



CenturyLink™

805 Broadway, 8th Floor
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November 17, 2010

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol Street NE, Ste 215
Salem, OR 97301-2551

RE: UM-1484 CenturyLink/Qwest Merger

Dear Commission:

Enclosed please find an original and three copies of CenturyLink and Qwest's Motion to Strike Certain Portions of Supplemental Testimony of James Appleby and The Direct Testimony of Chris Frentrup of Sprint.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

William E. Hendricks

cc: Service List

Encl.

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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
EXPEDITED MOTION TO STRIKE
CERTAIN PORTIONS OF SUPPLEMENTAL
TESTIMONY OF JAMES A. APPLEBY AND
THE DIRECT TESTIMONY OF CHRIS
FRENTROP OF SPRINT**

MOTION TO STRIKE

CenturyLink, Inc. ("CenturyLink") and Qwest Communications International, Inc. ("Qwest") (collectively "Joint Respondents") respectfully move the Commission to strike certain portions of the Supplemental Testimony of the James A. Appleby and the Direct Testimony of Dr. Chris Frentrup of Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc. ("Sprint"). The portions of testimony that Joint Respondents ask to be stricken address issues that are beyond the proper scope of this case, based on Administrative Law Judge ("ALJ") rulings in this case. This testimony is not appropriate to consider in this case, and will only serve to burden the record and delay the proceeding. This motion shall also serve as a response to Sprint's petition for relief under Paragraph 10 of (protective) Order No. 10-291 seeking to file Mr. Appleby's supplemental testimony (regarding Hart-Scott-Rodino ("HSR") issues). Joint Respondents request expedited review of this motion, including scheduling responses so that it can be resolved prior to the December 1-2, 2010 hearing.

In order for the Appleby testimony to be admitted to the record, the Commission must grant Sprint's request to permit Mr. Appleby, an in-house expert, to testify to information designated as highly-confidential, pursuant to the Protective Order (Order No. 10-2910 in this case).¹ Because Mr. Appleby has already seen the testimony in the context of another state merger proceeding, CenturyLink and Qwest do not object to his filing testimony regarding highly-confidential HSR Documents, but only to the extent that such testimony is otherwise proper.

RELEVANT PROCEDURAL HISTORY

The parties to the case have disputed the appropriate scope of issues that the Commission should consider in reviewing the merger. The CenturyLink first raised the issue in opposing the petitions to intervention of Lincoln City, Lincoln County and Tillamook County ("Coastal Intervenors"), arguing that the Coastal Intervenors request "for such particularized relief outside the scope of the Commission's statutory responsibility should be rejected and left to the appropriate forum so as not to unreasonably burden this proceeding."² The ALJ agreed in its ruling on the petitions and denied them, in part, stating that "the specific direction of resources or the managerial decisions to be made by [the merged company] with respect to the provision of services to a particular area, do not relate to the overall financial condition

¹ Order No. 10-291 restricts highly-confidential documents and materials to only outside counsel and outside expert witnesses.

² *CenturyLink's Opposition to Joint Petition to Intervene of the City of Lincoln City, Lincoln County, and Tillamook County*, Docket No. UM 1484, at p. 4 (August 9, 2010).

of the company and are beyond the scope of this docket.”³ Subsequently, the Coastal Intervenors filed a Motion to Certify Questions to the Commission, essentially seeking to overturn the limitation on their petition to intervene.⁴ That motion to certify was also denied, affirming the ALJ’s reasoning.⁵

In similar fashion, on September 7, 2010, the ALJ limited the scope of issues in discovery by denying a Sprint motion to compel, and later by denying Sprint’s motion to certify questions to the Commission.⁶ In doing so, the *Access Charge Rulings* hold that access charge issues are not an appropriate issue in this case.⁷

Prior to the *Access Charge Rulings* and the rulings on the interventions of the Coastal Intervenors, Sprint had filed the Direct Testimony of Chris Frentrup, on August 24, 2010, portions of which contravene the *Access Charge Rulings*. Then, on November 11, 2010, Sprint filed the Supplemental Testimony of James A. Appleby, portions of which also exceed the permissible scope of issues in this case by reiterating arguments that are, at their core, calls for reductions to access rates.

