Decision No. C11-001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 10A-350T

IN THE MATTER OF THE JOINT APPLICATION OF QWEST COMMUNICATIONS INTERNATIONAL, INC., AND CENTURYLINK, INC., FOR APPROVAL OF INDIRECT TRANSFER OF CONTROL OF QWEST CORPORATION, EL PASO COUNTY TELEPHONE COMPANY, QWEST COMMUNICATIONS COMPANY, LLC AND QWEST LD CORP.

INITIAL COMMISSION DECISION GRANTING APPROVAL OF INDIRECT TRANSFER OF CONTROL

Mailed Date: January 3, 2011
Adopted Date: December 15, 2010

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Submitted to Colorado PUC E-Filings System

I. BY THE COMMISSION

A. Procedural History

1. On May 27, 2010, Qwest Communications International, Inc. (QCII), and CenturyLink, Inc. (CenturyLink) (collectively Joint Applicants) filed an application requesting approval of an indirect transfer of QCII's operating subsidiaries, Qwest Corporation, El Paso County Telephone Company, and Qwest Communications Corporation (collectively Qwest) to CenturyLink (Application). Joint Applicants pre-filed direct testimony in support of the Application and requested an expedited treatment for the Application within the 120-day timeframe.

2. The Commission deemed the Application complete.[1]

[1] Decision No. C10-0705, at ¶ 3.

3. The following entities filed petitions to intervene by permission and/or notices of intervention by right: Staff of the Colorado Public Utilities Commission (Staff); the Office of Consumer Counsel (OCC); 360networks (USA) Inc. (360networks);[2] Eschelon Telecom of Colorado, doing business as Integra Telecom (Integra); Bresnan Broadband of Colorado LLC; Cbeyond Communications LLC (Cbeyond); Communications Workers of America (CWA);[3] Covad Communications Company; Level 3 Communications LLC (Level 3); NE Colorado Cellular, Inc.; tw telecom of Colorado LLC (tw telecom); iLOKA Inc., doing business as Microtech-Tel (Microtech-Tel); McLeodUSA Telecommunications Services Inc., doing business as PAETEC (PAETEC); U.S. Department of Defense and all other Federal Executive Agencies(DoD/FEA); and MCImetro Access Transmission Services LLC, doing business as Verizon Access Transmission Services and MCI Communication Services Inc., doing business as Verizon Business Services (Verizon).[4] The Commission granted all petitions to intervene by permission and/or acknowledged notices of intervention by right.[5]

4. The Commission referred this docket to Chairman Ronald J. Binz to act as a Hearing Commissioner. The Commission also anticipated issuance of an Initial Commission Decision in this matter because of the timeframes of this case and the workload of the Commission on other matters.[6]

[2] 360networks filed a notice of withdrawal of its intervention on October 5, 2010. Decision No. R10-1237-I, issued November 16, 2010.
[3] CWA filed a notice of withdrawal of its intervention on October 21, 2010. Decision No. R10-1238-I, issued November 16, 2010.
[4] Verizon filed a notice of withdrawal of its intervention on July 14, 2010.
[5] Decision No. C10-0705, at ¶¶ 4, 7.
[6] Decision No. C10-0705, at ¶ 8.

5. On July 15, 2010, the Hearing Commissioner held a prehearing conference in this docket. The Hearing Commissioner adopted a procedural schedule for the instant docket at that prehearing conference.[7]

6. The Commission is aware of the following settlement agreements reached in this docket: (1) a settlement executed between 360networks and the Joint Applicants; (2) a settlement executed between CWA and the Joint Applicants; (3) a settlement executed between DoD/FEA and the Joint Applicants; (4) a settlement executed between Staff and the Joint Applicants; and (5) a settlement executed between Integra and the Joint Applicants, to which Microtech-Tel later joined. The parties to the first two settlement agreements did not request Commission approval of these settlements and the Hearing Commissioner noted these settlements via interim orders.[8]

7. The Hearing Commissioner held an evidentiary hearing from November 8, 2010 to November 10, 2010. In addition, the Hearing Commissioner held a public comment hearing on November 8, 2010, during which five witnesses testified. The parties timely filed Statements of Position (SOPs) on November 24, 2010.

8. The Hearing Commissioner issued several interim orders throughout the course of this docket, pertaining to admissions *pro hac vice*, access to highly confidential information, and other procedural matters. We will not reiterate each of these interim rulings here, but will refer to them as necessary below.

B. Background

9. The proposed transaction is a stock-for-stock transaction that will require no new financing or debt. Qwest and its subsidiaries would merge into CenturyLink, a holding company

[7] Decision No. R10-0756-I, issued July 21, 2010.
[8] Decision Nos. R10-1237-I and R10-1238-I, issued November 16, 2010.

that contains a local service provider, an operating company acquired as a result of the Embarq merger, a long-distance company, and a Competitive Local Exchange Carrier (CLEC) operation. Qwest will be a first tier subsidiary, similar to the existing entities presently operating under CenturyLink. The merger is proposed at the holding company level and no changes are proposed to the corporate structure of the operating entities. The Joint Applicants assert that the regulatory requirements that each operating company in the merged company face currently will remain the same after the merger.

10. Qwest operates its local exchange service in 14 states, serving 10.3 million access lines (1.74 million in Colorado). Qwest provides nationwide long distance, Internet transport, and interexchange services. CenturyLink operates in 33 states, including Colorado, serving 7 million access lines nationally. It offers local exchange service, broadband (2.2 million subscribers) and video (553,000 subscribers).

