

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of

QWEST COMMUNICATIONS
INTERNATIONAL INC. AND
CENTURYTEL, INC.

For Approval of Indirect Transfer of Control
of Qwest Corporation, Qwest
Communications Company LLC, and Qwest
LD Corp.

DOCKET UT-100820

SECOND POST-HEARING BRIEF
OF PUBLIC COUNSEL AND
COMMISSION STAFF

HIGHLY CONFIDENTIAL PER PROTECTIVE ORDER

REDACTED VERSION

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of

QWEST COMMUNICATIONS
INTERNATIONAL INC. AND
CENTURYTEL, INC.

For Approval of Indirect Transfer of Control
of Qwest Corporation, Qwest
Communications Company LLC, and Qwest
LD Corp.

DOCKET UT-100820

SECOND POST-HEARING BRIEF
OF PUBLIC COUNSEL AND
COMMISSION STAFF

**HIGHLY CONFIDENTIAL
PER PROTECTIVE ORDER
REDACTED VERSION**

1 Staff of the Washington Utilities and Transportation Commission (Staff) and the
Public Counsel Section of the Attorney General's Office (Public Counsel) jointly¹ submit
this second post-hearing brief pursuant to the Commission's Order 13 issued January 7,
2011.

I. BACKGROUND

2 Four settlement agreements have been filed in this proceeding, which resolve all of
the settling parties' issues in this proceeding. On October 21, 2010, 360networks (USA)
inc. (360networks), CenturyLink, Inc. (CenturyLink) and Qwest Communications
International, Inc. (QCII) (together the "Joint Applicants") filed a settlement with the
Commission ("Letter Agreement"). Their Letter Agreement is of limited scope, but it
applies across 14 states² and its terms are open to all other similarly situated competitive
local exchange carriers (CLECs) operating in Washington.³ Integra Telecom, Inc. (Integra)
and the Joint Applicants filed a settlement with the Commission on November 10, 2010

¹ Public Counsel specifically joins the following sections of the brief: Section A (Encumbrances), Section C (Broadband), Section E (Synergies), Section F (Access).

² Exh. 1, Letter Agreement at p. 3, ¶ 8.

³ *Id.* at p. 4, ¶ 10.

(Integra Agreement). Similar to the 360networks settlement, the Integra Agreement involves wholesale issues, applies across multiple Qwest states,⁴ and provides that the agreement will be made available to any requesting carrier.⁵

3 On December 23, 2010, Staff, the Joint Applicants, and Public Counsel filed their settlement agreement (Settlement Agreement) with the Commission.⁶ It contains conditions designed to protect retail customers, wholesale customers, and people throughout Washington from potential merger harms. Department of Defense and All Other Federal Executive Agencies (DoD/FEA) and the Joint Applicants filed a settlement December 30, 2010.⁷ In the accompanying narrative, DoD/FEA asserts that its settlement along with the Settlement Agreement satisfactorily addresses its concerns in the proceeding.⁸

4 The Commission held a hearing January 5 through 6, 2011, to review these four settlements and to allow for cross examination of witnesses on the outstanding issues of non-settling parties. The parties in this proceeding filed a first round of post-hearing briefs January 14, 2011, on Commission-identified issues. Staff and Public Counsel submit this second brief to clarify various issues that were raised at the hearing, to reply to briefing by other parties of Commission-identified issues, and to underscore their support for the settlement they entered into with the Joint Applicants.

II. ARGUMENT

5 The Commission evaluates mergers under a “no harm” standard, which means that a transaction will be approved only if it does not harm the public interest.⁹ As the

⁴ Exh. 3, Integra Agreement at p. 12; Hunsucker, TR. 350:3–25.

⁵ *Id.* at p. 11, ¶ 15.

⁶ Exh. 5. In addition, they filed a revision on January 10, 2011, clarifying the language of Condition 16 addressing retail service quality.

⁷ Exh. 8.

⁸ Exh. 9 at p. 2, ¶ 4.

⁹ WAC 480-142-170; *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier*

Commission observed in a prior case, “[t]here is no bright line against which to measure whether a particular transaction meets the public interest standard”; rather, the “approach for determining what is in the public interest varies with the form of the transaction and the attending circumstances.”¹⁰ Given the circumstances of this transaction, the Settlement Agreement provides sufficient protections against potential negative impacts such that the merger will not harm the public interest.¹¹ The other settlements provide targeted protections to the particular settling parties in each agreement, and Staff and Public Counsel¹² do not oppose any of these settlements.

