[Service date: January 21, 2011]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the 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.	UT-100820 CBEYOND'S BRIEF ON ADDITIONAL ISSUES **REDACTED VERSION**

I. INTRODUCTION

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

[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.

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II. SUMMARY AND BACKGROUND

2 Cbeyond is a competitive local exchange carrier ("CLEC") providing local telecommunications and/or competitive voice services in competition with Qwest, an incumbent local exchange carrier ("ILEC") and Washington's Bell Operating Company ("BOC"). However, Cbeyond, like most other CLECs, also relies on Qwest as its wholesale supplier of essential wholesale services or interconnection used as essential inputs to provide competitive local services. Because CLECs like Cbeyond 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").[3] 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.

3 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.[4] Because they compete with CLECs, the Merging Companies have a strong incentive to undermine their wholesale CLEC customers by diminishing wholesale service quality or reducing resources devoted to wholesale customers.[5]

III. ARGUMENT

4 Cbeyond concurs with the arguments of the Joint CLECs in their Brief on Additional Issues. In addition, Cbeyond is particularly concerned that the proposed acquisition of Qwest by CenturyLink not result in a degradation of wholesale service quality.

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

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Accordingly, Cbeyond will focus its arguments in this brief on the issues relating to wholesale service quality.

A. The Merging Companies Have Not Committed to Sufficient Protections Regarding OSS.

5 Although the Staff Settlement addresses the Merged Company's continued use of Qwest's OSS, it does not adequately address the OSS risks associated with the Proposed Merger in several important respects. Therefore, to ensure that the post-merger OSS and performance levels do not deteriorate, approval of the Proposed Merger should be conditioned on the following additional commitments:

(1) an extension of Qwest's OSS for ***at least three years*** to match the Merged Company's 3-5 year synergy period; and

(2) a commitment by the Merged Company that any successor OSS will perform at the same level as Qwest's current OSS as confirmed by third-party testing at commercial volumes.

1. High quality OSS is critical to the ability of CLECs to provide competitive local services.

6 The FCC defines OSS to include five functions: (1) pre-ordering, (2) ordering, (3) provisioning, (4) maintenance and repair, and (5) billing.[6] OSS includes all of the computer systems, databases and personnel that an ILEC uses to perform internal functions necessary for these five functions.[7] The FCC has determined OSS to be a "network element."[8] Consequently, a CLEC must be permitted nondiscriminatory access to an ILEC's OSS functions in order to provide pre-order information to potential customers, sign up customers, place orders for services or facilities, track the progress of its orders to completion, obtain relevant billing information from the ILEC, and obtain

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[6] *See, e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; First Report and Order, CC Docket No. 96-98, FCC 96-325, Released August 8, 1996 (the "*Local Competition Order*") at ¶¶516-528.

[7] *See* 47 C.F.R. §51.313(c) and §51.319(g).

[8] *Local Competition Order* at ¶ 516.

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prompt repair and maintenance services for its customers.[9] The FCC has found that CLECs would be "severely disadvantaged, if not precluded altogether, from fairly competing," if they did not have nondiscriminatory access to OSS.[10]

7 These systems must also be efficient, reliable and accurate. Inefficient systems that require extensive manual intervention, for instance, needlessly increase CLECs' costs, make it more difficult to do business with the ILEC, and increase potential errors because of the manual nature of the work.[11]

2. The record indicates that there is a high risk of OSS degradation following the merger.

8 The Merging Companies have not provided sufficient detail regarding their plans with respect to the integration of the CenturyLink and Qwest systems. The evidence that has been provided on this issue, however, gives the Commission ample reason for concern that the merger will have an adverse impact on the OSS functionalities and capabilities available to CLECs who currently use Qwest's systems. CenturyLink has estimated that *****BEGIN HIGHLY CONFIDENTIAL** [REDACTED] **END HIGHLY CONFIDENTIAL***** of the total estimated $575 million in operational synergy savings will come from *****BEGIN HIGHLY CONFIDENTIAL** [REDACTED] **END HIGHLY CONFIDENTIAL*****.[12] Given the magnitude of the estimated savings from this item relative to the overall synergy savings estimate, it is likely that integration efforts will involve OSS (including the modification or replacement of Qwest's OSS systems and/or databases with inferior systems to achieve cost savings).[13] As Mr. Gates

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[9] Highly Confidential Responsive Testimony of Timothy Gates, Exhibit TJG-1T, at p. 35, lns. 1-6.

