

**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
PAC-WEST TELECOMM, INC.
ON ADDITIONAL ISSUES**

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I. INTRODUCTION

1. Pac-West Telecomm, Inc. (“Pac-West”) hereby files this brief on the critical issues that it believes the Commission must address prior to approving the proposed acquisition of the Qwest Operating Companies (“Qwest”)¹ by CenturyTel, Inc. and its subsidiaries (“CenturyLink”), (collectively, the “Merging Companies”).² Pac-West also fully supports the arguments and recommendations set forth in the Joint CLECs’ brief, the CBeyond brief, and the Interconnection Agreement “porting” arguments and recommendations in the Sprint brief, all three filed of even date herewith.

II. SUMMARY AND BACKGROUND

2. Pac-West is a competitive local exchange carrier (“CLEC”) focused for the last thirty years on providing wholesale communications infrastructure services for other CLECs, wireless providers, interexchange carriers, VoIP providers, Internet service providers (“ISPs”), and other information service providers. Pac-West’s network is engineered for easy integration and

¹ The Qwest Operating Companies include Qwest Communications International, Inc., Qwest Corporation, Qwest LD Corp., and Qwest Communications Company LLC.

² 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.

connectivity of multiple communications services. Pac-West recently introduced its Telastic service, a hosted operating environment for telecom services that allows carriers and service providers to evolve their less efficient legacy telecom infrastructure into a scalable and cost-effective system.³

3. Pac-West competes with Qwest not only in Washington, but also in Arizona, Colorado, Idaho, Oregon and Utah. Pac-West also partners with other companies to provide services in over 30 states across the country. Pac-West is interconnected with Qwest to exchange traffic and must purchase services from Qwest as the dominant incumbent local exchange carrier in Washington and the five additional states where Pac-West competes with Qwest. In addition, Pac-West competes with CenturyLink in Nevada. As such, Pac-West has had experience with both companies.⁴
4. Pac-West is a wholesale customer and a competitor of both Qwest and CenturyLink. As such, Pac-West is acutely concerned that the company resulting from the merger of CenturyLink and Qwest (“Merged Entity”) will use its increased market power to discriminate against smaller CLECs like Pac-West. Pac-West is particularly concerned today because it has experienced multiple instances where both Qwest and CenturyLink have not been willing to abide by state and federal orders and statutes.⁵
5. In considering the adverse impact of the merger on Pac-West, the Commission should also consider the impact on Pac-West’s customers and, in turn, their end users. Pac-West’s customers include: VoIP providers, who provide new, competitive services, often to parts of the state not reached by other competitors; ISPs, who provide competitive Internet access, again, in regions where broadband may not yet be available; and other new and innovative service providers, such as e-fax services.

³ Responsive Testimony of James C. Falvey, Exhibit JCF-1T (“*Falvey Responsive*”), p. 3, ln. 12 – p. 4, ln. 1.

⁴ *Id.* at p. 4, lns. 3-15.

⁵ *Id.* at lns. 16-21.

6. Pac-West is concerned that the proposed merger will exacerbate anticompetitive conduct by Qwest and, consequently, harm emerging competition. If competitors cannot compete due to discriminatory treatment, cumbersome interconnection negotiation requirements, lost wholesale inputs, longstanding, unresolved disputes and unpaid invoices due from Qwest, end-user consumers will see higher prices, reduced service quality, and fewer product options. Pac-West believes that the Commission can reduce the likelihood of competitive harm by adopting the specific and straight-forward conditions described in the testimony of Pac-West witness James Falvey in this proceeding.⁶ In addition, Pac-West supports the adoption of the conditions proposed by the Joint CLECs as well as the ICA “porting” condition recommended by Sprint.
7. In their merger application, Qwest and CenturyLink state that one of the “key” benefits of the merger would be to create a financially stronger company that can “compete against cable telephony providers, wireless carriers, *VoIP offerings, and CLECs . . .*”⁷ Given this statement, it is doubtful that a merged CenturyLink/Embarq and Qwest will use its increased strength to facilitate the operations of the CLECs against whom they directly compete.
8. If the merger is approved, CenturyLink will gain local exchange networks in four additional states: Arizona, Utah, North Dakota, and South Dakota. The Merged Company will have an expanded footprint spanning 37 states.⁸ Geographically, the merged entity will have an increased incentive and ability to discriminate against its wholesale customers by leveraging its increased footprint.
9. The FCC expressed these exact concerns when it reviewed the strikingly similar proposed merger of CenturyLink and Embarq:

Consistent with the “Big Footprint” theory that the Commission addressed in prior BOC mergers, we find that the increase in the

⁶ *Id.* at pp. 10, 17, and 20.

⁷ Joint Application for Expedited Approval of Indirect Control, Washington Public Utilities Docket No. UT-100820, May 13, 2010, at ¶30 (emphasis added).

⁸ Application for Consent to Transfer Control, FCC WC Docket 10-110, May 10, 2010, at p. 6.

size of CenturyTel's study area resulting from the merger may increase its incentive to engage in anticompetitive activity . . . Additionally, to the extent that CenturyTel has been less willing to cooperate with competitors than Embarq -- as numerous commenters allege -- following the merger, CenturyTel may extend this behavior to the Embarq territories. In order to address these potential harms, the Applicants have proposed a series of voluntary commitments, summarized above and included in Appendix C.⁹

10. The further merger of CenturyLink with Qwest poses exactly the same concern: that CenturyLink and Qwest could adopt each company's worst practices, including violations of state and federal rules and orders. Therefore, this Commission should approve the merger only with specific conditions to guard against anticompetitive conduct by the Merged Entity.

III. ARGUMENT

11. Pac-West's testimony in this proceeding has focused primarily on three issue areas, interconnection agreement issues¹⁰; intercarrier compensation for ISP-bound traffic¹¹; and Qwest's refusal to offer nondiscriminatory VoIP amendments¹².

A. Interconnection Agreement Issues

12. Pac-West believes that it is absolutely critical for the Commission to adopt as a condition of merger approval a requirement that the Merged Entity allow the porting of interconnection agreements from anywhere in the new Merged Entity footprint to Washington, as recommended by both Pac-West and Sprint. The Merged Entity will ensure that it will reap efficiencies from the transaction, as explicitly and candidly admitted above, so that it can better compete with CLECs and VoIP providers. To ensure that "best practices" relating to interconnection are adopted across the region, the Commission should require that the Merged Entity allow CLECs

⁹ *Applications Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46 (2009) ("*CenturyTel/Embarq Merger Order*"), at 8755 (internal citations omitted).

¹⁰ *Falvey Responsive* at pp. 5 – 10.

¹¹ *Id.* at pp. 10 – 17.

¹² *Id.* at pp. 17 – 21.

to opt into an ICA in use by Qwest or CenturyLink with another CLEC in this state or elsewhere. This requirement was appropriately made a condition to the merger of AT&T and BellSouth in 2007. *See* AT&T, Inc. and Bell/South Corp. Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) (“*AT&T/BellSouth Merger Order*”).

13. The Commission has an opportunity to improve upon the AT&T/BellSouth condition. The Commission should ensure that the selected ICA would be effective upon filing (by the CLEC or Qwest/CenturyLink) with any necessary revisions to follow after the ICA effective date.¹³ In other words, the Merged Entity should be required to allow any requesting carrier to “port” an existing ICA, without revision, subject only to the addition of state-specific prices. The Merged Entity would be authorized to request an order modifying the agreement after it is effective, to the extent it is not technically feasible for the Merged Entity to comply with one or more provisions of the agreement. Pac-West recommends that this portable opt-in condition continue for a period of five years following the closing date of this Merger (“Closing Date”).¹⁴ If the Merged Entity has legitimate implementation issues with a ported ICA once it is filed – such as legitimate issues of technical feasibility, those issues can be addressed only after the ICA is filed and effective. In that manner, the vast majority of the agreement will become effective, while any contested issues are worked out by the Commission, rather than holding the entire ICA hostage to disputes over a limited number of issues.¹⁵ Given that ported agreements have already been implemented in other states, the Merged Entity’s concerns about feasibility should be strictly scrutinized. By adopting this porting requirement, the Commission will ensure that all the benefits of the merger will not accrue solely to the Merged Entity. Competitors and the consumers who purchase their services will also gain the benefit of pro-competitive interconnection arrangements that have proved effective to inducing competition in other states.

