

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 INTEGRA'S MOTION
TO COMPEL DISCOVERY AND CWA'S
MOTION TO CHANGE THE DESIGNATION
OF INFORMATION PRODUCED BY QWEST**

On October 4, 2010, the Communications Workers of America (CWA) filed a Motion to Change the Confidentiality Designation of Particular Information Produced by Qwest. Qwest filed a Response to the Motion on October 11, 2010.

On October 8, 2010, Integra Telecom, Inc. (Integra) filed a Motion to Compel CenturyLink to produce all documents and information responsive to Integra's Third Set of Information Requests, specifically Requests 1 through 7. CenturyLink filed a Response to the Motion on October 14, 2010.

Oral argument on the Motions was heard via telephone conference call on October 15, 2010. The following parties participated in the conference call:

Michael J. Ahern, Dorsey & Whitney, Susan S. Masterton, CenturyLink, and Cathy Clucas, Embarq Minnesota, appeared on behalf of CenturyLink.

Jason D. Topp, Qwest Corporation Law Department, appeared on behalf of Qwest.

Gregory Merz, Gray, Plant, Mooty, Mooty & Bennett, appeared on behalf of Integra;

Scott Rubin, Attorney at Law, and Cristina Parra Herrera, Gregg M. Corwin & Associate, appeared on behalf of the Communication Workers of America.

Dan Lipschultz, Moss & Barnett, appeared on behalf of the CLEC Coalition.

Marc Fournier and Kevin O'Grady appeared for the staff of the Minnesota Public Utilities Commission.

The Administrative Law Judge orally ruled on the motions during the October 15, 2010, telephone conference call and is confirming those rulings in this written Order.

Based on all the files and proceedings in this matter, for the reasons set forth in the Memorandum below, and in accordance with the oral rulings that were previously issued on October 15, 2010, the Administrative Law Judge issues the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. The CWA's Motion to Change the Confidentiality Designation of Particular Information Produced by Qwest is **DENIED**.
2. Integra's Motion to Compel CenturyLink to produce all documents and information responsive to Integra's Third Set of Information Requests, specifically Requests 1 through 7, is **GRANTED**. CenturyLink shall conduct a further reasonably diligent inquiry and shall, to the extent possible, supplement its responses and production by the close of business on Tuesday, October 19, 2010.

Date: October 20, 2010

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

CWA's Motion to Change Confidentiality Designation

The CWA moved to change the designation of certain information produced by Qwest. The information at issue is Qwest's projection of the number of full-time positions that would be eliminated by the merger. This figure was included in a chart that was filed by Qwest under the Hart-Scott-Rodino Act, Attachment 4(c)-52. The entire document was designated by Qwest as "Highly Sensitive Trade Secret Information Subject to Additional Protection."

In its motion, the CWA asserted that the number of positions projected to be eliminated does not constitute the type of information that should be protected under any of the "Trade Secret" categories set forth in the Protective Orders that have been issued in this matter. It contended that the disclosure of the information will not result in any competitive disadvantage to the Joint Petitioners or disclose their financial status or strategies. The CWA further argued that the information does not meet the statutory definition of "trade secret," as set forth in Minn. Stat. § 13.37, subd. 1(b).¹ Accordingly,

¹ That provision defines "trade secret information" to mean "government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected

the CWA urges that the figure reflecting Qwest's estimate of the total number of positions that will be eliminated should be designated as public information.

In response, Qwest asserted that the CWA had not made the requisite showing that the materials challenged have been improperly designated by Qwest, or that any burden will be imposed on the CWA by virtue of the designation. Qwest pointed out that Qwest's projection was prepared about a month before the merger agreement was executed for the purpose of determining the value of the potential transaction for Qwest and its shareholders. It asserted that, if the transaction does not close, the information would be valuable to others in negotiating with Qwest or others regarding similar transactions. Qwest emphasized that the information was not prepared by any representative of the combined company, and was not used by those who estimated the synergies referenced by the Joint Petitioners in this case. Qwest maintained that the information fully qualifies for treatment as "Highly Sensitive Trade Secret Information Subject to Additional Protection" under the Supplemental Protective Order entered in this matter.

The Administrative Law Judge concludes that the CWA has not borne its burden to show that Qwest's designation of the information was improper and should be changed. Qwest's analysis of potential synergies for the purpose of estimating the value of the transaction meets the definition of "Highly Sensitive Trade Secret Information Subject to Additional Protection" set forth in the applicable Protective Orders. The information also constitutes "trade secret information" within the meaning of Minn. Stat. § 13.37, subd. 1(b), because the information was supplied by Qwest, Qwest has endeavored to maintain the confidential nature of the information, and the information derives economic value from not being generally known to others. The decision of the Court of Appeals' in *Prairie Island v. Department of Public Safety*² does not require a different result. Accordingly, the CWA's motion to change the designation is denied.

individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that 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."

