

Service Date: January 28, 2015

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF CenturyLink QC’s) REGULATORY DIVISION
Service Quality and Its Response to Notice of)
Commission Action in Docket N2014.3.38,) DOCKET NO. D2014.11.91
Including Petition for Waiver of Admin. R.) ORDER NO. 7388a
Mont. 38.5.337197)(b))

IN THE MATTER OF the Request of Staff) DOCKET NO. N2014.4.38
of the Montana Public Service Commission)
for CenturyLink Service Quality Information)

**ORDER DENYING QWEST CORPORATION D/B/A CENTURYLINK QC’S
MOTION FOR PROTECTIVE ORDER**

Background

1. On December 4, 2014, Qwest Corporation doing business as CenturyLink QC (CenturyLink QC) filed a Motion for Protective Order (Motion) with the Montana Public Service Commission (Commission).
2. CenturyLink QC’s Motion was accompanied by the supporting affidavit of Robert Brigham (Affidavit).
3. CenturyLink QC’s Motion was filed pursuant to Admin. R. Mont. 38.2.5001 through 38.2.5030 (2014), for the protection of certain information CenturyLink QC plans to submit in response to data request PSC-001.
4. CenturyLink QC seeks a standard protective order pursuant to Admin. R. Mont. 38.2.5014 to protect trade secret information.
5. The Commission noticed the Motion in the Regulatory Division Agenda.
6. No intervenor or member of the public commented on the Motion.
7. On January 20, 2015, a regularly scheduled work session was held to discuss and act on the Motion.

Discussion, Analysis, Findings, and Conclusions

8. A corporation seeking a protective order for materials filed with a regulating governmental agency must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, ¶ 56, 319 Mont. 38, 82 P.3d 876. The claimant's showing must be more than conclusory. It must be specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the claims to the right of confidentiality. *Id.*

9. The Montana Supreme Court has ruled: "A non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements." *Great Falls Tribune* at ¶ 56.

10. The Commission has implemented the Court's ruling through amendment or repeal of administrative rules concerning protective orders. *See* Admin. R. Mont. 38.2.5001 – 5030.

11. If information is determined by a governmental agency or reviewing authority to qualify as a property right in the form of a trade secret which warrants due process protection, secrecy can be preserved by the agency through reasonable means, including a protective order. *Great Falls Tribune* at ¶ 62.

12. "Trade secret" is defined by Mont. Code Ann. § 30-14-402 (2014), as "information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) 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; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

13. A party requesting a protective order based on trade secret must demonstrate that "(i) prior to requesting a protective order, the [party] has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and

information in the commission's possession; (ii) the claimed trade secret material is information; (iii) the information is in fact secret; (iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (v) the secret information is not readily ascertainable by proper means; and (vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy." Admin. R. Mont. 38.2.5007(4)(b).

14. CenturyLink QC provided a supporting Affidavit with its Motion, as required by Admin. R. Mont. 38.2.5007(3)(c). See Aff. Robert Brigham (December 3, 2015).

15. CenturyLink QC in its Motion acknowledged that it "understands and has fully considered the constitutional presumption in favor of public access to information filed in [Commission] proceedings," as required by Admin. R. Mont. 38.2.5007(4)(b). Mot. at p.3.

16. "'Information' includes knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items are attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request." Admin. R. Mont. 38.2.5001(3). In its Motion CenturyLink QC states that the "material for which protection is sought is comprised of knowledge, data and facts collected and recorded by, or at the direction of CenturyLink QC..." As such, the material is information as that term is defined by law." Mot. at p.3.

17. CenturyLink QC asserts that the subject information is in fact secret, and states that "CenturyLink QC does not share the Information for which protection is sought with other parties and maintains the information secretly." Mot. at p.3.

18. CenturyLink QC states that reasonable efforts are used to maintain the secrecy of the information, explaining that the information is not "disclosed or disseminated" and that the information "is maintained electronically on a secure network" and is "password protected." Mot. at p.3.

19. CenturyLink QC asserts that the data in question is not readily ascertainable by proper means, because it is collected and tabulated by CenturyLink QC. Mot. at p.3.

20. The final factor at issue in the trade secret analysis is whether the information that CenturyLink QC seeks to protect derives independent economic value or a competitive advantage from its secrecy.

21. CenturyLink QC asserts that if the information is not protected, “CenturyLink QC’s business competitors could use it to prioritize their marketing efforts and efficiently target specific customers or groups of customers in specific areas.” Mot. at p.4.

22. The Federal Communications Commission (FCC), in its November 18, 2011 Universal Service Fund Transformation Order, noted that 83% of rural customers without access to broadband were in price cap carrier territory. *In re Connect Am. Fund*, 26 FCC Rcd 17663, ¶ 127 (F.C.C. 2011). Price cap carrier territory makes up a great deal of CenturyLink QC’s service area. Price cap carriers are treated differently than rural rate-of-return carriers by the FCC.

23. Unserved areas in price cap territory are typically rural high cost locations that are uneconomic to serve. That is why the FCC directed an increasing percentage of federal high cost support to areas substantially unserved by an unsubsidized competitor. *Id.* at ¶150.

24. The areas in which CenturyLink QC is supposed to be making broadband investments using Universal Service Fund (USF) high cost support are expensive to serve with little or no competition. Therefore, CenturyLink QC’s arguments that its broadband speeds and project level capital expenditures would bestow a competitive advantage to its competitors are specious.

25. If investments made by CenturyLink QC are truly in unserved areas there should be no unsubsidized competitors serving those areas that could gain a competitive advantage.

26. CenturyLink QC has not made a *prima facie* case demonstrating that the information for which it seeks protection in its Motion for a Protective Order is in fact trade secret information subject to protection.

Order

THEREFORE, based upon the foregoing, it is HEREBY ORDERED as follows:

1. CenturyLink QC’s Motion for Protective Order is hereby DENIED.
2. CenturyLink QC must produce the information consistent with this Order within 14 calendar days of the service date of this Order.

DONE AND DATED this 20th day of January, 2015, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


KIRK BUSHMAN, Commissioner


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner

ATTEST:


Aleisha Solem
Commission Secretary

(SEAL)