

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

In the matter of,

Joint Application of Qwest Communications
International Inc. and CenturyTel, Inc. for
Approval of Indirect Transfer of Control of
Qwest Corporation, Qwest Communications
Company, LLC, and Qwest LD Corp.

Docket No. UT-100820

SUPPLEMENTAL REBUTTAL TESTIMONY

OF

ROBERT H. BRIGHAM

ON BEHALF OF

QWEST COMMUNICATIONS INTERNATIONAL, INC.

November 15, 2010

1 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND POSITION**
2 **WITH QWEST.**

3 A. My name is Robert H. Brigham. My business address is 1801 California Street,
4 Denver, Colorado, and I am currently employed by Qwest Corporation (“QC”) as a
5 Staff Director in the Public Policy department.

6

7 **Q. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY IN THIS**
8 **PROCEEDING?**

9 A. Yes. On November 1, 2010, I filed rebuttal testimony in this proceeding.

10

11 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

12 A. The purpose of my testimony is to respond to the Supplemental Responsive
13 testimony presented by Mr. James Appleby on behalf of Sprint Nextel Corporation
14 on November 1, 2010. As I will demonstrate, his claims the combined company
15 will be able to exert “unwarranted” market power” are not supported by any
16 evidence and should be given no weight by the Commission.

17

18 **Q. WHAT IS THE MAJOR THRUST OF MR. APPLEBY’S TESTIMONY?**

19 A. Mr. Appleby has reviewed the Hart-Scott-Rodino (“HSR”) documents provided by
20 the Joint Petitioners on or about October 12, 2010. He summarizes the content of
21 these materials, which include internal communications and merger planning
22 documents that in many cases outline the benefits that are anticipated to be
23 achieved by the merger. Based on his review, he concludes the post-merger
24 company will have “significant opportunities to wield market power” due to the
25 combination of networks and the resulting “owner’s economics” that the firm will

1 realize.¹ He also argues that “the combined network will enable significant revenue
2 opportunities such as broadband internet service, internet protocol television and
3 Fiber to the Cell (FTTC)”² that will allegedly increase the “market power” of the
4 combined company. According to Mr. Appleby, the new documents he has
5 reviewed demonstrate that the “merger will lead to increased market power that
6 could harm the competitive marketplace.”³

7
8 **Q. IN YOUR VIEW, DO ANY OF THE NEW DOCUMENTS THAT MR.**
9 **APPLEBY HAS REVIEWED SUPPORT THE PROPOSITION THAT THE**
10 **MERGED COMPANY WILL BE ABLE TO EXERCISE MARKET POWER**
11 **THAT WOULD HARM COMPETITION OR THE PUBLIC INTEREST IN**
12 **WASHINGTON?**

13 A. No. As I demonstrated in my rebuttal testimony, there is no basis for Mr.
14 Appleby’s claim that the post-merger company will be able to exercise market
15 power to the detriment of competition and the public interest in Washington. As
16 described below, nothing in the documents reviewed and described by Mr. Appleby
17 provide any new evidence that would lead to a different conclusion. Mr. Appleby
18 provides no evidence—in this testimony or his earlier filed testimony—that the
19 post-merger firm will have ‘unwarranted’ market power or be able to act in an anti-
20 competitive or discriminatory manner in Washington.

21

¹ Supplemental Responsive Testimony of James A. Appleby (“Appleby Supplemental”), pp. 1-2.

² *Id.*, p. 2.

³ *Id.*, p. 3.

1 **Q. WHAT IS THE CRITICAL FLAW IN MR. APPLEBY’S “MARKET**
2 **POWER” TESTIMONY?**

3 A. Based on his testimony, it appears that Mr. Appleby misunderstands the economic
4 concept of “market power.” Throughout his testimony, he cites the benefits that the
5 companies hope to achieve based on completion of the merger, and argues that
6 these benefits, if realized, would result in “unwarranted” market power.⁴ It is
7 certainly true that CenturyLink and Qwest hope to achieve benefits, including
8 increased revenues, network efficiencies and synergies as described in the Joint
9 Petitioners’ testimony and in the new information cited by Mr. Appleby. However,
10 Mr. Appleby confuses merger benefits with the concept of market power. The fact
11 that the merger may allow for new revenue streams or a reduction in certain costs—
12 the goal of any merger—does not in any way translate into a post-merger company
13 with “unwarranted” market power.

