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 **BRIEF OF SPRINT NEXTEL CORPORATION AND T-MOBILE WEST CORPORATION IN RESPONSE TO LIST OF COMMISSION-IDENTIFIED BRIEFING ISSUES**

I. INTRODUCTION

1 Sprint Nextel Corporation ("Sprint") and T-Mobile West Corporation ("Joint Wireless Carriers") hereby submit their Brief in Response to the Commission identified issues from Appendix A of Order 13 in this matter. While this response will address the Commission's issues, it must be considered in the context of this proceeding, which requires the Commission to review a merger request that will have a major impact upon the telecommunications marketplace in Washington. The Joint Wireless Carriers contend that the Commission should deny the merger between the CenturyLink ILECs and Qwest (together referred to herein as the "Merged Firm") unless conditions are imposed that ensure the merger will not distort or impair the development of competition. In previous merger proceedings, the Commission found that the transaction's "impact on competition at the wholesale and retail level, including whether the transaction might distort or impair the development of competition must be considered in determining if the merger is in "the public interest."[1] The Commission reiterated the importance of this consideration in

[1] *In the Matter of the Joint Application of Verizon Communications, Inc. and Frontier Communications Corp. for an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc.* , Washington State Utilities and Transportation Commission, Order 06, Final Order Approving and Adopting Subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction, Docket UT-090842 ("Verizon/Frontier Merger Order"), p. 53, ¶ 117.

this proceeding noting "Staff suggested, and rightly so, that the merger's impact on access charges and competition is within the purview of our examination."[2]

2 Furthermore, the commission must not only determine whether the merger is in the public interest, it must review multiple settlements that were presented to the Commission for approval. The Merged Firm entered into separate settlements with 360networks, Integra, Staff and Public Counsel and DoD/FEA.[3] In doing so, the commission must find that the settlement agreements are in "the public interest."[4] The Joint Wireless Carriers oppose the settlements unless additional conditions are imposed upon the Merged Firm to ensure that the Merger does not harm competition and is in the public interest under Washington law.[5] Two key conditions are necessary to accomplish this. First, CenturyLink ILECs' intrastate access rates must be brought down to the Qwest intrastate access rates immediately and then over time the intrastate access rates must mirror Qwest's interstate rates.[6] Second, the interconnection agreement conditions contained in the Integra settlement must be extended to CenturyLink contracts, the extensions should last for four years rather than three years, and interconnecting carriers should be able to port interconnection contracts between ILECs and from state to state.[7] The exact conditions proposed are listed in Mr. Appleby's responsive testimony[8] and will be more fully addressed in the second briefing opportunity provided for in Order 13.

II. RESPONSE TO COMMISSION ISSUES

1. Assume, *arguendo,* that the Commission adopts a condition requiring the merged companies to file a petition for an Alternate Form of Regulation (AFOR) by a date certain. What would be the effect of either a Commission rejection of the AFOR petition or the failure of the merged companies to accept a Commission-conditioned AFOR? Specifically, what rate structure would be in effect in the various Qwest and

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[2] Docket UT- 100820, Order 09, ¶ 20.
[3] Exs. 1,3, 5-6, and 8 respectively.
[4] WAC 480-07-750(1)
[5] Tr. 413 – Tr. 422. Citations to the transcript are denoted by Transcript page reference and line references, where applicable.
[6] Tr. 415, l. 25 – Tr. 416, l.4.
[7] Tr. 416, l. 15 – Tr. 417, l. 14.
[8] Ex. JAA-1CT, pp. 32, 38, 40-41, 43, and 45.

CenturyLink territories? Would Qwest rates be set under the expired AFOR (the one currently in effect), revert to those in effect before the AFOR, or some other structure?

3 The AFOR statute gives the Commission the discretion to substitute traditional rate of returns ("ROR") regulation with an alternate form of regulation "if the alternative is better suited to achieving [state] policy goals."[9] In essence, if a company subject to rate of return regulation - like the Merged Firm - was not operating under an AFOR then the rules applicable to ROR companies would apply. The law regarding rate-setting, [10] however, is the same for either an AFOR or ROR company.[11] In the event that an AFOR ceases to exist, either by Commission action or company choice, the utility would have to file with the Commission a new schedule of rates to apply. With respect to the Merged Firm, the Qwest AFOR Order set up a time period for thorough Commission review prior to the AFOR expiration.[12] During that review period alternate rate structures could be proposed and evaluated.

