

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

JOINT CLEC RESPONSE

TO

BENCH REQUEST NO. 5

January 3, 2011

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3 **BENCH REQUEST NO. 5:**

4 Please identify which of the initial commitments and conditions remain unaddressed by the
5 Integra Settlement.

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7 **JOINT CLEC RESPONSE TO BENCH REQUEST NO. 5**

8 XO Communications Services, Inc.; tw telecom of Washington, LLC; Pac-West Telecomm, Inc.;
9 McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services; Covad
10 Communications Company; Level 3 Communications, LLC; Cbeyond Communications LLC; and
11 Charter Fiberlink WA-CCVII, LLC (collectively, Joint CLECs) respond to Bench Request No. 5
12 as follows:

13 The most important conditions not addressed or addressed inadequately by the Integra Settlement
14 that should be added are:

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**1. The Merged Company will use and offer to wholesale customers
the legacy Qwest OSS for at least three years.**

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In the Qwest legacy territory, the Merged Company should use and offer to wholesale customers the legacy Qwest Operational Support Systems (“OSS”) for a minimum of *three* years following merger closing date (Joint CLEC Condition 19).¹ This is the absolute minimum time period associated with the three to five year integration/synergy timeframe CenturyLink has repeatedly forecasted. The Integra Settlement states that the Merged Company will use and offer to wholesale customers the legacy Qwest OSS for at least *two* years or until July 1, 2013, whichever is later (Integra Settlement Condition 12). The timeframe in the Integra Settlement is inadequate because it does not cover the minimum synergy timeframe, and as a result, CLECs would face significant risk of harm related to OSS post-merger.

¹ The Joint CLEC proposed conditions list is attached to the Responsive Testimony of Timothy J. Gates and marked as Exhibit TJG-9.

1 **2. Robust, transparent third party testing will be conducted for any**
2 **replacement OSS that replaces a Qwest system that was subject to**
3 **third party testing; and the replacement OSS should be required**
4 **to perform at current performance levels and in a manner that is**
5 **functionally equivalent to the current OSS for both Qwest and**
6 **CLECs (which will be benchmarked to measure future**
7 **performance).**

8 Absent from the Integra Settlement is any requirement for third-party OSS
9 testing. The Merged Company should be required to conduct independent
10 third-party testing similar to that used in the Regional Oversight
11 Committee process during the Qwest 271 proceedings for any OSS that
12 replaces a Qwest OSS that has undergone third-party testing. Third-party
13 testing is critical in determining the commercial readiness of OSS.
14 CenturyLink has never been through a Section 271 process and its systems
15 have never been found to be 271 compliant. The Commission should
16 require CenturyLink and Qwest to commit to the independent third-party
17 testing provisions of Joint CLEC Condition 19(b).²

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19 **3. The Applicable Time Periods for non-UNE commercial and**
20 **wholesale agreements and tariffs should be the Defined Time**
21 **Period³ initially proposed by Joint CLECs, or at a minimum, three**
22 **years.**

23 Many CLECs rely significantly on non-UNEs purchased from Qwest
24 under commercial and wholesale agreements and tariffs, including special
25 access, in order to provide services to customers in Washington. These
26 non-UNEs are typically the exact same facilities as their UNE counterparts
27 – the only difference is in the terms and rates under which those facilities
28 are provided. Therefore, it is essential for protections against merger-
29 related harm to cover the breadth and diversity of local competition as it
30 relates to the availability of wholesale services on which CLECs rely to
31 provide competitive local service. A primary problem with the Integra

² Joint CLEC proposed Condition 19(b) states: “For any Qwest system that was subject to third party testing (*e.g.*, as part of a Section 271 process), robust, transparent third party testing will be conducted for the replacement system to ensure that it provides the needed functionality and can appropriately handle existing and continuing wholesale services in commercial volumes. The types and extent of testing conducted during the Qwest Section 271 proceedings will provide guidance as to the types and extent of testing needed for the replacement systems. The Merged Company will not limit CLEC use of, or retire, the existing system until after third party testing has been successfully completed for the replacement system.”

