

**BEFORE THE WASHINGTON STATE 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.

DOCKET NO. UT-100820

QWEST'S AND CENTURYLINK'S
REPLY BRIEF

JANUARY 21, 2011

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I. INTRODUCTION.

1 Joint Applicants, Staff, Public Counsel, the Joint (Non-Settling) CLECs, and Sprint/T-Mobile
all filed opening briefs in response to Commission-identified issues on January 14, 2011. In
this reply brief, Joint Applicants will: (1) summarize the benefits of the transaction; and, (2)
explain why the additional conditions proposed by the Non-Settling CLECs should be
rejected, and respond to arguments presented in the Joint CLECs' and Sprint's January 14,
2011 opening briefs.

2 The Joint Applicants have entered into settlement agreements with the Staff of the
Commission ("Staff") and the Office of Public Counsel ("Public Counsel") (the "Settlement
Agreement"); Integra Telecom, Inc. ("Integra") (the "Integra Settlement Agreement");
360networks (USA), inc. ("360networks"); the Department of Defense and all Federal
Executive Agencies (DoD/FEA). Each of those intervenors supports the merger. The
Settlement Agreements contain a set of comprehensive protections for retail consumers and
wholesale competitors, including regulatory and reporting requirements that will provide the
Commission information to assure compliance with those protections. By approving the
merger with the conditions provided in the Settlement Agreements, the Commission can be
assured that the merger is in the public interest.

II. BACKGROUND.

A. The Transaction.

3 Under the April 21, 2010 Agreement and Plan of Merger ("Merger Agreement"),¹ QCII will
become a wholly-owned, first-tier subsidiary of CenturyLink, with no change in the corporate
structure of the Qwest regulated operating companies. Exhibit B attached to the Joint
Application depicts the pre- and post-Transaction corporate structure. No assets or separate
local exchanges are being sold to a new provider. The rates, terms, conditions, and regulatory

¹ Exhibit C to the Joint Application.

obligations of the CenturyLink and Qwest corporate entities and their operations in Washington will not change upon closing.

B. **Merger Approvals in Other Jurisdictions.**

4 Many other states have already approved the Transaction. Notably, of the nine states that require approval in the 14-state Qwest ILEC region, Iowa, Nebraska, Montana, Colorado and Utah have approved the Transaction,² and a recommended order of approval has been issued in Minnesota.³ None of these approval orders, including the Minnesota recommended order, adopted any of the additional conditions proposed by the Non-Settling CLECs in Washington. In addition, the Transaction has been cleared by a Department of Justice review under the Pre-Merger Notification Act.

III. **LEGAL STANDARD OF REVIEW.**

5 The legal standard for review of this transaction is discussed in the introduction to Joint Applicants' January 14, 2011 brief, paragraph 2.

² Response to Bench Request No. 1, Exhibit B-1. All of the state decisions are included in Appendix I to this brief. Report and Order, *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 Corporation*, Utah PSC, Docket No. 10-049-16, January 4, 2011, ("*Utah Decision*")**[Tab A]**; Order Approving Settlement Agreements, Granting Motions to Withdraw, and Allowing Proposed Reorganization; Order, *In Re: Qwest Communications International, Inc., and Centurytel, Inc.*; Iowa Utilities Board, Docket SPU 2010-0006, entered November 19, 2010**[Tab B]**; Final Order Approving Application Seeking Approval Of Transfer, *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, Qwest Communications Company, LLC, and Qwest LD Corp.*, Montana PSC, Order No. 7096e, Docket No. D2010.5.55**[Tab C]**; *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 and Qwest Communications Company, LLC, and Qwest LD Corp.*, Nebraska PSC, Application No. C-4280, entered January 4, 2011. Initial Commission Decision Granting Approval of Indirect Transfer Of Control**[Tab D]**, *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.*, Colorado PUC, Docket NO. 10A-350T, Adopted Date: December 15, 2010; Mailed Date: January 3, 2011, ("*Colorado Decision*")**[Tab E]**.

³ Findings of Fact, Conclusions of Law, and Recommendation, *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, State of Minnesota Office of Administrative Hearings for the Minnesota Public Service Commission, PUC Dkt. No. P-421, et al. /PA-10-456, ¶ 271. (Jan. 10, 2011) ("*Minnesota ALJ's Recommended Decision*")**[Tab F]**.

IV. ARGUMENT

A. **The Transaction is Consistent with the Public Interest**

1. **The Merger Will Not Alter any Regulatory Obligations and Commitments.**

6 Because the Transaction involves a parent-level transfer of control of QCII only, the CenturyLink ILECs and the Qwest Bell Operating Company ("BOC") will continue to operate as separate carriers and will continue to provide services to their customers under the same regulatory regime that now exists for each company. Specifically, the resulting entities will abide by all applicable regulatory obligations, including the Qwest AFOR, existing retail and wholesale service quality commitments, and existing tariffs.⁴

2. **The Merged Company's Financial Status Will Be Stronger.**

7 The testimony of CenturyLink witness G. Clay Bailey details the financial strength of the merged company. The proposed transaction will create a carrier with major scope and scale, and the financial resources and flexibility to provide high-quality, communications services to customers and communities across the country.⁵ The *pro forma* profile of the post-merger company includes 17 million access lines, approximately 5 million broadband subscribers, and more than one million enterprise customers.⁶ The *pro forma* financial profile of the company, as of year-end 2009, would include *pro forma* revenues of \$19.8 billion, EBITDA of approximately \$8.2 billion and free cash flow, excluding any estimated synergies, of \$3.4 billion.⁷ Based on these financials, the merged company is expected to have one of the strongest balance sheets in the U.S. telecommunications industry.⁸ The anticipated synergies of \$625 million in annual operating expenses and capital expenditures are conservative,

⁴ Reynolds Direct Testimony, Exhibit MSR-1T, pp. 8-10.

⁵ Bailey Direct Testimony, Exhibit GCB-1T, p. 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

representing in total only 8% of Qwest's 2009 cash operating costs.⁹ Even without the synergies, the merged company is expected to realize \$1.7 billion in remaining cash flow that could be used for additional investment, debt repayment, or other appropriate uses.¹⁰ The merged company will be financially capable of continuing to provide reliable, high quality services.

8 The merged company should have improved access to capital on reasonable terms. The *pro forma* net debt-to-EBITDA ratio for the merged company (2009) is 2.4 times *before synergies*, compared to Qwest's standalone 2009 ratio of 2.7.¹¹ The evidence is clear and overwhelming that the merged company, and the ILECs in Washington, will have the financial fitness and capability to continue to provide reliable, quality telecommunications services in the state.

3. **The Merger Results in a Company with Excellent Technical, Operational, and Managerial Fitness.**

9 The Joint Applicants' witnesses also describe in detail the strength of the technical, operational, and managerial resources available to the merged company as the result of this combination of two industry leading telecommunications companies.¹² The management team that has already been named for the post-merger company has deep managerial experience, including Chief Executive Officer Glen F. Post III, Chief Financial Officer R. Stewart Ewing, and Chief Operating Officer Karen A. Puckett. The CEO, CFO and COO have significant experience in successfully managing mergers and acquisitions.¹³ CenturyLink has named several other executives, drawing from the retail and wholesale expertise of both CenturyLink and Qwest, all with significant experience and proven track

⁹ This is realistic when compared to other merger-related ILEC-transaction synergies that generally have been 20%+ of the target company's cash operating expenses in recent years. *Id.*, pp. 10-11.

