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

INITIAL BRIEF OF JOINT CLECS AND CBEYOND COMMUNICATIONS, LLC ON COMMISSION-IDENTIFIED ISSUES

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I. INTRODUCTION

Pursuant to Administrative Law Judge Friedlander's order issued at the close of hearings in this proceeding (Order No. 13), the Joint CLECs and Cbeyond Communications, LLC (collectively the "Joint CLECs")[1] hereby file this brief on Commission-identified issues in the above entitled matter concerning the proposed acquisition of the Qwest Operating Companies ("Qwest")[2] by CenturyTel, Inc. and its subsidiaries ("CenturyLink"), (collectively, the "Joint Applicants" or "Merging Companies").[3]

Order No. 13 directs the parties to present arguments on four issues set forth in Appendix A of the order. Of those four issues, only two are directly relevant to those raised by the Joint CLECs in this proceeding. For that reason, the Joint CLECs hereby present briefing on Commission-identified Issues 3 and 4, related to the public's interest in the Joint Applicants'

[1] The "Joint CLECs" consist of the following competitive local exchange carriers: Charter Fiberlink WA-CCVII, LLC; XO Communications Services, Inc.; tw telecom of washington, llc; Pac-West Telecomm, Inc.; McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services; and Covad Communications Company. For purposes of this brief the Joint CLECs are also joined by Cbeyond Communications, LLC.

[2] The Qwest Operating Companies include Qwest Communications International, Inc., Qwest Corporation, Qwest LD Corp., and Qwest Communications Company LLC.

continued operation of separate regulated operating entities in Washington (Briefing Issue 3), and whether the merged company would be eligible for the rural exemption under federal law (Briefing Issue 4).

With respect to Commission-identified Briefing Issues 1 and 2 the Joint CLECs generally take no position, and will not present briefing on such issues. However, Joint CLECs would remind the Commission that with respect to Issue 1, any consideration of a new AFOR petition would necessarily require the applicants to include a proposal for ensuring wholesale service quality, and include terms that provide appropriate enforcement or remedial provisions in the event that the company fails to meet wholesale service quality standards or performance measures.[4]

II. SUMMARY AND BACKGROUND

The merger of the Joint Applicants' respective companies, if approved by the Commission, will lead to a company that will constitute the third largest incumbent local exchange carrier ("ILEC") in the nation, behind only AT&T and Verizon. According to the Joint Applicants' own witnesses, the merger is expected to generate synergy savings of up to $600 million. Nonetheless, the controlling company, CenturyLink, continues to use separate subsidiaries and exemptions from federal law (Section 251(c) of the Telecommunications Act of 1996), to avoid many of the statutory obligations necessary to support robust competition. If those practices are permitted to continue post-closing competitors, and the public's interest in a competitive market for voice services, will suffer. The Commission should therefore condition

[3] CenturyLink, as referred to herein, includes CenturyTel, Inc., CenturyTel of Washington, Inc., CenturyTel of Inter-Island, Inc., CenturyTel of Cowiche, Inc., CenturyTel Long Distance, LLC, CenturyTel Solutions, LLC, CenturyTel Fiber Company II, LLC, United Telephone Company of the Northwest, and Embarq Communications, Inc.
[4] *See* RCW 80.36.135(3).

approval of this transaction on the Merged Company's willingness to discontinue reliance on separate subsidies and the rural exemption.

The Joint CLECs are a group of individual competitive local exchange carriers ("CLECs") providing local telecommunications and/or competitive voice services in competition with Qwest, an ILEC and Washington's Bell Operating Company ("BOC"). However, each of the Joint CLECs also relies on Qwest as its wholesale supplier of essential wholesale services or interconnection used as essential inputs to provide competitive local services. In addition, Charter also provides service in competition with CenturyLink's affiliate, Embarq, which operates as an ILEC but not as a BOC. Because CLECs have few, if any, alternatives for these essential wholesale inputs, they are largely captive wholesale customers of Qwest and CenturyLink (sometimes referred to herein as the "Merging Companies").[5] Therefore, robust retail competition in Washington depends on the ability of CLECs to purchase Qwest's and CenturyLink's wholesale facilities and interconnection on fair and reasonable terms.

The Merging Companies' dual role with respect to CLECs as both their primary competitor and sole supplier of certain essential wholesale facilities creates an inherent conflict of interest and threatens to undermine competitive choices available to Washington consumers.[6] Because they compete with CLECs, the Merging Companies have a strong incentive to undermine their wholesale CLEC customers by increasing wholesale rates, diminishing wholesale service quality, reducing resources devoted to wholesale customers or eliminating wholesale offerings on which CLECs depend.[7] Further, as monopoly or near monopoly

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[5] Responsive Testimony of Dr. August H. Ankum, Exhibit_AHA-1T, ("*Ankum Responsive*") p. 14, lns. 6-9
[6] *Id.* at lns. 9-13.
[7] *Id.*

suppliers of essential facilities, Qwest and CenturyLink are in a position to impose unreasonable terms on the provision of the wholesale services on which CLECs rely.

Although Washington CLECs remain vulnerable to anticompetitive conduct by Qwest, they are now able to compete effectively as a result of a number of contested and often arduous proceedings, negotiations and regulatory mandates over the past 14 years that have produced a delicate competitive balance in Washington. Those proceedings, negotiations and regulatory mandates have resulted in the development of specific Qwest wholesale systems, policies and product offerings that have allowed local competition to develop in Washington, albeit imperfectly and more slowly than many would have preferred. As a result, there are multiple CLECs providing different product offerings to different market segments in competition with Qwest and CenturyLink and to the benefit of Washington consumers.