² 658 N.W.2d 876 (Minn. App. 2003). Most notably, the Court of Appeals found that significant portions of the independent financial audit data sought to be disclosed in that case were supplied in publicly-available SEC filings and were available to suppliers, personnel, and competitors. The Court also emphasized that the data were dated in nature (extending back to periods that were 4 to 10 years prior to the date of the disclosure request), and found that "financial-statement-type data lose their significance over time." *Id.* at 886-87. The Court concluded that most of the audit data do not derive independent economic value from nondisclosure, and therefore reversed the district court's determination that the financial statements were nonpublic "trade secret" data. The Court remanded for a determination of whether any specific portions of the audit data should be redacted. In contrast, the Qwest information at issue here was issued less than seven months ago and there is no evidence that it was publicly available from other sources.

Integra's Motion to Compel CenturyLink to Respond to Discovery

Integra moved to compel CenturyLink to produce all documents and information responsive to Requests 1 through 7 of Integra's Third Set of Information Requests. In those requests, Integra sought certain information and documents reflecting communications between CenturyLink and vendors, service bureaus, or gateway providers that represent CLECs, regarding systems and integration plans relating to order processing, systems/integration efforts, and ebonding (an application-to-application interface) after the closing date of the transaction. On September 23, 2010, CenturyLink provided its initial objections and responses to these Requests. It objected to each request on several grounds, contending, among other things, that the requests were "vague, ambiguous, overly broad, unduly burdensome and excessively time consuming," did not seek relevant information, "applie[d] to matters other than Minnesota intrastate operations subject to the jurisdiction of the Commission," and "call[ed] for information that is third-party proprietary information which is subject to a confidentiality agreement." Subject to and without waiving these objections, CenturyLink responded that it had not had any communications responsive to Requests 1-5. With respect to Requests 6-7, CenturyLink responded that it "has received several inquiries" from vendors or gateway providers regarding these matters but "has not received any formal requests." It did not produce any documents or identify any specific dates, vendors, gateway providers, or CenturyLink employees involved in these inquiries.

After Integra sent a letter to CenturyLink on September 27, 2010, outlining alleged deficiencies in the responses to these requests, CenturyLink submitted a supplemental response to Requests 6 and 7 on September 29 and October 1, 2010. In its supplemental responses, CenturyLink merely stated that the inquiries it had received "were informal discussions that were informational in nature" and "no notes were taken and no other documentation exists regarding these inquiries." Once again, CenturyLink did not produce any documents, or identify any dates, vendors, gateway providers, or CenturyLink employees involved in the inquiries.

In its motion, Integra indicated that it is aware of a September 1, 2010, email between CenturyLink and DSET (a gateway provider to CLECs for electronic interfaces with Qwest's Operations Support Systems) regarding the subject matter of Requests 6 and 7. As a result of this information and other discovery responses provided by CenturyLink, Integra questioned whether CenturyLink has made a reasonably diligent search of its records in order to ensure that it provided complete and accurate responses to Integra's discovery requests. In its motion, Integra requested that CenturyLink be compelled to conduct a reasonably diligent search for all documents and other information responsive to Requests 1-7 and produce all such documents and other information immediately.

In response to Integra's motion, CenturyLink affirmed its original objections and responses to Requests 1-7 as well as the clarifications set forth in its Supplemental Responses. CenturyLink contended that the information it provided is complete and correct, to the best of its knowledge, and provided an affidavit from its Director of

Wholesale Operations asserting that she used reasonable diligence in gathering the information necessary to respond to Requests 1-7. CenturyLink also provided an affidavit from its Manager, Client Support, Wholesale Operations, attesting that he did not recall receiving an email from DSET but did recall a telephone conversation with the DSET salesman concerning CenturyLink's electronic bonding capabilities and methods currently in use. CenturyLink urged that the Motion to Compel be denied.

Under the circumstances, the Administrative Law Judge concludes that it is appropriate to order that CenturyLink supplement its responses to Requests 1-7 of Integra's Third Set of Information Requests after first conducting a further, reasonably diligent search for all documents and other information responsive to those requests. The matters raised by Integra reflect legitimate concerns about the adequacy of CenturyLink's efforts to locate and provide information responsive to Requests 1 through 7. Moreover, because those requests were not limited to "formal" communications, CenturyLink's failure to provide specific information and documents relating to the "informal" and "informational" discussions it has acknowledged having with respect to Requests 6 and 7 is not warranted.

Accordingly, Integra's Motion to Compel is granted. Because Integra must file additional testimony by October 22, 2010, the Administrative Law Judge ordered that CenturyLink provide the supplemental responses by the close of business on Tuesday, October 19, 2010, to the extent possible.

B. L. N.