6 A panel of witnesses from the parties supporting the Settlement Agreement fielded questions at hearing concerning some of the protections of the Staff, Joint Applicants, and Public Counsel settlement. Settlement Agreement conditions that incorporate these protections are discussed below.

A. Settlement Agreement Condition 7, Encumbrance of ILEC Assets

7 Condition 7 provides as follows:

CenturyLink will not pledge the assets of the CenturyLink ILECs and Qwest to secure borrowing undertaken by CenturyLink without approval of the Commission.

This condition is consistent with RCW 80.08.020, which provides that creating liens on public service company assets is a special privilege, and that the supervision, regulation, restriction, and control of this privilege is vested in the state. One of the effects of this

Communication Corporation For an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc., Docket UT-090842, Order 06, Final Order Approving and Adopting, subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction, at p. 7, ¶ 9 (April 16, 2010).

¹⁰ *In Re Application of U S WEST, Inc. and Qwest Communications International, Inc., For an Order Disclaiming Jurisdiction, or in the Alternative, Approving the U S WEST, Inc.—Qwest Communications International, Inc. Merger*, Docket UT-991358, Ninth Supp. Order Approving and Adopting Settlement Agreements and Granting Application, at p. 9, ¶ 26 (June 19, 2000).

¹¹ See Vasconi, Exh. JJ/MR/MV/SJ-7T 22:10–12.

¹² As stated at the hearing, Public Counsel does not take a position with respect to non-settled CLEC issues, except for access, as discussed in this brief.

condition is to place the Commission on notice in the event CenturyLink would seek to place a lien on its regulated assets in Washington.¹³ In addition, it would require prior Commission approval. In the absence of this condition, public service companies are only obligated under RCW 80.08.040 to notify the Commission before issuing securities or debt. The filing must contain a statement as to why the transaction is in the public interest. The statute also allows the company to request an order from the Commission stating that the company has complied with the law. WAC 480-120-365 adapts these requirements specifically to telecommunications companies and includes additional filing specifics.

8 Condition 7 builds on these laws and the rule in that it ensures the Commission not only will be notified when CenturyLink seeks to pledge a Washington regulatory asset but, because of the added approval requirement, provides for Commission review of the circumstances of the transaction. Consistent with the requirement in RCW 80.08.040(3) that the company file a public interest statement, and with the Commission's RCW 80.01.040 duty to regulate in the public interest, the standard the Commission would use to evaluate a Condition 7 event would be *whether it was in the public interest* to allow the encumbrance.

B. Settlement Agreement Condition 28, Rate Center Consolidation

9 The rate center consolidations set forth in Condition 28 serve the sole purpose of conserving scarce numbering resources. Of the three common methods available to state commissions to conserve numbering resources and delay the exhaustion of area codes, rate center consolidation is the most effective.¹⁴ In the past twelve years, the Commission has overseen a number of rate center consolidations in the state ultimately resulting in successful

¹³ Mr. Bailey stated at hearing that he believed this would be an unusual situation. *See* Bailey, TR. 502:3-19.

¹⁴ *See* Beaton, Exh. RB-IT 14:1-15:8.

conservation of numbering resources.¹⁵

10 A rate center is a geographic area designated by an ILEC for billing purposes.¹⁶ In the rate center consolidations provided for in Condition 28, end-user rates remain the same. The rate centers in Condition 28 were chosen for consolidation because they already have two-way Extended Area Service local calling, which allows callers to place calls between different rate centers without incurring long-distance charges.¹⁷ Staff did not specifically testify about the effect of the rate center consolidations in Condition 28 on wholesale customers; however, the rate center consolidations will have no effect on access charges or reciprocal compensation because end-user rates and billing are not affected and traffic will continue to be switched and routed as it is today.¹⁸

C. Settlement Agreement Condition 14, Broadband Commitment

11 CenturyLink's commitments in Condition 14, including the obligation to spend a minimum of \$80 million on broadband deployment in the next five years, are meaningful commitments to broadband deployment in the state. While it is likely that the Joint Applicants would have invested in broadband deployment in Washington even without the commitment,¹⁹ Condition 14 guarantees that broadband investment will continue. This commitment is simply a floor—and an amount that is larger than the broadband commitment in any other state²⁰—ensuring that investment in Washington will not be neglected in favor of other jurisdictions.

12 In addition, other aspects of Condition 14 provide that unserved and underserved

¹⁵ *Id.* at 19:4–12.

¹⁶ *Id.* at 16:10.

¹⁷ *See* Beaton, Exh. RB-4.