III. ARGUMENT

As noted above, the Joint CLECs will focus their arguments in this brief on Commission-identified Briefing Issues 3 and 4, which involve competition and wholesale issues. Further, the Joint CLECs believe that discussion of Issue 4 should be presented before its discussion of Issue 3 because the rural exempt status of CenturyLink subsidiaries (Issue 4) is closely related to the question of whether those subsidiaries should, or should not, continue operating as separate entities in the state (Issue 3). For that reason the Joint CLECs present their arguments in that order.

A. *Commission Briefing Issue 4* - The Merged Company's Subsidiaries Should Not Be Permitted to Continue to Avoid Pro-Competitive Statutory Obligations Through Continued Reliance on the Rural Exemption

Commission-identified Briefing Issue 4 presents a question concerning the merged company's (or its subsidiaries) ability to seek protection from competition under the rural exemption provisions of federal law. Specifically, the Commission asks the following:

> 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?

The answer to this question differs depending upon which of the merged company's subsidiaries are at issue. None of the Qwest companies is eligible for the rural exemption today. Following the merger, none of the Qwest companies will be eligible for the rural exemption.[8] However, absent Commission action in this proceeding, following the merger certain CenturyLink (and Embarq) companies ***will*** be eligible for the rural exemption. The harm arising from this distinction is discussed in greater detail in subsections A.1 and A.2 below. A brief review of the purpose and effect of the rural exemption will help to illustrate the impact of this distinction.

The rural exemption under 47 U.S.C. § 251(f) provides a means for small, independent telephone companies operating in rural areas to avoid some of the pro-competitive obligations applicable to ILECs pursuant to Section 251(c) of the Act. Section 251(c) sets forth very detailed obligations concerning an ILEC's duty to provide access to interconnection, unbundled network elements ("UNEs"), resale and collocation on nondiscriminatory terms and in accord

[8] The Integra Settlement filed on November 10, 2010 contains a condition (No. 6) that purports to restrict the merged company from availing itself of the rural exemption in the legacy Qwest territory. While the Joint CLECs

with pricing standards set forth in the Act. These obligations are the foundation of the essential wholesale services that CLECs utilize to provide competing services. Without the ability to interconnect, and obtain UNEs, resale and collocation, CLECs would not be able to effectively compete with the incumbent.

Indeed, at this time, all of the largest ILECs (e.g., AT&T, Verizon, Qwest, Frontier) provide access to interconnection, UNEs, resale and collocation to competitors pursuant to Section 251(c). Because these obligations serve as the foundation for competitive entry into any particular market, Congress imposed the obligations on nearly *all* ILECs. However, Congress also recognized that a small percentage of ILECs operated in rural areas that did not have the benefit of sufficient size, measured primarily in terms of access lines or population, that could help absorb the initial impact of competitive entry. For that reason, Congress developed the rural exemption to mitigate the effects of competition for such rural ILECs. However, that exemption was intended to apply in a limited fashion to a narrow component of the industry. As Dr. Ankum testified "the rural exemption is intended for small rural carriers whose economic viability may be threatened if they were obligated to incur costs to implement all the unbundling and resale provisions of the Telecommunications Act of 1996, such as the costs associated with the development of sophisticated OSS."[9]

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do not oppose this condition, it does not in any way represent a "compromise" by the Joint Applicants, as this would be true by operation of federal law in any event.

[9] *Ankum Responsive* at p. 93, ln. 25 to p. 94, ln. 1.

Under the statute, these small independent carriers[10] are permitted a limited exemption from the pro-competitive obligations of Section 251. Specifically, under Section 251(f)(1), a qualifying rural telephone company is exempt from obligations under Section 251(c), absent the receipt of a request for interconnection and a state Commission decision that such interconnection is not "unduly economically burdensome."[11] Thus, when invoked, Section 251(f) immunizes rural ILECs from the basic obligations of Section 251(c), which are essential to the provision of competitive telecommunications services in Washington.

1. *Rural Exempt Status of the Former Qwest Company*

The merged company's subsidiary that constitutes the former Qwest Corporation (i.e. Qwest the ILEC/BOC in Washington) will not be eligible for the rural exemption under the terms of the Integra Settlement. Specifically, under Condition 6 of the Integra Settlement, the merged company's subsidiary operating in "legacy Qwest ILEC service territory" will "not seek to avoid any of its obligations" by asserting that it is exempt from pro-competitive provisions of the Act pursuant to the exemptions for so-called rural carriers set forth under section 251(f)(1) or (f)(2).[12]

This component of the Integra Settlement is of little practical utility to competitors in Washington for several reasons. First, Qwest does not operate today as a "rural carrier." Nor is Qwest otherwise entitled to invoke the rural exemption today. Given its operations in Seattle,

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[10] The Act defines a "rural telephone company" as a local exchange carrier operating entity that: (1) provides common carrier services in any study area that does not include either "any incorporated area with more than 10,000 inhabitants" or "an urbanized area;" (2) provides telephone exchange service to fewer than 50,000 access lines; (3) provides telephone exchange service to any study area with fewer than 100,000 lines; or (4) has less than 15% of its access lines in communities of more than 50,000. 47 U.S.C. § 153 (37). Section 251(f)(2) also defines a rural company at the holding company level as one that has fewer than two percent of country's subscriber lines in the aggregate nationwide. 47 U.S.C. § 251(f)(2).

[11] 47 U.S.C. § 251(f)(1)(A).

Tacoma, Olympia and other large metropolitan markets, Qwest cannot reasonably be deemed to operate as a "rural carrier." Thus, Qwest does not rely upon the rural exemption at this time. Second, Qwest has not operated under the rural exemption in Washington at any time in the last fourteen (14) years (since the rural exemption was enacted in the 1996 Act). Thus, Qwest is not a rural carrier now, has never operated as one in the past, and is not eligible to do so. It is, therefore, highly unlikely that the Qwest ILEC subsidiary would be entitled to invoke rural exempt status in the ***future*** (as Condition 6 of the Integra Settlement contemplates).