4 Therefore, while RCW 80.36.135 provides no explicit answer to this first question, the Commission would have full authority to set new rates during the AFOR review proceeding under RCW 80.04.130. Of most importance to the Joint Wireless Carriers is the fact that the presence or absence of an AFOR will have no impact on wholesale intrastate access rates because they are tariffed, non-competitive rates, regulated by the Commission. The overarching issue raised by the proposed AFOR treatment in the Staff/Public Counsel/Merged Firms' settlement ("Settlement") is the harmful multi-year delay in examining the access rates of the Merged Firm.

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[9] RCW 80.36.135(a).

[10] RCW 80.04.130(1) provides: (1) Except as provided in subsection (2) of this section, whenever any public service company shall file with the commission any schedule, classification, rule, or regulation, the effect of which is to change any rate, charge, rental, or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed change and the reasonableness and justness thereof. Pending such hearing and the decision thereon, the commission may suspend the operation of such rate, charge, rental, or toll for a period not exceeding ten months from the time the same would otherwise go into effect. After a full hearing, the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective.

[11] RCW 80.36.135(2) specifies that an AFOR is still subject to RCW 80.04.130, which governs rate-setting.

[12] Order 06, Docket UT-061625 Ex. MRH-19.

5 It is clear, however, the Commission must not wait to address intrastate access rates in the context of an AFOR or AFORs to be filed by Qwest and the CenturyLink ILECs three to four years after the proposed merger closes. The Settlement's proposed delay in the consideration of the AFORs, thwarts the Legislature's goal to promote competition, which is one of the very policy goals of the AFOR statute.[13] Accordingly, the Joint Wireless Carriers recommend that the Commission reduce the intrastate access rates of the CenturyLink ILECs to the level of the Qwest intrastate rates initially and then over time require the rates of the CenturyLink and Qwest ILECs to mirror Qwest's interstate access rates.[14]

6 Under the AFOR statute,[15] the Commission in approving a proposed AFOR must determine whether it will "[p]reserve or enhance the development of effective competition and protect against the exercise of market power during its development."[16] The Commission must also consider the interests of wholesale customers as it is required to approve an AFOR only if it contains a proposal for ensuring adequate carrier to carrier service quality.[17] The Commission recognized these goals, in approving the initial Qwest AFOR, stating that a carrier to carrier plan advances the twin statutory goals to "'preserve or enhance competition' and 'protect against the exercise of market power.'"[18] It is clear that the legislature's intent to ensure the development of effective competition and to protect against the exercise of market power must be considered by the Commission in deciding whether to extend an AFOR. In light of its duty to enhance competition, any extension of Qwest's initial AFOR must include provisions regarding intrastate access charges because of their significant impact on competition. To best effectuate the Legislature's intent in the AFOR statute, the Commission should not delay consideration of CenturyLink's and Qwest's intrastate access charges to a distant AFOR review.

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[13] RCW 80.36.135(2)(c).
[14] TR. 415, l. 25 – TR. 416, l. 4.
[15] RCW 80.36.135
[16] RCW 80.36.135(2)
[17] RCW 80.36.135(3).
[18] Order 06, p. 32, ¶ 109, Docket UT-061625, MRH-19.

7 The Settlement unnecessarily delays the filing of Qwest's AFOR for at least 3 to 4 years[19] and the beginning of consideration of CenturyLink's AFOR from 2014 to 2015.[20] The Settlement incorrectly assumes that intrastate access charges can only be considered in the context of the AFOR renewals in 2014 or 2015 as the Settlement Condition 3.d. mentions that intrastate access rate changes should be accomplished "over time" in the context of the AFOR renewals. This is not true. The merger between CenturyLink and Qwest will cause specific merger- related harms as soon as the Merger is complete, which should be addressed in the context of any merger approval of this Commission, and not be delayed to AFOR renewal processes that will not begin under Condition 3 for three to four years after the Merger closes or longer. Sprint's witness, Mr. Appleby, explained that with litigation time and typical transition periods, intrastate access rate mirroring could be delayed for up to eight years.[21]

