the disclosing party or third parties. Parties may designate documents or information they consider to be Highly Confidential and such documents or information will be disclosed only in accordance with the provisions of this Section.

4. Parties must carefully scrutinize responsive documents and information and strictly limit the amount of information they designate as Highly Confidential Information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section. The first page and individual pages of a document determined in good faith to include Highly Confidential Information must be marked by a stamp that reads:

> HIGHLY CONFIDENTIAL – USE RESTRICTED PER
> HIGHLY CONFIDENTIAL PROTECTIVE ORDER
> NO. 10-291 IN DOCKET UM 1484.

5. Placing a "Highly Confidential" stamp on the first page of a document indicates only that one or more pages contain Highly Confidential Information and will not serve to protect the entire contents of a multi-page document. To ensure protection, each page that contains Highly Confidential Information must be printed on green paper, marked separately as "Highly Confidential" to indicate where Highly Confidential Information is redacted, and provided under seal. Multiple pages from a document containing "Highly Confidential" information may be sealed in the same envelope. A separate envelope must be provided for

each document or filing. The unredacted versions of each page containing Highly Confidential Information and provided under seal also must be stamped "Highly Confidential" and submitted on green paper with references (*i.e.,* highlighting or other markings) to show where Highly Confidential Information is redacted in the original document. An original and five copies, each separately sealed, must be provided to the Commission. The envelopes/ containers must bear the legend:

> THIS ENVELOPE IS SEALED PURSUANT TO ORDER NO. 10-291 AND CONTAINS HIGHLY CONFIDENTIAL INFORMATION. THE INFORMATION MAY BE SHOWN ONLY TO QUALIFIED PERSONS AS DEFINED IN THE ORDER.

6. The Commission's Administrative Hearings Division shall store the Highly Confidential information in a locked cabinet dedicated to the storage of Confidential Information.

7. Parties who seek access to or disclosure of Highly Confidential documents or information must designate one or more outside counsel and one or more outside consultant, legal or otherwise, to receive and review materials marked "Highly Confidential * * * ." For each person for whom access to Highly Confidential Information is sought, parties must submit to the party that designated the material as Highly Confidential and file with the Commission the Highly Confidential Information Agreement certifying that the person requesting access to Highly Confidential Information:

a. Is not now involved, and will not for a period of two years involve themselves in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of Highly Confidential Information with respect to the pricing, marketing, and sales of telecommunications services in the state of Oregon; and

b. Has read and understands, and agrees to be bound by, the terms of the Highly Protective Order in this proceeding, including this Section of the Highly Protective Order.

8. The restrictions in paragraph 7 do not apply to the Commission Staff or employees or attorneys in the Office of the Attorney General representing Commission Staff. However, Commission Staff must submit the Highly Confidential Information Agreement, in the form prescribed by this Order, for any external experts or consultants they wish to have review the Highly Confidential Information. The Citizen's Utility Board ("CUB") may

designate in-house attorneys and experts to review Highly Confidential Information who must submit the Highly Confidential Information Agreement in the form prescribed by this Order.

9. Any party may object in writing to the designation of any individual counsel or consultant as a person who may review Highly Confidential documents or information. The objection must be filed within 10 days of the filing of the Highly Confidential Order. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged counsel or consultant from the review of Highly Confidential documents or information. Written response to any objection must be filed within five days after filing of the objection. If, after receiving a written response to a party's objection, the objecting party still objects to disclosure of the Highly Confidential Information to the challenged individual, the Commission shall determine whether the Highly Confidential Information must be disclosed to the challenged individual.

10. Designated counsel and consultants will each maintain the Highly Confidential documents and information and any notes reflecting their contents in a secure location to which only designated counsel and consultants have access. No additional copies will be made, except for use as part of prefiled testimonies or exhibits or during the hearing, and then such copies must also be subject to the provisions of this Highly Confidential Order. If the outside counsel or outside consultant to whom Highly Confidential documents or information have been given access believes that disclosure of such Highly Confidential documents or information to a non-eligible individual is necessary in order to adequately represent the party's interests in the proceeding, such outside counsel or consultant may petition the Administrative Law Judge, who, after reviewing presentations from the petitioning and objecting parties, shall promptly issue a ruling with respect to the request.

