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October 22, 2010

VIA ELECTRONIC FILING **EX PARTE**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a CenturyLink for Consent to Transfer of Control, WC Docket No. 10-110

Dear Ms. Dortch:

PAETEC Holding Corp., on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC, and McLeodUSA Telecommunications Services, L.L.C. (collectively "PAETEC"), submits this letter to address arguments raised in reply comments and ex parte filings by CenturyLink, Inc. and Qwest Communications International Inc. (collectively "Applicants"). On July 12, 2010, PAETEC filed Comments in this Docket jointly with 11 other CLECs ("Joint Commenter Comments"). Applicants filed a reply on July 27, 2010 (Applicants' Reply Comments") and have filed several ex partes since then. This letter will supplement the Joint Commenter Comments, will respond to Applicants' Reply Comments and ex partes, and will address matters raised in ex partes by other parties.

I. Introduction

The record of this proceeding, while incomplete, shows that the proposed merger of large national incumbent LECs, one of which is comprised of BOCs subject to Section 271, will not serve the public interest absent substantial conditions. The merger will result in structural injury because it will eliminate actual and potential competition between CenturyLink and Qwest, generate a Merged Company with an larger "footprint" that has increased ability and incentive to discriminate against its competitor-customers such as PAETEC, and will eliminate important benchmarks that the FCC and state commissions can use to evaluate Applicants' compliance with the pro-competitive conditions of the Telecommunications Act of 1996.

Although substantial conditions are required both to minimize and to offset the harm to competition that will result from the merger, Applicants have not offered a single condition, only a commitment in Reply Comments that they

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will not change their OSS for the first year after the merger. This is giving away the proverbial "sleeves off their vest," since Applicants admit the matter has to be studied, and CenturyLink is still busy integrating the OSS of Embarq and CenturyTel.

Instead, Applicants have resisted the imposition of numerous conditions that have been imposed in many or all other mergers involving BOCs and of this many or more access lines. Their claims that everything will work smoothly and that no competitor will be competitively disadvantaged by the merger are hollow, in light of the dismal experience of other recent mergers, in each of which the applicants made similar promises.

II. Injury to Competition

Injury to competition will result from the merger of both a structural nature and a merger-specific nature. The former is the simple result of the merger of two large carriers, with partially overlapping and heavily adjacent territories. The latter results from aspects of the merger peculiar to the attributes of the Applicants, such as CenturyLink's apparent intent to replace Qwest's OSS with its own.

A. Structural Injury to Competition

Applicants misconstrue the Joint Commenter Comments regarding industry to competition that will result from the approval of the merger. Joint Commenters cited the Commission's "big footprint" and "loss of benchmarks" theories as justifying conditions that will offset the competitive harm resulting from the merger, not as a basis for denying approval of the merger entirely.[1] Yet Applicants argue that these are not reasons to deny approval entirely,[2] thereby knocking down a "straw man" argument that Joint Commenters and others never made.

As to the Commission's "big footprint" theory, Applicants assert that the Commission has "repeatedly rejected attempts to hold up" mergers based on this theory, citing the Commission's *AT&T/BellSouth Order*.[3] In that very order,

[1] Joint Commenter Comments, filed July 12, 2010, at 23-31

[2] Applicants' Reply Comments at 15-19.

[3] Applicants' Reply Comments at 16.

however, the Commission imposed numerous conditions sought by PAETEC and others that Applicants resist here. Applicants do not explain why the *AT&T/BellSouth* conditions, such as the commitments to: (a) reduce Phase II price flex special access rates for 48 months to be no higher than in areas where it had not received Phase II pricing flexibility, (b) not include in any pricing flexibility contract or tariff access service ratio terms which limit the extent to which customers may obtain transmission services as UNEs rather than special access services, (c) not file a petition or implement any forbearance from 251 obligations, (d) not increase state approved prices for UNEs and collocation arrangements, (e) allow a CLEC to extend any current interconnection agreement, whether expired or not, and (f) allow a CLEC to use its existing ICA as the template for future negotiations, should not be required here, as they were in the *AT&T/BellSouth Order*.

Applicants also assert that "[t]he 'big footprint' objection would apply equally to any merger of LECs, many of which have been previously granted without conditions."[4] Applicants do not cite any examples, and we are aware of no examples of mergers approved without conditions involving a combined footprint that is close to being as large as the approximately 17,300,000 access lines to be served by the merged company that would result from approval of this merger.

In discussing the Commission's "big footprint" theory, Applicants also argue that no harms will result because the Applicants' networks are allegedly "complementary."[5] But that is the essence of the big footprint theory: by increasing the scope of their networks through merger, Applicants have an increased incentive and ability to discriminate against CLECs.[6] Moreover, in the very next breath Applicants assert that they "will face significant ongoing competition" from AT&T and Verizon.[7] Applicants thus recognize that ILECs whose territories do not overlap nonetheless compete with one another. AT&T's and Verizon's territories do not overlap with Qwest's and CenturyLink's to any greater extent than Qwest's and CenturyLink's overlap with each other, yet Applicants claim that AT&T and Verizon will provide competition for the merged

[4] Applicants' Reply Comments at 15-16.

[5] Applicants' Reply Comments at 17.

[6] *SBC/Ameritech Merger Order*, ¶¶ 191-193, 207.

[7] Applicants' Reply Comments at 17.

company. If this is true, then CenturyLink and Qwest are competing with each other today, and such competition will be eliminated if the merger is approved.

Finally, Applicants contend that conditions are not needed to prevent discrimination because Applicants' competitors "will immediately expose any discriminatory behavior."[8] This argument proves too much; if true, it would show that it was unnecessary for the Commission to impose any conditions in any of the prior RBOC mergers. In requiring those conditions, the Commission at least implicitly rejected the notion that the victim of discrimination is adequately protected merely by having an ability to "expose" the discrimination. The Commission has consistently wisely chosen to impose conditions that prevented the ILEC from engaging in discrimination in the first place, thereby imposing a burden of compliance on the applicants seeking approval of the transaction, rather than shifting the burden to competitors to identify and prove the existence of discrimination in subsequent complaint proceedings. The Commission's past practice of imposing conditions on mergers involving RBOCs is a reasonable exercise of regulatory oversight that recognizes that allowing ILECs to merge into bigger ILECs creates additional leverage for the combined entity above and beyond the advantages that that FCC has long acknowledged that ILECs already enjoy over competitors.[9] It should do the same here. An ounce of prevention is worth a pound of cure.

As to benchmarking, Applicants contend that the loss of a benchmark does not justify "holding up a merger," citing the Commission's finding in the *AT&T/BellSouth Order* that "benchmarks were unnecessary because each company's own performance was subject to monitoring."[10] The "monitoring" to which the Commission referred was part of the § 271 process that is applicable only to BOCs. This reasoning is inapplicable in large part to CenturyLink, whose operating companies are not BOCs, and whose performance is largely not subject to monitoring.