8 The Joint Wireless Carriers take no position on what retail rates would govern if a Commission approved AFOR is not in effect but they believe that retail rates should be governed by the competitive market where sufficient competition exists. Intrastate access rates, however, are not competitive and are established by tariff and regulated by the Commission. Because intrastate access rates are currently regulated by the Commission, it can require that access rates should be cost-based and reflect the cost of the carrier to terminate or originate an additional minute of traffic on its network.[22] If the Commission chooses not to set the cost-based rates, the Commission should at least set the intrastate access rates of all of the CenturyLink ILECs at the same level as Qwest's intrastate access rates and then over time transition the intrastate access rates of all of the CenturyLink ILECs to the level of Qwest's interstate access rates.[23]

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[19] See Settlement, Appendix A, Condition 3 ("No sooner than three years and no later than four years after the Transaction closes, CenturyLink must file concurrently with the Commission: …
ii. AFOR plan(s) CenturyLink must file at the company's option, either a single consolidated proposed AFOR plan or separate proposed AFOR plans for each CenturyLink ILEC and Qwest,")

[20] Tr. 253, ll. 1-6.

[21] Tr. 418. ll. 2-17; Tr. 432, ll. 3-19.

[22] The Joint Wireless Carriers will explain in their second brief why reduced access revenues will not harm the financial viability of the Merged Firm.

[23] Tr. 415, l. 24 – Tr. 416 l. 4.

9 Recently in a complaint case, the Commission approved a settlement that reduced the access rates of the Embarq ILECs over time to more reasonable levels whereby Embarq agreed to eliminate its CCL charge, reduce its originating switching charge and in phases reduce by half the Embarq ITAC rate element by January 2012.[24] There the Commission found that "lower intercarrier compensation rates require carriers to recover more of their ongoing investment and operating costs from their own end users, a condition that is clearly necessary in an increasingly competitive market."[25] The Commission then recognized the consumer benefits from reducing intercarrier compensation rates by stating, "the parties to the Settlement Agreement propose to reduce Embarq's intrastate access rates which they contend, and **we expect, will eventually lead to a measurable benefit for Washington's consumers in the form of lower long distance rates and more attractive calling plans.**"[26] This shows that significant reductions can and should be made to Embarq's and the CenturyTel ILECs intrastate access rates to bring them down to the same level of Qwest's intrastate access rates of $.02 a minute.[27] Moreover, Washington consumers benefit when intercarrier payments are reduced.

10 In sum, the Commission need not and should not wait to consider reducing the CenturyLink and Qwest ILECs' access charges to a far-away AFOR proceeding as suggested in Settlement Condition 3.b. Sprint's testimony has identified multiple merger-related harms that must be addressed here before the merger can be deemed in the public interest.[28] Mr. Appleby's testimony describes the amounts of access charges that will be internalized as a result of the merger[29] that can be used to undercut competition. In addition, discovery responses indicate that CenturyLink and Qwest currently do

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[24] *Verizon Services, Inc. et al. v. United Telephone Co. of the Northwest d/b/a Embarq*, Washington State Utilities and Transportation Commission, Docket UT-081393, Order 05, Final Order Approving and Adopting Settlement Agreement; Authorizing and Requiring Compliance Filing (November 13, 2009) ("Embarq Access Order"), p. 9, ¶ 31.

[25] Embarq Access Order, p. 8, ¶ 30.

[26] Embarq Access Order, p. 9, ¶ 31 (emphasis added). See Tr. 428 – 429 where Mr. Appleby describes that the competitive market guarantees rate reductions when input costs fall.

[27] See, Exhibits JAA-1CT, p. 13; JAA-2C, JAA-3C, JAA-4C.

[28] Tr. 416, ll. 9-14; Sprint JAA-1CT, pp. 8-12.

[29] Exhibit JAA-1CT, pp. 13-15. Mr. Appleby provides a confidential estimate of the total amount of the competitive advantage resulting from the merger that the Merged Firm will have in Washington over competitors on page 15, line 17 of his responsive testimony.

compete in each other's territory and have the potential absent the merger to be a competitive check on each other.[30] In other words, competition is lessened by the merger and the Commission must reduce access charges to ensure that the Merged Firm does not gain an undue competitive advantage. Delay of consideration of access rates to begin in 2014 or 2015 will not cure the merger-related harms and will only promote competitive harm.