11. Staff of designated outside counsel and staff of designated outside consultants who are authorized to review Highly Confidential Information may have access to Highly Confidential documents or information for purposes of processing the case, including but not limited to receiving and organizing discovery, and preparing prefiled testimony, hearing exhibits, and briefs. Outside counsel and consultants are responsible for appropriate supervision of their staff to ensure the protection of all Highly Confidential Information consistent with the terms of this Order.

12.. Any testimony or exhibits prepared that include or reflect Highly Confidential Information must be maintained in the secure location until filed with the Commission or removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review Highly Confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. The presiding officer(s) will determine the process for including such documents or information following consultation with the parties.

13. The designation of any document or information as Highly Confidential may be challenged by motion and the classification of the document or information as Highly Confidential will be considered in chambers by the presiding officer(s).

14. Highly Confidential documents and information will be provided to Commission Staff and the Commission under the same terms and conditions of this Highly Confidential Protective Order as govern the treatment of Confidential Information provided to Commission Staff and CUB and as otherwise provided by the terms of the General Protective Order in this proceeding.

Appeal/Subsequent Proceedings-

15. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction for purposes of an appeal or to the Federal Communications Commssion (FCC), but under seal as designated herein for the information and use of the court or the FCC. If a portion of the record is forwarded to a court or the FCC, the providing party shall be notified which portion of the sealed record has been designated by the appealing party as necessary to the record on appeal or for use at the FCC.

Summary of Record-

16. If deemed necessary by the Commission, the providing party shall prepare a written summary of the Highly Confidential Information referred to in the Order to be placed on the public record.

Preservation of Confidentiality-

17. All persons who are given access to Highly Confidential Information by reason of this Order shall not use or disclose the Highly Confidential Information for any purpose other than the purposes of preparation for and conduct of this proceeding, and must take all reasonable precautions to keep the Highly Confidential Information secure. Disclosure of Highly Confidential Information for purposes of business competition is strictly prohibited.

Qualified persons may copy, microfilm, microfiche, or otherwise reproduce Highly Confidential Information to the extent necessary for the preparation and conduct of this proceeding. Qualified persons may disclose Highly Confidential Information only to other qualified persons associated with the same party.

Duration of Protection-

18. The Commission shall preserve the confidentiality of Highly Confidential Information for a period of five years from the date of the final order in this docket, unless extended by the Commission at the request of the party desiring confidentiality. The Commission shall notify the party desiring confidentiality at least two weeks prior to the

release of Highly Confidential Information. This Order shall continue in force and effect after docket UM 1484 is closed, as set out in this paragraph.

Destruction After Proceeding-

19. Counsel of record may retain memoranda, pleadings, testimony, discovery, or other documents containing Highly Confidential Information to the extent reasonably necessary to maintain a file of this proceeding or to comply with requirements imposed by another governmental agency or court order. The information retained may not be disclosed to any person. Any other person retaining Highly Confidential Information or documents containing such Highly Confidential Information must destroy or return it to the party desiring confidentiality within 90 days after final resolution of this proceeding unless the party desiring confidentiality consents, in writing, to retention of the Highly Confidential Information or documents containing such Highly Confidential Information. This paragraph does not apply to the Commission or its Staff.

Additional Protection-

20. The party desiring additional protection may move for any of the remedies set forth in ORCP 36(C). The motion shall state:

a. The parties and persons involved;
b. The exact nature of the information involved;
c. The exact nature of the relief requested;
d. The specific reasons the requested relief is necessary; and
e. A detailed description of the intermediate measures, including selected redaction, explored by the parties and why such measures do not resolve the dispute.

The information need not be released and, if released, shall not be disclosed pending the Commission's ruling on the motion.

HIGHLY CONFIDENTIAL PROTECTIVE AGREEMENT
UM 1484

I, _____, as

__ Commission Staff attorney
__ Commission Staff expert
__ CUB Attorney
__ CUB Expert
__ Outside attorney
__ Outside expert

in this proceeding for _____ (a party to this proceeding) hereby declare under penalty of perjury under the laws of the State of Oregon that the following are true and correct:

a. I am not now involved, and will not for a period of two years involve myself in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of Highly Confidential information with respect to the pricing, marketing, and sales of telecommunications services in the state of Oregon; and

b. I have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding, including this Section C of the Protective Order.

_____ _____
Signature Date

_____
City/State where this Agreement was signed

_____
Employer

_____ _____
Position and Responsibilities Permanent Address