¹⁸ *See* Exh. RB-5 at p. 2, (b). The rate center consolidations set forth in Condition 28 have these characteristics.

¹⁹ *See* Liu, Exh. JL-1HCT 4:11–13.

²⁰ Johnson, TR. 302:9–17.

areas, including specific rural areas, will benefit from the investment and that funds will be targeted to where they are most needed. A minimum of 33 percent of the commitment must be targeted to unserved and underserved areas. Over and above this amount, Joint Applicants have committed to enable DSL in five rural central offices currently without DSL, including one located on the Colville Reservation. Once completed, essentially all Joint Applicants' wire centers in Washington will have broadband availability. Beyond this CenturyLink has agreed to develop a plan to target, where appropriate, broadband investments to wire centers with 85 percent or less broadband availability. The Settlement Agreement provides for Staff and Public Counsel to review and advise on CenturyLink's initial wire center targets for broadband deployment. Rural, unserved, and underserved communities in CenturyLink and Qwest service territories stand to benefit from Condition 14. This type of targeted deployment could not be mandated under a commitment which only required a state-wide average availability rate.²¹

D. Wholesale OSS

13

Settlement Condition 23 covering wholesale OSS is, with a few exceptions, identical to condition 12 in the Integra Agreement and provides important protections to all wholesale customers in Washington. The Integra condition as a package provided more comprehensive protections for CLECs than the condition Staff had proposed in its responsive testimony, and Condition 23 contains a few additions to the Integra Agreement language that strengthen the protection for the CLECs. Condition 23 provides that CenturyLink will continue to use and offer to wholesale customers the Qwest OSS in Qwest service territory for at least two years and that after that CenturyLink will provide a level of

²¹ See Oshie, TR. 305:23-6:2.

wholesale service quality that is not less than that provided by Qwest, “with functionally equivalent support, data, functionality, performance, electronic flow through, and electronic bonding.”²²

14 Joint CLECs suggest expanding the two-year timeframe for using and offering the Qwest OSS to at least three years.²³ There is, however, no particularly good argument that three years is better than two, except that it would ensure the CLECs keep the wholesale OSS system they prefer longer. Even the Joint CLECs’ witness, Mr. Gates, testified that the exact timeframe, be it two years, two-and-a-half years, three years, or seven, is not so important as the process and product of the OSS integration.²⁴ Similarly, Mr. Haas of Paetec, testifying on behalf of the CLECs, downplayed the timeframe and focused on the integration outcome.²⁵ The adoption of the Integra language in Condition 23, including the two-year timeframe, reflects the expectation that CenturyLink and Qwest will be integrating their OSS to achieve synergies and that the integration necessarily will need to be coordinated across multiple states. The two-year timeframe strikes a balance between providing stability and certainty to CLECs in the near term and allowing CenturyLink to convert or integrate its OSS to realize synergies in a reasonable period of time.

15 In addition to the two-year OSS conversion stayout period, the Settlement Agreement further protects CLECs from a degradation in the service quality they have as Qwest wholesale customers. Specifically, Condition 23 requires that, regardless of which wholesale OSS CenturyLink ultimately implements throughout its system, wholesale service

²² *C.f.* Integra Agreement condition 12, which requires a level of wholesale service quality that is “not materially less than that provided by Qwest” and which does not include the language “functionally equivalent.”

²³ Gates, TJG-20CT 6:7–11.

²⁴ Gates, TR. 528:24–529:3.

²⁵ Haas, TR. 456:25–457:13.

quality must be “functionally equivalent” to the current Qwest OSS. This service quality protection does not end after two years or even three years, but continues as long as it is needed. While Joint CLECs worry that CenturyLink might not define “functionally equivalent” the same way they would,²⁶ they also indicate that this concern can be mitigated.²⁷ The parties entered into the Settlement Agreement in good faith, and, regardless of the CLECs’ worries, the “functionally equivalent” language is an improvement on the Integra Agreement’s condition 12. Qwest’s wholesale customers also receive service quality protection under the Qwest Performance Assurance Program (QPAP), which is part of the Qwest AFOR.²⁸ The QPAP establishes service quality benchmarks and provides self executing remedies that may include payments to wholesale customers when Qwest fails to meet the set benchmarks.²⁹ It has been in existence for almost 10 years and has been periodically modified to address evolving wholesale issues. Because it is integrated into the Qwest AFOR, the QPAP would be extended along with the rest of the AFOR as contemplated in Settlement Condition 3

16 The CLECs also propose that the Commission require third-party testing of OSS following a conversion.³⁰ Condition 23 provides that CenturyLink will continue to follow the Qwest Change Management Process (CMP) and also provides for CLEC testing. This is sufficient, given the commercial volumes CenturyLink as well as Qwest now are

²⁶ Haas, TR. 458:14–459:3.

