BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1484

In the Matter of CENTURYLINK, INC. Application for an Order to Approve the Indirect Transfer of Control of QWEST CORPORATION	**QWEST'S AND CENTURYLINK'S JOINT RESPONSE TO SPRINT'S MOTION TO CERTIFY QUESTION TO COMMISSION**

INTRODUCTION AND SUMMARY

Qwest Communications International, Inc. ("Qwest") and CenturyLink, Inc. ("CenturyLink") (collectively "Joint Respondents") hereby respectfully respond to the Motion to Certify Questions to the Commission that Sprint Communications Company L.P., Sprint Spectrum, L.P. and Nextel West Corp. (collectively "Sprint") filed on September 17, 2010. In response to this filing, Qwest supports Administrative Law Judge Allan Arlow's September 7, 2010 Ruling denying Sprint's motion to compel discovery request Nos. 13 and 14. The Joint Respondents will further describe why the Commission should deny the motion for certification, or, if certification is granted, why the Commission should nevertheless affirm the ALJ Ruling.

ARGUMENT

I. SPRINT'S MOTION FAILS TO ADDRESS CERTIFICATION STANDARDS

Sprint's motion seeks certification of a question to the full Commission pursuant to OAR 860-014-0091. However, Sprint does not specifically discuss why it believes that certification of a routine discovery ruling on only two data requests to the Commission is warranted, nor even address the Commission's certification standards. The certification rule provides as follows:

> **Appeals to the Commission from Rulings of Administrative Law Judges**
>
> (1) A ruling of the Administrative Law Judge (ALJ) may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR 860-012-0035(1)(i), upon a finding that the ruling:

(a) May result in *substantial detriment* to the *public interest* or *undue prejudice* to any party; or

(b) *Denies or terminates any person's participation*. (Emphasis added.)

Although Sprint fails to address or even cite the certification standards, the only possible basis for its request for interlocutory review would be "undue prejudice to any party." There is certainly no argument (or reasonable basis to argue) that there would be "substantial detriment to the public interest." Nor can Sprint reasonably argue that the ALJ Ruling denies or terminates its participation in this proceeding.

Moreover, even as to any claim about "undue prejudice," the brief arguments that Sprint makes in the motion utterly fail to demonstrate any "prejudice," much less undue prejudice. There is, of course, no provision for certifying a question merely because a party believes that the Administrative Law Judge "erred" in denying Sprint's a discovery motion. Accordingly, on this basis alone, where Sprint utterly fails to cite, much less address, the standards for certifying a question to the full Commission, Sprint's motion should be denied.

II. THE MOTION ESSENTIALLY REARGUES THE MOTION TO COMPEL

Sprint's motion should also be denied because it does not really address the specifics of the ALJ Ruling. In that ruling, the Administrative Law Judge determined that switched access rates are not an issue to be addressed in this merger proceeding based on the following reasons:

> Historically, this issue has been addressed and was resolved many years ago by the requirement that ILECs place their competitive operations in fully separated subsidiaries with separate management, technical and financial staffs and operations, so that 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. Evidence regarding the amount of these special and interstate access charges that the Applicants' ILECs charge each others' CLEC affiliates is therefore not "reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the pending proceeding. Docket UM 1484, ALJ Ruling, *Motion Dismissed as Moot in Part and Denied in Part* (September 7, 2010), p. 4.

Sprint's motion to certify does not really address the Judge Arlow's reasoning. Sprint simply argues that the various ILEC CenturyLink and Qwest affiliates "will all be part of the same corporate parent that has consolidated books and results that will be reported publicly," and that payment of interstate charges from one corporate affiliate to another would result in an expense to one affiliate and revenue to the other. Motion to Certify, p. 2. From this, Sprint argues that competition "can be affected" by alleged "enhanced ability to reduce prices or increase investment to the detriment of its competitors." *Id.* However, Sprint essentially makes the same points it made in its original motion to compel, which Judge Arlow clearly rejected. In essence, all that Sprint really argues in this motion is that the ALJ Ruling was incorrect, or that "the Administrative Law Judge erred." Again, on this basis alone, Sprint's motion should be denied.