11. The Joint Applicants assert that the customers would see no immediate changes in the manner in which the services are provided. More specifically, the Joint Applicants state that tariffs, price plans, Interconnection Agreements (ICAs), and other regulatory obligations would continue in the same manner as before the merger. The Joint Applicants state that all regulatory issues will be handled in compliance with applicable statutes and rules. The transaction will not alter the manner in which the Commission oversees the operating entities and the relationships between employees and their bargaining units would not change.

12. This is the first merger in Colorado involving a telephone company designated as a Regional Bell Operating Company (RBOC) and an independent local exchange carrier (ILEC). This becomes important since Qwest has certain responsibilities under § 271 of the 1996 Federal Telecommunications Act, while the operating entities of CenturyLink do not.

II. DISCUSSION

A. Motion to File a Statement of Position in Excess of 30 Pages

13. On November 24, 2010, the Joint Applicants filed a Motion seeking to file a joint SOP in excess of the 30-page limit. The Joint Applicants contend that their joint SOP is less than 60 pages, the number of pages that would be submitted if each of them had filed a separate SOP. We find good cause to grant this unopposed Motion.

B. Standard of Review

1. Background

14. Section 40-5-105(1), C.R.S., states that "[t]he assets of any public utility … may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe." In determining whether a proposed transfer should be granted, the Commission must evaluate whether the transfer is "not contrary to the public interest." *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 763 P.2d 1020, 1029 (Colo. 1988); *Buckingham v. Pub. Utils. Comm'n*, 504 P.2d 677, 679 (Colo. 1972).

15. The parties in this case presented different interpretations of the "not contrary to the public interest" standard. The OCC filed a Motion In Limine on November 3, 2010. In that Motion, the OCC sought to exclude portions of rebuttal testimony of CenturyLink witness G. Clay Bailey, related to the test that the Commission should apply in determining whether the proposed merger is not contrary to the public interest. The Hearing Commissioner denied the Motion, but invited all parties to present further arguments on the issue in SOPs. Decision No. R10-1236-I, mailed November 16, 2010. The OCC, the Joint Applicants, Staff, PAETEC, and Level 3 did so in their SOPs filed on November 24, 2010.

2. Positions of the Parties

a. The OCC

16. The OCC argued that in three prior merger decisions involving major incumbent telecommunications, gas, and electric providers, the Commission, in determining whether the proposed merger was not contrary to the public interest, utilized the "consumer and producer welfare maximization" and "balancing of ratepayer and provider interests" tests. *See* Decision No. C00-0041, Docket No. 99A-407T mailed January 20, 2000 (involving the merger of U S WEST Communications, Inc. (U S WEST), the largest incumbent local exchange carrier in Colorado at that time, and Qwest, in the context of a presumed nascent competitive utility environment); Decision No. C00-0393, Docket No. 99A-377EG mailed April 24, 2000 (involving the merger between New Century Energies and Northern States Power); Decision No. C96-1235, Docket No. 95A-531EG (involving the Public Service-Southwestern Public Service Company merger) mailed November 29, 1996. The OCC also states that, in *Mountain States Tel. & Tel. Co.*, 763 P.2d at 1029 (Colo. 1988), a case involving the transfer of telephone directory publishing assets, the Colorado Supreme Court stated that the term "public interest," involves a balancing of interests of shareholders in a reasonable rate of return and rights of ratepayers to receive adequate service at a price which reflects the cost of service.

17. The OCC argues that one instance in which the Commission utilized the "no net harm to customers" test, a less stringent test advocated by the Joint Applicants, is an aberration from past Commission decisions in merger cases and that is distinguishable from the facts of this case. *See* Decision No. C08-0204, Docket No. 07A-108EG mailed February 29, 2008 (involving the merger between Black Hills and Aquila). The OCC states that the instant merger is a stock-for-stock transaction, not an asset transfer like the Black Hills-Aquila merger. Further, the Joint

Applicants face competition and Black Hills-Aquila did not. The OCC argues the public interest in this merger goes beyond Qwest/CenturyLink customers and encompasses all Colorado consumers.

18. The OCC finally argues that §§ 40-15-101, -501, and -502, C.R.S., focus on basic local exchange service and its availability and affordability. The OCC contends the Commission must find that basic local exchange service will be protected and affirmatively benefitted by the proposed merger before approving the transaction.

b. The Joint Applicants

19. The Joint Applicants argue that the test used by the Commission in determining whether a proposed acquisition is "not contrary to the public interest," has evolved from the "consumer and producer welfare maximization" and the "balancing of ratepayer and provider interests" tests into the "no net harm to customers" test. The Joint Applicants point to the most recent Commission merger decision, involving the Black Hills-Aquila merger, and argue that the decision controls.

20. The Joint Applicants argue that any attempts to distinguish the Black Hills-Aquila merger from the facts of this case are not persuasive. They contend that the standard of review should not depend on whether a transaction is a merger, an asset transfer, a transfer of partnership equity interests, or a stock merger at the parent corporation level. The applicable statute, § 40-5-105(1), C.R.S., provides that the Commission must approve all transfers of utility assets, with some exceptions, and does not distinguish between the types of transfers. The Joint Applicants argue that the Commission should apply the same test in telecommunications as in electric and natural gas mergers. The Joint Applicants add that, if anything, the standard of review should be

less stringent in a more competitive industry like telecommunications than in a non-competitive industry such as electric and natural gas.