¹⁰ *Id.*, at 11. This free cash flow figure represents the amount after dividend commitments are met.

¹¹ *Id.*, at 19-20 (emphasis added).

¹² Jones Direct Testimony, Exhibit JJ-1T at 8-10 and 13.

¹³ *Id.* at 11.

records in the telecommunications industry.¹⁴

10 CenturyLink witness Todd Schafer discusses the operational strengths that CenturyLink brings to the merged company, including CenturyLink's substantial and successful experience with the integration of past mergers.¹⁵ These past mergers include, most recently, the Embarq/CenturyLink merger, which closed in July 2009. CenturyLink has doubled and redoubled its size several times through a series of acquisitions, each time successfully integrating the acquisition¹⁶ and improving its financial strength.¹⁷ Through this experience, CenturyLink has developed a methodology for integration that is designed to maximize efficiency, minimize difficulties and above all ensure that the Transaction benefits, rather than harms, customers.¹⁸ Confidential Exhibit JJ-6C depicts CenturyLink's detailed integration process, which describes the integration efforts the company is undertaking to prepare for the Qwest merger.¹⁹

17 In addition, the Transaction will allow the combined company to draw on the network and operational strengths of both Qwest and CenturyLink.²⁰ The evidence overwhelmingly shows that the merged company will have more than sufficient technical, operational and managerial resources to continue to provide reliable and quality services after the merger. The Transaction will benefit consumers by creating a stronger more stable provider that will be able to compete more effectively and to continue to invest in and offer new and expanded services to consumers.²¹ In short, the record in this proceeding compels the conclusion that

¹⁴Jones Rebuttal, Exhibit JJ-4RT, pages 13-14 and JJ-5.

¹⁵ Schafer Direct, Exhibit TS-1T, pages 5-9.

¹⁶ Joint CLECs cited to a 2010 billing conversion in the state of North Carolina as evidence that CenturyLink experienced some significant problems in integrating the Embarq properties. *Gates Cross Answering Testimony (Exhibit TJG-13HCSRT)* p. 36. However, these claims were shown to be greatly exaggerated. As Mr. Hunsucker pointed out at the hearing, the level of customer complaints in CenturyLink's North Carolina operating territory actually decreased in the months immediately following the billing conversion. TR. 573

¹⁷ *Id.*, pages 5-7.

¹⁸ Jones Rebuttal, Exhibit JJ-4RT, pages 14-15.

¹⁹ Exhibit JJ-6C.

²⁰ Jones Direct, Exhibit JJ-1T, pages 8-11.

²¹ Bailey Direct, Exhibit GCB-1T, pages 11-12.

this Transaction will provide substantial, tangible benefits to customers in Washington.

B. The Settlement Agreement with Staff and Public Counsel Assures that the Merger is Consistent with the Public Interest.

12 In addition to the retail and wholesale provisions that assure that the Merger is in the public interest, the Settlement Agreement includes another significant public benefit, which is a commitment to invest not less than \$80 million in broadband infrastructure in Washington over a five year period, with significant deployment to unserved and underserved areas, and robust reporting requirements.²² The Settlement Agreement is comprehensive, containing conditions benefitting both retail and wholesale customers, including the remaining non-signing CLECs who will have an equal opportunity to take advantage of the settlement benefits in this and the Integra Settlement in Washington. Appendix A to the Settlement Agreement contains 29 separate conditions that will benefit wholesale and retail customers.

C. CLEC Intervenor's Claims Resolved and Remaining.

13 Qwest currently has numerous interconnection agreements in Washington with various CLECs and CMRS (wireless) providers. The CenturyLink ILECs also have a number of interconnection agreements in Washington with CLECs and CMRS providers. Twelve of those CLEC competitors were sufficiently interested in the Transaction to intervene.²³ The "original" Joint CLECs demanded that the Commission impose thirty conditions on the merger,²⁴ some of which had multiple subparts containing additional conditions. Other

²² The Settlement Agreement contains a provision requiring the Company to file a report with Staff and Public Counsel concerning the initial wire centers targeted under the commitment and then to meet and review those plans with those parties. This will allow the Company, Staff and Public Counsel to evaluate and consider specific areas and needs such as those identified by the Colville Tribe in this proceeding.

²³ The "Joint CLECs", as identified in their January 14, 2011 brief, are the following competitive local exchange carriers: Charter Fiberlink WA-CCVII, LLC; XO Communications Services, Inc.; tw telecom of washington, llc; Pac-West Telecomm, Inc.; McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services; and Covad Communications Company. In addition, the following parties intervened: Cbeyond Communications, LLC, Level 3, 360networks, Sprint, T-Mobile, the DoD/FEA and Integra Telecom of Washington, Inc., Electric Lightwave, Inc., Advanced TelCom, Inc., and United Communications, Inc. d/b/a Unicom (collectively "Integra");.

²⁴ Gates Direct Testimony Exhibit TJG-1HCT, page 112 and Exhibit TJG-9.

CLECs proposed yet more conditions. However, despite the fact that the various Settlement Agreements address every reasonable and legally cognizable concern that a CLEC could raise in this proceeding, the Non-Settling CLECs demand more.

- 14 The Non-Settling CLECs object to approval of the merger without the imposition of a litany of additional wholesale conditions – they ask for eleven conditions, and, PAETEC and Charter and Sprint/T-Mobile have requested even more conditions, including an unwarranted and unlawful reduction in access charges. These demands have been rejected by the five Qwest-region state commissions that have already approved the merger. Further, the Joint Applicants have reached settlement agreements with the utility commission and/or public counsel Staffs of eight Qwest-region states²⁵ and major CLECs like Integra, that do not include such additional conditions. The demands of the Non-Settling CLECs are simply unreasonable and not related to the public interest.
- 15 In support of their remaining conditions, the Non-Settling CLECs rely primarily on one argument – that their business plans are different from Integra’s, and that the Wholesale Provisions already agreed to in this docket are too narrow to address their needs.²⁶ They ignore completely the conditions in the Settlement Agreements that already go well beyond what is required of Qwest or CenturyLink by law, and also ignore the “no harm” standard of review in favor of a “net CLEC benefit” standard.
- 16 In an attempt to find some factual basis for the arbitrary timeframe the Non-Settling CLECs want to impose as part of their proposed conditions, they repeatedly assert that such timeframes should somehow be tied to the period during which the Joint Applicants believe

²⁵These commissions are Colorado, Utah, Iowa, Montana, Minnesota, Oregon, Washington, and Arizona.

²⁶ See, Exhibit TJG-20CT. Although the Joint CLECs and others had previously attempted to characterize this transaction as one that is subject to the same risks as those experienced by Hawaiian Telecommunications, Inc. after it was acquired by the Carlyle Group, and FairPoint Communications, Inc. after it acquired certain wireline operations of Verizon, Joint Applicants rebutted those arguments (Exhibit JJ-4RT, pages 15-20) and they were not raised as a major concern in the January 3, 2011 Settlement Testimony. In addition, concerns about the ability of CenturyLink to integrate Qwest, particularly in light of alleged pressure to achieve estimated synergy savings, were also rebutted by the Joint Applicants (TR. 579) and no longer appear to form a basis for the Joint CLECs’ additional conditions.

they will achieve estimated synergy savings from the Transaction.²⁷ Their argument relies on the presumption that the post-merger company will be under significant pressure to achieve its estimated synergy savings, raising a risk the post-merger company will seek to achieve some or all of those synergy savings at the expense of its wholesale operations. There is no evidence to support this speculation and, in fact, the evidence in the record is strongly contrary.