³ “Defined Time Period” is defined in Exhibit TJG-9 as follows: “refers to a time period of at least 5-7 years after the Closing Date or, alternatively, a time period that is a minimum of 42 months (*i.e.*, 3.5 years) and continues thereafter until the Applicants are granted Section 10 forbearance from the condition. With respect to agreements, the Defined Time Period applies whether or not the initial or current term of an agreement has expired (‘evergreen’ status).” (footnotes omitted)

1 Settlement (Condition 3) is the Applicable Time Periods associated with
2 the non-UNE commercial and wholesale agreements and tariffs. The
3 Applicable Time Period represents the length of time by which the
4 wholesale agreement will be made available without
5 termination/grandparenting, changes to terms and conditions, or increases
6 in rates.⁴ The Applicable Time Periods in Integra Settlement Condition 3
7 for the non-UNE offerings are as follows:
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- 9 • Commercial Agreements: at least eighteen months (Integra Settlement
10 Condition 3(b))
- 11 • Wholesale Agreements: at least eighteen months (Integra Settlement
12 Condition 3(c))
- 13 • Intrastate Tariffs: at least twelve months (Integra Settlement Condition
14 3(d))

15 These time periods are significantly shorter than the minimum three-year
16 synergy timeframe, and are also significantly shorter than the minimum
17 three-year Applicable Time Period associated with interconnection
18 agreement extensions (Integra Settlement Condition 3(a)). These shorter
19 timeframes for non-UNE wholesale agreements place CLECs who rely on
20 them at a competitive disadvantage relative to other CLECs who purchase
21 wholesale services as UNEs and interconnection under Section 251 of the
22 Act, and therefore, receive a longer three-year period of service and rate
23 stability. CLECs should not be discriminated against or penalized because
24 of their mode of entry. Instead, the commitments related to wholesale
25 service availability and rate stability should be consistent for all wholesale
26 agreements, whether interconnection agreements, commercial agreements,
27 wholesale agreements, or tariffed products. The Commission should
28 condition merger approval on an extension of those agreements and tariffs,
29 at current prices, for a period that corresponds to the synergy timeframe
30 (see, Exhibit TJG-9, Joint CLEC Conditions 6(a), 7 and 7(a) and definition
31 of "Defined Time Period"). At an absolute minimum, these agreements
32 and tariffs should be extended for at least three years following merger
33 closing to match the minimum three-year synergy timeframe as well as the
34 three-year Applicable Time Period for interconnection agreements.

⁴ The Integra Settlement defines the "Extended Time Period" as the unexpired term or for at least the Applicable Time Period, whichever occurs later. Integra Settlement Condition 3.

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3 **4. Competitors should be permitted to adopt, or opt-into, any**
4 **interconnection agreement to which Qwest is a party, in the same**
5 **state, or in any state to which Qwest is an ILEC. (See Joint CLEC**
6 **Condition 29).**

7 Although the Integra Settlement includes several important conditions
8 related to interconnection agreements, it does not include all necessary
9 conditions that will ensure that competitors' transaction costs will not rise
10 as a result of the Merged Company's actions post-closing. In particular,
11 the lack of any interconnection agreement "porting" (also known as
12 "cross-state" adoption) provision constitutes a significant omission of
13 necessary conditions to ensure that competitors' transaction costs do not
14 increase as a result of the Proposed Merger. Joint CLECs are concerned
15 that interconnection agreement terms and rates may not be stable over the
16 foreseeable future because the Merged Company may use its size and
17 market power to force competitors into negotiations of a new agreement.
18 This is particularly true for competitors that operate in multiple
19 CenturyLink and Qwest service areas, and who therefore have many
20 different agreements (on a state-by-state basis) with both Qwest and
21 CenturyLink. Joint CLECs are also concerned that the Merged Company
22 may direct its integration efforts to the detriment of wholesale customers
23 by withdrawing services, or significantly changing the offerings Qwest
24 currently makes available. To address these concerns the Commission
25 should adopt an additional condition that permits a competitor to adopt, or
26 opt-into, any interconnection agreement to which Qwest is a party, in the
27 same state, or in any state to which Qwest is an ILEC, subject to state-
28 commission required terms and pricing being included in the ported
29 agreement. Such a condition would reduce competitors' transaction costs
30 by permitting competitors to operate in Washington under the terms of an
31 agreement that may have been first negotiated in Oregon, or some other
32 Qwest state.
33