[10] *Local Competition Order* at ¶518.

[11] Highly Confidential Responsive Testimony of Timothy Gates, Exhibit TJG-1T, at p. 33, lns. 9-13.

[12] *Id.* at p. 43, lns. 9-12 (citing CenturyLink Response to Integra Washington Data Request #52(a), Highly Confidential Attachment Integra 52a.)

[13] *Id.* at p. 43, lns. 12-13.

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has testified, "[o]ut of the many ways that the Merged Company could integrate the two companies to the detriment of competition, degrading the quality or access to OSS would be the most effective, and could be, if not done through a transparent Change Management Process ("CMP"), one of the most difficult to detect and remedy."[14]

9 CenturyLink's plans to modify or replace Qwest's OSS in pursuit of merger-related synergy savings would cause substantial harm to CLECs' ability to effectively compete. Qwest's OSS is the only OSS that has a track record of handling the substantial commercial volumes in Qwest's legacy BOC territory. Qwest, unlike CenturyLink, went through the Section 271 approval process and, as part of that process, Qwest's OSS, CMP and supporting processes were extensively tested, including testing by an independent third-party, to ensure that they provided nondiscriminatory access.[15] In addition to extensive third-party testing, Qwest's OSS is also handling actual commercial volumes in Qwest's BOC territory today (and has for numerous years). By contrast, CenturyLink's OSS has not been through independent third-party testing and has not been tested for commercial volumes or shown to be operationally ready for Qwest's territory. And, given its relatively recent deployment, CenturyLink's OSS is much less familiar to CLECs.[16] There is a grave concern – grounded in CenturyLink's lack of experience, the lack of information from CenturyLink and Qwest regarding the future of an OSS conversion or replacement, and recent system integration failures – that allowing CenturyLink to modify or replace Qwest's OSS will expose the CLECs to severe risk that the Merging Companies' conversion or replacement OSS for the Qwest ILEC territory will deteriorate post-merger.[17]

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[14] *Id.* at p. 36, lns. 7-11.
[15] *Id.* at p. 41, ln. 18 to p. 42, ln. 1.
[16] *Id.* at p. 63, lns. 7-11.
[17] *Id.* at lns. 11-15.

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10 Mr. Gates has provided extensive testimony regarding the differences between the Qwest and CenturyLink OSS systems and the superior functionality of Qwest's OSS.[18] In addition, Mr. Haas testified about a comparative assessment of the Qwest OSS and the CenturyLink EASE OSS conducted by PAETEC. The clear conclusion of that assessment was that the CenturyLink OSS was "far inferior" to the Qwest OSS.[19] Mr. Haas also attached, as Exhibit WAH-3 a December 10, 2010 *Ex* Parte letter filed with the FCC by PAETEC which includes as an attachment "a detailed schedule denoting the functionalities of the Qwest OSS used by PAETEC today, and the comparable functionalities (or lack thereof) offered by EASE today."[20] As he pointed out, there "are many areas in which EASE is inferior to the Qwest OSS, and areas where it is clear that EASE is not 271 compliant."[21]For all these reasons, modifying or replacing Qwest OSS with CenturyLink OSS will degrade CLEC access to OSS (*i.e.,* access to equivalent functionality) in Qwest's legacy region and result in harm to competition as well as the public's interest in a competitive local services market.

11 Furthermore, modifying or replacing Qwest's OSS would result in significant disruption and cost related to the CLECs' own internal systems.[22] CLECs have built their own systems and interfaces to electronically bond directly with Qwest's OSS, and CLECs have also integrated their electronic interfaces into their own back end systems.[23] CLECs' interfaces and back end systems would be subject to change if the Merged

[18] *See, e.g., Id.* at pp. 48-50 and 58-60 (discussing, for instance, that Qwest (but not CenturyLink) allows electronic bonding capability for maintenance and repair that permits a direct connection between the CLEC and the Qwest repair technicians, and that Qwest's web-based maintenance and repair GUI has superior functionality that allows CLECs to submit trouble tickets for special access circuits through Qwest's GUI system, which is not permitted through CenturyLink's web-based system).
[19] Testimony of William A. Haas Regarding Proposed Settlement Agreements, Exhibit WAH-1HCT, at p. 5, ln. 19 to p. 6, ln. 4.
[20] *Id.* at p. 5, lns. 22-24.
[21] *Id.* at page 6, ln. 6 to p. 7, ln.2.
[22] *Id.* at pp. 53-57.
[23] *Id.*

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Company substantially modified or replaced Qwest's OSS post-merger, which could potentially require CLECs to revert to significantly less efficient manual processes. This would also require significant effort and cost to CLECs that have already developed internal systems to electronically bond with Qwest's OSS.