17 The Joint Applicants have stated that they expect to achieve the operating and capital synergies in a three-to-five-year timeframe.²⁸ Only 2% of the estimated operating synergy savings is attributable to wholesale operations.²⁹ That translates into only \$13 million out of \$575 million. Moreover, none of those specific estimated synergy savings are derived from OSS.³⁰ Further, the overall financial benefits of this Transaction argue against any undue pressure to achieve synergy savings at the expense of wholesale customers. The \$1.7 billion in annual free cash flow that will be available after the merger, even without synergy savings, ensures that the merged company will be under no undue pressure to achieve synergy savings at the expense of any stakeholder.³¹ The Non-Settling CLECs' argument that they need to be protected from any risk associated with the Joint Applicant's estimated synergy savings has no merit.

1. **The Settlement Agreement Contains Wholesale Conditions That Are In The Public Interest And That Adequately Address The Non-Settling CLECs' Concerns.**

18 The Non-Settling CLECs have acknowledged that the Settlement Agreement contains numerous wholesale conditions that address many of their original concerns. This is reflected in the prefiled testimony of Mr. Gates, where he stated that his Non-Settling CLEC clients are

²⁷ Exhibit TJG-20, page 13.

²⁸ Exhibit GCB-1T, page 4.

²⁹ Exhibit GCB-6HCRT, page 43.

³⁰ Exhibit RTA-5HC.

³¹ Exhibit GCB-6HCRT at 46, lines 6-13.

now proposing a “limited number” of additional conditions, through the testimony of Messers. Gates, Haas, and Pruitt.³²

- 19 In light of the Non-Settling CLECs' new posture, there is no need for the Commission to address any of the original 30 conditions proposed by the Joint CLECs, except to the extent that they overlap with the conditions proposed by Mr. Gates, Mr. Pruitt, and Mr. Haas in their Settlement Testimony. The Commission should find that the conditions in the Wholesale Settlement Agreement are in the public interest and that the Non-Settling CLECs' remaining proposed conditions are unnecessary and are not in the public interest.
- 20 The Integra Settlement Agreement contains numerous wholesale conditions that balance the CLEC interveners' uniform request for post-merger certainty and stability with the merged company's need for flexibility to manage its wholesale operations in a manner that is efficient and will bring value to all stakeholders. The Integra Settlement Agreement provides protections regarding numerous wholesale issues, including Operational Support Systems (“OSS”), interconnection agreement (“ICA”) negotiations, ICA extensions and opt-ins, rates and tariff changes, the continuation of the Qwest Performance Assurance Plan (“PAP” or “QPAP”) and the Change Management Process (“CMP”), rate and service stability, the continued applicability of FCC obligations and Qwest's status as a BOC. The Settlement Agreement does not require a reduction in access charges as proposed by Sprint, for the reasons discussed below, and as discussed in the Joint Applicants' opening brief which explained why it is appropriate to reschedule an earnings review.

2. The Settlement Agreement Addresses The Majority Of The Non-Settling CLECs' Concerns and There Is No Basis For Imposing Additional Wholesale Conditions On The Merger.

- 21 Each of the Non-Settling CLECs' remaining proposed conditions will be addressed in more

³² Exhibit TJG-20CT, page 5. This testimony is stated to represent the interests of the Joint CLECs, as well as Level 3, who had previously filed separate testimony.

detail below. However, it is noteworthy that the Joint Applicants' have reached a settlement with either the state utility commission Staff or relevant consumer counsel (or both, where applicable), in every Qwest-region state that is reviewing this merger,³³ and in no state have any of the Non-Settling CLECs' proposed additional conditions been included in those settlement agreements.

22 The Non-Settling CLECs' continued push for more conditions is not reasonable and evidences nothing more than an attempt to extract unreasonable additional benefits that have no place in this merger docket. The Commission should say that enough is enough, as other commissions have done. For example, both the Colorado and the Utah Commissions rejected the Non-Settling CLECs' pleas for more conditions similar to those requested here. The Colorado commission stated:

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.³⁴

Likewise, the Utah Commission stated:

Based on the evidence submitted to the Commission, and based on the proposed settlements - especially the Division and Integra settlements, the Commission finds the merger is in the public interest. *The Commission's duty is to protect all the public interest, and "the ultimate criterion against which all relevant factors are to be evaluated is the 'public good and convenience' not the existing carriers' convenience and necessity."* [Citations omitted.] The Commission finds the settlement agreements strike an appropriate balance between the interests of the Joint Applicants, the interests of their wholesale customers (CLECs), and the interests of retail customers in Utah. Therefore, no other conditions other than those contained in the individual settlements will be imposed. (emphasis added)

³³ With the exception of Nebraska, where the merger review process could be characterized as involving more of a "legislative" hearing process. In any event, the Nebraska Commission approved the merger on January 4, 2011, and without any of the conditions requested in this case by the Non-Settling CLECs.

³⁴ *Colorado Decision*, pp. 26-27, ¶¶ 74-76.

* * * *

The Commission declines to impose McLeodUSA's and Level 3's requested conditions. The settlements submitted to the Commission give sufficient certainty to the CLECs during the merger, but also allow the Joint Applicants to adjust to the ever-changing competitive landscape in the telecommunication industry.

* * * *

The Commission declines to impose McLeodUSA's conditions either. . . . Requiring the Joint Applicants to use Qwest OSS for three instead of two years, however, will not ensure that the OSS degradation – if it does occur, will be less likely to happen after three years than after two. In contrast, however, the proposed settlements strike an appropriate balance between the CLECs' desire to maintain high-quality OSS and the Joint Applicants' interest in fully realizing synergy savings, while still maintaining a framework to preserve healthy competition in Utah.³⁵

a. **The OSS Commitments, Including the Two-Year Period, Are Sufficient.**

23 The major premise underlying the CLECs' proposed OSS conditions is the unsupported assertion that CenturyLink plans to promptly uproot Qwest's OSS in Qwest territories and replace it with a CenturyLink OSS. Accordingly, the Non-Settling CLECs continue to argue that the Qwest OSS must be maintained for three years after the merger close, in contrast to the two years in both the Staff and Integra Settlement Agreements. What the Non-Settling CLECs consistently overlook is that under the current CMP, Qwest can (and does) modify or discontinue a Qwest OSS on a 9-month calendar. In addition to maintaining Qwest OSS for two years following the merger close or July 1, 2013 (whichever is later), the Joint Applicants have committed to: (a) provide detailed notification 270 days in advance of replacing or integrating any OSS Systems; (b) follow the Qwest Change Management Process ("CMP") in connection with any such change; (c) provide notification, joint testing, and training before replacing an OSS interface; and (d) ensure that any changes to billing systems comply with ICAs and are compliant with Ordering and Billing Forum requirements.³⁶ In addition, the

³⁵ *Utah Decision*, pp. 3-4, 9-10.

³⁶ Exhibit 3, Condition 12, and Exhibit 6, Condition 23.