14

15 **Q. DOES MR. APPLEBY DEFINE “MARKET POWER?”**

16 A. No. He simply assumes that if the merger will provide benefits to the new
17 company—such as new revenues or cost savings—then the company will have
18 increased and “unwarranted” market power.

19

20 **Q. PLEASE DEFINE “MARKET POWER.”**

21 A. Market power is generally defined as the ability of a firm to profitably raise prices
22 above *competitive* levels for more than a transitory period of time. The latest
23 Horizontal Merger Guidelines (“HMG”) released by the Department of Justice

⁴ Mr. Appleby refers to the merged firm gaining “unwarranted” market power. Appleby Supplemental, p. 3.

1 (“DOJ”) and Federal Trade Commission (“FTC”) state: “A merger enhances
2 market power if it is likely to encourage one or more firms to raise price, reduce
3 output, diminish innovation, or otherwise harm customers as a result of diminished
4 competitive constraints or incentives.”⁵

5
6 **Q. BASED ON THE PROPER DEFINITION OF “MARKET POWER” IS**
7 **THERE ANY NEW INFORMATION PROVIDED BY MR. APPLEBY THAT**
8 **WOULD DEMONSTRATE THAT THE POST-MERGER COMPANY**
9 **WOULD BE ABLE TO EXERCISE “UNWARRANTED” MARKET**
10 **POWER?**

11 A. No. Nothing in the new information presented by Mr. Appleby leads to the
12 conclusion that the post-merger company will have increased “market power” based
13 on the concept as properly defined. Just because the new company may be stronger
14 in some respects does not mean that it will have the market power to “raise price,
15 reduce output, diminish innovation, or otherwise harm customers.” The DOJ
16 agrees. As I pointed out in my rebuttal testimony, on July 15, Qwest and
17 CenturyLink received notification from the Department of Justice and the Federal
18 Trade Commission that the merger review received early termination under the Hart
19 Scott Rodino Act. Thus, the proposed merger of Qwest and CenturyLink has
20 received clearance from an antitrust perspective,⁶ as the DOJ and FTC have
21 determined that there will not be a significant erosion of competition or undue
22 market power resulting from the merger.

⁵ Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Issued August 19, 2010, p. 2.

⁶ See Form 425 filed with SEC on July 22, 2010, available at: <http://investor.qwest.com/qcii-sec-filings>

1

2 **Q. MR. APPLEBY CLAIMS THE POST-MERGER COMPANY WILL ENJOY**
3 **ADDITIONAL “OWNER’S ECONOMICS” AND THAT THIS WILL LEAD**
4 **TO “UNWARRANTED” MARKET POWER. PLEASE COMMENT.**

5 A. One of the recognized benefits of the merger is that the company will be combining
6 networks and can bring more of the company’s traffic “on net,” thus reducing its
7 dependence on the purchase services from other vendors, as described by other
8 Joint Applicant witnesses. Mr. Appleby refers to this as realizing “owner’s
9 economics.” While Mr. Appleby cites “new” information to emphasize this merger
10 benefit, realizing “owner’s economics” is a benefit that was identified by the Joint
11 Applicants when the merger was announced.⁷ In fact, moving services “on-net” is a
12 recognized benefit of virtually all telecommunications mergers. While the post-
13 merger company may save money by self-provisioning additional facilities and
14 avoiding some charges to other providers, Mr. Appleby has provided no evidence
15 that this will provide the post-merger company with additional market power, i.e.,
16 the ability to “raise price, reduce output, diminish innovation, or otherwise harm
17 customers.”