[8] Applicants' Reply Comments at 18.

[9] *See, e.g.*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96‑98, FCC 96‑325, 11 F.C.C.R. 15499, 1996 WL 452885 (FCC, Rel. Aug. 8, 1996) at ¶¶10 and 218

[10] Applicants' Reply Comments at 19.

Applicants also argue that where benchmarks are needed "there will remain plenty of competitors as options."[11] It is unclear what Applicants mean, but the purpose of benchmarking is to measure the performance of an ILEC in complying with its unbundling and related obligations under the Telecommunications Act of 1996. To the extent that Applicants' "competitors" are not ILECs, they are not subject to the same obligations and cannot serve as helpful benchmarks. This is especially true with respect to wholesale last mile for which ILECs are, in nearly all instances in their region, the only wholesale option for CLECs such as PAETEC that focus almost exclusively on serving business customers.

B. Merger-Specific Injury to Competition

As a threshold matter, the Commission should accord no weight to that portion of Applicants' September 29, 2010 *ex parte* (the first page after the first paragraph and the entire second page) that discusses a settlement agreement involving Applicants, PAETEC, and others before the Iowa Utilities Board ("IUB"). In the Iowa settlement agreement, Applicants and the other parties agreed that "they shall not use this agreement in any other proceeding as evidence of any other Party's position in that proceeding." Yet that is what Applicants' September 29, 2010 *ex parte* does, arguing that:

> The Iowa settlement resolved all of the CLEC intervenors' concerns regarding the combined companies' Operations Support Systems (OSS), change management systems (CMP), interconnection agreements (ICAs) and performance metrics. . . . The Iowa settlement thus addresses and resolves the same major categories of concerns as raised by the CLECs in their recent [FCC] *ex parte* filings.

Because Applicants' use of the Iowa settlement in their September 29, 2010 *ex parte* violated the terms of the Iowa settlement itself, PAETEC filed a motion with the IUB to enforce the settlement agreement by, among other things, requiring Applicants to withdraw that portion of its September 29, 2010 *ex parte* that discusses the Iowa settlement.[12] Although Applicants claimed that their ex parte had not violated the terms of the Iowa settlement, their attempted defense highlighted the violation of that agreement when Applicants admitted that they

[11] Applicants' Reply Comments at 19.

[12] Exhibit 1 hereto..

argued "the Iowa settlement thus ***addresses and resolves*** some major categories of ***concerns as raised by the CLECs*** in their recent ex parte filings with the FCC." That is, the Applicants argued that the Iowa settlement resolves the CLECs' concerns at the FCC – something the CLECs not only never agreed to, but made it known to Applicants that such a representation was a deal breaker and insisted on language expressly forbidding the Applicants from doing so. Even after PAETEC filed that motion with the IUB, Applicants made yet another filing with the FCC, arguing that the Iowa settlement serves as a "useful model[] for resolving the issues" raised by PAETEC and the other CLEC signatories for the Iowa settlement, again violating their undertaking in the Iowa settlement itself not to use it "in any other proceeding as evidence of any other Party's position in that proceeding."[13]

Even apart from the fact that this Commission should not allow Applicants to use the Iowa settlement in violation of the terms of the settlement itself, the settlement terms certainly do not "resolve all of the CLEC intervenors' concerns." PAETEC and other CLEC intervenors in both the IUB proceeding and this proceeding raised have consistent, legitimate, and specific concerns about the prospect of CenturyLink making detrimental changes to Qwest's wholesale practices in Iowa and elsewhere. Settlement by its nature, however, involves compromise by all parties. Historically, imposition by the IUB of mandatory conditions upon approval of reorganizations has not been common, whereas it has been very common at the FCC.

Moreover, the short statutory time-frame for consideration by the IUB of such an application made protracted discovery fights impractical; as a result, in the IUB proceeding, no CLEC obtained the materials the Applicants deemed "Highly Confidential." Given that the IUB had historically approved transactions without imposing conditions, PAETEC was willing to make certain compromises in Iowa to ensure some marginal protection for its Iowa operations rather than taking a risk of obtaining no protections at all against degradation of OSS in Iowa, for example. The calculus in entering into the Iowa settlement also factored into it the expectation (as reflected in the settlement agreement itself) that PAETEC would be able to continue its advocacy for more meaningful pro-competitive commitments or conditions in other jurisdictions, including at the FCC. Thus, compromises made in Iowa are not compromises that would be made in a jurisdiction such as the FCC with a history of attaching meaningful conditions. Applicants' assertion that the Iowa compromise terms "resolved all concerns"

[13] Letter, Karen Brinkman, Esq., Counsel for CenturyLink, to Marlene H. Dortch, October 13, 2010.

raised by PAETEC and other CLECs in their FCC comments thus defies both the nature of settlements and any reasonably honest discussion of this particular settlement.

1. OSS Integration Issues

The Joint Commenter Comments demonstrated the importance of the Commission carefully evaluating the impact of the merger on Applicants' wholesale OSS and the risk that efforts by the Merged Company to save money by integrating two different sets of OSS could injure competition. Those Comments also pointed out the importance of ensuring that any replacement OSS to be implemented in Qwest BOC territory was subjected to third party testing before the existing Qwest OSS is replaced. As the FCC stated in approving Qwest's Section 271 application:

> The most probative evidence that OSS functions are operationally ready is actual commercial usage. Absent sufficient and reliable data on commercial usage, the Commission will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS. Although the Commission does not require OSS testing, a persuasive test will provide us with an objective means by which to evaluate a BOC's OSS readiness where there is little to no evidence of commercial usage, or may otherwise strengthen an application where the BOC's evidence of actual commercial usage is weak or is otherwise challenged by competitors. ***The persuasiveness of a third-party review, however, is dependent upon the qualifications, experience and independence of the third party and the conditions and scope of the review itself. If the review is limited in scope or depth or is not independent and blind, the Commission will give it minimal weight***.[14]

The Joint Commenter Comments could not, however, discuss Applicants' plans for integrating OSS because no plans had at that time been publicly disclosed.[15] Applicants' Reply Comments provide very little additional information, beyond stating that no changes would be made for twelve months

[14] *Qwest 9 State 271 Order*, Appendix K "Statutory Requirements" at p. K-16 (emphasis added).

[15] Joint Commenter Comments at 7-12, 67-68.

after the merger, and that Applicants will continue to comply with Section 271 in Qwest territory.[16] Applicants offer no further commitments. There are several reasons why the FCC should impose substantial additional commitments with respect to Applicants' OSS.