CLECs' ICAs contain significant protections and identification of the OSS functionality that the combined company is required to provide. Further, beyond these contractual commitments, CenturyLink has repeatedly stated that: (1) it has made no decisions on what OSS it will employ in the long term, and (2) it will make a careful, structured examination of both companies' systems and features and draw on the best of both companies' capabilities in order to employ industry leading OSS for the long term.³⁷

24 The Non-Settling CLECs' conjecture about potential OSS degradation in Washington also ignores the key fact that CenturyLink is not simply acquiring access lines from Qwest, but rather, is acquiring the *entire company*.³⁸ Because it is acquiring Qwest's existing systems, personnel, documented policies, experiences, and processes, CenturyLink will have no immediate need (or be under any time or financial pressure) to make any alterations to Qwest's OSS. CenturyLink has also repeatedly acknowledged that Qwest's OSS will continue to be subject to Section 251, Section 271, and ICA obligations applicable in Qwest territories.³⁹

25 Furthermore, even if the merged company were to adopt all or portions of CenturyLink's OSS at some later date, there is nothing in the record demonstrating that the quality of service would be degraded. In fact, contrary to the CLECs' assertions, CenturyLink's OSS is a robust, well-tested system that serves both rural and urban areas. CenturyLink processed approximately one-million LSRs and ASRs in 2010, compared to Qwest's 1.8 million.⁴⁰ The record simply does not support the Non-Settling CLECs' speculation about degradation of OSS.

26 The Non-Settling CLECs argument that the merged company should retain the existing Qwest

³⁷ Hunsucker Rebuttal, Exhibit MRH-1RT, pages 46-50.

³⁸ *Id.*, page 14.

³⁹ Exhibit 3, Conditions 6 and 7.

⁴⁰ TR. 573:2-3; 595:1-596:5.

OSS for at least three years, compared to the minimum two years agreed to in the Settlement Agreement goes far beyond what those CLECs with vested commercial interests (Integra and 360networks), and those with the duty to protect the public interest (like Staff), have found to be sufficient and reasonable.⁴¹ As noted, all of the commissions that have addressed this additional proposed condition have rejected it.

b. **Third Party Testing Should Not Be Required for Any Future Replacement of Qwest's OSS.**

27 In connection with any future replacement of Qwest's OSS, the Non-Settling CLECs argue that third-party testing of any new OSS must be required as a condition of approving the merger.⁴² This is surprising because even Mr. Gates admits that the FCC itself has stated the most probative evidence that an OSS is operationally ready is actual commercial usage.⁴³ If, hypothetically, CenturyLink were to eventually adopt its EASE OSS for use in the Qwest region, the record shows that CenturyLink already has commercial usage volumes through its EASE system that are reasonably comparable to Qwest's wholesale order volumes, demonstrating that the system is operationally ready.⁴⁴

28 The FCC itself has stated that OSS testing, of any sort, is not technically required to demonstrate compliance with nondiscriminatory access requirements of Section 251 and Section 271. The FCC has also explicitly stated that carrier-to-carrier testing and internal testing can be used to demonstrate the operational readiness of an OSS.

The most probative evidence that OSS functions are operationally ready is actual commercial usage. Absent sufficient and reliable data on commercial usage, the Commission will consider the results of *carrier-to-carrier testing*,

⁴¹ Indeed, even the Non-Settling CLECs agreed that it is not so much a question of the rigid adherence to a two or three or four year time frame for OSS, but rather that CenturyLink be required to meet certain commitments before implementing a new OSS. TR. 531:16-532:3. Joint Applicants believe that the current Settlement Agreements contain a number of such commitments, and that other commitments demanded by the Non-Settling CLECs, such as third party testing, are unwarranted and costly, as explained below.

⁴² Exhibit TJG-20CT, page 6.

⁴³ *Id.*, pages 19-20.

⁴⁴ TR. 573:2-3; 595:1-596:5.

*independent third party testing, and internal testing, in assessing the commercial readiness of a BOC's OSS. . . . [T]he Commission does not require OSS testing*⁴⁵

29 Third party testing is simply not required. Importantly, the Joint Applicants have committed to a wholesale condition that requires joint acceptance testing with CLECs to ensure that any new OSS is acceptable per jointly adopted criteria—this testing will ensure that any new OSS provides the level of wholesale service quality provided by Qwest prior to the merger close.⁴⁶ This testing is subject to the Qwest Change Management Process (“CMP”). Once the acceptance testing is completed and the acceptance criteria are met, the merged company will also allow coordinated testing with CLECs to permit CLECs to stress test the new OSS in coordination with their own back office systems before transitioning to the new OSS.⁴⁷ In any event, the merged company will submit a detailed plan that will provide the parameters of the acceptance testing and the coordinated testing.⁴⁸

30 It is also important to note that the original Qwest OSS interface that was third-party tested (at great expense)⁴⁹ for purposes of granting Qwest in-region interLATA service authority under Section 271 has since been replaced by a new OSS interface that was not third-party tested.⁵⁰

c. **The Commitments for Non-Section 251 Agreements and Tariffs Are Sufficient.**

31 The Non-Settling CLECs also have sought conditions to ensure that Qwest's current ICAs, as well as other wholesale and commercial agreements, continue in place for longer periods than those provided for in the settlements. Although the language of the Settlement Agreement does not track the Non-Settling CLECs' proposed conditions verbatim, the terms of Condition

⁴⁵ FCC 02-332, Memorandum Opinion and Order, WC Docket No. 02-314, Adopted: December 20, 2002, Appendix K at p. 16.

⁴⁶ Exhibit 3, Condition 12.c.i.

⁴⁷ *Id.*, Condition 12.c.ii.

⁴⁸ *Id.*, Condition 12.a.

⁴⁹ See, Exhibit B-7, showing a cost of \$120 million for the ROC testing, which did not include all states. This is in stark contrast to the \$200 - \$500K figure postulated by Mr. Gates at TR. 537:21-22.

⁵⁰ Viveros Rebuttal Testimony, Exhibit CV-1RBT, page 25.

3 show that the Joint Applicants made substantial concessions to address CLEC concerns.

32 First, the Joint Applicants have agreed to extend the term of all Qwest ICAs for a period of 36 months. Second, the Joint Applicants have agreed to extend the terms for all Qwest wholesale and commercial agreements (which involve services that are not subject to Section 251 of the Act) for 18 months. And, finally, the merged company agrees not to change the terms of Qwest's wholesale tariffs for at least 12 months. In making these commitments, the Joint Applicants have agreed to forego substantial rights they otherwise would enjoy absent the merger. Nothing more should be required.

33 The Non-Settling CLECs argue that the Merging Companies' commitment to not make changes to applicable commercial and wholesale agreements for 18 months does not go far enough, especially based on their "business models." Thus, they advocate a three-year extension for commercial and wholesale agreements and for wholesale tariff terms, including interstate tariffs, and argue that not providing the same 36-month extension that is provided for ICAs is somehow "discriminatory."⁵¹ However, the Non-Settling CLECs' arguments are without merit and there is no credible evidence to support additional extensions.