34 **5. A condition that provides CLECs with the right to utilize a single**
35 **point of interconnection per LATA for all of the Merged**
36 **Company's entities operating within that LATA, provided that**
37 **this condition only applies to those places where the Merged**
38 **Company chooses to interconnect the networks of its affiliates**
39 **within the LATA. (See Joint CLEC Condition 28).**

40 The Integra Settlement does not address concerns that are unique to
41 facilities-based wireline competitors providing competitive services to
42 primarily residential customers in smaller towns and communities in

1 Washington. Specifically, the Integra Settlement has no conditions that
2 address concerns related to inadequate single point of interconnection
3 issues. The Integra Settlement does not have any language that addresses
4 the concerns raised by CenturyLink's burdensome, costly and inefficient
5 practice of requiring CLECs to establish multiple points of interconnection
6 per LATA. The Commission can address the Joint CLECs' concerns with
7 respect to single point of interconnection by adopting an additional
8 condition which gives CLECs the option to interconnect with the Merged
9 Company at a single point of interconnection per LATA. Notably, the
10 Joint CLECs have revised their proposed condition to apply *only* where
11 the Merged Company's affiliates' networks are interconnected. The
12 significance of this additional limitation is that it substantially limits the
13 application of the condition. Specifically, the Merged Company could
14 require competitors to interconnect at several points in the same LATA if
15 there were no facilities connecting the Merged Company's networks in
16 that LATA. However, if the Merged Company establishes facilities
17 between several of its ILEC service areas in the same LATA, the Merged
18 Company would have the ability to carry its own traffic between such
19 areas. If it has the ability to carry its own traffic, then it should also be
20 required to carry the traffic of competitors that choose to interconnect at
21 only one point on the Merged Company's network. This basic principle
22 reflects the well established non-discrimination standard under Section
23 251, which requires the incumbent LEC to provide interconnection to the
24 competitive LEC on terms that are equivalent to what the incumbent
25 provides itself.
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27 **6. The Merged Company should commit to comply with federal and**
28 **state law as it relates to its directory assistance and directory**
29 **listings responsibilities in all of its ILEC territories just as Qwest**
30 **currently does today. (See Joint CLEC Condition 23 in Exhibit**
31 **TJG-9).**

32 The Integra Settlement does not address any of the Joint CLECs' concerns
33 related to the directory listing and assistance practices of the merging
34 entities. In particular, the Settlement fails to address any of the Joint
35 CLECs' concerns with respect to CenturyLink's failure to provide
36 wholesale access to directory listing and directory assistance functions in a
37 nondiscriminatory manner. There is not a single provision in the
38 Settlement that secures a commitment that the Merged Company will
39 comply with existing federal law with respect to its responsibilities to
40 provide nondiscriminatory access to directory listing and directory
41 assistance, or that the Merged Company will not attempt to shift its
42 directory listing and directory assistance responsibilities to a third party
43 vendor and then claim that it no longer has any such responsibilities under

1 the Act. The Joint CLECs have proposed a condition (i.e., CLEC
2 Condition 23) that would require the Joint Applicants to commit to
3 comply with federal and state law as it relates to their directory assistance
4 and directory listings responsibilities in all their ILEC territories just as
5 Qwest currently does today. Currently Qwest allows CLECs to submit
6 Directory Service Requests to retain, add or change a CLEC directory
7 listing in the white and yellow pages directories that Qwest causes to be
8 published for its own customers, without charge (although Qwest's recent
9 industry notice suggests this may change). In addition, the listing
10 automatically flows to its directory listing database which ensures that the
11 CLEC's customers' name, address and/or phone numbers can be obtained
12 by Qwest's customers when they dial Qwest's directory assistance number
13 requesting a CLEC customer's number.