First, as outlined in the Direct Testimony of Timothy Gates in the Minnesota proceeding, the third party testing that served as the predicate for the FCC's approval of Qwest's § 271 application would prove nothing about a replacement OSS, such as CenturyLink's EASE OSS, that had never been subjected to such testing. It is appropriate for the FCC to require that any replacement OSS be subjected to the same type of testing.[17]

Second, as has been shown in testimony in state proceedings, replacing the Qwest OSS that passed three years of rigorous testing with another OSS that has not been so tested will take much longer than one year, as the replacement OSS must be shown to meet the same exacting standards that the FCC required of Qwest and the other BOCs when it initially granted the § 271 authority. Mr. Gates's Direct Testimony in the Minnesota proceeding details the processes required to replace Qwest's OSS with another OSS, such as EASE, which is now being used by CenturyLink.[18] As shown in the Surrebuttal Testimony of Dr. August Ankum in Minnesota, Applicants have admitted that "after the first twelve months, the post-merger firm may and is in fact likely to modify or change its operations support systems (OSS)."[19] As reflected in the Reply Comments of

[16] Applicants' Reply Comments at 20-25.

[17] Direct Testimony of Timothy Gates, August 19, 2010, *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, Docket No. P-421, et al./PA-10-456 (Minn. P.U.C) ("Gates Direct Testimony") at 42-60, 121-22 (Exhibit 2 hereto).

[18] Gates Direct Testimony at 34-60.

[19]Surrebuttal Testimony of Dr. August Ankum, August 19, 2010, *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, Docket No. P-421, *et al.*/PA-10-456 (Minn. P.U.C.) ("Ankum Surrebuttal Testimony") at 2 (Exhibit 3 hereto), citing Hunsucker rebuttal testimony for Applicants. *See* Surrebuttal Testimony of Timothy Gates, August 29, 2010, *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to* CenturyLink, Docket No. P-421, *et al.*/PA-10-456 (Minn. P.U.C.) ("Gates Surrebuttal Testimony") at 21 (Exhibit 4 hereto) (CenturyLink Minnesota testimony shows that "CenturyLink will undertake a significant systems integration effort if the proposed merger is approved.").

New Edge Network, Applicants have indicated that if the Merged Company were to utilize a single OSS, it would most likely be EASE, rather than Qwest's OSS.[20] This is confirmed by the Minnesota Surrebuttal testimony of Timothy Gates, who has pointed out that since Applicants have asserted that they intend to have a unified ordering model interface to LSRs (local service requests), and Qwest's interface is not uniform ordering model compliant, this necessarily means that the Qwest interface for processing LSRs will have to be replaced or modified.[21]

Third, as reflected in Mr. Gates's Direct Testimony in Minnesota, any changes to Qwest's OSS would require that CLECs make substantial changes in their own systems that interface with Qwest's OSS.[22] Those changes require notice and advance planning on the part of CLECs.[23] In contrast with the approach that Applicants have taken before the FCC that they reserve the right to decide what to do after the merger is completed, unfettered by regulatory constraints, as long as any they do not implement it until after one year after closing, more notice is needed to enable the CLECs, as well as the Merged Company to make changes. CLECs need time to plan and budget for changes in their own systems that interface with those of the Merged Company in order to avoid disruptions in service to their own customers, something that will inure to the Merged Company's competitive advantage and to the CLECs' disadvantage, even if inadequate time for planning is the Merged Company's fault.

Moreover, making these changes will not only be time consuming for CLECs, but also will impose considerable expense on PAETEC and other CLECs, who will be the Merged Company's competitors. PAETEC has previously made substantial investments totaling more than a million dollars in its own back office systems to interface directly with the Qwest OSS. It would be patently unfair to render useless PAETEC's own IT enhancements that bond PAETEC's own systems directly with various Qwest OSS and their supporting databases. PAETEC incurred the expense of these system enhancements to enable PAETEC to make its own operations significantly more cost efficient.

[20] Reply Comments of New Edge Network, Inc., July 27, 2010, at 4.

[21] Gates Surrebuttal Testimony at 23.

[22] Gates Direct Testimony at 51-55.

[23] Gates Direct Testimony at 51-54

For example, when PAETEC e-bonded its trouble ticket management system[24] with the Qwest system for handling DS1 circuits, PAETEC was able to shift 12 full time equivalents from manually processing trouble tickets to other responsibilities.[25] Today, for the average 1,200 trouble tickets opened monthly with Qwest for DS1 circuits, the PAETEC back office system submits, on average, nearly 13,000 "events" (*i.e.*, an electronic communication from the PAETEC OSS to the Qwest OSS, or about 11 electronic communications per trouble ticket), and Qwest's OSS generates an average of 5 responsive "events" per trouble ticket.

If that trouble ticket information exchange reverted to a manual non-e-bonded process, both PAETEC and Qwest would need to assign significantly more personnel to manage the same amount of trouble tickets. PAETEC conservatively estimates that its annual labor costs would increase more than $700,000 to work trouble tickets manually if the e-bonding functionality is eliminated from Qwest's OSS. And if the Merged Company does not increase its own support staff to accommodate the additional call volume, the additional annual cost to PAETEC would increase dramatically as "hold times" increase.

Elimination of e-bonding for trouble ticket management for DS1 circuits will also significantly impact the efficiency of PAETEC's ability to meet out of service ("OOS") and Mean Time to Repair ("MTTR") service quality metrics. When a customer contacts PAETEC to report an OOS, PAETEC uses software to electronically test the service and circuit to the smart jack. If that electronic testing comes up clean to the smart jack, the PAETEC OSS automatically generates a detailed trouble ticket that is sent to Qwest's OSS using the e-bonding, which initiates their trouble ticket in the Qwest OSS. If e-bonding is eliminated, PAETEC personnel will have to manually open a trouble ticket with Qwest, which, on average, takes 30 minutes to properly complete the form. Obviously, adding an extra 30 minutes before a trouble ticket is opened in the Qwest OSS has at least two significant consequences: (1) most importantly, that means the customer will remain in an OOS condition for at least 30 minutes more than before, and (2) the MTTR will be extended by at least 30 minutes. Since PAETEC has Service Level Agreements ("SLAs") with every business customer

[24] The bonding of the PAETEC trouble ticket system with the Qwest trouble ticket system is referred to as Electronic Bonded Trouble Administration ("EBTA").

[25] A separate OSS e-bonding enhancement related to managing trouble tickets for POTS lines allowed PAETEC to shift an additional 25 full time equivalent positions from manually processing POTS-related trouble tickets to other responsibilities.

whose services are based on underlying DS1 circuits, increasing the MTTR would have multiple negative impacts for PAETEC. First, PAETEC's remedy payments associated with MTTR would increase, and second, business customers may ultimately take their business away from PAETEC since reduced service quality levels may be unacceptable The additional operating inefficiencies, risk of additional SLA compensation and potential lost business impacts resulting from elimination of e-bonding for trouble ticket management of DS1 circuits would substantially increase the estimated $700,000 annual cost increase to PAETEC.