18

19 **Q. DO OTHER FIRMS IN THE INDUSTRY SEEK TO TAKE ADVANTAGE**
20 **OF “OWNER’S ECONOMICS?”**

21 A. Yes. All firms in the industry, with the possible exception of pure resellers, enjoy
22 “owner’s economics” to some extent and may move traffic “on-net” in order to
23 decrease costs or maintain control over facilities. Many companies, including

⁷ E.g., Investor Presentation, April 22, 2010, p. 10. See
<http://www.centurylinkwestmerger.com/downloads/presentations/Investor%20Presentation-4-22-10.pdf>.

1 Sprint and a number of CLECs have built their own facilities in many instances
2 rather than purchasing facilities from another provider such as Qwest. Seeking to
3 take advantage of owner's economics is not a remarkable or anti-competitive
4 action, and does not increase the post-merger company's market power. The mere
5 fact that the acquisition of Qwest by CenturyLink may allow the combined
6 company to move more traffic "on-net," thus avoiding some payments to other
7 carriers, provides no justification for Mr. Appleby's claim that the merged company
8 will gain "unwarranted" market power.

9
10 **Q. MR. APPLEBY CLAIMS THAT THE MERGED FIRM WILL ENJOY**
11 **EXCESSIVE MARKET POWER DUE TO ITS ALLEGED "CONTROL OF**
12 **LOCAL ACCESS FACILITIES"⁸ DO YOU AGREE?**

13 A. No. Qwest today, and the combined company in the future, does not have
14 excessive market power based on "control" of local access facilities. First, as I
15 described in my rebuttal testimony, Qwest is subject to Sections 251, 252 and 271
16 of the Telecommunications Act and must provide unbundled network elements to
17 CLECs at TELRIC-based prices, except where "non-impairment" has been declared
18 based on the FCC's Triennial Review Remand Order ("TRRO") criteria. In
19 Washington, only one wire center—Seattle Main—has been declared non-impaired
20 for DS1 and/or DS3 loops.⁹ In this "non-impaired" wire center, CLECs may
21 purchase last mile facilities at non-TELRIC-based rates per Section 271 of the
22 Telecommunications Act. In addition, switched access and special access services

⁸ Appleby Supplemental, p. 10.

⁹ See Qwest Wholesale web site at
http://www.qwest.com/wholesale/downloads/2010/100111/Non_Impaired_Wire_Center_12_23_09.xls.

1 are available from Qwest at just and reasonable rates in all areas.¹⁰ Further, as
2 described in my rebuttal testimony, there are numerous non-ILEC options available
3 to Sprint and other carriers to obtain last-mile access in Washington.¹¹ As Mr.
4 Appleby himself acknowledges, “the monopoly era is over and carriers are
5 competing with the ILECs for local services.”¹² Mr. Appleby fails to provide any
6 evidence to support his claim that “regulation has failed to control the market power
7 that the Merged firm will possess.”¹³

8
9 **Q. DOES MR. APPLEBY CLAIM THAT THE POTENTIAL POST-MERGER**
10 **PROVISION OF BROADBAND SERVICES AND IPTV SERVICES WILL**
11 **INCREASE THE POST-MERGER COMPANY’S MARKET POWER TO**
12 **UNACCEPTABLE LEVELS?**

13 A. Yes. Mr. Appleby notes that “additional non-voice services will help the merged
14 firm compete in the market,”¹⁴ and he claims that somehow the provision of these
15 services will increase the firm’s market power to the detriment of customers and the
16 market. This claim is erroneous for several reasons. First, no reasonable argument
17 can be made that Qwest or CenturyLink has significant market power in the
18 broadband or video market today, given that DSL broadband connections—like
19 those offered by Qwest and CenturyLink—represented only 22% of broadband

¹⁰ Intrastate switched access rates are regulated by the Washington Commission and are contained in state tariffs, while interstate switched access rates are regulated by the FCC and contained in federal tariffs. Intrastate special access rates are not price regulated by the Washington Commission, and are contained in Washington QC Private Line Transport Services Catalog No. 2.