³ *Ruling on Petition to Intervene of the City Lincoln City, Lincoln County, and Tillamook County*, Docket No. UM 1484 (citations omitted) (August 26, 2010).

⁴ *Ruling on Motion to Certify Questions to the Commission of the City of Lincoln City, Lincoln County, and Tillamook County*, Docket No. UM 1484 (September 23, 2010).

⁵ The ALJ also limited the intervention of the Northwest Public Communications Council. See *Ruling, Petition to Intervene Granted with Conditions*, Docket No. UM 1484 (August 10, 2010).

⁶ See *Ruling on Motion to Compel Further Responses to Data Requests, Dismissed as Moot in Part and Denied in Part*, Docket No. UM 1484 (September 7, 2010) (“*Sprint Motion to Compel Ruling*”); See also *Ruling on Motion of Sprint to Certify Questions to the Commission, Denied*, Docket No. UM 1484 (November 3, 2010) (“*Sprint Motion to Certify Ruling*”) (collectively “*Access Charge Rulings*”).

⁷ See *Sprint Motion to Compel Ruling*, at pp. 3-4, and *Sprint Motion to Certify Ruling*, at p. 4.

On October 14, 2010, the Commission held a hearing on the Joint CLECs' motion to amend the schedule, which had sought an additional round of testimony on the Hart-Scott-Rodino ("HSR Documents") and to reschedule the October 20-21, 2010 hearing. On Friday, October 15, 2010, the ALJ granted that request and rescheduled the hearing to December 1-2, 2010. The ALJ also adopted a schedule for the CLECs to file supplemental testimony on November 12, 2010, and for responsive testimony to be filed on November 19, 2010. On October 22, 2010, CenturyLink requested that the Commission clarify that the scope of that supplemental should be limited to testimony directly related to HSR documents produced to the Joint CLECs after August 24, 2010.⁸ The Commission later clarified, on November 4, 2010, that any such supplemental testimony would be limited to matters arising from the HSR Documents that the Joint Movants provided after August 24, 2010.

⁸ CenturyLink replied by email, on November 4, 2010, to the Joint CLECs' November 3, 2010 Response to CenturyLink's Request for Clarification. CenturyLink concurred in that reply that the production of any documents after August 24 was appropriate.

ARGUMENT

I. DR. FRENTRUP'S DIRECT TESTIMONY SHOULD BE PARTIALLY STRICKEN ON THE GROUNDS THAT IT ADDRESSES ISSUES THAT ARE BEYOND THE PERMISSIBLE SCOPE OF THIS PROCEEDING

A logical extension of the *Access Charge Rulings* bars Dr. Frentrup's testimony on access charges. The ALJ found that access charges were not an appropriate subject of discovery because "the issue of the proper level of switched and special access charges and their impact on competition may be investigated by the Commission *sua sponte* or pursuant to a petition at any time."⁹ The ruling also provided:

There are innumerable facets to the operation of a large incumbent local exchange carrier that have competitive consequences. Each of these facets change to a greater or lesser extent whenever ILEC entities merge. To try to examine each of them in the context of the merger proceeding would unduly delay the proceedings, burden the record and prevent timely conclusion of the review within the practical time limits such a transaction naturally imposes.¹⁰

The Frentrup testimony outlined below squarely addresses the exact access charge issues the *Access Charge Rulings* find are beyond the proper scope of this proceeding, and the offending testimony should therefore be stricken.

A. Frentrup, Page 5, Line 5 through Page 11, Line 4 should be stricken

This portion of Dr. Frentrup's testimony provides an in-depth analysis of how the merger will affect the costs for the merged company to provide access services. This

⁹ *Sprint Motion to Compel Ruling*, at page 4.