III. IF CERTIFICATION IS GRANTED, THE ALJ RULING SHOULD BE AFFIRMED

Even if Judge Arlow determines to certify the question of the ALJ Ruling to the full Commission, the Joint Respondents respectfully submit that the Commission should nevertheless affirm that ruling. Sprint makes no new arguments in support of its request, and it basically simply reiterates that it believes Judge Arlow was wrong. For all the reasons stated in the Joint Respondents' August 31, 2010 response to the motion to compel, and the reasons set forth in the ALJ Ruling, it is clear that switched access issues are not relevant in this merger proceeding.

A. The ALJ Ruling is correct

First, the ALJ Ruling is correct. Access charges which the Joint Respondents' ILEC affiliates pay to each other will have the same economic impact upon their operations as they would to an unaffiliated CLEC competitor. As such, wholly apart from the fact that this merger proceeding is not the appropriate forum for collateral issues like switched access charges, these issues are simply not reasonably calculated to lead to the discovery of evidence relevant to the issues involved in this proceeding.

B. Switched access issues are complex and not appropriate in a merger docket

In addition, as the Joint Respondents argued in their response to the motion to compel, and the reasons the Joint Respondents and Staff have discussed in their respective testimonies, switched access issues are *complex telecommunications industry issues* that do not belong here. Sprint has available to it other more appropriately-focused forums and proceedings, such as generic dockets on switched access or intercarrier compensation issues or an interconnection enforcement complaint, in which it can raise switched access issues if it believes the Respondents' switched access rates are too high or violate federal or state law. And as Judge Arlow recently found in denying a motion for certification that Lincoln City, Lincoln County and Tillamook County filed, "[t]he tactic of seeking application of 'leverage' in an unrelated proceeding, rather than involving one of the potential defendants in an as-yet-to-be-filed complaint, is contrary to the direct intent of OAR 860-012-0001" (the Commission's intervention rule).

C. The Washington order is not applicable, in part because of Oregon factors

Further, Sprint cites to the Washington Utilities and Transportation Commission's recent granting of a similar motion to compel. However, that is beside the point. First, the Washington Commission's order is not binding on this Commission. Moreover, the Administrative Law Judge in Washington did not analyze the points that Judge Arlow raised.[1]

Further still, unlike here, the Washington Staff apparently "suggested . . . that the merger's impact on access charges and competition is within the purview of [the Washington Commission's] examination."[2] Here in Oregon, however, Staff has taken the *opposite view*. As

[1] There is no indication that the Washington ALJ considered the ALJ Ruling in its order. Moreover, in Washington, the Commission has concluded that access charges are relevant to a merger proceeding. However, as the Joint Respondents noted in their response, review of or adjustments to access charges have *not* been considered proper areas of inquiry in this Commission's dockets reviewing telecommunications merger/acquisitions transactions. See e.g., Docket UM 1416 (CenturyTel/Embarq merger) and Docket UM 1431 (Frontier/Verizon)).

[2] A review of the Washington order, however, shows that on the motion to compel, Washington Staff did *not* support Sprint's motion. Rather, the reference to Staff's "suggestion" was merely in support of Sprint's

Staff witness John Reynolds recently discussed in his testimony on access charges (as well as intercarrier compensation in general and universal service):

> . . . . the issues of Universal Service Support, intercarrier compensation, and *access charges* are *extremely complex* and a solution that focuses only on the carriers involved in this transaction is not appropriate. Staff Direct Testimony of John Reynolds, Exhibit Staff/300, Reynolds/11. (Emphasis added.)

> These issues are *too broad and too complex* to be addressed simply as a condition for approval of this transaction. Where many of the requests of the parties may have merit and warrant in-depth consideration, these issues must be considered in a broad policy context. . . . . Staff/300, Reynolds/13. (Emphasis added.)

Moreover, even as a substantive matter, Mr. Reynolds concluded that access charges should *not* be reduced as part of this proceeding. Said Mr. Reynolds:

> Reducing CenturyLink's access rates at this time is likely to have serious undesirable consequences: (1) a potentially large increase in the Oregon Exchange Carrier Association (OECA) pool access charges, (2) a significant reduction in CenturyLink's rates could price them below costs. . . . Staff/300, Reynolds/11.