34 In an attempt to provide a rationale for such an extension, Mr. Gates refers to the FCC's Phoenix Forbearance Order ("PFO"),⁵² claiming that in this order the FCC "rejected the notion that there are suitable available alternatives to Qwest's wholesale services, whether they are UNE or non-UNE services."⁵³ According to Mr. Gates, the PFO thus justifies the same treatment for UNE and non-UNE agreements. However, Mr. Gates mischaracterizes the PFO, which only addressed Qwest's request for forbearance from Section 251(c) unbundling

⁵¹ Exhibit TJG-20CT, page 26.

⁵² In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113 (Rel. June 22, 2010)

⁵³ Exhibit TJG-20CT, page 27.

requirements.⁵⁴ Although the PFO makes passing references to other carriers' reliance on Qwest's wholesale services,⁵⁵ these references are legally *dicta* and are irrelevant for the purposes of this proceeding. The PFO in fact contains no analysis of *the degree* to which CLECs rely on *non-Section 251 wholesale services*, nor any analysis of the potential affect on competition if access to *non-Section 251 wholesale services* were limited, reduced or eliminated. Quite simply the PFO made no findings regarding non-UNE elements or commercial agreements, and does not provide support for the Non-Settling CLECs' argument for an extension of 36 months for all non-Section 251 wholesale service arrangements.

35 The Joint Applicants' commitment regarding non-Section 251 commercial agreements in the Settlement Agreement is very reasonable, particularly given that the provision of elements in these agreements is not required under Section 251 of the Act and are without exception not within the Commission's jurisdiction.⁵⁶ The FCC determined that when CLECs are not impaired without access to a UNE, it need not be provided based on Section 251 at Total Element Long Run Incremental Cost ("TELRIC")-based rates pursuant to an ICA. The FCC allowed these network elements and services to be provided through commercial agreements without Section 251 restrictions. Thus, under the law, CLECs' reliance on Qwest commercial agreements and tariffs is a matter of choice, and any "discrimination" argument necessarily fails.

36 Because synergy savings are not expected to be realized through some impact on wholesale service arrangements then there is no basis to tie the extension of wholesale and commercial agreements and tariffs to the timeframe for achieving synergies. Mr. Gates' attempt to link

⁵⁴ Mr. Gates selectively quotes from ¶ 96 of the PFO where the FCC stated "there is no record evidence of significant competition for the wholesale products used to serve either mass market or enterprise customers." However, the rest of ¶ 96 makes it clear that the FCC is only addressing Section 251(c)(3) loop and transport unbundling requirements, not wholesale products and services generally.

⁵⁵ E.g., PFO ¶¶ 68 and 87.

⁵⁶ Many (if not most) commercial agreements are not even legally required under Section 271 of the Telecommunications Act. They are certainly not required under Sections 251 or 252; otherwise, they would be interconnection agreements subject to those sections.

the extension of wholesale service arrangements to the estimated timeframe for synergy savings is illogical.

- 37 The Non-Settling CLECs propose that extensions should be granted for all non-UNE commercial and wholesale agreements and tariffs in effect as of the filing date of the Joint Application, or for at least those agreements and tariffs in effect as of the end of 2010.⁵⁷ Mr. Gates' Settlement Testimony makes clear that the only real issue here is tw telecom's transparent attempt to lock in rates for an interstate special access volume and term discount plan under a version of the Qwest RCP that is no longer available.⁵⁸
- 38 As long as a CLEC's RCP plan does not terminate before the merger close date that RCP plan will be extended pursuant to the terms of Condition 3.d.i. of the Integra Settlement Agreement. Consequently, tw telecom's concerns are misplaced, assuming the merger close date occurs before tw telecom's RCP expires on June 1, 2011. Because the Joint Applicants consider it likely that the merger will close before June 1, 2011, and tw telecom's specific concern seems to be the true basis for the Non-Settling CLEC's proposed condition, that condition is moot. Nevertheless, and not to leave any doubt, the Non-Settling CLEC's general proposal to apply the extension provisions of Condition 23 to all non-Section 251 wholesale and commercial agreements and tariffs in effect *prior to the closing date, and going back to either the date of the Joint Application or the end of 2010*, should be rejected. As noted above, the rationale for such a condition ("rate stability") does not square with the underlying premise for imposing any merger-related condition, which is that conditions are allegedly necessary to protect the public interest post-merger. Until the merger is closed Qwest by law must, and will, conduct business as usual. Any wholesale service arrangements, including tariffs that expire prior to the merger close, are not subject to

⁵⁷ Exhibit TJG-20CT, page 6.

⁵⁸ *Id.* at page 31, and page 32, fn. 37. However, it is not the case that a 22% discount under an RCP is no longer available to tw telecom, but rather that the interstate tariff in which the RCP is offered has changed – it appears that tw telecom may simply prefer the old over the new RCP's volume and term requirements.

CenturyLink's management. It is logical, and customary, to draw the line for the applicability of merger conditions at the date the merger closes.

d. **The Non-Settling CLECs' Request for an Additional Performance Assurance Plan Must Be Rejected.**

39 The Additional Performance Assurance Plan ("APAP") design is flawed, does not tie payments to merger-related conduct, and will result in excessive, windfall payments to the CLECs. The Non-Settling CLECs' concerns are already addressed by the QPAP, which was implemented to satisfy the objectives of the Act, and which was expanded and extended under Qwest's AFOR. Further, the Settlement Agreement provides additional protection,⁵⁹ by comparing post closing performance to the performance during the 12 months preceding closing. The Joint Applicants agree that they will "meet or exceed the average wholesale performance provide by Qwest to CLEC" for at least three years after the closing date. If the post closing performance levels do not measure up under the methodology specified, then the merged company must conduct a root cause analysis and develop a proposal to remedy each deficiency. Unresolved performance deficiencies may be brought before the state commission for resolution.

40 Rather than applying the non-discrimination standard that the Telecom Act requires and that is the basis of the QPAP,⁶⁰ the Non-Settling CLECs demand the imposition of a new wholesale standard to measure "performance degradation" or "deterioration" in wholesale service, to prevent merger-related harm.⁶¹ Reduced to its essentials, the APAP proposes to compare every post-closing measurement, every month, to the average performance for a year, preceding closing. Mr. Williams testified that this scheme does not measure whether post

⁵⁹ Settlement Agreement, Condition 2(a) and (b).

⁶⁰ Williams Rebuttal, Exhibit MGW-IRT, page 5..

⁶¹ However, whether the level of service quality has degraded over time is not a recognized performance standard under the Act or a recognized means of assuring compliance under Section 271. The QPAP is based on the ILECs' legal duty of nondiscrimination--to provide service to CLECs at the same level that it provides to itself and its affiliates for its own retail customers.

closing wholesale performance degrades, to the detriment of CLECs, or whether it was due to effects of the merger. It is flawed logic to assume that every monthly variation in the performance levels harms CLECs or is merger related.⁶² There are innumerable factors—including many that are not caused by the ILEC—that can cause the performance levels in a given month, post-merger, to be different from the proposed APAP’s comparisons with annual average levels of pre-merger Qwest performance.⁶³ Furthermore, it is fallacious to assume that any monthly Performance Indicator Definition (“PID”) result that is lower than the baseline average proves that the CLECs have been harmed.