21. The Joint Applicants conclude the Commission should use the Black Hills-Aquila "no net harm to customers" test in determining whether this merger is not contrary to the public interest. In the alternative, the Joint Applicants argue that the proposed merger is not contrary to the public interest regardless of whether the Commission applies the "no net harm to customers" test or any of the tests advocated by other parties.

c. PAETEC and Level 3

22. PAETEC argues that the Commission, in determining whether the merger is not contrary to the public interest, must determine the impact on competition. PAETEC cites §§ 40-15-101 and -501, C.R.S., for the proposition that the Colorado law reflects a strong public policy favoring competition in local telecommunications markets. PAETEC argues that to the extent the merger creates a risk of harm to competition, the Commission should place conditions on the merger that provide adequate protection against such harm. Level 3 adds that the Joint Applicants must show that the post-merger company will not engage in certain anti-competitive conduct that can occur or will be exacerbated by the merger.

d. Staff

23. Staff argues there is a middle ground between the opposing interpretations offered by the Joint Applicants and the OCC. Staff states that the Commission should use the principles listed in §§ 40-15-101, -501, and -502, C.R.S., in determining whether the proposed transaction is not contrary to the public interest.

3. Discussion

24. Sections 40-15-101, -501, and -502, C.R.S., collectively, provide that competition in the telecommunications industry; availability of high quality advanced telecommunications services; and availability and affordability of basic local exchange service to all residents of the state are the objectives the Commission should strive for. In addition, we find that both tests advocated by the OCC and the Joint Applicants are relevant to a determination of whether the merger is "not contrary to the public interest" and the Commission is not required to choose one over the other. The Commission will therefore consider whether the merger and any conditions would ensure: (1) no net harm to customers; and (2) a balance of ratepayer and provider interests, also keeping in mind the legislative directives listed above. We will also take into consideration that the merger is proposed at the holding company level, rather than at the operating company level.

C. Joint Application for Indirect Transfer of Control

1. Joint Applicants

25. Qwest and CenturyLink maintain that the transaction is in the public interest, will provide benefits to customers, will not negatively impact the competitive landscape, and will provide the merged company financial and operational strength. CenturyLink asserts the two companies have complimentary local and long distance operations. CenturyLink asserts that the transaction will allow the merged company to compete and grow its product lines successfully, in light of the state of the wireline telecommunications industry.

26. CenturyLink asserts that the merged company will have a strong presence in the state, as Qwest's Business Market Group will be headquartered in Denver. The merged company

would have *pro forma* revenues of $20 billion; earnings before interest, taxes, and depreciation and amortization of $8.2 billion, and cash flow of $3.4 billion.

27. The transaction is a tax-free stock-for-stock swap with no new debt or refinancing required. Qwest shareholders will receive 0.1664 shares of CenturyLink for each share of Qwest common stock owned at closing. The merger contemplates that the shareholders of pre-merger CenturyLink will own approximately 50.5 percent of post-merger CenturyLink and the shareholders of pre-merger Qwest will own approximately 49.5 percent of post-merger CenturyLink. The transaction would not result in the transfer of assets, exchanges, or operations to a wholly different provider. The transaction contemplates Qwest will become a wholly-owned subsidiary of CenturyLink and that current operating Qwest subsidiaries will remain subsidiaries of Qwest.

28. The merger contemplates that Qwest will continue to operate until the Alternative Form of Regulation approved by the Commission in Docket No. 04A-411T takes place. Qwest will continue to comply with all pricing, service quality, reporting, and other requirements as defined in that and other Commission dockets. Qwest's wholesale obligations would not be impacted by the transaction.

29. The merged company will have an enterprise value of $37 billion and revenues of $20 billion. In Colorado, the networks of the two companies are largely complimentary—Qwest serves many of the larger urban areas and CenturyLink serves rural areas including the eastern plains, northwest Colorado, and large parts of the San Luis Valley.

30. The Joint Applicants assert that the merged company will be stronger financially and will have access to necessary capital to invest in a network capable of providing enhanced

products and services including deployment of its fiber to the cell tower and fiber to the node facilities (to increase broadband speeds and develop new services such as video).

2. Opposition to the Merger

31. Staff, the OCC, and other intervenors either opposed the merger, or suggested that the Commission only approve the merger upon certain conditions. Staff, Integra, Microtech-Tel, and DoD/FEA withdrew their objections to the merger after reaching settlement agreements with the Joint Applicants. The remaining parties maintained their positions and argued the settlements did not address their concerns.

a. The OCC

32. The OCC generally expressed a concern that the Joint Applicants did not provide a sufficient basis for the Commission to determine that the Application was not contrary to the public interest. The OCC stated that the Commission must find that the proposed transaction is not contrary to the public interest before approving the same, in accordance with § 40-5-105, C.R.S., and Rule 2109 of the Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* 723-2. The OCC argued that, if it chose to approve the merger, the Commission has specific statutory authority to prescribe conditions to protect the public interest.

33. The OCC also concluded that the Joint Applicants failed to meet the requirements in Rule 2109(a)(IV), which mandates that the Application include "[a] statement of the facts (not in the form of conclusory statements) relied upon to show that the proposed transfer is consistent with, and not contrary to, the statements of public policy in §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S." The OCC contended the Joint Applicants failed to provide sufficient information

regarding the public policies expressed in these three statutes. Therefore, the OCC recommends a denial of the Joint Application unless certain conditions are imposed to address its concerns.