Mr. Reynolds went on to note that reduction in CenturyLink's access rates could affect the Oregon Exchange Carrier Association (OECA) pool and that departure of CenturyLink from the OECA pool to allow it to file its rates independently is likely to cause a significant increase in the rates that the remaining 29 OECA pool members must charge. He noted that the options the other companies would have to consider to counteract this increase would be to (1) increase basic service rates, which is not acceptable, or (2) increase the Oregon Universal Service Fund (OUSF) distributions to the companies, which is contrary to the direction of the FCC (and it is not likely that additional OUS funds would be available in any event). Staff/300, Reynolds/11-12. Finally, Mr. Reynolds testified that a significant reduction in CenturyLink's access rates might cause such rates to be below costs. Staff/300, Reynolds/12.

(challenged) late-filed petition to intervene in that docket, and even that reference cited to the Washington Commission's approval of the Verizon/Frontier transaction. See Washington Order, pp. 7-8, ¶ 20, fns. 36-37.

D. Interstate switched and special access services are not regulated by the Commission, and there will be no changes here

Finally, as the Joint Respondents noted in their response to the motion to compel, the services at issue are not subject to regulation by the Commission – they are primarily *interstate* services. Thus, such revenues are not relevant to a determination of any issue properly in dispute in the pending merger application. For example, neither CenturyLink nor Qwest have proposed, and the transaction will not result in, any change to access charge rates, and thus access charges are simply not relevant to the Commission's review and consideration of this merger. This is, of course, entirely consistent with the Commission's recent actions in the CenturyLink-Embarq merger or the Frontier-Verizon merger. *See e.g.*, Order No. 09-169 in Docket UM 1416 (CenturyLink/Embarq) and Order No. 10-067 in Docket UM 1431 (Frontier/Verizon). In neither of those cases did the Commission review or adjust access charges, or address such charges. The Commission's practice of not addressing switched access issues in its consideration of merger applications should apply with extra force here since these services are primarily interstate.

The Joint Respondents have further noted that Sprint's arguments are unavailing because they are based on a false factual premise; that is, Sprint has argued that "[r]esponses to these requests should be required because they will allow Sprint to demonstrate the amount of access charge savings that the merged company will retain when access charge payments become intracompany payments rather than payments from QC entities to CenturyLink entities and vice versa."[3] Sprint Motion to Compel, pp. 4-5. But as CenturyLink made clear in its Application:

> The Transaction contemplates a parent-level transfer of control of QCII only. Qwest Corp, QCC, QLDC, and the CenturyLink Oregon Operating Subsidiaries [fn. omitted] will continue as separate carriers and each will continue to have the requisite managerial, technical and financial capability to provide services to its customers. Immediately upon

[3] This is essentially the same argument that Sprint makes in its certification motion here- that is, competition can be "affected" because the Qwest IXC access expense to a CenturyLink ILEC would be "internalized," and the Qwest IXC would then allegedly have "an enhanced ability to reduce prices or increase investment to the detriment of its competitors." Motion to Certify, p. 2.

> 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… Application, ¶ 8. (Emphasis added.)

Finally, as Joint Respondents have made clear in other responses to Sprint data requests, the Qwest and CenturyLink ILEC 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. Because access charge payments will not change, Sprint's stated justification for the relevance of reviewing revenues outside this Commission's jurisdiction is not factually supportable. At a very minimum, these reasons are not sufficient for the Commission to reverse the ALJ Ruling in motion to certify.

CONCLUSION

Accordingly, the Joint Respondents respectfully submit the Commission should deny Sprint's motion to certify to the full Commission the question of the ALJ Ruling denying its motion to compel on data request Nos. 13 and 14.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that on the 4th day of October, 2010, I served the foregoing **QWEST'S AND CENTURYLINK'S JOINT RESPONSE TO SPRINT'S MOTION TO CERTIFY QUESTION TO COMMISSION**, in the above entitled docket on the following persons via e-mail, and via U.S. Mail to those who have not waived paper service, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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** denotes signed Protective Order Nos. 10-192 and 10-291