Because Condition 6 of the Integra Settlement prohibits the merged company's Qwest ILEC subsidiary from taking action that it has never taken in the past, and is unlikely to have been eligible to take in the future, the prohibition on Qwest operating as rural carrier under Integra Settlement Condition 6 is nothing more than a symbolic prohibition on an unasserted legal right that Qwest has never invoked and would be hard pressed to invoke in the future.

2. *Rural Exempt Status of the CenturyLink Companies*

In contrast, the former CenturyLink companies (including the Embarq entities in Washington) will not be constrained by the Integra Settlement. The Integra Settlement specifically excludes any of the CenturyLink subsidiaries that do not operate in the legacy Qwest territory from any of the limitations set forth in Condition 6. As such, absent Commission action in this proceeding, the CenturyLink subsidiaries in Washington will continue to be eligible for the rural exemption under Section 251(f).

CenturyLink currently has three separate ILEC subsidiaries in Washington that invoke the rural exemption at this time. Specifically, CenturyTel of Washington, Inc., CenturyTel of

[12] Integra Settlement Agreement at ¶ 6.

Inter-Island, Inc., and CenturyTel of Cowiche, Inc. all currently invoke the protections of the rural exemption to avoid their obligations under Section 251(c).[13]

Although CenturyLink identifies these companies as separate subsidiaries[14] that provide service in Washington, the record in this proceeding shows that the majority of operational tasks necessary to provide services in Washington occur at the national level, out of the CenturyLink corporate headquarters in Monroe, Louisiana (or other locations outside of the state of Washington). The specific operations at issue are discussed in greater detail in the next section of this brief (concerning the public interest benefits associated with the merged company's continued reliance on separate subsidiaries in Washington).[15] As demonstrated there, the CenturyLink subsidiaries in Washington appear to be effectively shell companies that exist primarily for reasons related to the company's finances and/or for protection from the obligations of Section 251(c).[16]

Despite the fact that these subsidiaries do not actually operate independently, they continue to invoke the rural exemption under Section 251(f) as if they were independent companies.[17] As a result, those subsidiaries are not subject to the pro-competitive obligations set forth under Section 251(c). The impact of this situation is felt most directly by competitors that compete with CenturyLink today, including Charter.

For example, in other states where CenturyLink has invoked the rural exemption, Charter has been forced to expend additional resources to obtain basic interconnection terms with

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[13] *See* Responsive Testimony of Billy Pruitt, Exhibit__BHP-1T ("*Pruitt Responsive*"), p. 39, line 1 (citing Exhibit__ BHP-9 – CenturyLink Discovery Response No. 38(a)).
[14] Tr. Vol III, p. 286, lns. 3-24 (Reynolds).
[15] *See infra* pp. 12-13.
[16] Tr. Vol. IV. P.391, ln. 11 to p.392, ln. 17 (Hunsucker).

CenturyLink. In addition, as discussed further below, Charter has also been forced to accept the obligation to establish interconnection arrangements with these CenturyLink "rural" companies at multiple locations within the same state. Interconnecting at multiple locations necessarily increases the costs that a competitor must bear in order to obtain the ability to interconnect and exchange traffic with "rural" ILECs like the CenturyLink companies in Washington. Further, CenturyLink's decision to invoke "rural" company status for these subsidiaries in Washington also has the unwanted effect of creating an absolute bar to competitive entry for those CLECs that rely upon unbundled network elements, resale or collocation rights to support their competitive service arrangements.[18] CenturyLink's anti-competitive practice of invoking the rural exemption to avoid these obligations, and/or to keep competitors out of their service areas, is yet another example of the type of "worst" practices that CenturyLink engages in at the expense of competitors and the public's interest in a competitive marketplace for voice services.

3. *This Commission Should Eliminate the Distinction in the Integra Settlement Agreement and Condition Approval of this Transaction on the CenturyLink Companies' Waiver of the Rural Exemption*

The distinction drawn by the Integra Settlement, whereby some of the merged company's subsidiaries will not invoke the rural exemption (i.e., those to which the exception has never applied and never will), but others will, is not in the public interest. Because the risk of continuing to permit rural exempt status is highest with the former CenturyLink companies, it is ***those*** entities that should be barred from invoking the rural exemption post merger. Accordingly, the Commission should eliminate the distinction created by the Integra Settlement

[17] *See Pruitt Responsive*, Exhibit__BHP-1T, p. 39, line 1 (Exhibit Charter No. BHP-9 – CenturyLink Discovery Response No. 38(b)).

and instead condition approval of the transaction on the merged company's waiver of the ability to claim the rural exemption on behalf of ***any and all*** of its operating subsidiaries in Washington.

Under similar circumstances, the Minnesota Commission denied another ILEC's attempt to invoke the rural exemption because it determined that there were "close operational ties" between the ILEC's local operating company and its national parent company.[19] That Commission explained that although the local operating company, viewed in isolation, might qualify as a rural carrier (*i.e.*, since less than 15% of its access lines were in cities or towns with populations exceeding 50,000), the national entity did not qualify for such treatment.[20] The Commission reasoned that because there were "close operational ties" between the local operating company and its national parent company, it must therefore consider the parent company for purposes of evaluating the ILEC's claims for a rural exemption. Further, the Minnesota Commission concluded that Congress had no intention of extending the rural exemption to an ILEC (GTE) which was then one of the nation's largest local telephone service providers in the United States.[21]

In this instance, Qwest is also one of the nation's largest ILECs, behind only AT&T and Verizon. There is also undisputed evidence that CenturyLink's operating companies have "close operational ties" with the parent company.[22] In fact, CenturyLink's witnesses have made it clear that most of CenturyLink's operations occur at the parent company (*i.e.*, national) level, not at

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[18] Indeed, the record reflects that Integra (a UNE-based CLEC with significant operations in Washington) does not compete in the CenturyLink affiliate service territories. Supplemental Testimony of Billy H. Pruitt, Exhibit_BHP-18CT, p.5, lns. 14-16.