34. Overall, the OCC argued the merger focuses on deregulated advanced services, at the expense of regulated basic telecommunications services. The OCC also argued that the Joint Applicants failed to present a complete picture regarding the impact of the merger on the public interest. The OCC compared the materials filed by the Joint Applicants with the Securities and Exchange Commission (SEC) on June 4, 2010 with the direct testimony filed in this case. The OCC asserted that the Joint Applicants present considerably more risk associated with the merger in the SEC filings than in the direct testimony.

35. The OCC further suggested that a major effect of the merger may be reductions in corporate overhead and the elimination of duplicative functions and systems quantified as $575 million in anticipated operating expense savings. Therefore, the OCC expressed a concern that some of the anticipated operating expense savings will be reached by reducing customer service and operations employees, which could result in a lower level of quality of service and customer care for Qwest's retail customers. To protect against such an outcome, the OCC presented a list of service quality measures beyond those currently required by the Commission. It also proposed a mechanism of automatic penalties for failure to meet those metrics.

36. The OCC developed a list of specific factors for the Commission to consider in determining whether the merger may be inconsistent with the public interest, such as residential and business rate stability, quality of service, possible impact on the Colorado High Cost Support Mechanism (CHCSM) and the need for residential alternatives to flat-rated basic local exchange service.

37. The OCC expressed a concern that the Joint Applicants will attempt to raise rates on basic local exchange service for standalone residential and small business customers, which would not be necessary but for the merger. The OCC recommended that the rates on basic local exchange services should not be raised for a period of at least three years commencing from the closing of the merger transaction.

38. Regarding service quality metrics, the OCC argued there should be an expansion of the current retail customer quality of service plan. Mr. Frank Shafer, on behalf of the OCC, testified that the Commission should monitor the level of service that Qwest's retail customers receive that result in monetary penalties if service levels deteriorate following the transfer. The OCC also recommended that the Commission require CenturyLink to assume all current service related obligations of Qwest as a result of Qwest's Price Plan regime.

39. The OCC also concluded that, due to the savings promised by the Joint Applicants following the merger, there should be no need for the continuing receipt of CHCSM subsides for Qwest or for an initial request of these subsidies by CenturyLink. In the alternative, the OCC argued that Qwest should be precluded from applying for additional CHCSM subsidies and that CenturyLink should be precluded from applying for an initial CHCSM subsidy for a period of at least three years commencing from the closing of the merger transaction.

40. The OCC recommended that, pursuant to Rule 2001(q), the Commission require CenturyLink to provide measured rate and message rate service, at a lesser rate compared to its flat-rated basic local exchange service. This would be similar to a requirement imposed by the Commission on Qwest. The OCC further recommended that an approval of the merger be made conditional upon both Qwest and CenturyLink providing "lesser" alternatives to flat-rated basic

service, including: a basic service option which allows incoming calls in addition to 9-1-1 calling and a basic service option that provides 9-1-1 service only.

41. The OCC finally asserted that the Commission can protect the public interest by adopting conditions that have been placed on the merger by other regulatory agencies, including the Federal Communications Commission (FCC) and other state public utility commissions. This recommendation is known as the "most favored nation" recommendation.

b. Level 3, tw telecom, Cbeyond, and PAETEC

42. Originally, all CLEC intervenors recommended that the Commission impose a list of conditions related to wholesale services on the merger.[9] Subsequent to the settlement being filed by the Joint Applicants, Integra and Microtech-Tel, the remaining CLECs generally supported the conditions contained in that settlement, but argued that the Commission should impose additional conditions on the merger.

43. Level 3 argued the Commission should require that the Joint Applicants extend the time period of all existing interconnection agreements by 36 months or, in the alternative, allow the CLECs to select which of the three proposed extension periods (12, 24, or 36 months) best fit it needs.

44. Level 3 also asserted the Joint Applicants should be required to commit to the following: (1) treat all locally dialed ISP-bound traffic, including virtual NXX traffic as local traffic in the calculation of relative use factors pursuant to 47 *Code of Federal Regulations* §703(b); (2) require the merged company to allow carriers to use new or expanded interconnection routes established by its affiliates in adjoining service territories, and require

[9] *See* the Answer Testimony of Timothy Gates, Exhibit TG-9 on behalf of the Joint CLECs.

notice by the merged company of the same; (3) make contracts between affiliates of the merged company for telecommunications services and network interconnection publicly available; (4) prohibit the merged company from using billing disputes with one entity from threatening disconnection, or disconnecting or refusing to provision new orders by any entities within the merged company; (5) prohibit the merged company from continuing or expanding the improper homing of 8YY switched access charge and transport practices; and (6) require Qwest to cease its practice of denying disputed claims solely on the basis that they are more than 90 days beyond the date originally billed.

45. In addition, Level 3 argued the Joint Applicants have not shown that the merger would not be contrary to the public interest. Level 3 argued that, by approving the merger, the Commission would be reducing the potential for local exchange competition in Colorado.

46. PAETEC suggested that the CLEC settlement agreement is not robust enough regarding operational support system (OSS) protections. PAETEC argued that existing OSS should be protected for three to five years after the close of the merger; that operational thresholds must be set for any replacement OSS; and that the Joint Applicants must meet benchmarks for OSS components of support, data, billing, functionality, performance, and electronic flow through and bonding.

47. Intervenor tw telecom argued that existing contracts, services, contracts, and OSS be frozen for three years after the merger, as opposed to the staggered timeframes in the Integra Settlement.