The e-bonding also generates significant savings for both companies because the information exchanged between the PAETEC OSS and Qwest OSS also generates detailed documentation of the trouble ticket resolution without human intervention. The time and date stamp of when a ticket was opened, when Qwest acknowledged receipt, when Qwest assigned a tech (if required), when a tech made a site visit, what was done to fix the issue, when the ticket was closed, etc. is recorded in both companies' respective records without requiring human data entry. Again, that OSS-generated documentation would have to be replaced if the e-bonding capability is eliminated by CenturyLink without replacing with another functionally equivalent OSS. Replacing the system-generated documentation with manual data entry would add substantially to the estimated $700,000 annual cost increase to PAETEC. Clearly, degrading the functionality of the current OSS would be a negative synergy if CenturyLink is permitted to make such changes.

Likewise, PAETEC was able to take the line loss notification provided by Qwest's OSS from its system and direct that information into the PAETEC billing system to cut off an end user billing. That OSS enhancement enabled PAETEC to reallocate employees previously responsible for manually tracking line loss notifications and manually inputting that information into the PAETEC system to cease a billing to order writing functions to improve order processing intervals for PAETEC's end users. Moreover, PAETEC's implementation of this OSS functionality resulted in a 98% reduction in end user complaints relating to the "billing after downgrade" issue. In contrast, where PAETEC does not have a comparable OSS functionality with other ILECs, "billing after downgrade" continues to occur and generates end user complaints. The manual processing of line loss notifications simply results in significantly more errors.

a. Qwest OSS is functionally superior to EASE

In comments opposing the merger, Joint Commenters attached a spreadsheet comparing certain aspects of the three separate OSS systems – CenturyTel, Embarq and Qwest. CenturyLink claims that many of the allegations

made that the Qwest OSS is superior to CenturyLink's were "false."[26] The factual basis of CenturyLink's response represents either a (a) misunderstanding of the difference between the comparative functionality of the Qwest OSS and EASE, or (b) a nuanced misrepresentation of the capabilities of EASE compared to Qwest, neither of which bodes well for the veracity of Applicants' claims.

Before responding to specific claims by Applicants, however, it is important for PAETEC to identify some basic overarching differences between Qwest's OSS and EASE that cannot be swept under the rug by focusing on narrow allegations of incorrect assertions regarding EASE.

First, various Qwest OSS is bonded to PAETEC's OSS. That allows PAETEC personnel to make one data entry/input into the PAETEC system, which system then submits the data to Qwest's system directly without further human intervention. Likewise, Qwest's systems provide responses which directly flow into the PAETEC systems, which information may trigger notices or internal order or work assignment processing without further human intervention. The Qwest OSS allows this bi-directional flow-through process with the PAETEC system. In contrast, EASE is a stand-alone system that requires human interface between it and PAETEC's own back office systems. The lack of bonding means that PAETEC personnel are required to input data twice: first in the PAETEC system(s), and then again in EASE. Likewise, although EASE provides data electronically within the EASE application to PAETEC personnel who access EASE, there is no ability to flow that information directly into the PAETEC systems. Thus, PAETEC is required to key into its own system data received from EASE, whereas the same data flows straight from Qwest's OSS into PAETEC's system, with no keying of data or manual interface by PAETEC.[27]

Second, the Qwest OSS is significantly more robust in terms of depth and breadth of functions. While Applicants may claim that EASE has several of the same functions as the Qwest OSS, it only has similarity at high-level functions. The sub-functions incorporated with the Qwest OSS are far more extensive and robust than the EASE system.

[26] Applicants' Reply Comments at 11, n. 32.

[27] PAETEC has continued to ask CenturyLink about its e-bonding capabilities. As recently as September 2010, PAETEC was told that there was not a road map that could be provided for e-bonding for pre-order functions.

Finally, Qwest OSS has detailed documentation within the Qwest systems and on Qwest's website for assistance, training and reference. This documentation is easily accessible to users 24 hours a day, 7 days a week. The documentation includes on-line training, instructor-led training, user-guides and job-aids. By contrast, the documentation on the CenturyLink website to support the EASE application is limited at best. PAETEC personnel have scoured the CenturyLink website on numerous occasions to determine the functionality of EASE and how to access the system to identify its capabilities. Though the system is considered "user friendly" for those who are familiar with a Virtual Front Office (VFO) interface (human interface between systems), the supporting documentation available on the website and within the system is cryptic for infrequent and new users.

With respect to Applicants' specific assertions that Joint Commenters had previously made false claims regarding EASE, PAETEC maintains that the concerns Joint Commenters raised about EASE are accurate. On page 23 of their Reply Comments, Applicants state:

> The Joint CLEC Commenters also claim that CenturyLink processes orders more slowly than Qwest, because of batch processing. Again, that is false. All CenturyLink wholesale customers have the option to have their orders entered through CenturyLink's web-based graphical user interface, an online ordering system, and such orders are processed in real time or near real time.

The fact is that the Qwest OSS processes LSR and ASR orders in real time and the EASE system does not. It is true that ASR/LSR Ordering transactions can be sent electronically via File Transfer Protocol ("FTP") using EASE. However, LSR transactions are batch processed by EASE every 20 minutes, and ASRs are processed three times a day. Characterizing this performance as "real time" or "near real time" order processing is simply trying to redefine "real time" order processing to be something less than exists today between the e-bonded PAETEC and Qwest OSS. The lack of true "real time" order processing between a CLEC and EASE makes the EASE OSS significantly less efficient for a CLEC's operations.

One such example of real time processing offered through the Qwest OSS relates to Firm Order Commitments ("FOCs"). The Qwest OSS issues the FOC to

the CLEC via the e-bonding as soon as the Qwest system determines the FOC.[28] PAETEC's OSS electronically takes the FOC information received via the XML interface and populates its own back end systems that schedule PAETEC's tech install assignments. Thus, because of the e-bonding between the Qwest and PAETEC OSS, PAETEC is able to schedule its tech install assignments without manual intervention.

In contrast, EASE requires a CLEC to access and recheck the EASE system manually in search of a FOC response. This makes accessing FOCs a guessing game that requires CLEC personnel to monitor the EASE system manually, which in some instances may take longer than 48 hours. And in contrast to the direct feed of the FOC produced by the Qwest OSS FOC into the PAETEC back office systems, once EASE issues the FOC, then a PAETEC employee is required to access EASE, retrieve the data, and re-key that information into the PAETEC system. The requirement that a CLEC undertake such duplicative steps to use the information provided by EASE is a recurring problem with the EASE system as it exists today.