2. To what extent is it in the public interest to delay the earnings review required as a condition of the Commission's approval of the CenturyTel/Embarq merger in Docket UT-082119, as set forth in the Joint Applicant/Staff/Public Counsel Settlement Agreement in this proceeding? Should the Commission order an earnings review by a date earlier than that contained in the Staff/Public Counsel/Joint Applicant Settlement?

11 Settlement condition 3 delays a condition that the Commission ordered in Docket UT-082119 requiring an earnings review and a CenturyLink filing for an AFOR five years after the 2009 closing of the CenturyTel/Embarq merger.[31] In ordering that condition, the Commission noted the "Commission is faced with consideration of an AFOR for what is an entirely new company from a financial perspective; a new company that results from the combination of two companies, **neither of which have been before the Commission for a full earnings review in more than 20 years."**[32] In reviewing the Qwest/CenturyLink merger, the Commission is now being asked to approve a delay to the earnings review ordered in the CenturyTel/Embarq Merger Order. Staff witness Vasconi acknowledged that Staff does not have the authority to change that condition.[33]

12 Since an earnings review of CenturyTel and Embarq has not happened in at least 20 years, an earnings review delay is not in the public interest. In approving that merger, the Commission noted that the "Commission is concerned with the broader public interest,

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[30] Exhibit JAA-1CT, p. 8, ll. 3-17; MRH-16C; MRH-17C.
[31] *In the Matter of the Joint Application of Embarq Corp. and CenturyTel, Inc. for transfer of control of United Tel. Co. of the Northwest d/b/a Embarq and Embarq Communications, Inc.*, Washington State Utilities and Transportation Commission, Docket UT-082199, Order 05, Final Order Approving and Adopting Settlement Agreement; Authorizing Transaction Subject to Conditions; Rescinding Order 03; Approving and Rejecting Side-Agreements; Granting and Denying Pending Requests for Leave to Withdraw; Dismissing Party (May 28, 2009) ("CenturyTel/Embarq Merger Order"), p. 15, ¶ 49.
[32] CenturyTel/Embarq Merger Order, p. 14, ¶ 48 (emphasis added).
[33] Tr. 253, ll. 7-13.

not simply the interests of the customers. The question of potential harm to customers, however, is central to our consideration of the public interest."[34] The Commission also has made it clear that the term "customers" includes wholesale customer such as access purchasers of CenturyLink and Qwest.[35] As detailed in response to question 1 above, specific merger related harms regarding the impact of above-cost intrastate access rates ranging up to $.14 a minute for one of the CenturyLink companies must be addressed as part of the Commission's review of whether this merger is in the public interest.

13 If the Commission does not reduce access charges in this proceeding, the Commission should be "dealing with the access issues at the earliest possible convenience" and not wait for any future earnings review.[36] Staff witness Vasconi acknowledged that it is a good idea for Washington customers to be given the concrete benefits resulting from the transaction's synergy savings before the delayed consideration of the AFORs[37] and stated "clearly the sooner the merger benefits can accrue to the public the better."[38] Moreover, Mr. Vasconi stated that if access charges are not considered, then synergy savings cannot flow to wholesale customers before the AFORs are reviewed.[39] As such, a delay in the earnings review of CenturyLink is not consistent with dealing with access at the earliest possible time and therefore is not in the public interest.

3. To what extent is it in the public interest to retain separate regulated operating entities in Washington (i.e., the CenturyLink companies, Embarq, and Qwest) after closing of the merger? Should the Commission's order in this proceeding require that the companies be consolidated or otherwise treated as a single entity for Washington regulatory purposes?

14 It is contrary to the public interest for the CenturyLink, Embarq and Qwest operating companies to be kept separate for regulatory purposes. The merged companies claim $575 Million in annual operating synergies from the merger in 3 to 5 years and

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[34] CenturyTel/Embarq Merger Order, p. 13, ¶ 43.
[35] Tr. 418, ll. 20-25. See Order 09 in this docket, UT-100820, ¶ 20 ("Staff suggested, and rightly so, that the merger's impact on access charges and competition is within the purview of our examination.").
[36] Tr. 439, ll. 12-13.
[37] Tr. 240, l. 24 – Tr. 241, l. 4.
[38] Tr. 298, ll. 6-8.
[39] Tr. 243, ll. 5-11.

acknowledge that operational synergies will begin from day 1 after the merger closes.[40] Mr. Vasconi estimates that Washington specific merger synergies will amount to $57 Million annually.[41] Yet, the Merged Firm vows to keep the five operating companies (CenturyTel of Washington, CenturyTel of InterIsland, CenturyTel of Cowiche, United Telephone of the Northwest d/b/a Embarq, and Qwest Washington) separate for financial and regulatory purposes. It is contrary to the public interest for the Merged Firm to continue operating as separate entities for regulatory purposes for multiple reasons. Chairman Goltz's question to the panel of CenturyLink witnesses cogently captured the contradiction in the Merged Firm's position. He asked: "But aren't you trying to have it both ways? You want to have one company, have it merge and get advantage of all the synergies from the merged company but still have separate companies that place limits on CLEC and others that may want to have the advantage of a merged company?"[42]

15 CenturyLink witness Bailey tried to justify maintaining separate legal entities speculating at the hearing that debt covenant defaults would be triggered if the separate ILEC entities were consolidated for financial purposes.[43] Mr. Bailey, however, gave no specific information regarding potential defaults and did not explain how they would be triggered by combining the Washington ILECs. This is particularly troubling because he acknowledged that none of the CenturyLink entities have debt.[44] The Commission should order that the five ILECS be united for <u>regulatory</u> purposes even if they remain separate for financing purposes to avoid the potential harm to customers from allowing the regulatory gamesmanship made possible by maintaining separate entities. Requiring consolidation would resolve the intrastate access issue, in part. Only one intrastate access rate would apply. Mr. Appleby listed the different access rates charged by the Merged Firm's separate ILEC entities, ranging from $.02280 for Qwest Washington to $.1436 for CenturyTel of Cowiche.[45] A regulatory structure that permits the different ILECs to charge separate and distinct intrastate access rates allows the CenturyTel and Embarq

[40] Tr. 239, ll. 22-25; Tr. 214, ll. 1-6.
[41] Tr. 238, ll. 9-18.
[42] Tr. 390, l. 23 – 391, l. 2.
[43] Tr. 392.
[44] Tr. 503, l.19.
[45] JAA-4C.

ILECs to maintain their intrastate access rates at current rates that far exceed the Qwest rates and causes competitive harm.

16 Mr. Appleby's testimony demonstrated the competitive disadvantages of Qwest's competitors paying the high CenturyTel and Embarq access rates while Qwest enjoys owner's economics over the facilities and its real economic costs to originate and terminate calls in CenturyTel and Embarq territories rather than the published access rates.[46] Mr. Appleby's supplemental testimony based on his review of the HSR documents indicates that the Merged Firm acknowledges the economic benefits of reduced termination costs and will no longer be concerned with the access prices that the Qwest IXC will be charged by the CenturyTel and Embarq ILECs.[47] Therefore, a regulatory structure in Washington that forces CenturyLink's competitors to pay access rates multiple times higher than the economic cost of providing that access harms competition and is contrary to the public interest.

17 The Commission should eliminate the regulatory differences between the five CenturyLink ILECs and require them to tariff intrastate access services at the same rates as the Qwest ILEC currently does. Then the Commission can require the consolidated ILECs' rates to be reduced from the Qwest intrastate rates to the Qwest interstate rates in steps over time.

18 Another reason for treating the five CenturyLink ILECs the same for regulatory purposes would be to resolve some of the interconnection-related issues discussed by Sprint and the Joint CLECs. Sprint proposed a condition to allow interconnecting carriers like Sprint to port an interconnection contract from one ILEC to another of the Merged Firm and to allow contracts to be ported across state lines. Mr. Appleby testified:

> Like contract extensions, the ability to port a contract from one ILEC to another in the Merged Firm avoids the burdensome incremental cost of contract negotiations and potential arbitration to establish a new contract.

