

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) ORDER NO. 7388g
Admin. R. Mont. 38.5.337197)(b))

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

**ORDER GRANTING IN PART AND DENYING IN PART CENTURYLINK QC’s
MOTION FOR RECONSIDERATION**

BACKGROUND

1. On December 4, 2014, Qwest Corporation doing business as CenturyLink QC (CenturyLink QC) filed with the Montana Public Service Commission (Commission) a *Motion for a Protective Order*, accompanied by the supporting Affidavit of Robert Brigham, seeking protection of information responsive to Data Request PSC-001. Specifically, CenturyLink QC sought to protect information regarding how it spent its 2013 and 2014 Frozen High Cost Support (FHCS).

2. On January 20, 2015, the Commission issued *Order 7388a* (Order), denying CenturyLink QC’s Motion. The Commission pointed out that the Federal Communications Commission (FCC) has directed an increasing percentage of high cost support to areas substantially unserved by an unsubsidized competitor. *In re Connect Am. Fund*, 26 FCC Rcd 17663, ¶ 150 (F.C.C. 2011); Or. 7388a ¶ 23 (Jan. 20, 2015). The Commission asserted that the areas in which CenturyLink QC is supposed to be making investments using high cost support are expensive to serve, and that there is little or no competition in those areas. Or. 7388a ¶ 24.

3. Based on the above, the Commission concluded that the information did not derive independent economic value from its secrecy, and did not derive a competitive advantage

from its secrecy. Therefore, the Commission concluded the information was not trade secret, and denied CenturyLink QC's request for protection.

4. On February 9, 2015, CenturyLink QC filed its *Motion for Reconsideration* (Motion) and Affidavit of Robert Brigham (Affidavit). Specifically, CenturyLink QC seeks reconsideration of the Commission's Order regarding Exhibit 5, which, according to CenturyLink QC, "includes competitively sensitive capital investment data by project by exchange." Mot. at ¶ 3.

5. On March 17, 2015, the Commission held a regularly scheduled work session to discuss and act on CenturyLink QC's Motion.

DISCUSSION

6. Admin. R. Mont. 38.2.4806(1) states that within ten days after an order has been issued by the Commission, any party may apply for reconsideration. If such a motion is filed, and the Commission decides that the original order is unjust or unwarranted, or should be changed, the Commission may change or modify its order. Admin. R. Mont. 38.2.4806(3) (2015).

7. 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.*

8. 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.

9. 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.

10. 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.

11. “Trade secret” is defined by Mont. Code Ann. § 30-14-402 (2013), 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.”

12. 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).

13. CenturyLink QC provides two rationales for the protection of Exhibit 5. First, Robert Brigham in his Affidavit argues that:

...the Information in Exhibit 5 contains granular, location-specific data showing where CenturyLink has upgraded its HSI [High Speed Internet] capability. Knowledge of this data would allow a potential competitor to more effectively compete with CenturyLink for broadband customers, and to target specific areas for expansion or upgrade of facilities. The Information in Exhibit 5 contains granular, location-specific data about CenturyLink’s investment in broadband capable infrastructure to which competitors do not have access. Knowledge of this data would allow a potential competitor to plan its own network infrastructure deployments to more effectively compete with CenturyLink for customers.

Aff. Robert Brigham ¶ 10 (Feb. 6, 2015).

14. Second, Robert Brigham argues that Exhibit 5 data shows the exact geographic location of CenturyLink HSI facilities, and asserts that making such information available to the public could result in theft, vandalism, and sabotage of the equipment. *Id.* at ¶ 11.

15. Regarding the first assertion, the Commission has protected granular geographic information regarding network investments funded by Universal Service Fund (USF) High-Cost Support in areas in which the applicant has shown there is competition. Conversely, where there has been no convincing argument regarding the presence of competition, the Commission has taken the position that information regarding the expenditures of USF High-Cost support should be transparent and available to the public. *See* Dkt. N2014.4.45, Or. 7257e.

16. CenturyLink QC has categorized its exchange network investments on Exhibit 5 into three categories, including: (1) exchanges that are not served as defined by the FCC, exchanges that are 90-100% unserved (or 0-10% served); and (2) exchanges that are 60-89% unserved (or 21-40% served).

17. Regarding the exchanges where investments were made with CenturyLink QC Connect America Fund (CAF) Phase I Round I Incremental Support Company Copay, CenturyLink QC acknowledges those areas are currently defined as unserved by an unsubsidized competitor by the FCC. CenturyLink does argue in its motion that that there is no basis to conclude that there is not competition in those areas because there may be providers competing with CenturyLink. *Mot.* at ¶ 7. CenturyLink QC asserts that there may be providers in an area who are offering HIS that is below 4 Mbps which is the FCC standard to be considered an unsubsidized competitor. Conversely, CenturyLink QC offers no evidence that there is such competition.

18. CenturyLink QC also asks to protect the exchange area investment detail in exchange areas that are 60% or more substantially unserved. CenturyLink QC utilized the National Broadband Map in making its percent unserved analysis for each exchange which shows at the census block level whether that census block is served or unserved. However, the Commission, for sake of consistency and lack of better information, will reply upon the FCC determination as to what is an unserved area of the exchange areas where investments were made utilizing CAF Phase I Round I Incremental Support Company Copay funds. Therefore, CenturyLink QC has demonstrated that the information derives independent economic value

from its secrecy, or that competitive advantage is derived from its secrecy, in the exchange areas that are more than 60% unserved.

19. Regarding Robert Brigham's second assertion, the Commission agrees that due to network security concerns, all location information should be redacted from the public version of Exhibit 5.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED THAT:

20. CenturyLink CQ's Motion for Reconsideration is hereby GRANTED in part and DENIED in part;

21. CenturyLink QC's request for protection of Exhibit 5 is GRANTED with regards to exchange areas that are more than 60% unserved;

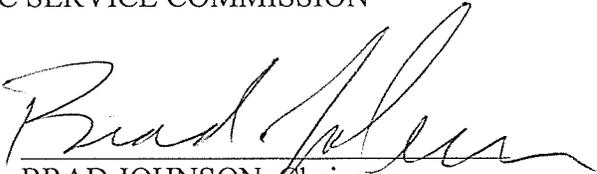
22. CenturyLink QC's request for protection for Exhibit 5 information for exchanges funded by CenturyLink QC CAF Phase I Incremental Support Company Copay is DENIED.

23. All Exhibit 5 exchange information provided for exchange investments funded by the CenturyLink QC CAF Phase I Incremental Support Company Copay must have the geographic location information redacted;

24. CenturyLink QC must produce the information consistent with this Order within 10 calendar days of the service date of this Order.

DONE AND DATED this 17th day of March, 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)



Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2014.11.91, Order No. 7388g

Order Action Date: March 17, 2015

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented