

ISSUED: November 3, 2010

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1484

In the Matter of

CENTURYLINK, INC.,

Application for Approval of Merger
between CenturyTel, Inc., and Qwest
Communications International, Inc.

RULING

DISPOSITION: MOTION TO CERTIFY QUESTIONS DENIED

In this ruling, the Administrative Law Judge (ALJ) denies the Motion to Certify Questions to the Commission (Motion) filed by Sprint Communications Company L.P., Sprint Spectrum, L.P., and Nextel West Corp. (Sprint).

I. BACKGROUND

On September 7, 2010, the ALJ issued a ruling (Ruling) denying Sprint's motion to compel discovery of data requests (DRs) Nos. 13 and 14 upon CenturyLink, Inc., and Qwest Communications International, Inc. (Applicants) with respect to the dollar amounts of the special and interstate access charges that Applicants charged each other's CLECs.

In the Ruling, the ALJ stated at page 4 that the issue of competitive fairness, with respect to the relationship between an ILEC and its CLEC affiliate, had been settled in law by the establishment of numerous requirements "so that the access charges which [affiliated CLECs] pay to their ILEC affiliate will have the same economic impact upon their operations as they would to an unaffiliated CLEC competitor." The dollar amounts of access charges were therefore "not reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the pending proceeding."

II. POSITIONS OF THE PARTIES

The Sprint Motion poses one question for certification: whether the ALJ erred in denying the motion to compel responses to DRs 13 and 14 upon the Applicants. The discovery requests asked Applicants to provide the amounts of the Oregon interstate switched

and special access charges that CenturyLink charged Qwest's long distance carrier affiliate and that Qwest charged CenturyLink's long distance carrier affiliate.¹

Sprint contends that, to assess the proposed merger's effect on competition, it is important to know how much the Applicants are paying each other, because the payments will become intra-company transfers, thereby providing the Qwest IXC with "an enhanced ability to reduce prices or increase investment to the detriment of its competitors. The separate affiliate requirements cited in the ALJ's Order do not change that fact."² Because the Public Utility Commission of Oregon (Commission) reviews merger transactions under the "no harm" standard, Sprint asserts that its request is germane to the Commission's determination as to whether the transaction will have an adverse impact on competition and that the requested data "will inform that analysis."³

Applicants filed a Joint Response on October 4, 2010 (Response), opposing the Sprint Motion on several grounds. Applicants assert that the motion fails to address the requirements for certification⁴ because Sprint provided no argument regarding undue prejudice, substantial detriment to the public interest or termination of participation in the proceeding and essentially reargues the points that failed to convince the ALJ in the Sprint's Motion to Compel.⁵ Further, Applicants argue that, if certification is granted, the Commission should affirm the ALJ's Ruling. Applicants state that the Ruling is correct insofar as there is no difference in economic impact on operations as a result of the merger.⁶ Next, Applicants contend that the merger proceeding is not the proper forum to address such complex telecommunications issues as switched access or intercarrier compensation; if Sprint believes that the rates are too high or violate federal or state law, Applicants assert, a more focused forum such as either a complaint or a petition to open a generic docket, would be appropriate.⁷ Applicants seek to distinguish the Washington Utility and Transportation Commission (WUTC) Ruling granting the Sprint Motion to Compel, noting that the WUTC's ALJ did not consider the issues raised by the ALJ in this docket, and that the Oregon Commission Staff, unlike the WUTC Staff, considered the consideration of access charges to be too broad and complex to be addressed as a condition in the merger review proceeding. Any significant changes to the current access charge regime could pose a number of problems.⁸ Finally, Applicants argue that interstate switched and special access charges are not regulated by the Commission and are not a proper subject for the instant proceeding.⁹

¹ Sprint Motion at 1-2. Sprint variously refers to these affiliates as "long distance providers" or "IXCs."

² *Id.* at 2.

³ *Id.* at 3.

⁴ Oregon Administrative Rule (OAR) 860-001-0110(2), which replaced OAR 860-012-0035(1)(i) subsequent to the filing of Applicants' Response, provides as follows: "The ALJ must certify the ruling to the Commission under OAR 860-001-0090 if the ALJ finds that:

- (a) The ruling may result in substantial detriment to the public interest or undue prejudice to a party;
- (b) The ruling denies or terminates a person's participation; or
- (c) Good cause exists for certification."