¹³ *Id.* at pp. 6-7.

¹⁴ *Id.* at p. 7, lns. 6-8.

¹⁵ *Id.* at p. 7, ln22 – p. 8, ln. 2.

B. Intercarrier Compensation for ISP-bound Traffic

14. The issue of intercarrier compensation was likewise thoroughly addressed in Pac-West's testimony in this proceeding, incorporated herein by reference.¹⁶ The important point for the purposes of this brief is that, before Qwest and CenturyLink further expand the reach of their service territory, the Commission should ensure that both carriers are committed to following, rather than continually challenging, the FCC's orders, and specifically the November 2008 *Core ISP Order*.¹⁷ For years, BellSouth has made a 9-state agreement available throughout the BellSouth region that allows for LATA-wide VNXX, based on tandem interconnection, at the \$0.0007 rate. Similarly, the issue has been resolved in California for several years, again based on tandem interconnection, with payment for all ISP-bound, including VNXX traffic, at \$0.0007. AT&T has also offered a 13-state amendment in states ranging from Arkansas to Connecticut to Texas to Wisconsin that provides for VNXX in the same compensation range across a broad footprint. These agreements require interconnection at each tandem, which itself is an onerous requirement.¹⁸ But these other ILECs have long since put this issue behind them, unlike Qwest and CenturyLink, which cling to claims on traffic exchanged over five years ago, and will not come to terms on reasonable VNXX arrangements anywhere in their soon to be combined territories. The issue is relevant in this merger proceeding, as Qwest's ongoing resistance on this issue has significantly disrupted the business plans of at least Pac-West and Level 3, and other CLECs, as well. Establishing nondiscriminatory VNXX arrangements consistent with FCC orders should, therefore, be at the forefront of the Commission's concerns in this proceeding.

¹⁶ *Id.* at pp. 10-17.

¹⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 01-92, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (rel. Nov. 5, 2008) ("*Core ISP Order*").

¹⁸ *Falvey Responsive* at p. 15, ln. 17 – p. 16, ln. 8.

15. By requiring the Merged Entity to commit to adhere to the *Core ISP Order*, the Commission could resolve an issue that Qwest has used to sow uncertainty throughout its region for CLECs, ISPs, and VoIP providers alike. Consistent with the FCC's "Big Footprint" theory, the Commission will also ensure that the Merged Entity does not seek to continue to use this issue to its advantage and to the detriment of new entrant competitors for years to come.

C. The Commission Should Require Qwest to Offer VoIP Certified Termination Agreements on a Nondiscriminatory Basis

16. Pac-West requested a VoIP Certified traffic termination amendment with Qwest in Washington nine months ago in May 2010.¹⁹ Pac-West would like to terminate VoIP Certified traffic as other CLECs in Washington do, at bill and keep, or a rate of zero. In the alternative, Pac-West would like to terminate VoIP certified traffic at \$0.0007. Qwest's position has been straightforward: we only offer VoIP Certified termination at those rates to carriers that forego their right to bill reciprocal compensation at the Washington state TELRIC rates, rates established by this Commission, and incorporated by the FCC as an integral part of the *ISP Remand Order*'s compensation directive.²⁰ Qwest is engaging in unlawful discriminatory conduct, picking CLEC favorites, and rewarding those who have chosen Qwest's preferred bill and keep reciprocal compensation election.

17. Pac-West has a right to bill reciprocal compensation rates in a manner consistent with the *ISP Remand Order*.²¹ That Order moved CLECs to much lower rates for ISP-bound traffic, but Pac-West has been willing to accept those much lower rates in the context of the FCC's 3:1 regime.²² Qwest should not be permitted to force Pac-West to forego those rates in order to obtain other interconnection arrangements on a nondiscriminatory basis; in this case, the right to terminate

¹⁹ *Id.* at p. 17, lns. 10 – 22.