48. Cbeyond argued for the original set of conditions set forth by the Joint CLECs, listed in the answer testimony of Mr. Timothy Gates, Exhibit TG-8. This would include a five to seven-year freeze on existing services and relationships provided by the applicants to CLECs.

D. Settlement Between the Joint Applicants and Staff

49. In its answer testimony, Staff originally proposed 25 conditions to be attached to a Commission approval of the proposed transaction. Staff argued these conditions were necessary to ensure Colorado business and residential consumers and other telecommunications providers continue to receive high quality telecommunications services. The settlement agreement reached by the Joint Applicants and Staff addresses these conditions.

1. Overview of the Settlement

50. The settlement agreement requires, among other things, that:

- The Joint Applicants will continue to file annual financial reports in compliance with Commission Rules. These reports will include "goodwill" assets, merger transaction costs, re-branding costs, and plant acquisition adjustments, if any. During the merger transaction period, additional financial reporting will be done based on future discussions among the parties.
- The Joint applicants will update Staff on any material changes in the merger until approval by the Commission.
- The Joint Applicants will file a quarterly report regarding integration status. The content of that is subject to future negotiations.
- Staff will receive 180 days' notice of any changes to current OSS and will receive updates on those conversion activities.
- Any future changes in draws on the CHCSM will be in accordance with the applicable Commission Rules.
- The Joint Applicants commit to spending $70 million over a five-year period, beginning on January 1, 2011 for deployment of Colorado broadband facilities. Of that amount, 20 percent will be allocated to unserved or underserved areas.
- Staff will review the merged company's capital expenditure plan for Colorado on an annual basis during the transition period.
- The merged company will continue to comply with 9-1-1 rules and work towards NextGen 9-1-1, and it will work with Staff and 9-1-1 Task Force members to review redundancy in the existing Colorado system.

- The Colorado Performance Assurance Plan (CPAP) for wholesale services will be used to create a set of similar performance metrics on the retail side. The results will be reported to Staff and the OCC.
- During the transition period, the Joint Applicants will present metrics and results at the wire-center level for certain service quality metrics.
- Upon request from Staff, the Joint Applicants will perform root cause analysis on any issues stemming from declines in performance covered by the above metrics. Staff and OCC maintain their authority under existing statutes and rules to oversee service quality and exercise any other authority they have under current law and rule.
- The Joint Applicants will meet with Staff on a quarterly basis to discuss service quality reports and integration activities.
- Staff will also monitor other capital expenditures for three years.

2. The OCC's Position on the Settlement

51. The OCC recommends that the Commission deny the Staff settlement agreement on the grounds that its terms and conditions are vague and ambiguous and are rendered meaningless and unenforceable as to significant merger-related issues. The OCC argues that the settlement agreement leaves many material and substantive issues to be decided at an undetermined future time. For example, with regard to the reporting requirements during the merger transition period, annual financial reports, integration status reports, and OSS reports, the settling parties state only that they agree to negotiate the format and content of these reports. The OCC also makes a similar argument regarding the quality of service reporting requirements, pointing out that the Staff settlement agreement does contain any self executing penalty provision in the event of non-compliance.

52. The OCC argued that Staff and the Joint Applicants request the Commission find that an agreement is in the public interest even though they have not agreed to a specific content, format, or time frame with regard to critical reporting that would inform the Commission

whether the promised synergies and benefits of the merger are occurring or, alternatively, whether merger related problems, costs, or delays are occurring.

53. In addition, the OCC argues that the evidentiary record is deficient as to whether the $70 million broadband commitment contained in the Staff settlement agreement is an amount above the intended capital investment level, or if it is merely a reflection of what will be done regardless of any prior commitment. The OCC points out that the broadband commitment carries with it no enforcement provision or penalty if the Joint Applicants invest less than the promised $70 million during the relevant period.

54. The OCC points out that the Staff settlement agreement refers to the settlement agreement between the Joint Applicants and Integra. The Staff settlement agreement states the Integra settlement "serves the public interest and sufficiently addresses the concerns regarding wholesale matters raised by Staff in their testimony." The Integra settlement contains rate freeze provisions to promote wholesale rate stability and service quality metrics with a penalty regime and associated remedies. The OCC states that similar protections on the retail side are lacking in the Staff settlement agreement.

E. Settlement Between the Joint Applicants and Integra and Microtech-Tel

1. Overview of the Settlement

55. We note that the settlement agreement reached by Integra and the Joint Applicants discusses CLECs generally, rather than Integra specifically. That settlement agreement requires, among other things, that:

- The Joint Applicants will not seek cost recovery through wholesale pricing for transaction costs, branding costs and transition costs related to the merger, nor for any premium paid in the acquisition.

- In Qwest-legacy ILEC territories, the existing requirements for wholesale service quality and accompanying penalties based on statutes, Commission Rules, tariffs, and ICAs will continue unchanged. The parties will not seek to reduce coverage of the metrics in the Qwest Performance Indicator Definition (PID) and Qwest PAP for at least 18 months after the merger closing, after which the coverage can only be changed pursuant to the PID and PAP terms and conditions.

- The wholesale service quality must meet or exceed the conditions imposed by the FCC on the Century-Embarq merger, for no less than three years after the closing of this merger.

- If service quality falls below these levels, the Joint Applicants must provide a root cause analysis. CLECs maintain their right to file complaints at the Commission, if needed.