[19] *In the Matter of AT&T Communications of the Midwest, Inc.'s petition for Arbitration with GTE Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Denying Claim to Rural Exemption at 8, Docket P-442, 407/M-96-939 (Minn. PUC 1996).

[20] *Id.* at 4.

[21] *Id.* at 5.

the subsidiaries (*i.e.*, local) level. Specifically, CenturyLink's witness Mr. Schafer acknowledged in pre-filed testimony that the CenturyLink operating companies in Washington do not have local operations for marketing, sales, wholesale operations, customer services, and operations (which include billing, operations support systems ("OSS"), signaling networks, and related functions).[23] Instead, all of these operations occur at the corporate headquarters in Monroe, Louisiana (*i.e.*, at the national parent company level).

Hence, the record shows that very few, if any, functions actually occur at the local entity level. Notably, the Joint Applicants did not offer any evidence of what operational functions actually occur at the local level. Indeed, CenturyLink's use of separate subsidiaries appears to be nothing more than a legal fiction as the parent company (*i.e.*, corporate headquarters) manages the operations for all of the separate operating companies. Given CenturyLink's opposition to the Joint CLEC testimony on this issue, it is reasonable to assume that approach will continue after merger closing.[24] Such a result could not have been what Congress intended when it crafted the framework for the rural exemption.[25]

Indeed, this Commission has recognized that maintaining the rural exemption for incumbents shields them from most of the obligations under Section 251(c), which are intended to promote competition in the local telecommunications/voice services market. In a decision involving the grant of eligible telecommunications carrier ("ETC") status to a carrier operating in a rural area, this Commission granted such rights after the applicant agreed not to assert the rural

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[22] *See e.g.*, Direct Testimony of Todd Schafer (CenturyLink), Exhibit TS-4 (diagram of CenturyLink Operating Model)
[23] *Id.*
[24] *See* Rebuttal Testimony of Michael R. Hunsucker, Exhibit MRH-1RT, pp. 37-38 (objecting to Joint CLEC proposed condition for CenturyLink to waive the rural exemption).
[25] *Id.* at p. 90, lines 1-6.

exemption in such areas.[26] Specifically, the Commission explained that "CTC-Idaho will not assert a claim for rural exemption to avoid interconnection pursuant to 47 U.S.C. Sections 251(b) or (c) of the Telecommunications Act of 1996... agreeing not to assert its rural exemption for interconnection ***will promote competition***."[27]

For that reason the Commission should take the same approach as that used in Minnesota and recognize that any consideration of the merits of permitting the merged company's subsidiaries to invoke the rural exemption must account for the fact that the Washington subsidiaries have little to do with the actual operations and the provision of service. Ignoring the close operational ties, and the fact that the Washington subsidiaries are effectively "shell" companies, leaves open the possibility that the third largest ILEC in the country will be free from its ILEC obligations in portions of its operating territory in Washington. Residents of Washington residing in those areas of the state deserve to benefit from the same level of competition that has emerged in Seattle, Tacoma, Spokane, Olympia and other more densely populated "metropolitan" areas of the state, given the monolithic realities of the merged company operating as a single unit.

Moreover, in its review of a comparable transaction involving Verizon and Frontier, the Federal Communications Commission ("FCC") found that a similar condition was appropriate. Competitors involved in that proceeding had expressed serious concerns that post-closing Frontier would invoke the rural exemption, and thereby eliminate its obligations under Section

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[26] *See in the Matter of the Petition of Citizens Telecommunications Company of Idaho for Designation as an Eligible Telecommunications Carrier*, 2000 Wash. UTC LEXIS 275,*10 (2000) (the Commission explained that a rural carrier's "agree[ment] not to assert its rural exemption for interconnection will promote competition."). *See also Ankum Responsive* at p. 81, lns. 1-23.

[27] 2000 Wash. UTC LEXIS 275. at * 10 (emphasis added).

251(c).[28] The FCC determined that these concerns must be addressed, and approved the transaction only after Frontier committed "not to assert that it is exempt from section 251(c) obligations pursuant to section 251(f)(1) in the areas transferred from Verizon that are rural telephone companies outside of West Virginia, or 'to move or reclassify any exchanges or wire centers currently located in Verizon West Virginia's legacy service areas so as to … take advantage of the rural exemption under Section 251(f)(1).'"[29]

Tellingly, the CenturyLink companies have not explained why they should be entitled to continued protection from pro-competitive obligations that nearly all other large ILECs operate under today. The failure to justify the continued reliance on these protections is particularly astonishing given its soon-to-be-prominence as a "national" telecommunications company. Indeed, if this transaction is approved, CenturyLink will be the third largest ILEC/BOC in the

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[28] *In the Matter of Applications Filed by Frontier Communications Corp. and Verizon Communications Inc. for Assignment of Transfer of Control*, Order, WC Docket No. 09-95; FCC 10-87, ¶ 39 (2010).