CenturyLink also disputes the claim that it imposed a limit of 50 orders per day.[29] It claims that such a limit had not been in place for over a year. If CenturyLink has not had any order volume limitations for over a year, then CenturyLink failed to inform or direct PAETEC users away from CenturyTel Service Guide for CenturyTel ILEC Areas ("CenturyTel Service Guide"), which was the on-line resource available to PAETEC (and which PAETEC has relied) until August 13, 2010. PAETEC has not received notice alerting of a new redesigned website.

On the other hand, Qwest has a multitude of information available to CLECs on-line regarding its products, ordering, provisioning, processing, systems, tutoring, templates, guidelines, rules, service areas, contacts, escalations, etc to assist CLECs. If indeed, PAETEC's understanding of the business rule noted above was in error, it is because Century Link had the incorrect information on-line at the website that it provides for CLECs to use in their operations.

Qwest OSS allows CLECs access to download and use databases to supplement and incorporate information within processes associated with a

[28] It is PAETEC's experience that the Qwest OSS issues the FOC within 24 hours.

[29] Applicants' Reply Comments at 22-23.

CLEC's own OSS. One example of a database available to CLECs from Qwest and not from CenturyLink is Service Address Guide ("SAG") database. The SAG database, which provides address records, is maintained and serviced by Qwest for the CLECs and Qwest. For CLECs that are not e-bonded with Qwest OSS, Qwest provides notices of updates related to the address validation tool. Then once a month, the file can be downloaded. For CLECs that are e-bonded, such as PAETEC, the SAG data is automatically downloaded and PAETEC's system is then automatically updated monthly without human intervention. In contrast, though EASE provides a pre-order address validation query, it is strictly limited to one unique address. There is no download option available for the CenturyLink database, so access is restricted to the pre-order address validation query for a single transaction.

The monthly SAG download is critical to PAETEC's internal pre-ordering and ordering processes. PAETEC uses SAG data as a verification tool prior to initiating any order submissions. Qwest's SAG is an address database that, in addition to validating an address, displays the address and the associated range of addresses within the Qwest footprint. When the SAG database is downloaded, the PAETEC OSS syncs the address information with LERG to identify the associated local service office (CLLI code), NPA-NXX, Operating Company Number ("OCN") for all of the addresses within PAETEC's databases. In contrast, EASE offers a single transaction that only validates the unique address within the CenturyLink service area. Even through the pre-order address validation query (the single transaction) is available to view in EASE, the validation of a single address by EASE pales as compared with the functionality that the SAG database download provides to PAETEC. Again, the SAG database download allows the PAETEC OSS to sync all of the addresses within the Qwest footprint with LERG, which enables PAETEC to populate all its back office systems with the associated correct local service office, NPA-NXX, or OCN for each address. This linking of the LERG data with validated addresses from the SAG download is used by PAETEC's OSS to, among other functions, automatically (a) generate clean orders, (b) verify that an end user port request does not cross a rate center, and (c) verify whether a particular service offering can be provided at a particular end user location. EASE limits PAETEC to one address search at a time and provides no means for updating PAETEC's internal systems and database.

If CenturyLink or the Merged Company were to decide to cease maintenance and availability of SAG to PAETEC, PAETEC would immediately require OSS development for the Qwest region to (1) restructure its automated ordering processes and (2) find an alternative database resource, assuming there is one, that would be available to update PAETEC's internal database. Eliminating

access to Qwest's SAG database and download functionality will harm PAETEC's ability to submit clean orders and eliminate the ability to us this information for other uses. PAETEC would incur significantly more operating costs to process orders and serve its end user customers if this functionality is eliminated.

Applicants also take issue with Joint Commenters' claim that EASE does not reject incorrect orders. In response, Applicants claim that EASE online ordering tool identifies a "significant number of errors before order processing."[30] It is noteworthy that Applicants merely claim that EASE identifies a number of errors. Applicants do not assert that EASE matches the functionality of the Qwest OSS in terms of the total number of errors identified, nor do Applicants discuss how such errors are handled once identified. The functionality of EASE pales by comparison to the Qwest OSS.

The difference stems again from the fact that PAETEC is electronically-bonded with the Qwest OSS, a functionality that does not yet exist with EASE. Because CLECs, such as PAETEC, that are e-bonded with the Qwest OSS, they are able to take advantage of the numerous edits for the fields of the automated processes when placing orders within their own system to ensure that the data is accurate, errors are reduced and orders are not rejected. These field edits were a result of joint development with Qwest to ensure that both OSS "interfaced" accurately with each other in a minimal amount of time. Consequently, the potential rejects and subsequent submissions resulting from typos, incorrect information (such as a wrong NC/NCI code) and/or missing information is reduced because of the edits in the PAETEC system and Qwest back-end system prior to Qwest accepting the data. The same applies to Qwest edit responses, since the systems interface directly with one another.

In contrast, the CenturyLink User Interface requires PAETEC users to re-input information back and forth between the PAETEC and EASE systems. The lack of e-bonding means that PAETEC personnel are required to "re-key" identifiers for an order each time the user accesses the CenturyLink or PAETEC system for data input, search, retrieval, and or to update in addition to obtaining and transferring the appropriate information from the system. EASE is simply not nearly as functional as the Qwest OSS, and as EASE is not e-bonded with other carriers, it does not provide an efficient information exchange for those few functions it does perform.

[30] Applicants' Reply Comments at 23.

b. Change management process

PAETEC also disagrees with Applicants' assertion in their Reply Comments that CenturyLink has an adequate change management process.[31] The FCC has found that a change management process is a critical component for a CLEC to have a "meaningful opportunity to compete by providing sufficient access to a BOC's OSS" and has stated that it ensures the adequacy of a BOC's change management process by finding the presence of five factors:

> (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the 17 purpose of building an electronic gateway.[32]

Qwest's change management process was found to meet this test. CenturyLink's by contrast, as shown in the Gates Direct Testimony in Minnesota, does not meet any of the five components of this test.[33] Similar to its requirement in the Frontier/Verizon Merger,[34] the FCC should require that the Merged Company maintain Qwest's Change Management Process ("CMP"), utilizing the terms and conditions set forth in the CMP Document. In addition, the Merged Company should be required to dedicate the resources needed to complete pending CLEC change requests in a commercially reasonable time frame.

In Reply Comments filed in response to Joint Commenters' concerns with EASE, CenturyLink claimed that OSS changes should be resolved through the *ordinary course of business*, and in response to marketplace conditions.

[31] Applicants' Reply Comments at 24.

[32] *Qwest 9-State 271 Order* at ¶ 132.

[33] Gates Direct Testimony at 137-41.

[34] *Frontier/Verizon Merger Order*, Appendix C, p. 35, Condition 14.

CenturyLink pledged that it will give CLECs "ample and adequate notice" of future changes, consistent with its legal obligations and *accepted business practices."*[35] Rather than providing comfort to PAETEC, CenturyLink's statements confirm that it seeks an unfettered ability to change the Qwest OSS to the detriment of its wholesale CLEC customers sometime in the future when the authority for regulators to adequately oversee such changes will be less certain.