The third standard, (c), is not present in the earlier rule.

⁵ Response at 2-3.

⁶ *Id.* at 3.

⁷ *Id.* at 4 (citing the ALJ's Sept 23, 2010 Ruling).

⁸ *Id.* at 4-5 (citing Staff/300, Reynolds/11, 13).

⁹ *Id.* at 6.

On October 14, 2010, Sprint filed a Reply to the Applicants' Response. Sprint argues that the question satisfies the Commission's "undue prejudice" standard because, without the information, the Commission will be not be able to make a fully informed decision as to whether the transaction satisfies the "no harm" standard. Sprint notes that its testimony seeks reductions in access rates, but states that

The requested information can help demonstrate the magnitude of the problem that Sprint's requested access reductions are meant to address. The Commission need not decide in this motion whether access reductions can be ordered, but granting of Sprint's motion will help in fully informing the Commission.¹⁰ (fn omitted).

Sprint further states that it will be unduly prejudiced because it needs the information "to undertake a reasonable investigation into the harms created by the merger." Specifically, Sprint argues that by making the former payments into intra-company accounting entries, the merged firm will have an advantage over competitors, and the information is necessary to determine the magnitude of the problem.¹¹ Sprint cites the success of its motions before the WUTC and the Minnesota Commission and states that it will not be able to present as "robust" a case in Oregon if the discovery request is denied. Sprint believes that this Commission needs to have the information to determine competitive harm. Such information is a precondition to its decision as to whether an issue should be added to the proceeding regarding imposing a rate reduction as a condition for approval of the merger.¹² The Minnesota Commission agreed with Sprint that the information could bear on the impact of the merger on competition in the local telecommunications market. Sprint asserts that it will provide evidence why access reductions are necessary to counteract the loss of competition and will be used as a suggestion to "cure" the merger-related harms."¹³

III. DISCUSSION

Requirements for Certification of an ALJ's Ruling to the Commission.

Sprint timely filed its request for ALJ Certification, within 15 days of the date of service of the ALJ's Ruling, in accordance with the requirements of OAR 860-001-0110(1). However, upon review of the pleadings submitted pursuant to OAR 860-001-0110(2), I find that Sprint has failed to meet the standard necessary for the question of compelling discovery of switched and special access charge financial information. Although Sprint has couched the question in terms of a two-step process, it clearly seeks information to buttress expected testimony advocating a reduction in access charges as a condition for the Commission's approval of the merger transaction. Under these circumstances, the requested data is unlikely to lead to admissible evidence because the level of access charges is not an appropriate issue to be considered within the scope of this proceeding.

¹⁰ Sprint Reply at 2.

¹¹ *Id.* at 2-3.

¹² *Id.* at 4.

¹³ *Id.* at 5.

There are innumerable facets to the operation of a large incumbent local exchange carrier that have competitive consequences.¹⁴ 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.

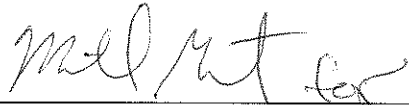
IV. CONCLUSION

In denying the Motion, it is first noted that Sprint does not complain that there has been a denial or termination of its participation. Furthermore, I conclude that there is neither detriment to the public interest nor is Sprint prejudiced by a denial of its Motion to Compel; 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. Such a proceeding will afford the opportunity for a far more thorough and focused analysis of the issue than may reasonably be undertaken in the context of a merger review proceeding.

V. RULING

The Sprint Communications Company L.P., Sprint Spectrum, L.P., and Nextel West Corp.'s Motion to Certify Questions to the Commission is denied.

Dated at Salem, Oregon, this 3rd day of November, 2010.



Allan J. Arlow
Administrative Law Judge

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¹⁴ See, e.g., *In Re U S West Communications, Inc, Into In-Region Interlata Services Under Section 271 of the Telecommunications Act of 1996*, Docket UM 823. The petition was the subject of one of the most lengthy and complex proceedings in the history of this Commission, covering virtually every aspect of interconnection, operations, accounting, engineering, microeconomics, customer service and public policy imaginable. The active portion of the case lasted almost three years; there were hundreds of thousands of pages of testimony and dozens of witnesses examined over the course of many weeks, spread throughout the proceedings.