[29] *Id.* at ¶ 40. Similarly, this Commission limited Frontier's right to invoke the rural exemption after it acquired Verizon's exchanges in the state of Washington. *See In the Matter of the Joint Application of Verizon Communications, Inc. and Frontier Communications Corporation*, Final Order Approving and Adopting, Subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction, Docket UT-090842 (Wash. UTC 2010) (adopting CLEC settlement agreements with condition that Frontier will "not seek to avoid its obligations" on the grounds that it is "exempt from such obligations under Section 251(f)(1)-(2) of the Communications Act."). Other states have applied the same condition. *See, e.g., Frontier Comm. Corp., Verizon West Virginia Inc., et al.*, Order, Case No. 09-0871-T-PC, 2010 W. Va. PUC LEXIS 1158, * 130 (2010) (Frontier commits that it "will not seek to avoid any of its obligations under any assumed agreements on the grounds that Frontier WV is not an incumbent local exchange carrier under the Federal Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq*, (the 'Communications Act'), nor on the grounds that it is exempt from any of the obligations hereunder pursuant to Section 251(f)(1) or Section (f)(2) of the Communications Act."); *In the Matter of Verizon Communications Inc. and Frontier Communications Corp. Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc.*, Order No. 10-067, Docket UM 1431, Appendix A, pp.9-10 (Feb. 24, 2010) (Frontier commits that it "will not seek to avoid any of its obligations on the grounds that it is exempt from any of the obligations pursuant to Section 251(f)(1) or Section 252(f)(2) of the Act.").

country with more than 17 million access lines and over $19.8 billion in revenue.[30] Its operating territory will span 37 states and it will be a BOC in 14 of those states.[31]

Given both its absolute and relative size, it is well past time that CenturyLink cease wrapping itself in the protective cloak of the small "rural" carrier. It should qualify neither as a rural carrier under 251(f)(1) nor under 251(f)(2), which applies to carriers with less than 2% if the nation's subscriber lines in the aggregate. CenturyLink will have well in excess of 2% of the nation's access lines following the merger. Notably, adopting the Joint CLEC's Condition in Washington will not affect CenturyLink's ability to continue receiving universal service fund subsidies. Thus, there is no jeopardy to the approximately $931 million in payments received by the company over the last three years.[32]

For these reasons, the Commission should eliminate the distinction created by the Integra Settlement and instead condition approval of the transaction on the former CenturyLink companies' waiver of their existing (and any future) rural exemptions.

B. *Commission Briefing Issue 3* - The Merged Company Should Not Be Permitted to Continue to Use Separate "Operating" Subsidiaries in Washington to Avoid Their Obligations Under Federal Law

Commission Briefing Issue 3 asks whether the public interest is served if the merged company retains and "operates" separate subsidiaries within the state. Specifically, the Commission asks:

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[30] Direct Testimony of G. Clay Bailey (CenturyLink), Exhibit GCB-1T, p.4, lns. 4-10; *see also, Ankum Responsive* at p. 94, lns. 1-4; *and* Responsive Testimony of Timothy Gates, Exhibit_TJG-1HCT, ("*Gates Responsive*"), p.6, lns. 8-10.

[31] *Id.*

[32] Supplemental Testimony of Billy H. Pruitt, Exhibit_BHP-18CT, p.18, lns. 1-3, fn.7 (citing W. David Gardner, *AT&T, Verizon Receive Billions From FCC Phone Fund*, Information Week (July 12, 2010), http://www.informationweek.com/story/showArticle.jhtml?articleID=225702855 (explaining that CenturyTel received $931 million from the Universal Service Fund over the past three years)).

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?

The Joint CLECs take no position on whether the merged company should be permitted to retain separate legal subsidiaries following closing of the merger. Testimony presented during the hearing suggests that the sole purpose for these entities is to facilitate certain financing arrangements that CenturyLink and/or Qwest have utilized in the past.[33] However, the Joint CLECs do take the position that any continued reliance on separate subsidiaries post-closing should not be a means for the merged company (or its subsidiaries) to avoid otherwise applicable legal obligations to wholesale customers and competitors. Thus, to the extent that the Commission permits the merged company to continue using subsidiaries in Washington, the Commission should make it very clear that such arrangements do not insulate the merged company from all of its wholesale (and competitive) obligations under the law, and existing agreements.

1. *The Continued Use of Separate Subsidiaries Should Not be Used as a Means of Avoiding Wholesale and Competitive Obligations That Otherwise Apply Under Federal or State Law*

As noted above, this question is closely related to the question of whether the merged company should be permitted to continue to invoke the rural exemption. That issue is tied to this one because CenturyLink takes the position that its separate subsidiaries in each state should be treated as "rural telephone companies" under the 1996 Act. Despite controlling over 7 million access lines following its merger with Embarq, several CenturyLink subsidiaries in Washington

[33] Tr. Vol. IV p.391, ln. 11 to p.392, ln. 17 (Hunsucker).

continue to assert the protections of a "rural telephone company." Their reliance on this exemption is supported, in part, by the fact that the subsidiaries are separate legal entities that can each qualify under the statutory definition of a "rural telephone company"[34] due to their relatively small size.

While the problem in Washington is significant, it is more pronounced in several other states in which CenturyLink operates. Specifically, CenturyLink lists 17 operating entities in Wisconsin, 9 in Louisiana, 7 in Arkansas and 5 in Missouri. In Washington, of course, CenturyLink maintains 3 subsidiaries that operate as a separate "rural" companies, exempt from many of the critical pro-competitive obligations imposed on other ILECs.

As demonstrated above, there is undisputed evidence that CenturyLink's subsidiaries in Washington have "close operational ties" with the parent company.[35] In fact, CenturyLink's witnesses have made it quite clear that most of CenturyLink's operations occur at the parent company (*i.e.*, national) level, not at the operating company (*i.e.*, local) level.[36] Indeed, the Joint Applicants offered testimony that the opportunity to consolidate these operations into Qwest's national operations (to create consolidated systems and operations that support subsidiaries in all states) would be one of the major synergies the merged company would seek to achieve. As Mr. Gates testified, synergy savings would be achieved in large part through "the elimination of duplicative functions (or headcount) and systems ..."[37] Thus, it is clear that the CenturyLink subsidiaries in Washington will rely upon these consolidated systems that operate on a national basis to support the provision of service in Washington.