For example, an "ordinary course of business" for CenturyLink has been to implement OSS changes unilaterally without any formal process for CLEC input on the proposed changes. Indeed, CenturyLink's pledge to give "adequate notice" of future changes should leave no doubt that it believes it has a narrow obligation to merely *notify* CLECs of OSS changes, rather than obtain their input. Likewise, it has also been a CenturyLink "accepted business practice" to announce an OSS change the day the modification goes live, leaving CLECs unaware of the change beforehand.

2. Unbundling and Interconnection Agreements

Over the past 14 years, CLECs have developed a working relationship with Qwest regarding interconnection agreements and unbundling. While the relationship has not been without strife, CLECs and Qwest have become used to working together with certain forms of interconnection agreements and processes for doing business. While it is understandable that CenturyLink may prefer to disrupt the format of the interconnection agreements and processes to convert them to what it is accustomed to working with, just as it may prefer to replace Qwest's OSS with EASE, such disruption imposes a merger-related cost on PAETEC and other CLECs.

Raising its rivals' costs of competing with it generates a benefit for the Merged Company, but not for consumers, who will be worse off if the Merged Company is able to handicap its competitors this way. To offset this adverse competitive effect, the Commission has recognized in previous mergers that it is appropriate to impose conditions that facilitate competition, even if the conditions are not directly related to the merger.[36]

[35] Applicants' Reply Comments at 21.

[36] *See, e.g., SBC/AT&T Merger Order*, ¶ 51, *Verizon/MCI Merger Order*, ¶ 51; *AT&T/BellSouth Merger Order*, ¶¶ 185, 222.

Applicants do not acknowledge these precedents, contending, for example, that Joint Commenters' request that "Applicants' ILECs shall cap UNE rates at current levels"[37] should be rejected because it is not "a legitimate merger concern and in any event, UNE stability is already assured by Sections 251(c)(3) and 271(c)(2)(B)."[38] Applicants do not, however, even attempt to show why this case is different from the prior merger cases in which conditions not directly related to the merger were imposed.[39] Examples of a few such conditions from the *AT&T/BellSouth Order* are listed in a footnote below.[40] In those cases, the Commission, by incorporating the capping of UNE rates at current levels as merger conditions and imposing many of the conditions CLECs seek in this proceeding, found that such capping and other conditions addressed "legitimate merger concerns."

Moreover , Section 251(c)(3) was just as much applicable in those cases as in the instant case, while Section 271(c)(2)(B) was more applicable in those cases than in the instant case, since it does not apply to CenturyLink's legacy companies. In addition, UNE price stability is not assured by those sections of the Act. Section 251(c)(3) would not preclude CenturyLink from seeking UNE rate increases the day after the merger closes, based on the submission of cost studies predicated on differences between its rate methodology and Qwest's, alleged

[37] Joint Commenters' Comments at 47

[38] Applicants' Reply Comments at 34.

[39] *See SBC/AT&T Merger Order*, ¶ 51; *see also Verizon/MCI Merger order*, ¶ 51, *AT&T/BellSouth Merger Order*, ¶¶ 185, 222.

[40]
- Conditions on the provision of special access service (*AT&T/BellSouth Order* at 150-52);
- Rates for tandem transit service; (*AT&T/BellSouth Order* at 153);
- Provision of ADSL service;[40] (*AT&T/BellSouth Order* at 153-54);
- Net neutrality commitments;[40] (*AT&T/BellSouth Order* at 154-55);
- Agreement not to file forbearance petitions[40] (*AT&T/BellSouth Order* at 155).

changes in costs that resulted from the merger or otherwise, or for any other reason. As Dr. Ankum noted in his Minnesota Surrebuttal Testimony, while state PUCs have historically rejected ILEC attempts to recover merger costs in wholesale rates,

> post-hearing wholesale rate/UNE cost proceedings are an expensive, time consuming, and uncertain way of attempting to prevent the Joint Petitioners from improperly recovering merger costs from wholesale customers/competitors. Indeed, those merger-related costs could be buried in complex cost models that allow them to find their way into wholesale rates undetected.[41]

Finally, Section 271(c)(2)(B) does not regulate UNE prices and to the extent that it governs pricing of Qwest's network elements that are not UNEs, the Commission has never conducted a proceeding to determine the compliance by any BOC with these requirements, and any state commission efforts to conduct such a proceeding have been struck down by the courts.[42]

Another example in which Applicants fail to acknowledge the Commission's prior adoption of merger conditions not directly related to the

[41] Ankum Surrebuttal Testimony at 27.

[42] *See, e.g., Verizon New England, Inc., v. Maine Public Utilities Commission*, 509 F.3d 1, 7 (1st Cir. 2007) (holding the authority to determine which elements BOCs are required to provide under Section 271 and the rates for them "is granted exclusively to the FCC") (subsequent history omitted); *Illinois Bell Telephone Co., Inc., v. Box*, 548 F.3d 607, 613 (7th Cir. 2008) ("[T]he state commission's power over [an interconnection] agreement is limited to the terms in the agreement relating to access under section 251."); *Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676, 682-83 (8th Cir. 2008) (rejecting the claim that "states have implied authority to ensure ILECs comply with § 271" in interconnection agreement arbitration proceedings), *cert. denied*, 129 S.Ct. 971 (2009); *Qwest Corp. v. Arizona Corp. Commission*, 567 F.3d 1109, 1116 (9th Cir. 2009) ("We join the First, Seventh, Eighth, and Eleventh Circuits in holding that the Act does not authorize state commissions to implement Section 271 terms and rates in interconnection agreements") (footnote omitted); see also *BellSouth Telecommunications, Inc. v. Georgia Pub. Serv. Comm'n*, 555 F.3d 1287, 1288 (11th Cir. 2009) (per curiam) (deciding state commissions are not authorized to implement Section 271); *See also Qwest Corp. v. Arizona Corp. Commission*, 567 F.3d at 1116 (citing *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633, at *6 (E.D.Mich. Sept.26, 2007); *BellSouth Telecomms., Inc. v. Kentucky Public Serv. Comm'n*, No. 06-65-KKC, 2007 WL 2736544, at *6-*7 (E.D.Ky. Sept.18, 2007); *BellSouth Telecomms., Inc. v. Mississippi Public Serv. Comm'n*, 368 F.Supp.2d 557, 565-66 (S.D.Miss.2005)).

merger is copper loop retirement. Joint Commenters showed in their comments why it would be appropriate for the FCC to require that Applicants cease retiring copper loops until the Commission completes its rulemaking in RM-11358.[43] Applicants respond that "there is no basis for such a condition" because "the issue is entirely divorced from the merger," pointing to the National Broadband Plan's statements about copper loop retirement as evidence that the issue is industrywide[44] PAETEC does not dispute that the copper loop retirement issue is industrywide; as shown above, however, the Commission has in the past addressed numerous industrywide issue in merger conditions as a means of offsetting the harm that results from the merger.