- The agreement sets in place an "Extended Time Period" for ICAs that are in place. ICAs, either active or in evergreen status, are automatically extended for 36 months after the closing of the merger. Further, CLECs may use their existing ICAs as the negotiation template to extend/renew ICAs after the extension period. All ICAs, current or in Extended Time Period, are eligible for opt-in. The rates for existing wholesale services will effectively remain unchanged for 36 months, after which the rates can be modified pursuant to state regulations. No new fees can be charged for customer acquisition and migration other than those currently in place in the Qwest legacy territories.

- Commercial agreements for certain resale services and unbundled elements no longer required to be offered by the LEC will be extended for 18 months, after which the parties can begin the process to modify rates. Services for embedded base customers will be grandfathered, but rates could change. The tariff-based arrangements will be extended for 12 months after the close, including term and volume discount plans.

- CenturyLink and its ILECs will comply with §§ 251 and 252 of the Federal Telecommunications Act. Qwest legacy territories will be considered RBOCs and subject to §§ 271 and 272 of the Act. Qwest will not seek additional wire center impairment decisions or seek forbearance before June 2012.

- In Qwest legacy service territories, the merged company will make certain standard information available to CLECs, regarding carrier relations, functions and personnel, account management, escalations, etc. The level of detailed data, information, and assistance currently provided to CLECs will continue.

- The merged company will ensure there is sufficient staffing and support to handle CLEC order volumes and the levels do not fall materially relative to pre-merger levels. The merged company will use employees dedicated to the wholesale function. The merged company will not permit employees to use CLEC information for the merged companies' retail sales benefit.

- Current OSS will remain in place until July 1, 2013 or at least two years after the merger closes. The merged company will file any proposed changes with the Wireline Competition Bureau of the FCC at least 270 days before implementation, and will detail the changes proposed. The current Qwest Change Management Process will govern the changes to OSS and any replacement or retirement of current OSS with a new system will be tested until mutually negotiated acceptance criteria are satisfied. Testing will include a testing environment and controlled production testing, and the merged company will provide training and education regarding the new system.

- The merged company will engineer and maintain its network subject to federal and state law. The CLECs and Joint Applicants will amend the current ICAs with a proposed amendment in the Settlement Agreement regarding loop conditioning for DSL-type capabilities.

2. Opposition to Settlement from Non-Settling CLECs

56. The CLECs that have not joined in the Integra settlement agreement generally find fault with the compromises made by Integra regarding time frames in which the status quo for certain services and relationships will be maintained, among other things.

57. Intervenor tw telecom argued that existing contracts, services, contracts, and OSS be frozen for three years after the merger. Cbeyond requested that the Commission impose the original set of conditions set forth by the Joint CLEC witnesses as described in Timothy Gates' Direct Testimony, Exhibit TG-8, including a five to seven-year freeze on existing services and relationships provided by the applicants to CLECs. Level 3 proposed that the agreement should extend the time period of all existing interconnection agreements by 36 months or, in the alternative, allow the CLECs or commercial mobile radio service providers to select which of the three proposed extension periods (12, 24, or 36 months) best fit its needs.

F. Discussion of the Joint Application, Staff Settlement Agreement, and Integra Settlement Agreement

58. We find that the Joint Application is in the public interest and shall be approved consistent with the discussion below. We find that the Joint Applicants have met their burden of

proof that the proposed merger, as modified by the settlements, will not be contrary to the public interest.

59. We generally note that the telecommunications market has evolved significantly, as shown in the record. For example, wireless services and applications have exploded and serve as effective competition to wireline companies in many aspects of the industry. Cable companies offer competitive alternatives for residential customers and to some degree business customers. This lessens the likelihood that the proposed merger will pose anti-competitive risks.

60. Despite the increased levels of competition, parties argued that the Commission needs to establish conditions to the merger that will protect customers of the merged company where it will maintain a varying level of market power. These conditions relate to availability of wholesale services and retail quality of service. We find that the settlements reached by the Joint Applicants with Staff, Integra, and Microtech-Tel will serve these important goals.

61. It is also important to note that the federal and state regulatory oversight for each of the individual operating entities of Qwest and CenturyLink will continue after the merger. If the merged company wishes to change rates, or restructure the company, it would be required to file applications with this Commission. We would then evaluate the impact on the public interest of the proposed changes. Therefore, the Commission will continue its regulatory oversight with respect to the quality of the merged company's services, its obligations to wholesale CLECs, and the pricing requirements of the new entity's services.

62. The proposed merger may have significant economic ramifications for Colorado and the Denver area in particular since Denver has served as the global headquarters for Qwest. Because of that, Denver has been the beneficiary of upper-management level jobs and the resulting impacts on the Denver economy. Even though the Joint Applicants point out that

Qwest's business markets will remain in Denver and that Denver will serve as a regional headquarter for the combined entity, the merger may reduce the number of higher level Qwest positions in the Denver area.

63. Over the years, Mountain Bell, U S WEST, and later Qwest, have been very actively involved in the community in Denver and elsewhere in Colorado. The evidence presented at the hearing demonstrated the typical levels of cash contributions to non-profits and charities either directly from Qwest or through the Qwest Foundation. No data was presented regarding typical levels of in-kind donations.