12 The Staff Settlement does not adequately address the OSS risks associated with the Proposed Merger, particularly with respect to CLECs that have more automated internal systems interfaced with Qwest's OSS. To ensure that the post-merger OSS and performance levels do not deteriorate and to prevent serious harm to the CLECs (and local competition), approval of the Proposed Merger should be subject to the following two additional conditions: (a) Qwest OSS should be offered for at least three years; and (b) third-party testing should be required thereafter for any substantial conversion or replacement of the Qwest OSS.

3. The Commission Should Adopt A Requirement That the Merged Company Use and Offer Qwest OSS for at Least Three Years.

13 The Joint CLECs urge the Commission to require the Merged Company to add at least one additional year to the time period in the Staff Settlement during which the Merged Company will continue to use and offer the Qwest OSS, such that the OSS will be used and offered for at least three years after the merger. Further, the Commission should clarify that the Merged Company may not provide the specific 270-day prior notice of future OSS changes until the three-year period has expired. Mr. Gates has explained that because CenturyLink has estimated synergy savings to be achieved over a three-to-five year period, evidence in the record shows that the greatest risk to CLECs of CenturyLink degrading access to OSS is during that three-to-five year window.[24]

[24] *Id.* at p. 125, lns. 9-13.

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14 As the record demonstrates, if CLEC access to OSS is degraded due to integration failures or attempts to find synergy savings, competitors will be disadvantaged in attempting to compete with CenturyLink. A commitment to continue operating the Qwest OSS for a period of time *less than* three years – less than the time period during which CenturyLink will be aggressively pursuing synergy cost savings – significantly increases the potential that the Merged Company will eliminate or degrade the OSS systems, processes, and support relied upon by CLECs. For this reason the Commission should require that, in the legacy Qwest ILEC service territory, the Merged Company will use and offer to wholesale customers the legacy Qwest OSS for at least three years after closing.

4. The Commission Should Require Third-Party Testing At Commercial Volumes To Ensure That the Any Successor OSS Is Equivalent To The Current Qwest OSS After The Three Year Period.

15 A degradation of the levels of service provided today under the Qwest OSS would represent a significant step backwards. Qwest's OSS was subjected to an extensive third-party test conducted over a three-year period for the express purpose of determining whether it satisfied the nondiscriminatory access requirement under Section 271.[25] That third party testing revealed hundreds of problems that were addressed, and later resolved, through OSS improvements and re-testing. Millions of dollars of investment and countless person hours went into this process.[26] Ultimately, because of those investments and the continued review and oversight of state commissions like this one, Qwest ultimately received 271 authority to provide in-region interLATA services. Replacing Qwest's legacy OSS with CenturyLink's legacy (or new) OSS would lead to backsliding on Qwest's 271 obligations because Qwest would no longer be providing the

[25] *Id.* at p. 36, lns. 13-16.

[26] *Id.* at p. 61, ln. 18 to p. 63, ln. 5.

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nondiscriminatory access to OSS that was a *quid pro quo* for 271 approval. Also, as discussed above, the evidence shows that, when compared to Qwest's existing OSS, CenturyLink's OSS has inferior functionality, does not support as many services, has not been third-party tested, and has never processed the significantly higher commercial volumes experienced in Qwest's legacy territory.[27]

16 The risks associated with replacing Qwest's OSS following the merger are quite significant and must be met with equally compelling safeguards beyond those in the Staff Settlement. Therefore, at a minimum, it is essential that any changes in OSS following the three year period requested by the Joint CLECs should be subject to the same third-party testing at commercial volumes that was used to ensure the adequacy of the current Qwest OSS.

B. The Merging Companies Have Failed to Commit To A Mechanism To Prevent Or Discourage Any Decline In Wholesale Service Quality.

17 As discussed extensively above, the Merged Company must maintain service quality at current levels to ensure sufficient competition and that the merger is in the public interest. There must therefore be a disincentive for the Merged Company to achieve its promised synergies at the expense of the CLECs through a deterioration of its wholesale market operations. For that reason, it is essential that the Merging Companies commit to implementing the additional performance assurance plan ("APAP") proposed by the Joint CLECs. As discussed below, the APAP is necessary to (1) ensure that wholesale quality does not decline post merger, and (2) provide a truly enforceable mechanism to protect impacted CLECs if wholesale quality does decline.