With respect to all of the interconnection agreement conditions that PAETEC and other CLECs have proposed that are arguably not directly related to the merger, as Dr. August Ankum explained in his Direct Testimony in the Minnesota proceeding, conditions with respect to interconnection agreements that have been proposed by PAETEC and other CLECs, many of which were imposed in prior BOC mergers, are appropriate because:

> the availability of wholesale services should be stable over the foreseeable future to offset the substantial uncertainty and risks of degraded wholesale services associated with the proposed merger, including the risks that stem from the Merged Company's efforts to achieve synergy savings post-merger. These conditions ensure that the Merged Company does not direct its integration efforts to the detriment of wholesale customers by withdrawing services or significantly changing the offerings Qwest currently makes available. These conditions also recognize that the Merged Company will be a larger carrier with a bigger footprint, possibly resulting in economies and efficiencies, as the Joint Applicants claim. To serve the public interest, any such economies and efficiencies should accrue in part to the benefit of captive wholesale customers and the general public as well as the merged company; otherwise, the Merged Company will enjoy an unreasonable cost advantage over its captive customers/competitors. As a result, if the Joint Applicants' claims of merger savings are accurate, those savings should decrease the costs associated with providing wholesale services and

[43] Joint Commenters' Comments at 48-51.

[44] Applicants' Reply Comments at 34.

> interconnection to CLECs. Allowing the Merged Company to be the sole beneficiary of the economies and efficiencies resulting from the merger would have an anti-competitive and discriminatory impact on the merged company's captive wholesale customers, who depend on wholesale services from and interconnection with the ILEC to compete. Such a result would be inconsistent with the pro-competitive mandate of the Act, FCC orders, and state law, and contrary to the public interest.[45]

Joint Commenters also proposed that, as in past mergers, CLECs be permitted to extend their existing ICAs with Applicants.[46] Applicants do not contend that such a condition is unrelated to the merger, but attempt to dismiss it as "not a wise approach" because "it makes no sense to require CenturyLink to extend" an agreement that is nearing expiration "absent negotiation."[47] Applicants thus contend that a condition included in prior FCC merger orders "makes no sense," but offer no explanation why what made sense in prior mergers does not make sense in this merger. Not only did the FCC cross that bridge when it included such a condition in the *AT&T/BellSouth Merger Order*,[48] stating that this condition, along with others, "should reduce any incremental effect of the pending merger on the incentive to discriminate,"[49] but several state commissions have also used that approach in other mergers.[50] The condition makes perfect sense because, as the FCC has recognized, a merger increases the merged company's incentive to discriminate against CLECs; moreover, in a merger, the ILEC/CLEC relationship is disrupted by changes in personnel and systems. There should be no need for the new ILEC management to disrupt arrangements further

[45] Direct Testimony of Dr. August Ankum, August 19, 2010, *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, Docket No. P-421, et al./PA-10-456 (Minn. P.U.C) ("Ankum Direct Testimony") at 65-66. (Exhibit 5 hereto.)

[46] Joint Commenters' Comments at 54.

[47] Applicants' Reply Comments at 33.

[48] *AT&T/BellSouth Merger Order*, Appendix F, "UNEs" commitment # 4.

[49] *AT&T/BellSouth Merger Order*, ¶ 185.

[50] *See* Ankum Direct Testimony at fns. 113-15.

by insisting on changing terms and conditions of interconnection (except where change is required by law).

In addition, if the FCC agrees with PAETEC that CLECs should be permitted to extend their current agreements for a specified period of time, it should clarify that a CLEC's exercise of that right moots any ongoing negotiations or arbitration for a new agreement.

Similarly, Joint Commenters proposed that CLECs be permitted to start negotiation of new ICAs based on their existing ICA.[51] Ignoring the fact of the merger and the Commission's inclusion of such a condition in the *AT&T/BellSouth Order*, Applicants respond by pointing to the fact that neither the Act nor the Commission's rules require this.[52] The impact of such an approach would be to impose part of the costs of the merger on CLECs, since CLECs have invested a great deal of time and money in negotiating and arbitrating interconnection agreements with Qwest that follow Qwest's format, and that investment would be wasted if CLECs had to shift to the interconnection agreement template favored by CenturyLink. [53]

[51] Joint Commenters' Comments at 54

[52] Applicants' Reply Comments at 33.

[53] In an ex parte letter filed October 19, 2010, CenturyLink counsel submitted an agreement between Applicants and a CLEC, 360networks, in which Applicants agreed to extend the CLEC's interconnection agreement by 3 years and to allow the CLEC to base future interconnection agreement negotiations on the existing agreement. Letter of Karen Brinkman, Esq., counsel for CenturyLink, to Marlene H. Dortch, October 19, 2010. While this agreement reflects Applicants' acknowledgment of the appropriateness of these conditions, PAETEC disagrees with CenturyLink's assertion that the agreement with 360networks demonstrates that it is unnecessary for the Commission to impose merger conditions. First, the Commission cannot and should not delegate to private parties its obligations under Sections 214(a) and 310(d) to ensure that the merger is in the public interest. Second, such a delegation would unduly burden the hundreds of CLECs adversely affected by the merger, which absent an FCC willingness to impose conditions globally, would have no leverage to obtain reasonable conditions through private negotiations. This is highlighted by the fact that the agreement with 360networks only addressed a fraction of the issues that CLECs have raised. The Commission should not infer that 360networks did not care about the other issues. Rather, the fact that the agreement stated that "Nothing in this agreement shall preclude 360networks from obtaining the benefits of additional FCC conditions not addressed in this agreement"

The Staff of the Oregon PUC has agreed with PAETEC that it is appropriate to require the Merged Company to allow CLECs to start the negotiation of a new interconnection agreement with the Merged Company on the basis of the existing interconnection agreement,[54] as well as to allow CLECs extend their existing interconnection agreements for a period of four years[55] and to opt into any Qwest Oregon interconnection agreement,[56] as well as agreeing with a number of the other conditions PAETEC has advocated.[57]

III. Duration of conditions

The Joint Commenter Comments suggested that conditions be in effect for a period of 7 years, or for 42 months, and thereafter until the Commission grants a forbearance request from the Merged Company to be relieved of conditions.[58] Joint Commenters pointed to the experience in the AT&T/BellSouth merger, in which immediately after the merger, AT&T announced price increases to go into effect as soon as the merger conditions expired and during the effective period of the conditions, AT&T engaged in regulatory and legal challenges that rendered many of the key provisions useless. Joint Commenters also pointed to the FCC's imposition of 6 years of conditions in the Time Warner/Adelphia Cable merger.