41 The APAP’s flaws will potentially create huge windfalls of penalty revenue for the CLECs. Mr. Williams’ testimony, which was not contested by any rebuttal, shows a real-world example of how the APAP could result in the assessment of extraordinarily high penalties even though the very same level of service was provided during the comparison periods. Using actual 12 month performance data (which resulted in an actual penalty of \$148,000 under the QPAP), Mr. Williams showed that if the same 12 months were repeated post closing, under the APAP an *additional* \$2,000,000 penalty would be incurred, even though the pre and post period performance was exactly the same.⁶⁴ The Minnesota ALJ agreed:

The Joint Petitioners provided convincing evidence that the APAP has serious flaws and should not be adopted. Most significantly, they demonstrated that substantial payments would be due under the proposed APAP even if service levels remained exactly the same, resulting in a windfall to CLECs.”⁶⁵

42 The existing QPAP provides sufficient post-merger performance monitoring, because it detects trends in performance, by the production of monthly “indications” of performance levels. Any party can use QPAP data to identify trends in wholesale service quality

⁶² Exhibit MGW-1RT, pages 19-20, 22, and 28. TR. 564:20-565:4.

⁶³ Exhibits MGW-1RT, pages 27-28, and MGW-2.

⁶⁴ *Id.*

⁶⁵ *Minnesota ALJ’s Recommended Decision* ¶ 271.

performance.⁶⁶ Furthermore, the Settlement Agreement provides for the continuation of post-merger service quality, by specifying the process for identifying deficiencies, and clearly provides for Commission resolution if deficiencies are not resolved.⁶⁷ These are substantive, important protections providing further reasons to reject the APAP proposal, just as the Minnesota ALJ did:

The Administrative Law Judge also finds that the Integra Settlement Agreement provides an adequate mechanism to discourage any decline in wholesale service quality and is consistent with the public interest. The Integra Settlement provides for a comparison of service quality before and after the Transaction; requires the Merged Company to meet or exceed the average wholesale performance provided by Qwest to the CLEC for at least three years after the transaction closing date; and requires the Merged Company to conduct a root cause analysis if service deteriorates and develop proposals to remedy deficiencies within thirty days. A CLEC may also invoke the root cause procedure if the CLEC determines that the performance it received for a PID, product, or disaggregation is materially different post-merger.⁶⁸

43 Forcing an additional penalty plan upon the merged companies, against their will, raises serious issues about whether such action exceeds the Commission's lawful authority, as has been expressed by the Minnesota ALJ:

[I]f the Commission were to condition its approval of the merger upon the adoption of the proposed APAP, its action arguably would amount to requiring the Joint Petitioners to make self executing payments to their competitors and thus exceed the Commission's authority. (*citing In Re Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, Minn. 2005).⁶⁹

44 Further, such an action by the Commission would constitute an amendment of the existing QPAP, which was put into effect by an order of the Commission. Such an amendment is not justified in this proceeding, and would be legally and procedurally flawed. The QPAP terms and the terms and timing for Commission review have previously (and recently) been

⁶⁶ Williams Rebuttal, Exhibit MGW-IRT, page 29

⁶⁷ Settlement Agreement Condition 2(a) and (b).

⁶⁸ *Minnesota ALJ's Recommended Decision*, ¶ 272.

⁶⁹ *Minnesota ALJ's Recommended Decision*, ¶ 271.

addressed by the Commission.⁷⁰

e. **The Settlement Agreement's Moratorium on Non-Impairment Filings and Forbearance Petitions Is Reasonable and Provides Sufficient Stability for CLECs.**

45 The Settlement Agreement prohibits the merged company from seeking to reclassify as “non-impaired” any Qwest Washington wire center for purposes of Section 251, and from filing any petition seeking forbearance from Section 251 obligations under Section 160(c) of the Act or dominant carrier regulation in any Qwest Washington wire center before June 1, 2012. The Non-Settling CLECs’ argue that this moratorium should be in place for 36 months from the date of the merger close.⁷¹ Again, the only rationale provided by the Non-Settling CLECs for their proposed term of the moratorium is that the moratorium should coincide with the period that CenturyLink has stated it expects to realize its estimated synergy savings.⁷²

46 The argument that the timeframe for post-merger conditions should be tied to the estimated timeframe for achieving synergy savings is a flawed argument. Furthermore, it is not sound public policy and not in the public interest to tie the hands of the merged company and limit its ability to seek regulatory treatment authorized by the FCC if the merged company can demonstrate that competitive conditions merit relief from certain Section 251 or Section 271 obligations per federal law. A moratorium until June 1, 2012 provides a period of certainty on this issue for CLECs, and is sufficient as a compromise that is in the public interest.

f. **Sprint's Arguments Regarding Reductions in Access Charges Must Be Rejected**

47 Intervenor Sprint advocates that the Commission should, in this proceeding, immediately reduce the intrastate access charges of the CenturyLink ILECs operating in Washington.

⁷⁰ See generally, Docket No. UT-073034, Order No. 09, discussing the terms of the QPAP and the interrelationship with the terms of the Qwest AFOR.

⁷¹ Exhibit TJG-20CT, pages 46-47.

⁷² *Id.*

Sprint struggled in vain throughout this proceeding to make a case that its desire for such access charge reductions is somehow a merger-related issue. However, they never could get past the fact that the proposed merger has no impact on those access charges. The intrastate access charges of the CenturyLink ILECs are currently subject to tariff and remain subject to those same tariffs after the merger. The process for changing those tariffs will be the same after the merger as it is now. The access charges of the CenturyLink ILECs is simply not a merger-related issue.

48 Sprint attempted to tie the level of access charges to the merger by arguing that there is something unique and sinister about the affiliated relationship that will exist between Qwest Long Distance and the CenturyLink ILECs. However, on cross examination at the hearing, Sprint witness James Appleby had to admit that the very same affiliated relationship he was complaining of was earlier experienced by Sprint when they owned and operated some of these very same ILEC properties.⁷³ In fact he had to further admit that the level of access charges was even higher when Sprint owned the properties.⁷⁴ It is disingenuous for Sprint to argue that such a relationship will create a crisis under CenturyLink ownership, when Sprint was allowed to engage in that very same relationship with access charges that were even higher than they are today.

49 When Sprint was given an opening to at least assure that access charge reductions would benefit retail consumers even if they had nothing to do with the merger, Sprint “dropped the ball.” Attorney for Staff, Ms. Cameron-Rulkowski on cross examination asked Mr. Appleby if Sprint could guarantee that there would be corresponding rate reductions to retail customers if Sprint’s proposal to immediately reduce access charges in this docket were adopted. Mr. Appleby responded that Sprint did not need to make any such guarantee.⁷⁵

⁷³ TR. 425 – 426.

⁷⁴ TR. 426:23.

⁷⁵ TR. 428 – 429.