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[34] *See* note 10, *supra.*
[35] *See, e.g.*, Direct Testimony of Todd Schafer (CenturyLink), Exhibit TS-4 (diagram of CenturyLink Operating Model).
[36] *Id.*

At the same time, these CenturyLink subsidiaries will continue to exist as separate legal entities, thereby requiring competitors to compete with each entity separately. Practically speaking, that means that competitors that wish to compete in all of the CenturyLink (i.e., former CenturyTel and Embarq ILEC) territories in Washington must maintain separate interconnection agreements, each with their own associated wholesale accounts, billings, provisioning, trouble reporting, dispute process, etc., with each CenturyLink subsidiary in the state.

More significantly, competitors must maintain separate physical points of interconnection with each CenturyLink subsidiary in Washington with which it exchanges traffic. The impact of this fact is illustrated by the testimony of Charter witness, Mr. Pruitt, who explained that in other states CenturyLink has insisted that Charter interconnect with CenturyLink at multiple locations on the CenturyLink network. Competitors like Charter frequently seek to interconnect with ILECs at a single point on the ILEC's network within a LATA in order to keep its network interconnection costs low, and to gain the same efficiencies in the delivery of traffic between networks that the ILEC enjoys. CenturyLink, and other ILECs, have economic incentives to object to this approach and insist that competitors interconnect at multiple points on the incumbent's network. That approach reduces the incumbent's interconnection costs (while also increasing the competitor's costs of interconnection).

To address these anti-competitive incentives, the FCC has ruled that competitors do not have to build networks that mirror the ILEC's network,[38] and that Section 251 permits

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[37] *Gates Responsive* at p. 29,lns. 10-12.

[38] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 209 (1996) ("*Local Competition Order*").

competitors to interconnect via a single point of interconnection ("POI") within a LATA.[39] The premise underlying these rules is that efficient network arrangements between competitors and incumbents are necessary and useful to encourage the development of competitive entry into the local exchange market, and to ensure that network interconnection costs are not improperly shifted to competitors.

2. *Regardless of Whether the Commission Permits the Continued Use of Separate Subsidiaries, the Merged Company Should Be Required to Permit Competitors to Benefit from Network and Operations Efficiencies Achieved by the Merged Company*

The Joint Applicants expect to obtain over $600 million in synergy savings[40] through the consolidation and elimination of duplicate operations and networks.[41] To the extent that such synergy savings are achieved, competitors should be entitled to benefit from operational efficiencies that can pass through to competitors. For example, where the merged company has consolidated networks and operations that are adjacent or contiguous to one another, as Qwest witness Reynolds affirmed, then the costs of transporting traffic between the newly combined networks will decrease and become more efficient. Those efficiencies and cost reductions should also be shared with competitors through adoption of conditions which would require the

[39] *See, e.g., Local Competition Order* at ¶ 209 (competitors entitled to interconnect at any technically feasible point on the ILEC network); *Application by SBC Communs. Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communs. Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommuns. Act of 1996 to Provide In-Region, InterLATA Services in Texas*; CC Docket No. 00-65; 15 FCC Rcd 18354, ¶ 78 (2000); *Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Wireline Competition Bureau, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶ 52 (2002) (right to single POI per LATA). The Fourth Circuit has affirmed that the Wireline Competition Bureau's decision is entitled to the same deference that would normally be granted to a decision of the full Commission. *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872, n. 8 (4th Cir. 2003).

[40] Direct Testimony of G. Clay Bailey (CenturyLink), Exhibit GCB-1T, p.4, ln.15 to p.5, ln. 2.

[41] Tr. Vol. IV, p. 526, line 22 to p. 527, line 2 (Gates).

merged company to permit competitors to interconnect at a single point of interconnection within a LATA where such contiguous or adjacent networks are interconnected.

With respect to potential network efficiencies, the record in Washington shows that although CenturyLink has refused to provide any meaningful details with respect to the facilities that connect its subsidiaries in Washington,[42] "the Merged Company will not only have a larger footprint, but also will have many legacy CenturyLink exchanges that are adjacent or in close proximity to legacy Qwest exchanges."[43] In fact, CenturyLink provided a map of Qwest and CenturyLink exchanges in Washington that shows that the majority of the 118 legacy CenturyLink exchanges in Washington are adjacent or in very close proximity to a legacy Qwest exchange.[44] Qwest's witness Mr. Reynolds explained that "[i]n many cases the [Qwest and CenturyLink] networks are adjacent or within close proximity to one another, and this will make it easier to implement operating efficiencies and infrastructure improvements."[45] Hearing Exhibit TJG-12 is a network map that illustrates the degree to which the two companies' existing networks (exchanges) are contiguous.[46]

To the extent that the Merged Company provisions facilities to connect the legacy networks of CenturyLink and Qwest in Washington to realize the benefits of a larger interconnected footprint, these same benefits should also flow through to competitors

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[42] *See Pruitt Responsive*, Exhibit_BHP-10 (CenturyLink Discovery Response No. 45). CenturyLink refused to provide Charter with any detailed information when asked whether its facilities connects its affiliates in Washington.
[43] *Gates Responsive* at p. 188, lines 8-12; Exhibit_TJG-12 (Map of Qwest and CenturyLink exchanges in Washington); *Pruitt Responsive*, Exhibit_BHP-10 (Map of Qwest and CenturyLink exchanges in Washington).
[44] *Id. See also Gates Responsive* at p. 188, lines 8-12. Further, Joint CLEC's witness Mr. Gates explained that many of these reside in the same LATA. *Gates Responsive* at p.188, lns. 15-16. For example, the 195 total exchanges that the Merged Company would operate in Washington post merger reside in four LATAs: 672, 674, 676 & 960. *Id.* at p. 188, ln. 16 to p.189, ln. 1.
[45] Direct Testimony of Mark S. Reynolds (Qwest), Exhibit_MSR-1T, p.13, lns. 5-7.
[46] Hearing Exhibit TJG-12.

interconnecting with the Merged Company.[47] As Dr. Ankum explained, allowing CLECs to share in the operational benefits enjoyed by the Merged Company would "lower barriers to entry for competitors who would be permitted to capitalize on the increased scale and efficiencies of the Merged Company."[48]

Indeed, the FCC recognized that ILECs enjoy economies of "density, connectivity, and scale" that arise from their expansive network and operations.[49] At the same time, CLECs do not enjoy the same benefits. To even the playing field, and ensure that competitors' costs are not improperly increased, the FCC has concluded that the "local competition provisions of the Act require that these economies be shared with [competitive] entrants."[50] The same principles should be applied in this case, where the merged company will clearly enjoy greater synergy savings and efficiencies arising from its combined network and operations.