¹¹ Rebuttal Testimony of Robert Brigham, pp. 24-25.

¹² Appleby Supplemental, p. 10.

¹³ *Id.*

¹⁴ Appleby Supplemental, p. 14.

1 connections in the state as of June 2009,¹⁵ and that the companies have virtually no
2 facilities-based presence in the video market in the state.¹⁶ Second, customers will
3 certainly not be harmed if the merged company dedicates additional financial
4 resources to expanding its Fiber to the Node (“FTTN”) network to facilitate
5 offering broadband or IPTV services to additional customers. Consumers in
6 Washington would clearly benefit if the post-merger company were better able to
7 compete with cable companies such as Comcast in the broadband and video
8 markets, and the large wireless providers such as AT&T and Verizon in the
9 broadband market.

10
11 Mr. Appleby argues that the merged company is not “solely a provider of local
12 service” but is instead becoming a broadband provider—as if this represents new
13 information that Joint Applicants would disagree with.¹⁷ However, Qwest has been
14 marketing itself as a “broadband company” for the past several years, and clearly
15 sees the future success of the company as tied to providing broadband services. I
16 am not sure what point Mr. Appleby is making, but if his point is that the future
17 company will be focused on broadband services or applications such as IPTV, I
18 agree with him. As noted above, this movement to broadband does not increase the
19 company’s market power.

¹⁵ *Internet Access Services Status as of June 30, 2009*, Industry Analysis and Technology Division Wireline Competition Bureau, September 2010, Table 14. As of June 30, 2009, the FCC reported 573,000 ADSL connections, 687,000 cable modem connections and 510,000 mobile broadband connections out of a total of 1.8 million.

¹⁶ Qwest does resell DirecTV service, but does not provide any facilities-based video service.

¹⁷ Appleby Supplemental, p. 15.

1 **Q. MR. APPLEBY CLAIMS THE POST MERGER COMPANY MAY**
2 **REALIZE HIGHER REVENUES, HIGHER ARPU AND GREATER**
3 **PROFIT MARGINS, AND THAT THIS INCREASES ITS MARKET**
4 **POWER. PLEASE COMMENT.**

5 A. Qwest and CenturyLink certainly hope that the merger will provide the financial
6 benefits Mr. Appleby describes, as this is the primary basis for the merger.
7 Obviously, the parties would not have moved forward with the merger unless they
8 saw future benefits such as those described in the documents provided to Mr.
9 Appleby. If these goals are realized, the company will be financially healthier, and
10 will be better able to provide the new and innovative services customers demand.
11 This is in the public interest.

12
13 However, if the merged company meets its financial goals and improves its
14 revenues, ARPU and profit margins, this does not mean that it will have
15 “unwarranted” market power as alleged by Mr. Appleby. Contrary to Mr.
16 Appleby’s theory, there is no basis to assume that a company that improves its
17 financial standing can exert market power in a manner that is detrimental to
18 customers or the public interest—especially when it operates in an intensely
19 competitive industry such as telecommunications.

20
21 Mr. Appleby claims that since the merged company projects it will be able to
22 collect more revenue based on its combined network, it should be required to
23 reduce its access charges in this proceeding.¹⁸ This reasoning is flawed on several
24 levels. First, as discussed in my rebuttal testimony and the rebuttal of other Joint

¹⁸ Appleby Supplemental, p. 19.

1 Applicant witnesses, there is no basis for requiring the merged company to share
2 any financial gains with other providers such as Sprint. Shareholders are risking
3 their capital in the two companies, and they should receive the financial rewards or
4 losses that would be incurred based on the Transaction. Second, the company
5 should not be forced to reduce its access revenues to compensate for the future
6 increases in revenues that the company hopes to attain. Mr. Appleby is essentially
7 making a “revenue requirement” argument, recommending that the Commission
8 impose reductions in current revenues that would offset projected (but not
9 guaranteed) future increases in revenue streams. This is completely inappropriate
10 to say the least, since the Qwest subsidiary is and will be regulated under an AFOR.
11 Even if the company were rate of return regulated, there would be no justification
12 for reducing current revenues based on projected future earnings.