Applicants' response is Joint Commenters' suggestion is "absurd" because "[t]he combined company will continue to face substantial competition,

shows that 360networks is counting on the FCC to require additional conditions not contained in the settlement agreement with 360networks.

[54] Reply Testimony of Michael Dougherty, Staff Exhibit 100, Case UM 1484 (Or. PUC September 3, 2010) (Exhibit 6 hereto), at 55, proposed condition 42.

[55] *Id*. at 53, proposed condition 30.

[56] *Id*. at 55, proposed condition 43.

[57] *See*. *e.g.*, *id.* at 53-55, proposed condition 31 (no increase in tariffed or wholesale rates for 4 years); proposed condition 32 (no increase in transit rates); proposed condition 35 (Section 271 continues to apply in current Qwest territory); 37 (Qwest PAP continues to apply for 4 years); proposed condition 40 (Qwest's current Change Management process will be continued, and Pending CLEC Change Requests will be completed in a commercially reasonable time frame).

[58] Joint Commenters' Comments at 42-46.

including from much larger carriers, that will discipline its pricing and market conduct."[59] Applicants offer only one commitment, keeping wholesale support systems in place for 12 months.[60] Applicants' position that conditions regarding their wholesale service are unnecessary because of competition from other carriers completely misses the point that Applicants control virtually all last-mile facilities within their territories. Their reference to "larger carriers" must be to AT&T and Verizon, which will be the only "larger carriers" in the United States after the merger. But the vast majority of end users in Applicants' territories are not served by last-mile facilities of either AT&T or Verizon, nor are AT&T and Verizon obliged to unbundle those facilities that they do have. From the perspective of Applicants' wholesale customers, Applicants are the "only game in town" within Applicants' territory.

The Gates Direct Testimony provides additional bases for the condition duration proposed by Joint Commenters. As Mr. Gates pointed out, a 42-month minimum duration is appropriate, given Applicants' representation of a 3-5 year synergy period, because "during the time period when the Merged Company is making merger-related changes to achieve synergies, customers and competition should be protected from harm resulting from those changes."[61] Mr. Gates also pointed out that the FCC imposed a 42-month duration on the AT&T/BellSouth merger conditions, which like this merger, involved the acquisition of a BOC, raising more serious concerns not present in non-BOC acquisitions, and thus warranting additional protections.[62] Unlike AT&T, whose management already had experience operating a BOC, and merging with and integrating the operations of a BOC, CenturyLink's management has never operated or merged with a BOC, thus warranting a longer duration for merger conditions.[63]

V. Discovery

In an ex parte filed September 17, 2010, Integra Telecom, Inc. and tw telecom inc. requested that the Wireline Competition Bureau submit information

[59] Applicants' Reply Comments at 34.

[60] *Id.*

[61] Gates Direct Testimony at 112-13.

[62] *Id.* at 113-14.

[63] *Id.* at 113-15.

requests as to the Applicants' integration plans and history. The proposed discovery requests sought to remedy the same concerns expressed by Joint Commenters' July 12, 2010 Comments that the Application contained no information at all about Applicants' plans with respect to integrating wholesale OSS, an issue that is critically important to CLECs. In general, the requested discovery sought to secure from the Joint Applicants information that would provide information regarding the comparative functionality of EASE to the existing Qwest OSS.

On October 18, 2010, the Wireline Competition Bureau issued discovery requests to Joint Applicants, asking for some of the OSS information requested by Integra and tw telecom. PAETEC is concerned that Joint Applicants will be able to answer the questions posed by the Wireline Competition Bureau without directly addressing one of the primary concern of CLECs – will elimination of Qwest OSS in favor of the EASE OSS at some point in the future result in an OSS that is materially less functional than the Qwest OSS that passed muster for 271 purposes?

Given the information that PAETEC and other CLECs have already placed in the record already demonstrates that EASE is significantly less functional than the Qwest OSS, perhaps there is no need for requesting such comparative since a strong condition is already warranted based on what is already known. However, the limited discovery already issued by the Bureau may, unfortunately, send an incorrect signal that the FCC is not concerned that the Merged Entity maintain a 271 compliant OSS going forward. Given that witnesses of Joint Applicants have testified in various state proceedings that a 271 compliant OSS is not an ongoing requirement of the 96 Act (a proposition with which PAETEC strenuously disagrees), an incorrect signal by the Commission may embolden Joint Applicants to make OSS changes that do degrade the functionality, leading to bigger problems in the future if the Commission, is not in fact, in agreement with the Joint Applicants regarding the ongoing need for a 271 compliant OSS. PAETEC therefore suggests that the Wireline Competition Bureau propound the remaining discovery questions regarding OSS submitted by Integra and tw telecom.

V. Absence of Public Benefits

The Joint Commenter Comments established (at pages 32-42) that Applicants had failed to show any demonstrable and verifiable public benefits that are "likely to be accomplished as a result of the merger but unlikely to be realized

by other means."[64] In their Reply Comments, Applicants reiterate their claims that the merger will facilitate the development of broadband and advanced services, benefit consumers with increased scale and scope, and facilitate the Merged Company's commitment to rural communities,[65] but fail to demonstrate that these will occur if and only if the merger takes place.

Apart from Applicants' failure to rebut the arguments of the Joint Commenters that these were not demonstrable and verifiable public benefits that are likely to be accomplished as a result of the merger but unlikely to be realized by other means, Applicants' discovery responses in state proceedings in which discovery has taken place show that Applicants have been unable to support these claims. As shown in the Minnesota Direct testimony of Dr. August Ankum, the alleged benefits are not "verifiable" because Applicants have been unable to offer evidence to support anything more that "unsupported predictions about what may transpire in the distant future."[66] Dr. Ankum appended a chart to his Direct Testimony analyzing each of Applicants' claims of public benefits by comparing Applicants' assertions of public benefits with their discovery responses. Dr. Ankum's comparison demonstrates that Applicants were unable to show their claimed benefits were verifiable and unlikely to occur but for the merger.[67] Moreover, Dr. Ankum showed that in several recent prior mergers in which cost-saving synergies were claimed as a public benefit, the synergies did not develop as predicted.[68]

Conclusion

For the reasons set forth above, as well as in the Joint Commenter Comments, PAETEC respectfully requests that the Commission condition approval of the merger on the basis of the conditions requested in this letter and in the Joint Commenter Comments.

[64] *CenturyTel/Embarq Merger order*, ¶ 35, citing *AT&T/BellSouth Merger Order*, ¶ 202.

[65] Applicants' Reply Comments at 2-9.

[66] Ankum Direct Testimony at 59; *see id.* at 57-60.

[67] Ankum Direct Testimony at Exhibit AHA-4.

[68] Ankum Direct Testimony at 32-37.

Sincerely yours,

/s/ *electronically signed*

Eric J. Branfman