Thus, where competitors in Washington currently have one (or more) points of interconnection with both Qwest and CenturyLink (i.e., CenturyTel or Embarq ILEC) subsidiaries in the state, the potential for duplicative an inefficient use of network resources exist. Physically interconnecting communications networks, whether by entrance facilities, collocation, or meet point arrangements, is an expensive endeavor. Indeed, the FCC has explained that competitors are entitled to establish a single point of interconnection with the ILEC's network in order to minimize competitors' costs, and to avoid inefficient network arrangements. It therefore stands to reason that where competitors must interconnect at more than one point on the ILEC's network, costs of physical interconnection will increase. Thus,

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[47] *Gates Responsive* at p. 189, ln. 17 to p.190, ln. 4; *Ankum Responsive* at p. 86, lns. 6-9. *See also*, *Local Competition Order* at ¶ 209.
[48] *Ankum Responsive* at p. 86, lns. 11-13.
[49] *Local Competition Order* at ¶ 11.

requiring two points of interconnection on a network is necessarily twice as expensive as a single point. These costs can be minimized, or avoided altogether, if the Washington Commission affirms that competitors can establish a single POI with the Merged Company's network, once those networks are interconnected.

Another byproduct of CenturyLink's continued reliance on the rural exemption and separate subsidiaries is their failure to provide directory assistance and listing services in a manner that complies with their obligations under federal law. Because CenturyLink's subsidiaries have successfully hidden behind the rural exemption to shield part of their company from their ILEC obligations, they do not have significant experience providing directory services.

The record demonstrates that with respect to certain directory listing and directory assistance functions, CenturyLink refuses to implement wholesale practices required under Section 251(b)(3). More specifically, CenturyLink spuriously attempts to shift its obligations under Section 251(b)(3) of the Act to a third-party vendor by refusing to contract with competitors (in an ICA) for certain basic directory listing and directory assistance functions.[51] As a result of this practice, there is a greater likelihood that directory services provided by competitors will be degraded if CenturyLink, or its third-party vendor, fails to properly maintain directory assistance and directory listings databases in the same manner that Qwest does throughout its ILEC serving territory.[52]

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[50] *Id.*
[51] *Responsive Gates* at 167, lns. 16-19.
[52] *Id.* at p. 167, lns. 19 to p.168, ln. 2.

Mr. Gates testified that CenturyLink's use of a third-party vendor to provide directory assistance services created significant problems for Charter's subscribers.[53] For example, within the last several years, CenturyLink subscribers were not able to obtain Charter subscribers' listing information from CenturyLink's directory assistance service. Specifically, every time that a CenturyLink subscriber called directory assistance by dialing "4-1-1" and requested listing information about a Charter subscriber, the listing information was not provided by CenturyLink's vendor and the subscriber was told that such information was not available.[54] As a result, CenturyLink subscribers trying to reach Charter subscribers – by requesting information from CenturyLink's directory assistance (i.e., "411") services – were unable to do so.[55] To address the potential impact that this type of practice will have on competitors, the Commission should adopt CLEC Condition 23 as an additional condition that the Merged Company must operate under. The adoption of this Condition (in addition to the terms of the Integra Settlement) will ensure that competitors in Washington are provided the nondiscriminatory access to directory listing and directory assistance functions that is required by law, and that Qwest currently provides competitors.

Section 251(b)(3) states that all local exchange carriers have the duty to permit all competing providers with "nondiscriminatory access to telephone numbers, . . . directory

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[53] *Id.* at p.168, ln. 11 to p.169, ln. 6.

[54] *Id.* at p. 168, lns. 11-14. After some investigation, Charter determined that the problem arose because CenturyLink had contracted with a third-party vendor to operate its directory assistance database. *Id.* at p. 168, lns. 16 to p.169, ln. 1-12. That third-party vendor did not have Charter's listings in its local database and was not querying the correct national database, thereby excluding Charter subscriber listing information from 411 search results for thousands of Charter subscribers. *Id.*

[55] *Id.* at p.168, lns. 12-15. When presented with this information, CenturyLink disclaimed any obligation to remedy the situation, claiming instead that the practices of its directory assistance database vendor were not subject to scrutiny from competitors like Charter. *Id.*

assistance, and directory listing."[56] Of particular relevance to this proceeding, is the statute's mandate that ILECs provide to CLECs "nondiscriminatory access to the . . . directory assistance, and directory listing"[57] that they maintain for their own customer's benefit. A directory listing consists of the customer's name, phone number, and address that are published in a directory, such as a telephone book, or included in a directory database, such as that used when a caller dials "411."[58] Thus, competitors have the right to have their customers' listing information "placed" into the local directory assistance databases that other LECs (mainly incumbents) maintain, *or cause to be maintained*, on "nondiscriminatory rates, terms and conditions."[59]

This action of "placing a customer's listing information in a directory assistance database" is the very functionality that CenturyLink refuses to incorporate into its ICAs. CenturyLink refuses to include such language, but provides that very same basic functionality to its own customers. Because Section 251(b)(3)'s nondiscrimination standard operates to require the ILEC to provide to the CLEC that which it provides its end users, CenturyLink has the

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[56] 47 U.S.C. § 251(b)(3). In construing the obligations arising under this section of the statute, the FCC has clearly proscribed the specific actions that ILECs (indeed, all LECs) must undertake to comply with their duty under Section 251(b)(3) to provide non-discriminatory access to directory listing. To that end, the FCC has explained: "the section 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by the suggestion . . . that directory listing be defined as a verb that refers to *the act of placing a customer's listing information in a directory assistance database* or in a directory compilation for external use (such as white pages)." *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information under the Telecommunications Act of 1934 [sic], As Amended*, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd. 15550 ¶ 160 (1999) ("*SLI/DA Order*").