14 **7. A commitment that prevents CenturyLink from avoiding its**
15 **obligations as an ILEC under Section 251(c) by using the rural**
16 **exemption as a shield against network interconnection obligations**
17 **which promote competition. (See Joint CLEC Condition 12, 10.b**
18 **and footnote 5).**

19 Integra Settlement Condition 6 states that in the legacy ILEC Qwest
20 territories the Merged Company will not seek to avoid any of its
21 obligations on the grounds that Qwest Corporation is exempt from such
22 obligations pursuant to Section 251(f)(1) or (f)(2) of the Communications
23 Act. This condition of the Integra Settlement does not adequately address
24 Joint CLECs' concerns with CenturyLink's current practice of using the rural
25 exemption in an anticompetitive manner. Although the Integra Settlement
26 addresses the rural exemption issue, it is limited to the rural exemption's
27 application to only the "Qwest ILEC service territory."⁵ Because this
28 condition only applies to Qwest and not CenturyLink, it is of limited utility to
29 competitors who provide service in Washington's smaller, less densely
30 populated communities in competition with CenturyLink. CenturyLink's
31 assertion of the rural exemption has the effect of increasing operational
32 costs for such competitors. The Commission should go beyond the limited
33 terms of the Integra Settlement by securing commitments from the
34 Merged Company to waive its right to seek exemption for rural telephone
35 companies under Section 251(f)(1), and to waive its right to seek
36 suspensions and modifications for rural carriers under Section 251(f)(2)
37 of the Act.

38 **8. The extension of non-UNE commercial and wholesale agreements**
39 **and tariffs, including term and volume discount plans, should**
40 **apply to wholesale agreements in place as of the merger filing date.**

⁵ Integra Settlement Agreement at ¶ 6.

1 **As noted in (3) above, the minimum time period for these**
2 **agreements should be three years.**

3 Integra Settlement Condition 3(d)(i) states that term and volume discount
4 plans “offered by Qwest as of the Closing Date” will be extended by
5 twelve months beyond the expiration date of the then existing term (unless
6 the CLEC opts out). The phrase “offered by Qwest as of the Closing
7 Date” presents a problem for CLECs who rely on Qwest’s Regional
8 Commitment Plan (RCP) Agreements. Qwest grandfathered RCP in June
9 2010, and replaced it with a new RCP that would result in significantly
10 higher costs for CLECs. Qwest is now arguing that the existing RCP
11 Agreements with CLECs (which are based on the now-grandfathered
12 RCP) are no longer “offered by Qwest as of the Closing Date,” so the
13 CLECs’ current RCP Agreements are not eligible for extension. Based on
14 Qwest’s position, there would be no extension for CLECs’ existing RCP
15 Agreements under the conditions of the proposed Integra Settlement.
16 Likewise, if a CLEC’s existing RCP Agreement expires before the
17 Closing Date, the CLEC would be unable to extend its existing RCP
18 Agreement with Qwest and be forced on to the new RCP that increases the
19 CLEC’s costs and negatively impacts its ability to compete. Under the
20 Integra Settlement, some CLECs are entitled to no protection (or less
21 protection than other CLECs) from merger-related harm just because the
22 arbitrary expiration date in the CLEC’s agreement with Qwest is before
23 the arbitrary (and unknown) merger closing date.

24 **9. The Additional PAP (“APAP”) should apply in addition to the**
25 **QPAP. The APAP is set forth and explained in greater detail in**
26 **Attachment A hereto).**

27 The Integra Settlement fails to include the Joint CLECs’ proposed
28 Condition 4(a) under which an “Additional PAP” or “APAP” would apply
29 if the Merged Company failed to provide wholesale service quality at
30 levels Qwest provided prior to the merger. The APAP is a minimum five-
31 year performance assurance plan applicable to the legacy Qwest ILEC
32 territory which would compare the Merged Company’s monthly
33 performance with the Qwest performance that existed in the twelve
34 months prior to the merger filing date. This comparison would be made
35 using the current Washington Performance Indicators (“PIDs”), products
36 and disaggregation, as well as the same statistical methodology that exists
37 in the Qwest Washington Performance Assurance (“QPAP”) to determine
38 whether a statistically significant deterioration in performance exists. The
39 QPAP was designed to capture discriminatory treatment, not merger-
40 related service quality deterioration, and as such, the QPAP compares
41 *wholesale* service quality to *retail* service quality. This comparison would
42 not capture or address deterioration in wholesale service quality related to