[46] JAA-1CT, pp. 12-15.
[47] JAA-7HCSRT, pp. 7-9.

> With more than 100 ILECs in the Merged Firm[48] *and its stated plan to retain each legal entity, management of the interconnection arrangements can be unnecessarily burdensome.* A carrier wishing to interconnect with the Merged Firm in multiple locations would need to negotiate with the Merged Firm on a myriad of issues over and over again. It makes much more sense for the industry as a whole to permit the porting of existing agreements from one ILEC to another within the Merged Firm, even if the agreement originated in another state.[49]

19 Management of the multiple interconnection agreements with the various Merged Firm ILECs is burdensome and expensive for interconnecting carriers. For example, Exhibit MRH-10 shows that Qwest has 17 wireless interconnection agreements while the CenturyLink ILECs have 27 wireless interconnection agreements. There is no doubt that the increased number of wireless interconnection agreements with CenturyLink is due to the four separate ILEC entities operated by CenturyLink currently. The confusion and burden caused by implementing, billing and administering multiple interconnection contracts with the various Merged Firm ILECs can be reduced with a condition that treats the Merged Firm ILECs as one for regulatory purposes.

20 CenturyLink claims that it is too complicated to port interconnection agreements from state to state and between ILECs in a state.[50] Yet, CenturyLink entered into a multi-state settlement agreement with Integra in this merger, which it will be implementing in multiple states and has the technical ability to make the agreement applicable in multiple states.[51] Moreover, in discovery responses CenturyLink indicated that no technical reasons prevent it from porting interconnection contracts between ILECs and between states.[52]

21 An additional reason for treating the Merged Firm ILECs as one for regulatory purposes is to promote network efficiency. If the Merged Firm interconnects its own ILEC networks, the CLECs and wireless carriers should be able to take advantage of the same

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[48] Nationally, the Merged Firm will have approximately 75 legacy CenturyTel ILEC legal entities, approximately 25 legacy Embarq ILEC legal entities, and 13 legacy Qwest ILEC legal entities, according to CenturyLink and Qwest price cap filings at the FCC.
[49] Ex. JAA -1CT, pp. 38-39 (emphasis added).
[50] Tr. 403.
[51] Tr. 350-351.
[52] Ex. JAA-1CT, p. 39 citing discovery responses to Sprint DRs 32, 33, and 34.

network economics and have the opportunity to interconnect networks at a single point. Mr. Pruitt of Charter explained the increased costs associated with deploying multiple interconnection facilities to multiple POIs in a state[53] and described how the CLECs would be disadvantaged if the Merged Firm ILECs interconnect their network and enjoy cost savings from more efficiently moving their traffic, while the CLECs are forced to interconnect at multiple points in a LATA. If the Merged Firm ILECs are treated as a single ILEC for regulatory purposes, CLECs and wireless carriers could also benefit from the network efficiencies gained by the Merged Firm ILECs.

22 Another reason to consider treating the Merged Firm's ILECs as a single entity for regulatory purposes is to ensure that they cannot claim the rural exemption under subsection 251(f)(1). If the Qwest entity is combined with the CenturyLink ILECs then the CenturyLink ILECs cannot be defined as a rural telephone company under federal law as discussed below in response to question four.

23 In sum, requiring the Merged Firm ILECs to be treated as a single ILEC in the state of Washington for regulatory purposes would help cure many of the merger-related harms. Such a requirement could help remove anticompetitive access charge disparities, interconnection agreement disparities, network inefficiencies and claims of the rural exemption caused by the five Merged Firm ILEC entities in Washington.

4. If the Commission approves the transaction, together with the conditions included in the proposed Settlement Agreements, would the merged company (or its subsidiaries) operating in Washington be eligible for the rural exemption under 47 U.S.C. § 251?

24 The federal rural exemption statute in federal law has two components. Section 251(f)(1) allows rural telephone companies as defined in 47 U.S.C. § 153(37) to be exempt from subsection 251(c) until the rural telephone company receives a bona fide request and the state commission determines that the request is not, among other items, unduly economically burdensome.[54] Section 251(f)(2) allows certain LECs with less than two

[53] Tr. 451, l. 19 – Tr. 452, l. 4;
[54] 47 U.S.C. § 251(f).

percent of the nation's subscriber lines in the aggregate to petition a state commission for suspension or modification of its section 251(b) and/or (c) requirements. Thus, the rural exemption confers two benefits upon eligible carriers. Given the number of access lines of the Merged Firm, it would not qualify to petition for suspension or modification under section 251(f)(2). However, the individual CenturyTel or Embarq operating entities might qualify under subsection 251(f)(1). The Commission should not relieve the Merged Firm of its federal obligations but should consider the scale and scope of those entities' corporate parent and exercise its power under the "public interest" standard to refuse to allow the rural exemption for the Merged Firm's ILECs in Washington. It can do so by ordering that it will consider all of the Merged Firm's ILECs as a single ILEC in the state of Washington for regulatory purposes.

25 Certainly, from a policy perspective the third largest ILEC in the country should not be eligible to claim exemptions from Section 251 duties due to the rural exemption. Witnesses for the Merged Firm tout the scale and scope with the combination of CenturyLink and Qwest.[55] By FCC Rule, ILECs that are part of a holding company having more than 2% of the nation's lines are ineligible for the 251(f)(2) exemption.

> § 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.
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> A LEC is not eligible for a suspension or modification of the requirements of section 251(b) or section 251(c) of the Act pursuant to section 251(f)(2) of the Act if such LEC, at the holding company level, has two percent or more of the subscriber lines installed in the aggregate nationwide.[56]

26 Accordingly, the Commission must view CenturyLink from the holding company perspective as an ILEC with over 17 million access lines nationwide[57]as a whole in determining whether the CenturyLink ILECs in Washington can apply for the rural

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[55] See, e.g. Ex. MSR-1T, p. 13 ("The Transaction will result in a combined enterprise that can achieve greater economies of scale and scope than the two companies operating independently." Mr. Reynolds goes on to mention that economies of scale and scope in that the two networks are primarily complementary, which will allow the company to optimize network capacity, deploy additional broadband services, and have increased purchasing power.)

[56] 47 C.F.R. § 51.403.

[57] JJ-1T, p. 8. ll. 17-18.

exemption from section 251(b) and (c) duties under 251 (f)(2). The Merged Firm would not qualify under any definition of subscriber lines.

27 With respect to the Section 251(f)(1) exemption, one or more of the current CenturyLink ILECs technically qualify under the Act's definition of "rural telephone companies". Yet, this merger of two highly sophisticated and technologically savvy network operators begs the question whether the Commission should allow these companies to be exempt from their Section 251 obligations of negotiating and entering into interconnection agreements, interconnection, UNEs, and resale. Commissioner Jones perceptively asked witness Bailey whether one of the reasons for maintaining separate CenturyTel subsidiaries in Washington is to obtain expense savings associated with not being subject to the 251(c) obligations.[58] Mr. Bailey could not, or did not, answer the question.[59] Joint CLEC witness Pruitt described the issues related to obtaining interconnection agreements and efficient interconnection due to the CenturyLink ILECs claiming the rural exemption.[60] Clearly, the Commission needs to make adjustments to the Settlements before approving the merger.

28 The Commission has the authority and obligation in considering the public interest for this merger to encourage competition. Therefore, the Commission has the authority to order the CenturyLink ILECs, if they remain separate, to be ineligible for the 251(f)(1) exemption.

III. CONCLUSION

29 The Commission's briefing issues highlight some of the vexing issues raised by this merger and the regulatory difficulties associated with dealing with a Merged Firm. The Commission needs to impose conditions in addition to the conditions contained in the various settlement agreements. Conditions regarding the reduction of intrastate access charges, interconnection agreements, and requiring company consolidation for regulatory purposes are necessary to satisfy the public interest. The merger does not satisfy the Commission's public interest standard under the current settlement agreements as they do

[58] Tr. 395, l. 15 – Tr. 396, l. 15.
[59] Tr. 395, 11. 18-24.
[60] Tr. 454, ll. 4-22.

not adequately address wholesale customers of the Merged Firm and do not cure the competitive harms of the merger. Only prudent action from the Commission can prevent this result.

RESPECTFULLY SUBMITTED this 14th day of January, 2011.

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