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[27] Highly Confidential Responsive Testimony of Timothy Gates, Exhibit TJG-1T, at p. 51, ln. 1 to p. 52, ln. 10; see also Exhibits JJ-9C (CenturyLink Supplemental Response to Integra Information Request No. 2), JJ-12C (CenturyLink Supplemental Response to Integra Information Request No. 77), and MSR-3C (CenturyLink Response to Integra Information Request No. 1).

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18 The APAP is a minimum five year performance assurance plan applicable to the legacy Qwest ILEC territory, which would compare the Merged Company's post merger monthly performance with the performance that existed in the twelve months prior to the merger filing date.[28] This comparison would be made using the current Washington Performance Indicators ("PIDs"), products and disaggregation, as well as the same statistical methodology that exists in the current Qwest Washington Performance Assurance Plan ("WPAP") to determine whether a statistically significant deterioration in performance exists.[29]

19 The APAP is intended to provide the proper incentives to the Merged Company not to pursue savings at the expense of its wholesale customers.[30] The APAP does not replace the QPAP; rather, it works in tandem with the QPAP, and uses the same methodology but is tailored to the purpose of measuring merger-related performance issues. So, whereas the current QPAP compares wholesale service quality to retail service quality to determine whether Qwest is providing nondiscriminatory access, the APAP compares pre-merger wholesale service quality to post-merger wholesale service quality to determine whether there has been a merger-related deterioration in wholesale service quality.[31]

1. The Merging Companies' rejection of the APAP signifies why the APAP is necessary.

20 The fact that CenturyLink and Qwest outright reject the APAP is, in itself, an indication that they foresee (or at least acknowledge the substantial risk of) a post-merger deterioration in wholesale service. While both of the Merging Companies have made

[28] Gates Supplemental Testimony on Proposed Staff/Public Counsel and Integra Settlements, Exhibit TJG-20CT, at p. 41, lns. 16-19.
[29] *Id.* at p. 41, ln. 19 to p. 42, ln. 2..
[30] *Id.* at p. 42, lns. 6-8.
[31] *Id.* at lns. 2-6.

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sweeping statements about their utmost commitment to providing quality service to CLECs, the fact that they do not support the use of the APAP to back up their promises strongly suggests that they (a) are prepared for a deterioration in service quality if the merger is approved, and (b) they do not want to be held accountable for it. These are precisely the reasons the APAP is necessary -- to ensure that the Merging Companies' actions match their words.

2. The Merging Companies' arguments in opposition to the APAP are flawed.

21 The Merging Companies have no proposals to simply assure that wholesale service quality doesn't degrade if the merger is approved. Instead, they raise a host of arguments in opposition to the APAP proposal. None of these arguments, however, are persuasive.

22 The Merging Companies erroneously contend that the "mere existence of lower performance levels ... cannot necessarily be characterized as Qwest's performance degradation. . ."[32] To the contrary, "performance degradation" is by definition a decline in performance levels. So, to the extent there is a decline in performance, there is performance degradation. CenturyLink and Qwest further claim that the "mere 'degradation of performance' from already-superb service quality levels would not automatically translate into harm. . ."[33] This claim fails to recognize the impact that a degradation of performance would have on CLECs. Lower performance levels -- no matter how large or small -- directly impact CLECs and their end user customers. As an example, when wholesale performance levels decline and the ability of the respective CLEC to provide reliable service and meet its commitments diminishes, no matter who is providing the various underlying network components, the end-user customer will inevitably blame its retail service provider (the CLEC). Furthermore, it is important to

[32] Rebuttal Testimony of Michael G. Williams, Exhibit MGW-1RT, at p. 22, lns. 4-6.
[33] *Id.*, at p. 21, lns. 3-5.

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note that the decline in performance that is at issue, is a decline in performance that is sufficiently significant to trigger the protections and penalties of the APAP. So, assuming the diminution of performance levels are sufficient to trigger the penalties, it will undoubtedly impact the respective CLEC.