[57] *Id.*

[58] *Gates Responsive* at p.169, lns. 10-12.

[59] 47 C.F.R. § 51.217(a)(2)(i) (FCC rule defining "nondiscriminatory access" requirement of Section 251(b)(3) (emphasis added).

obligation to undertake the same activities for competitor's subscribers as it does for its own subscribers.[60]

Although it is not uncommon for ILECs to use third-party vendors for directory assistance activities, the problem arises when an ILEC, with specific requirements under Section 251(b)(3), attempts to shift its responsibilities to a third-party. While the FCC has certainly recognized that carriers may enter into agreements to have subscriber listing databases administered by a third party,[61] such agreements must still be included in ICAs since use of a side agreement for access to subscriber listing databases would be directly at odds with the statutory requirements that LECs (i) provide directory listings on a nondiscriminatory basis; and (ii) make these directory assistance and directory listing terms available to other carriers in ICAs for adoption through the mechanism of 47 U.S.C. § 252.[62]

Clearly, carriers cannot avoid their obligations under Section 251(b)(3) simply by contracting with a third-party vendor for those functions that are required by that section. In this case, that means that CenturyLink, even though it may use a third-party vendor to support its directory assistance service, is still the federally-regulated entity that is obligated to provide nondiscriminatory access to directory assistance under Section 251(b)(3). Second, when problems occur with the directory listing information, CenturyLink must accept responsibility (and ultimately liability) for addressing and resolving the problems. CenturyLink cannot be allowed to disclaim responsibility for the discriminatory handling of subscriber listing

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[60] *See, e.g., U.S. West Comm., Inc. v. Hix*, 93 F.Supp.2d 1115 (D. Colo. 2000); *MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*, 79 F.Supp.2d 768 (E.D. Mich. 1999).

[61] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, FCC 96-333, 11 FCC Rcd 19392 at ¶ 144 (1996), vacated in part, *People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997), rev. on other grounds, *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721 (Jan. 25, 1999).

information simply through its decision to use a third-party vendor. Therefore, CenturyLink's general policy of refusing to include its 251(b)(3) obligations within ICAs – including the obligation to publish competitor's listings in the same directories in which it publishes its own customers listings, and the obligation to ensure that competitor's listings are available to its own customers who request directory assistance – contravenes its obligations under Section 251.

Notably, Joint CLEC-proposed Condition 23 simply requires that the Merged Company provide wholesale directory services in compliance with existing law. It does not impose any additional operational burdens that the Merging Companies should not already be operating under. Indeed, Condition 23 is also consistent with the terms of existing Qwest ICAs. The Condition, however, would ensure that the Merged Company could not undermine competitors by offering wholesale directory listing and assistance services in a manner that is inconsistent with federal law. The fact that the Condition only requires CenturyLink to continue to comply with existing federal law in the Qwest ILEC territory should not be grounds for dismissing this Condition as mere surplusage. If the Condition is not imposed on this merger, there will be nothing except a future arbitration or complaint case before this Commission that will stop this worst practice of CenturyLink from being imported into the vastly larger Qwest ILEC territory in Washington. Competitors should not have to enforce their existing rights under federal law through arbitration when Qwest does not engage in such practices today. Doing so, would violate the "no harm" standard of the public interest standard.

To address these concerns, the Merged Company should be required to adopt Qwest's best practices of including terms in its ICAs that address its 251(b)(3) obligations to ensure that

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[62] *SLI/DA Order* at ¶ 36.

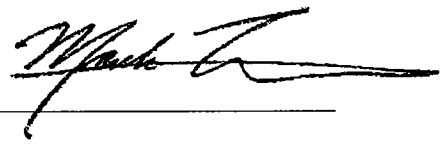
(1) its end users have access to competitors' customer listings when they call CenturyLink's directory listing vendor, and (2) CenturyLink doesn't import its worst practices of either refusing to accept directory listings from its competitors (CenturyTel) or assessing a grossly inflated monthly "maintenance and storage" charge for those listings it does accept (Embarq) . Although these principles are absent from the Integra Settlement, they are reflected in CLEC Condition 23, which ensures that CenturyLink will comply with federal and state law with respect to its directory assistance and directory listings responsibilities. CenturyLink's refusal to do so contravenes statutory obligations and creates operational and competitive problems for competitors whose service may be perceived as substandard by the competitor's end users. Accordingly, the Commission should condition approval of this transaction upon a commitment from the Merged Company to adopt Qwest's best practices, and reject CenturyLink's worst practices, in regard to directory listings and directory assistance.

IV. CONCLUSION AND RECOMMENDATION

Based on the forgoing, the Joint CLECs urge the Commission to adopt the Joint CLECs proposed conditions which address the Joint Applicants' obligations related to single points of interconnection, the rural exemption, and directory assistance/listing practices.[63]

[63] *Gates Responsive*, Exhibit_TJG-9 (Preliminary Conditions), p.7 (rural exemption), p.10 (DA/DL practices) and p.12 (single POI).

Respectfully submitted,



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