13
14 **Q. MR. APPLEBY DISCUSSES FIBER TO THE CELL SITE (“FTTC”) AND**
15 **CLAIMS THAT “THE MERGED FIRM CAN USE ITS NEAR MONOPOLY**
16 **MARKET SHARE OF LOCAL ACCESS FACILITIES TO CONTINUE TO**
17 **DOMINATE THE WIRELESS BACKHAUL MARKET INTO THE**
18 **FUTURE.”¹⁹ PLEASE RESPOND.**

19 A. Mr. Appleby’s characterization of the wireless backhaul market is erroneous; this
20 market is highly competitive today and will continue to be so in the future. Mr.
21 Appleby is correct that the demand for wireless backhaul bandwidth is increasing
22 rapidly, as customers utilize more “smartphone” wireless broadband applications.
23 However, he is wrong when he states that wireless carriers will rely solely on
24 special access provided by ILECs for these connections. As described in my

¹⁹ Appleby Supplemental, p. 21.

1 rebuttal testimony, Qwest and other providers are negotiating commercial
2 agreements with wireless providers to *build* fiber backhaul facilities *that are not in*
3 *place today*. In each case, the provision of the facilities is based on freely
4 negotiated contracts—not special access or other tariffs. Since the facilities are not
5 in place today, each competitive bidder must seek a contract that would gain the
6 business, but would allow for recovery of the significant capital expenditure over a
7 period of the contract. Qwest or any provider must risk capital to deploy these
8 facilities. The company is hopeful that the additional financial strength of the
9 combined company will provide the resources for additional builds to meet
10 burgeoning wireless broadband demand. The negotiation of FTTC contracts
11 provides a vivid example of how competitive markets work.

12
13 Contrary to the claims of Mr. Appleby, numerous companies are competing to
14 provision fiber wireless backhaul facilities in Qwest’s territory. On October 26,
15 2010, Qwest filed an ex parte with the FCC that describes the nature of this highly
16 competitive market. I am attaching, as Exhibit RHB-3, a redacted copy of this ex
17 parte and the Declaration of Beth A. Halvorson, which describes the competitive
18 wireless backhaul market and the nature of the Requests for Proposals (“RFPs”)
19 issued by wireless providers. As noted, wireless providers “are finding numerous
20 providers willing and able to provide these services, including cable providers,
21 CLECs and independent LECs.”²⁰ The Declaration states: “Within Qwest’s service
22 area, Cox and tw telecom have won a significant number of fiber backhaul bids for

²⁰ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-1 0593 - Ex Parte of Qwest, October 26, 2010, Declaration of Beth A. Halvorson, p. 2.

1 cell sites in AZ and NM. Qwest has also lost bids to Comcast (CO, MN), Iowa
2 Network Services (IA), Bresnan (MN), tw telecom (AZ, WA) and Cox (AZ).”²¹
3 The information in this ex parte demonstrates that the wireless backhaul market is
4 far different than described by Mr. Appleby.

5

6

IV. CONCLUSION

7

8 **Q. WHAT DO YOU CONCLUDE?**

9 A. As I have demonstrated, Mr. Appleby’s claims the post-merger company will be
10 able to exert “unwarranted” market power are not well founded. His citation of
11 “new” documents provided by Qwest and CenturyLink do nothing to support his
12 erroneous “market power” thesis. As the Joint Applicants have demonstrated, the
13 combination of Qwest and CenturyLink will enhance competition and consumer
14 choice in Washington, and therefore the merger is in the public interest.

15

16 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

17 A. Yes, it does.

18

²¹ *Id.*, p. 5.