50 Sprint once again showed its true colors in its cross examination of CenturyLink witness John Jones. Mr. Jones explained to Sprint's counsel, that Sprint or any other IXC could file a complaint seeking a reduction in the access charges of the CenturyLink ILECs and therefore would not have to wait for the AFOR filing provided for in the Staff/Public Counsel/Joint Applicants Settlement Agreement in order to request any relief Sprint felt it was entitled to. Sprint's reaction was to point out that Sprint would bear the burden of proof in any such complaint proceeding.⁷⁶ Clearly, instead of focusing upon proving a case for lower switched access rates, Sprint is attempting to leverage the merger proceeding to short-cut necessary process and analysis. Sprint's arguments on this issue completely ignore the need to deal with access charges in a holistic manner.⁷⁷

g. **Other Proposed Conditions Related to Porting of ICAs; Single Point of Interconnection Should Also Be Rejected.**

51 Joint CLECs and Sprint propose that the Commission condition approval of the merger on CenturyLink being required to allow interconnection by CLECs at a single point of interconnection per LATA. The proposed condition goes beyond the requirements of the Telecom Act and relevant FCC orders. It involves complex and fact-specific issues for which other more appropriate forums already exist. As described by the Minnesota ALJ, it is not proper to attempt to re-litigate this issue in a merger proceeding:

The Administrative Law Judge concludes that the Joint CLECs have failed to meet their burden to demonstrate that this proposed condition is relevant to any potential harm caused by the merger or is otherwise appropriately addressed in this proceeding. Disputes between Charter and CenturyLink regarding the type of interconnection required by the Act are more appropriately addressed in interconnection proceedings in which a full evidentiary record can be developed, rather than being summarily decided in this proceeding. Accordingly, the Administrative Law Judge recommends that the Commission not impose this proposed condition.⁷⁸

52 Joint CLECs and Sprint also propose that merger approval be conditioned on requiring

⁷⁶ TR. 228.

⁷⁷ See the discussion between Commissioner Oshie and Mr. Appleby on this issue, TR 437-440.

⁷⁸ *Minnesota ALJ's Recommended Decision*, ¶ 251.

CenturyLink to allow CLECs to port interconnection agreements across state lines and between ILECs. Once again this is a proposal that goes far beyond what is required by the Telecom Act. There are many practical and legal problems associated with this proposal, not the least of which is that it would undermine the authority of the Washington Commission to review and approve ICAs applicable to operations in the state of Washington. In rejecting this proposal, the Minnesota ALJ summed it up this way:

There are a number of practical, operational, and legal issues that would arise if this condition were imposed. Because CenturyLink and Qwest ICAs have been negotiated with the particular network and facilities in mind, it would be contrary to the expectations of the parties that an ICA could be imposed upon another entity's network and facilities. As a technical or logical matter, not all negotiated terms can be applied to all companies or in all jurisdictions. ... Following such an approach would also be contrary to the review and approval process conducted by the Commission. Moreover, importing terms from another state could allow CLECs to effectively ignore or inappropriately modify Minnesota rulings on particular issues.⁷⁹

53 The proposed ICA porting condition has not been accepted by any state commission reviewing the transaction and should be rejected by this Commission as well.

h. **PAETEC's Attempt to Modify the Settlement Agreement's Language Regarding OSS Functionality Should Be Rejected.**

54 PAETEC, in the Settlement Testimony of Mr. Haas, proposes that additional language be added to Condition 23 of the Staff Settlement Agreement⁸⁰ in order to address its concerns about possible changes it might need to make to its back office systems.⁸¹ Condition 23 states that CenturyLink “ will provide a level of wholesale service quality that is not less than that provided by Qwest prior to the Transaction's closing, with functionally equivalent support, data, functionality....”— PAETEC proposes to insert a parenthetical that says “including

⁷⁹ *Minnesota ALJ's Recommended Decision*, ¶ 206.

⁸⁰ Exhibit 6. The discussion in this section also applies to Condition 12 of the Integra Settlement, which is similar to Condition 23, though PAETEC believes that Condition 23 is an improvement over Condition 12. Exhibit WAH-1HCT, page 10.

⁸¹ Exhibit WAH-1HCT, page 10. PAETEC also proposes modifying the language of Condition 12 to require that CenturyLink maintain the Qwest OSS for three years or until July 1, 2014, whichever is later. PAETEC's proposal to require the Qwest OSS to be maintained for three years does not vary from the same proposal as presented by Mr. Gates on behalf of the Non-Settling CLECs.

functionality affecting the operations of CLEC back office functionality as of the Transaction's closing.”

55 PAETEC wants absolute assurance that there can be no post-merger change to the Qwest OSS that would impact the functionality of its back office systems in any manner. That is unreasonable, and is inconsistent with Qwest's current ability to make changes via the CMP. Qwest has made hundreds, if not thousands, of changes to its OSS, including the replacement of the original OSS interface, and all of these changes were managed through the CMP.⁸²

56 While the Joint Applicants have committed to maintaining “functionally equivalent” support, data, functionality, etc., the merged company will have no real insight into the potential impact of an OSS change on a CLEC's back office systems, except through the CMP. It is the nature of computer based systems (for both Qwest and CLECs) that periodic changes and upgrades are required to maintain and enhance functionality. PAETEC's proposed condition could require an outdated OSS to be maintained indefinitely and prevent CenturyLink from implementing changes that are required to maintain automated functionality or that are more efficient for other CLECs.

57 It is reasonable to expect CLECs to accept some responsibility to modify their systems to accommodate changes that might be made to Qwest's OSS in the future. Both Settlement Agreements state that the majority of CLECs will have to agree with the OSS replacement, just like they previously agreed to the change from the Qwest IMA-EDI interface to the IMA-XML interface. This change was a complete replacement of an OSS interface.⁸³

58 Condition 23 assures CLECs of a continued level of wholesale service quality and functionally equivalent support, data, functionality, performance, electronic flow-through and electronic bonding. However, beneficial changes that are intended to produce long-term

⁸² Viveros Rebuttal, Exhibit CV-1RBT, page 25.

⁸³ TR. 591.

efficiencies and cost savings often require both the ILEC and the CLEC to make changes in order to take advantage of the improvements. CenturyLink will work with CLECs to try to minimize the impacts of any future OSS changes on the CLECs' systems, but Condition 23 does not guarantee that a CLEC's back office systems will never have to be modified, nor should such a guarantee be imposed as a condition on this merger.

i. **Level 3 and Pac-West should not be allowed to use this merger review docket to resolve an unrelated intercarrier compensation dispute over VNXX.**

59 Level 3 and Pac-West seek to leverage the merger review process to secure a favorable resolution to certain long-standing, complicated intercarrier compensation issues. Specifically, those CLECs want to be paid by ILECs for a call routing scheme that the industry has labeled "VNXX" traffic. How VNXX traffic should be characterized and how carriers should be compensated on an ongoing basis in the context of VNXX has been addressed by the Commission previously in Docket No. UT-063038. The Commission should not use this docket as a means to resolve individual complaints or to revisit the previous determinations regarding VNXX. The recent ruling by the Colorado PUC is instructive:

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 3.⁸⁴

60 Furthermore, the specific Level 3 and Pac-West complaints regarding VNXX are already before the Commission in Docket Nos. UT-053036 and UT-053039. This docket is clearly not the place to litigate these issues.⁸⁵

⁸⁴ *Colorado Decision*, ¶ 74.

⁸⁵ Exhibit CV-1RBT, pages 40-43.

j. **Reply to Initial Briefs – Rural Exemption**

61 In their Initial Briefs with respect to Issue #4, Sprint/T-Mobile and Joint CLECs urge the Commission to condition approval of the merger on a termination of the rural exemption held by the legacy CenturyTel ILECs in Washington. For reasons stated in Joint Applicants' initial Brief, this would not be appropriate or even within the Commission's authority in the context of a merger review.