1 the merger, particularly if both retail and wholesale service quality
2 deteriorated post-merger. To properly capture merger-related
3 deterioration in wholesale service quality, pre-merger wholesale service
4 quality must be compared to post-merger wholesale service quality, as the
5 APAP does. Moreover, the APAP provides financial incentives in the
6 form of APAP remedy payments for merger-related wholesale service
7 quality deterioration. These remedies would provide the necessary
8 incentives to the Merged Company to not pursue merger savings at the
9 expense of wholesale service quality or pay current QPAP remedies as a
10 cost of doing business. These remedies would also provide incentives to
11 the Merged Company to move quickly to resolve wholesale service quality
12 problems if/when they occur during integration so as to limit the resulting
13 harmful effects on CLECs and end user customers.

14
15 **10. The moratorium on Qwest requests to reclassify wire centers as**
16 **“non-impaired” and requests for forbearance should apply for the**
17 **Defined Time Period initially proposed by Joint CLECs.**

18 While the Joint CLECs agree with moratoriums on non-impairment filings
19 and petitions for forbearance to address merger-related harm, the time
20 period of proposed Integra Settlement Condition 8 is too short and
21 arbitrary. If the proposed transaction is ultimately approved in the first
22 quarter of 2011, as CenturyLink and Qwest are hoping, the June 1, 2012
23 expiration date results in an effective moratorium of about 15 months.
24 This falls far short of the three-to-five year time period during which the
25 Merged Company will be integrating the two companies and pursuing
26 merger-related synergy savings. Joint CLECs have proposed in Condition
27 14 that such moratoriums should remain in effect for the Defined Time
28 Period, which corresponds to the synergy timeframe. Under no
29 circumstances should the timeframe of this commitment be less than three
30 years. The timeframe proposed by Joint CLECs is sufficient in length
31 because it covers the synergy timeframe, and is objective because it is
32 based on CenturyLink’s own projections.

33 **11. A Most Favored State condition should be adopted.**

34 The Commission should adopt the Most Favored State (“MFS”) condition
35 proposed by Joint CLECs as Condition 29 (see Exhibit TJG-9) This
36 condition would ensure that the public interest benefits obtained as a result
37 of conditions agreed to by CenturyLink/Qwest in other jurisdictions, or at
38 the FCC, can also be applied in Washington. The MFS condition provides
39 a proper balance between the interest of CenturyLink and Qwest to secure
40 regulatory approval of the merger on a shortened timeframe and the

1 interest of the Commission to ensure that approval of the merger is in the
2 public interest. In the alternative, the Commission could simply wait until
3 all other jurisdictions have ruled on the proposed transaction before
4 rendering its decision. Absent the proposed MFS condition, this is the
5 only way for the Commission to ensure that Washington consumers
6 receive the benefits and protections afforded to consumers elsewhere.

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8 **Additional Conditions Proposed By PacWest:**

9 PacWest supports the conditions set forth above. In addition to these conditions, PacWest
10 requests the Commission impose the following conditions⁶ that are not addressed by the Integra
11 Settlement:

12 **1. The Merged Company Should Be Required to Pay Compensation On**
13 **VNXX Traffic.**

14
15 The Commission should require that the Merged Company abide by all
16 Commission and FCC Orders relating to VNXX traffic, including the reciprocal
17 compensation requirements of Section 251(b)(5) and the FCC's November 2008
18 Order on Mandamus. The Merged Company shall pay reciprocal compensation for
19 the termination of traffic sent to an ISP in accordance with the Core ISP Order and
20 shall cease any demands for repayment in a manner inconsistent with that Order.
21 The Merged Company will also not pursue claims for originating access for such
22 traffic in a manner inconsistent with the Core ISP Order.
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24 **2. The Commission should require the Merged Company offer the same Voice**
25 **over Internet Protocol traffic termination ICA amendment rates, terms**
26 **and conditions to all CLECs on a non-discriminatory basis.**

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⁶ See Responsive Testimony of James C. Falvey, Exhibit JCF-1T, pp. 10 – 21.

1 Respectfully submitted this 3rd day of January , 2011.

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