23 CenturyLink and Qwest also argue that, "if CLECs believe they have been harmed by issues beyond those that the PAP addresses, such as alleged merger-related harm, it would only be proper that they would have the burden to bring forth any conforming evidence."[34] This argument inappropriately flips the burden of proof regarding the impact of the merger on the public interest from CenturyLink and Qwest to the CLECs. As discussed above, the Merging Companies bear the burden to establish that the proposed merger is in the public interest and one of the factors that *they* must establish is the absence of harm. The burden should be on the applicants regarding future wholesale service quality. The CLECs didn't ask for the merger, the applicants did. The improper burden shift urged by the Merging Companies would effectively eviscerate the CLECs' ability to enforce current wholesale levels, as the expense of filing a Commission complaint for each individual marker of reduction in service and quality would likely exceed the cost of the particular individual problem. If the Merging Companies had their way, not only would the CLECs have to deal with the issues surrounding a degradation of service, but the CLECs would also bear the burden and costs to rectify it. This issue in itself underscores the reason for a key feature of the APAP -- self-executing remedies triggered upon the Merged Company's failure to meet particular quality standards.

24 CenturyLink and Qwest claim that the PIDs contained in the QPAP are not and cannot be designed to measure service degradation. Specifically, they argue, "the PIDs were defined to measure performance against parity or fixed benchmarks, not to properly

[34] *Id.*, at p. 20, ln. 22 to p. 21, ln. 3.

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identify 'performance degradation.'"[35] However, CenturyLink and Qwest do not provide any support to this contention.

25 A common theme in the Merging Companies' persistent opposition to the APAP is, stated in various ways, that the QPAP, by itself, is already "sufficient" to measure and ensure wholesale service quality.[36] However, as discussed above, the QPAP is insufficient to protect CLECs against a post-merger decline in wholesale service quality. While the QPAP serves a crucial function -- ensuring that wholesale service levels are at least as good as retail service levels -- it provides no protection against post-merger wholesale service degradation. Indeed, under the QPAP, wholesale service quality could deteriorate after the merger and never trigger a payment so long as retail service quality deteriorates at the same pace. On the other hand, the proposed APAP will help to ensure that the Merged Company maintains wholesale service qualities at current levels and will create disincentives for the Merged Company to achieve synergies at the expense of its CLEC competitors through a deterioration of wholesale service operations.[37]

26 Qwest's representative (Mr. Williams) contends that under the proposed APAP the Merged Company would face a penalty of over $2 million (as compared to only $148,000 under the PAP) if it merely equals its pre-merger performance levels.[38] Mr. Williams claims to have performed an "analysis" but does not share with the Commission and the other parties the underlying data and computations that led to this assertion. Mr. Williams' "analysis" does not assist the Commission in ascertaining the public interest and should be given no weight in its consideration thereof.

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[35] *Id.*, at p. 25, lns. 2-3.
[36] *See, e.g., Id.* at 29, lns. 8-16.
[37] Gates Supplemental Testimony on Proposed Staff/Public Counsel and Integra Settlements, Exhibit TJG-20CT, at p. 42, lns. 11-14.
[38] Rebuttal Testimony of Michael G. Williams, Exhibit MGW-1RT, at p. 27, lns. 10-16.

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27 The Merging Companies also assert that the APAP is "inappropriate" because it does not necessarily focus on "merger-harm" and could instead be triggered by "normal variations in performance that could occur" in the regular course of their operations.[39] Whatever minimal merit this argument might otherwise have, it can readily be addressed by amending the proposed APAP condition to include a solution whereby no payments are owed under the APAP unless and until the post-merger service degradation exceeds the measureable pre-merger service fluctuations. Specifically, Cbeyond proposes the following formulation:

> APAP remedy payments to a CLEC for a specific PID in some measure will not occur until the remedy payments exceed the remedy credit. And for each CLEC and each PID, product, and disaggregation in the APAP, a remedy credit will be calculated as described in this paragraph. The remedy credit is calculated as follows for each PID, product, and disaggregation: For each month[,] one year prior to the merger filing date[,] monthly performance will be compared to the average wholesale performance provided by Qwest to each CLEC for one year prior to the merger filing date. If monthly performance, as described in the preceding sentence, would result in a remedy payment calculated using the methodology in the APAP to determined remedy payments, then the calculated amount will be a remedy credit for the PID, product, and disaggregation.

This proposal would address Qwest's stated concerns and make sure that we're really capturing a deterioration in wholesale service quality before there would be any remedy payments under the plan.