62 Joint Applicants described in their Initial Brief that the rural exemption exists by operation of law and can only be terminated in a Section 251 proceeding or as the result of a voluntary waiver by the rural telephone company.⁸⁶ None-the-less Sprint/T-Mobile claims that the Commission has the authority in this docket to declare the CenturyLink ILECs "ineligible" for the rural exemption.⁸⁷ Sprint/T-Mobile's claim ignores the fact that the only provision in the 1996 Telecom Act for terminating a rural exemption that otherwise exists by operation of law is in a Section 251 proceeding. This docket is not a Section 251 proceeding and consequently no attempt has been made to evaluate and review the elements necessary to justify termination of a rural exemption.

63 The Non-Settling CLECs are subtle in their effort to get around the inescapable fact that this is not a Section 251 proceeding. They suggest that the Commission could somehow manufacture a voluntary waiver of the rural exemption. However, they attempt to evade the "voluntary" element of a valid waiver by suggesting that the Commission "require" that CenturyLink waive the rural exemption as a condition of approval of the merger.⁸⁸ Obviously a waiver that is ordered is not a voluntary waiver and therefore not a valid waiver at all.

64 The Non-Settling CLECs claim that this situation is similar to the FCC's order in the Frontier/Verizon transaction where the FCC accepted Frontier's commitment to waive the

⁸⁶ As described in Joint Applicants' Initial Brief, the rural exemption held by United Telephone Company of the Northwest was in fact earlier terminated by voluntary action when that company was owned by Sprint.

⁸⁷ Sprint/T-Mobile Initial Brief, at paragraph 28.

⁸⁸ Joint CLECs' Initial Brief, at page 10

rural exemption with regard to the Verizon service territories it was acquiring.⁸⁹ The FCC order in Frontier/Verizon does not make the Joint CLECs' case for two reasons. First, Frontier volunteered to waive the rural exemption for the Verizon service territory.⁹⁰ They were not ordered to do so in contrast to what Joint CLECs suggest should happen here. Second, the waiver in the Frontier case applied only to the acquired service territories and not to Frontier's pre-transaction service territories. The Integra Settlement in this case already contains the Frontier commitment, i.e. the rural exemption cannot be claimed in the acquired service territories.⁹¹ Attempts to terminate the rural exemption beyond that are unprecedented and outside the Commission's authority in this, a non-Section 251 proceeding.

65 The flaws in Joint CLECs' reasoning were aptly pointed out by the Minnesota Administrative Law Judge in her Recommended Decision:

The Administrative Law Judge recommends that the Commission reject the attempt by the Joint CLECs to impose this condition in the current proceeding. The proposed transaction is structured as parent-level transfer of control that will not result in any change in the corporate structure of the CenturyLink and Qwest operating entities as a result of the transaction. Because nothing about the merger changes the operations of those entities, there is no proper basis to require as a condition of the merger that CenturyLink affiliates relinquish their current rights to the rural exemption. The Merged Company's voluntary commitment in the Integra Settlement Agreement that it will not seek to change the status quo by asserting that Qwest is entitled to the rural exemption applies in the legacy Qwest ILEC service territory is an adequate safeguard that is logically related to the merger. In fact, this commitment accomplishes the same purpose as the condition approved by the FCC in the Frontier/Verizon merger proceeding. In any event, the Joint CLECs did not demonstrate in this record that the rural exemption does not apply to the CenturyLink affiliates that currently claim it. Moreover, because the Act provides a process to challenge the exemption, other remedies are available to CLECs that believe the exemption has been inappropriately claimed.⁹²

66 The Commission cannot, and should not terminate the rural exemptions described in this

⁸⁹ *Id* at pages 13-14.

⁹⁰ This and other commitments made by Frontier are clearly recognized by the FCC as being "voluntary." *In the Matter of Applications Filed by Frontier Communications Corporation and Verizon Communications, Inc., for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, at paragraph 3.

⁹¹ Integra Settlement Agreement (Exhibit 3), Condition No. 6.

⁹² *Minnesota ALJ's Recommended Decision* ¶ 245.

docket. Joint CLECs and Sprint/T-Mobile should not be allowed to use this docket to circumvent the Section 251 process.

k. **Reply to Initial Briefs – Directory Issues**

67 In its initial brief Joint CLECs spend five and a half pages arguing in support of Joint CLECs' proposed condition No. 23 regarding directory assistance and listings services.⁹³ This is a curious maneuver given that directory assistance and listings have nothing to do with the issues identified by the Commission for briefing in the initial brief. Even though Joint CLECs would have the Commission believe that directory assistance and listings have something to do with the rural exemption, they do not. Directory assistance and listing requirements stem from section 251 (b) of the Act and therefore have nothing to do with the section 251 (f) (1) rural exemption which only applies to section 251 (c) requirements.

68 In any event, Joint CLECs' arguments are entirely misplaced in this proceeding. Clearly, some of the Joint CLECs and CenturyLink have a difference of opinion as to how to interpret the directory assistance and listing requirements of section 251 (b). This disagreement existed before the merger and will continue to exist after the merger. It is not a merger-related issue. These disagreements have been, and will continue to be the subject of various state commission arbitrations and court cases. This is not a simple case of "complying with the law." It would not take five and a half pages of argument to say that. This is instead, as witness Michael Hunsucker described, a case of:

What the CLECs request, however, is much more than compliance with applicable law and agreement terms. These specific proposed conditions do not stand in isolation. The CLECs have proposed other interrelated conditions and add descriptive language beyond the simple "comply with the law" condition, in an effort to achieve their slant on what they believe the law should be. In short, the CLECs are trying to establish substantive terms and conditions that are not required by applicable law and can be or have been subject to negotiation or arbitration.⁹⁴

⁹³ Joint CLECs' Initial Brief, at pages 22 – 27.

⁹⁴ Rebuttal Testimony of Michael R. Hunsucker (Exhibit MRH-1RT) at page 36.

69 Joint CLEC proposed condition 23 regarding directory services is inappropriate and unnecessary in this proceeding. The reasoning of the Administrative Law Judge in Minnesota is very sound in reaching this same conclusion:

The Administrative Law Judge concludes that the Joint CLECs have not demonstrated that this condition is needed for the transaction to be deemed to be in the public interest. The Joint CLECs argue that the proposed condition “simply requires that the Merged Company provide wholesale directory services in compliance with existing law.” [Citation omitted] If that is the case, the Joint Petitioners’ Settlement Agreement with Integra already explicitly addresses this concern by stating that “CenturyLink and all of its incumbent local exchange carrier (“ILEC”) affiliates will comply with 47 U.S.C. Sections 251 and 252.” [Citation omitted] Should CenturyLink improperly deny its responsibility to provide access to directory services in the future, any affected CLEC would have the right to file a complaint with the Commission, in which all the relevant facts and applicable law can be fully presented and considered. Imposition of this condition on the merger is simply not necessary.⁹⁵

70 Joint CLECs proposed condition 23 should likewise be rejected in this proceeding.

V. CONCLUSION

71 The record clearly demonstrates that approval of the Joint Application, with the conditions contained in the Settlement Agreement entered into between the Joint Applicants, Staff and Public Counsel, is in the public interest. Therefore, the Joint Applicants request that the Commission expeditiously issue an order approving the Transaction as described in the Joint Application and the record in this case.

72 Respectfully submitted this 21st day of January, 2011.

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⁹⁵ *Minnesota ALJ's Recommended Decision*. ¶ 257.