²⁰ *Id.* at p. 19, lns. 1 – 17.

²¹ Order on Remand and Report and Order, CC Docket No. 96-98, para. 79 (rel. Apr. 27, 2001) ("*ISP Remand Order*").

²² *Id.* at para. 79.

VoIP Certified traffic on the same basis as other carriers in Washington. The Commission should, therefore, require as a condition on merger approval that Qwest cease such discriminatory “pick and choose” tactics.

18. Qwest has claimed that there are technical issues with having different rates for VoIP Certified traffic, “local” traffic, and ISP-bound traffic.²³ Yet Qwest has entered into multiple agreements that feature diverse rates, and Qwest also refused Pac-West’s technical solution to Qwest’s ostensible billing problem.²⁴ Qwest continues to insist on forcing Pac-West to lower reciprocal compensation rates because Qwest will save money by terminating its traffic for free on Pac-West’s network at Pac-West’s expense.²⁵ Qwest cannot demand that Pac-West forego its federal reciprocal compensation rights in order to gain a nondiscriminatory VoIP Certified traffic arrangement. The trade-off offered by Qwest is particularly suspicious given that the VoIP Certified arrangement may or may not work out between the parties in practice. Qwest has audit rights and could make it difficult for Pac-West to implement its VoIP Certified arrangement through aggressive auditing. But the adverse impact on Pac-West in lost reciprocal compensation would be immediate.

19. Qwest has also claimed that these types of disputes are not valid merger issues. However, discrimination against CLECs to winnow the field and pick “preferred” business plans is very much a merger issue. The issue is particularly relevant where, as here, the other merging company, CenturyLink, has engaged in the exact same gamesmanship, picking favorites to carry its VoIP traffic. Infotelecom, in its July 12, 2010 FCC Comments, stated:

Infotelecom carries traffic from voice over Internet Protocol (VoIP) providers. Use of IP technology to carry voice and thereby offering greater efficiency and features is precisely the type of innovation the Telecommunications Act intended to encourage. Infotelecom, however, has been attempting to obtain a suitable

²³ *Falvey Responsive* at p. 19, lns. 4 – 13.

²⁴ *Id.* at lns. 12 – 17.

²⁵ *Id.*

ICA with CenturyLink/Embarq for more than six months without success. The failure to obtain an ICA stems primarily from two problems. First, Embarq has been extremely unresponsive to Infotelecom's request for an ICA pursuant to Sections 251 and 252 of the Telecommunications Act. Infotelecom first contacted Embarq requesting an ICA on January 26, 2010, and since that time, Embarq has responded on only two occasions, and has failed to provide any ICA that meets Infotelecom's needs. Second, *what little communication Embarq has had with Infotelecom has consisted almost exclusively of Embarq's denial of Infotelecom's request to adopt the same ICA provision for the termination of VoIP traffic that Embarq offers to another CLEC, Level 3.*²⁶

20. Considering also Qwest's history of secret agreements, this issue should be an issue of central concern during this Merger proceeding. The Commission should ensure that Qwest does not continue to play favorites, by requiring that Qwest provide Pac-West with the same VoIP Certified termination rate offered to other carriers, without additional strings attached.

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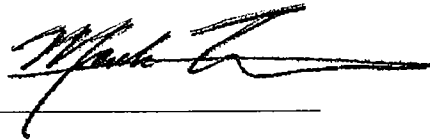
²⁶ *Opening Comments of Infotelecom, LLC On Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a/ CenturyLink for Consent To Transfer of Control*, FCC WC Docket No. 10-110, at 3 (July 12, 2010) (emphasis added, citations omitted).

IV. CONCLUSION AND RECOMMENDATION

21. Based on the forgoing, Pac-West urges the Commission to adopt Pac-West's proposed conditions which address the Joint Applicants' obligations to port interconnection agreements, to abide by the FCC's intercarrier compensation orders, and to offer nondiscriminatory VoIP Certified traffic arrangements.

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Respectfully submitted,



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