64. Based on testimonial statements by witnesses for the Joint Applicants, we know that CenturyLink realizes the importance of involvement in the communities it serves. We hope that, with respect to corporate giving, CenturyLink will follow in the tradition of Qwest. To provide some assurance to Colorado non-profits and charities, we require that CenturyLink, in its role as a regulated corporate entity in Colorado, commit to maintain the level of corporate giving that has been the practice over the last three years by Qwest for a period of three years after the merger closes. Such a commitment would create a transition and avoid an immediate problem for many of the current recipients from Qwest, especially given the uneasy state of the economy and its impact on overall charitable donations. [10]

65. We generally agree with the Joint Applicants that OCC has failed to demonstrate the need for additional service quality measurements beyond those currently in place. Further, we agree with the Joint Applicants that the settlement agreement reached with Staff will provide a basis to supplement Qwest's current service quality reporting. The settlement agreement with

[10] Commissioner James Tarpey dissents from this portion of the Order. His written dissent is attached to this decision.

Staff includes retail service quality metrics using the definitions and results from the Colorado Performance Assurance Plan (CPAP) and associated Performance Indicator Definitions (PIDs). We find that the OCC did not provide a cost benefit analysis of the imposition of its additional service quality metrics above and beyond those currently in place and we are not persuaded that the service quality metrics proposed in the Staff settlement agreement are not sufficient. We also agree with the Joint Applicants that it would be irrational for the merged company to reduce service quality in a competitive environment. We conclude that additional service quality measures advocated by OCC are not warranted.

66. We are not persuaded by the OCC's argument that a residential rate freeze is necessary to prevent the merged company from inappropriately passing on the transaction costs of the merger to the customers. First, the settlement agreement between Staff and the Joint Applicants provides that any goodwill and associated merger transactions costs will not be included in any Colorado ratemaking filings. In addition, as the Joint Applicants pointed out, the Commission will continue to have the authority to set, maintain, and review the rates charged by each operating entity for basic service. If the merged entity wishes to increase its residential basic local exchange service rates in the future, it must file an application pursuant to § 40-15-502(3), C.R.S., for Commission approval before doing so. Further, as the Staff settlement agreement points out, the merged company will continue to file its annual report with this Commission, which will contain its financial operating results. Therefore, if any party believes the company is over-earning in the future, that party can file a complaint with this Commission.

67. Based on the discussion above, we will not adopt the OCC's recommendation to impose a residential rate freeze on the merged company, since the Commission will retain its ability to monitor and set just and reasonable rates. This recommendation therefore would not

provide any additional protection for the consumers and the public interest than they are already afforded by Commission Rules and statutes.

68. We find merit in the OCC's recommendation that the Commission should require the merged company to offer measured local service or message local service in addition to flat-rated basic local exchange service to the extent that they are not already doing so. However, instead of imposing such a requirement upfront, we will require CenturyTel of Colorado and CenturyTel of Eagle to file advice letters and tariff pages to implement such a service within 90 days of the close of the merger.

69. Regarding the "most favored nation" recommendation made by the OCC, we find that imposing such a requirement on the merged company is inappropriate. The company may be subject to a variety of requirements in other jurisdictions and the circumstances in other jurisdictions may be different. We find that Commission review of particular requirements and conditions is necessary before imposing them on the company in Colorado.

70. However, we direct CenturyLink and Staff, and the OCC if they so choose, to meet within 90 days of the closing of the merger to develop a list of requirements that have been agreed to by the Joint Applicants in other states or imposed by other state public utility commissions as a condition of their approval of the merger. Once this list is completed, CenturyLink shall file the list in this docket for informational purposes.

71. We find that the settlement agreement between Staff and the Joint Applicants, as clarified in Attachment A to both Staff and the Joint Applicants' SOPs, is in the public interest and we therefore approve it. The settlement agreement provides Staff with the ability to monitor merger related activities, future service quality changes, and the issues related to ratemaking. Staff and the Joint Applicants have reached a good compromise that balances the benefits to

consumers without imposing unnecessary regulatory requirements on the merged company. Importantly, the settlement agreement memorializes a commitment on the part of the Joint Applicants to spend $70 million over the next five years in Colorado on broadband facilities.

72. We believe the use of the CPAP as a basis for enhanced service quality monitoring of retail services is appropriate and will ensure that the wholesale and retail sectors are measured consistently. The inclusion of 9-1-1 related requirements is equally important as we move towards NextGen 9-1-1. The interim reporting of merger related activities will assist Staff in catching any negative trends in either the financial or logistical progress of the merger.

73. We are not persuaded by OCC's arguments that the terms of the Staff settlement agreement are vague and unenforceable. We find that the terms contained in that agreement in regards to integration reporting, merger cost rate recovery safeguards, network infrastructure investment, 9-1-1 services, service quality reporting and monitoring, and wholesale services are in the public interest and should be approved. In addition, for reasons discussed above, we do not believe that the merged entity will be able to both maintain or grow its customer base and allow service quality to deteriorate.

74. We decline to adopt the recommendations presented by the non-settling CLECs. For example, the additional conditions requested by Level 3 are ICA-related terms and conditions that previously have been the subject of disputes between the CLECs and Qwest. We find that Level 3 may be attempting to use the merger docket to overturn previous Commission decisions in CLEC ICA arbitration cases. We therefore deny the requests made by Level 3.

75. We also decline to adopt the recommendations offered by tw telecom, PAETEC, and Cbeyond. We believe that these recommendations are similar to those presented by Level 3 and we decline the invitation to settle ICA-related disputes in this merger application. We note

that within existing state and federal statutes and regulations, CLECs have opportunities to raise their issues with the Commission or with the FCC. Issues such as the treatment of ISP traffic, billing disputes, and other such issues are far beyond the scope of this merger proceeding and are more suited for ICA arbitrations or complaints. The authority of the Commission to arbitrate such ICA-related issues will not change after the merger.