¹⁰ *Id.*

testimony concludes that the effect of those cost changes will result in “increased market power” and an “unfair competitive advantage” for the merged company.

B. Frentrup, Page 12, Lines 4 through 11

This testimony consists of a question and answer references access charges to support a claim that the merged company will have an unfair competitive advantage.

C. Frentrup, Page 18, Line 9 though Page 21, Line 22

This portion of Dr. Frentrup’s testimony concludes, again beyond the scope of permissible issues in this case, that the Commission should order changes to CenturyLink’s and Qwest’s intrastate switched access charges. Specifically, Sprint asks that a condition be imposed on the merger approval that would require (1) all CenturyLink ILECs in Oregon to reduce their intrastate switched access rates to mirror the intrastate switched access rates and rate structure of the Qwest ILEC in Oregon no later than 30 days after the close of the merger, and (2) all CenturyLink ILECs in Oregon to reduce intrastate switched access rates to mirror the interstate switched access rates and rate structure of Qwest no later than 120 days after the close of the merger.¹¹ This testimony fall squarely under the *Access Charge Orders* and should be stricken.

¹¹ Direct Testimony of Chris Frentrup, Ph.D. (“Frentrup Direct”), at page 21, lines 2 through 12.

II. MR. APPLEBY'S SUPPLEMENTAL TESTIMONY SHOULD BE PARTIALLY STRICKEN ON THE GROUNDS THAT IT ADDRESSES ISSUES THAT ARE BEYOND THE PERMISSIBLE SCOPE OF THIS PROCEEDING

Mr. Appleby's Supplemental Testimony, provisionally filed on November 11, 2010 with Sprint's petition for relief under Paragraph 10 of the protective order, suffers from the same flaws as Dr. Frentrup's Direct Testimony, and is mostly duplicative of Dr. Frentrup's Direct Testimony. Mr. Appleby reiterates much of the discussion engaged in by Dr. Frentrup that the merged companies' access rates are anti-competitive. In addition, even though Mr. Appleby couches Dr. Frentrup's arguments in new terms to describe this alleged unfair advantage (i.e. "owner's economics"), the arguments are still, at their core, arguments about access rates. For example, Mr. Appleby claims that the "Merged Firm will realize owner's economics on the incremental amount of long distance traffic that it can move from third-party long distance transport providers currently handling it to the Qwest long distance transport network."¹² Mr. Appleby then concludes this inappropriate access charge argument by reasserting Sprint's proposal to reduce access rates.¹³ Although Mr. Appleby cites to some of the HSR Documents to support his arguments, the arguments themselves, and Sprint's proposed condition, are nevertheless beyond the proper scope of the proceeding given the limitations in the *Access Charge Rulings*. Specifically, the following sections should be stricken:

¹² Supplemental Testimony of James A. Appleby ("Appleby Supplemental"), at page 7, lines 15-17.

¹³ Appleby Supplemental, at page 11.

- Appleby, page 4, in the answer at lines 1 through 15: the second sentence at line 2 through 6 and the fifth sentence at lines 10-13.
- Appleby, page 5, line 1 through page 12, line 14.
- Appleby, page 21, lines 1 through 6.

CONCLUSION

Sprint's end-game is to use this proceeding to extract reductions to ILEC access rates in order to reduce its access charge expenses. This not the appropriate forum for such action, and will only serve to burden the record and delay these proceedings. Therefore, the Joint Respondents ask the Commission to strike the offending testimony.

DATED: November 17, 2010

Respectfully submitted,

CENTURYLINK

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**CERTIFICATE OF SERVICE
UM-1484**

I certify that on November 17th, 2010, a true and correct copy of **CenturyLink and Qwest's Motion to Strike Certain Portions of Supplemental Testimony of James Appleby and the Direct Testimony of Chris Frentrup of Sprint** was served on the following parties via electronic mail and where paper service is not waived, by U.S. mail:

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