3. The Terms of the Integra Settlement Are Insufficient to Prevent Merger Related Harm to the CLECs.

28 The Integra Settlement would prevent the Merged Company from eliminating or withdrawing the QPAP for at least three years after the merger closing date; however this is insufficient because, as discussed above, the QPAP would not identify or resolve

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[39] Gates Supplemental Testimony on Proposed Staff/Public Counsel and Integra Settlements, Exhibit TJG-20CT, at p. 22, ln. 13 to p. 23, ln. 3.

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merger-related harm to wholesale service quality. In addition, while the Integra Settlement requires the Merged Company to meet or exceed the average wholesale performance provided by Qwest to the CLEC for a certain time following the merger and to conduct a root cause analysis if wholesale service quality deteriorates, these are not sufficient incentives for the Merged Company to maintain wholesale service quality levels post-merger.

29 Condition 2(a)(i) in the Integra Settlement contains a provision that would track the Merged Company's post-merger wholesale service quality to CLECs. However, unlike Joint CLECs' Condition 4(b) (which would require the Merged Company to maintain the average wholesale service quality provided by Qwest to CLEC during the 12 months immediately preceding the merger filing date), the Integra Settlement establishes the benchmark on a rolling average tied to the merger closing date.[40] Thus, over time the Merged Company's post-merger performance will be compared against earlier post-merger wholesale service quality (which is not the relevant comparison for identifying merger-related harm to wholesale service quality).[41] In addition, the root cause provision (Integra Settlement Condition 2(b)) does not provide any self-effectuating incentives so that, if/when post-merger wholesale service quality deterioration occurs, the Merged Company is properly motivated to resolve these problems immediately and without the need for additional litigation and disputes.[42] The root cause provision that requires the Merged Company to determine why service quality problems are occurring and to develop a plan to rectify them is of little benefit to CLECs and their end users who will be experiencing service-affecting problems and disruptions until such service

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[40] Gates Supplemental Testimony on Proposed Staff/Public Counsel and Integra Settlements, Exhibit TJG-20CT, at p. 44, lns. 4-9.
[41] *Id.* at p. 44, lns. 9-12
[42] *Id.* at p. 45, ln. 1 to p. 46, ln. 2.

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degradations are corrected.[43] Such a provision does not satisfy the "no harm" standard against which this proposed transaction must be judged.

30 Moreover, it is not in the public interest to approve the merger based on a commitment from the Merged Company to simply look into merger-related wholesale service quality problems as they occur and propose a plan to fix them; instead, the Proposed Merger should not be approved unless there are sufficient assurances that wholesale service quality deterioration does not occur in the first place.[44] The APAP is an essential self-effectuating mechanism to ensure that during the synergy period the Merged Company's performance in the legacy Qwest ILEC territory does not deteriorate as compared to pre-merger performance. If the Merged Company acts as CenturyLink and Qwest have represented -- and there is no degradation in service -- then the status quo remains intact and the Merged Company will not be subjected to any payments or penalties. Only if the Merged Company fails to live up to representations that CenturyLink and Quest have made to the Commission will the APAP provisions be triggered.

31 Based on the record in this proceeding, the Commission should adopt the Joint CLECs' proposed APAP condition and require that it remain in place for the five year synergy period (or at least the three year minimum synergy period). If the Commission does not adopt the proposed APAP, the Joint CLECs alternatively ask the Commission to immediately open an expedited docket to consider modifications to the proposed APAP or adopt another appropriate self-effectuating measure to provide proper and meaningful incentives for the Merged Company to prevent wholesale service quality degradation.

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[43] *Id.*
[44] *Id.* at p. 46, lns. 3-8.

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IV. CONCLUSION AND RECOMMENDATION

32 Based on the forgoing, Cbeyond urges the Commission to adopt the proposed conditions discussed herein in addition to the conditions set forth in the testimonies and briefs of the Joint CLECs.

33 RESPECTFULLY SUBMITTED this 21st day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of January 2011, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

David S. Danner Secretary and Executive Director Washington Utilities and Transportation Commission 1300 S Evergreen Park Drive SW PO Box 47250 Olympia, WA 98504-7250	___ Hand Delivered ___ U.S. Mail (first-class, postage prepaid) _x_ Overnight Mail (UPS) ___ Facsimile (360) 586-8203 _x_ Email (records@wutc.wa.gov)

I hereby certify that I have this 21st day of January 2011, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of 360networks:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of January 2011, at Seattle, Washington.