76. We find that the Integra settlement agreement is in the public interest and we will approve it in this docket. We find that the agreement provides a reasonable level of protections to the CLECs beyond what was initially offered by the Joint Applicants. We decline to adopt the additional recommendations offered by the non-settling CLECs.

77. We find that the Integra settlement agreement will maintain some certainty and stability in the relationships between the CLECs and the Joint Applicants. Extended timeframes for the ICAs and other commercial agreements, advanced notice of OSS changes, and continuity in the CPAP will provide protections to CLECs. The availability of an ICA amendment relating to line conditioning for the provision of high speed loop-based internet access will also expand the ability of CLECs to market these services using the network provided by the Joint Applicants.

78. The Integra settlement should be available to all CLECs doing business in the Colorado territories of Qwest and CenturyLink, including, at their option, the loop conditioning ICA amendment. All CLECs should be afforded the terms and conditions of the Integra settlement agreement. We expect the Joint Applicants to provide non-discriminatory treatment to all CLECs, whether this happens through amendments to ICAs and Commercial Agreements, or through non-contract policy, practices, and procedures.

G. Settlement Between the Joint Applicants and DoD/FEA

79. Under the settlement agreement reached by the Joint Applicants and DoD/FEA, the post-merger company will not increase current pricing on retail Business Lines with or without Qwest Packages (single or multi-line), Centrex, Qwest Utility Line™, and PBX trunks for three years after the execution of the Agreement. We note these are contract services, not tariff offerings to the general public.

80. The agreement is contingent on the U.S. Government and its agencies in Arizona, Colorado, and Utah maintaining total service levels resulting in billings by the merged company of at least 90 percent of the average quarterly billings for the four quarters preceding the date of the agreement. If, after notice by the merged company, the total service billings remain continuously below the 80 percent level for 180 days, the merged company may terminate the agreement.

81. The Joint Applicants offered this plan to the U.S. Government and its agencies on an individual case basis pursuant to applicable regulations. The Joint Applicants further agreed that any service quality requirements contained in any state public utility commission order related to the proposed merger, as well as any other service quality requirements ordered by any public utility commission shall be applicable to service provided to the U.S. Government and its agencies under this Agreement.

82. The agreement reached by the Joint Applicants and DoD/FEA is unopposed. We find this agreement is in the public interest and therefore will approve it without modifications. We note that the provision addressing the three-year moratorium on price increases is unique to the customer-specific contract services and does not affect tariff offerings subject to our regulatory jurisdiction.

III. ORDER

A. The Commission Orders That:

1. The Joint Application filed on May 27, 2010 by Qwest Communications International, Inc. and CenturyLink, Inc., for Approval of Indirect Transfer of Control of Qwest Corporation; El Paso County Telephone Company; Qwest Communications Company, LLC; and Qwest LD Corp. is granted consistent with the discussion above.

2. The Settlement Agreement between Qwest Communications International, Inc. and CenturyLink, Inc.; and Staff of the Commission is approved.

3. The Settlement Agreement between Qwest Communications International, Inc. and CenturyLink, Inc.; Eschelon Telecom of Colorado, doing business as Integra Telecom; and iLOKA Inc., doing business as Microtech-Tel is approved.

4. The Settlement Agreement between Qwest Communications International, Inc. and CenturyLink, Inc.; Eschelon Telecom of Colorado, doing business as Integra Telecom; and iLOKA Inc., doing business as Microtech-Tel shall be applicable to all Competitive Local Exchange Carriers in Colorado.

5. The Settlement Agreement between Qwest Communications International, Inc. and CenturyLink, Inc.; and the U.S. Department of Defense and all other Federal Executive Agencies is approved.

6. The Motion to File a Statement of Position in Excess of 30 Pages filed by Qwest Communications International, Inc. and CenturyLink, Inc., on November 24, 2010 is granted.

7. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

8. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING December 15, 2010.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director

COMMISSIONER JAMES K. TARPEY
DISSENTING IN PART.

IV. <u>COMMISSIONER JAMES K. TARPEY DISSENTING IN PART</u>

1. The majority's decision requires CenturyLink, Inc.'s (CenturyLink) commitment that it will maintain for the next three years the level of charitable contributions, including in-kind services, that is reflected in the recent history of Qwest Communications International, Inc. (Qwest) (*see* paragraphs 63 and 64). I respectfully dissent from the majority's decision to impose a requirement on CenturyLink's shareholders to make charitable contributions with money that rightfully belongs to the shareholders. Charitable contributions are not a cost paid by ratepayers and are a matter outside the Commission's jurisdiction.

2. One reason for imposing conditions on a utility is to ensure that the quality of service provided post-merger will be consistent with the quality of service provided prior to the

merger. Restated, quality of service is an issue the Commission can address in the absence of a merger. While the majority has an interest in CenturyLink continuing Qwest's level of donations for at least the next three years, conceptually this is a very different situation from quality of service. Prior to the merger the Commission lacked the authority to order Qwest to maintain its level of charitable contributions, and it lacks the authority to impose that requirement as a condition for Commission approval of the merger.

3. Over the years I have been aware of the largesse of Qwest and its Foundation, and I applaud them for being so generous. I hope this continues in the future but appreciate that the level of charitable contributions is within CenturyLink's discretion and not for the Commission to mandate.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JAMES K. TARPEY

Commissioner