²⁷ Gates, Tr. 531:10–17.

I'm a little troubled by the "functional equivalent" phrase because if you were to ask everyone in this room you might come up with a different definition of what that means, but we do have service intervals. We have very specific functionalities we can define, if you want to use that, and we'll get the engineers and IT guys and put it back into technical talk, but that's one way to do it.

²⁸ *In the Matter of the Petition of Qwest Corporation for an Alternative Form of Regulation Pursuant to RCW 80.36.135*, Docket UT-061625, Order 08, Order Accepting, Subject to Conditions, AFOR Carrier-to-Carrier Service Quality Plan and Granting Motion to File Reply to Comments at p. 10, ¶ 42 (Sept. 6, 2007).

²⁹ *See id.* at p. 2, note 3.

³⁰ Gates, TJG-20CT 6:12–16.

accustomed to processing,³¹ that Qwest now has a performance assurance plan, and the existence of the CMP. Third-party testing following a conversion of the Qwest OSS is not necessary as it was when Qwest originally implemented its wholesale OSS. Moreover, given the response to Bench Request 7,³² it would appear that any benefit third-party testing might render in terms of dispute mediation would be more than offset by the tremendous cost. Accordingly, as a whole, Condition 23 provides not only sufficient but comprehensive protection for all wholesale customers facing some type of future OSS integration.

E. Timing of Synergies and AFOR

17

A number of conditions in the Settlement Agreement, such as Condition 3 concerning the AFOR filing, are timed to coincide with the anticipated timetable for achieving synergies from the merger. CenturyLink has estimated that in three to five years there will be \$575 million in annual operating synergies.³³ Although some synergies may accrue before the three year mark,³⁴ CenturyLink synergy estimates reviewed by Staff show that there will be [REDACTED]

[REDACTED].³⁵ Furthermore, these projections indicate that [REDACTED]
[REDACTED].³⁶ Accordingly, the AFOR in Condition 3 is optimally timed to take advantage of [REDACTED].

18

Until net synergy savings are realized and quantified, it does not make sense to institute a proceeding to consider flowing them through to rates. Similarly, it is beneficial to schedule such a proceeding after synergy savings have peaked, so that the maximum amount

³¹ See Viveros, TR. 567:11-568:4.

³² Exh. B-7.

³³ See, e.g., Bailey, Exh. No. GCB-1T 11:14-16; Bailey, TR. 375:14-17.

³⁴ Bailey, GCB-6HCRT 30:17-21.

³⁵ Applegate, Exh. RTA-1HCT at p. 11, Table 3.

³⁶ *Id.*

potentially can be flowed through to Washington rate payers. The AFOR proceeding contemplated in Condition 3 would be such a proceeding.³⁷

F. Intrastate Access Charges

19 Sprint Nextel Corporation (Sprint) and T-Mobile West Corporation (T-Mobile) argue that access charges should be reset as part of this proceeding. Staff, Public Counsel and Joint Applicants disagree. This is not an appropriate proceeding to undertake that process. The AFOR proceeding contemplated in Condition 3 is, on the other hand, an appropriate proceeding, and the Agreement expressly contemplates access charges as one of the issues to be considered. That proceeding will have the benefit of extensive filings regarding earnings and other financial information required by this Agreement. In addition, as noted above, net synergy savings will be accruing by that time and reporting of synergy costs and savings will be available. As a result, the Commission will have a record far better suited to setting various rates, including access rates, than in the instant docket.

20 The Commission has declined to consider access charge reductions before in an ownership change proceeding, as Sprint may recall. In the proceeding examining Sprint's spinoff of its local operating company, United Telephone Company of the Northwest, Administrative Law Judge Dennis Moss discussed the Commission's decision on the scope of the issues to be decided in the proceeding:³⁸

I will begin by shrinking the universe. Despite the laws of physics that tell us it is ever expanding, we will in this case shrink it in this fashion. Access charges and rate rebalancing will not be considered in this

³⁷ Vasconi, TR. 240:6-13.

³⁸ *In the Matter of the Request of Sprint Nextel Corporation for an Order Declining to Assert Jurisdiction over, in the Alternative, Application of Sprint Nextel Corporation for Approval of the Transfer of Control of United Telephone Company of the Northwest and Sprint Long Distance, Inc. from Sprint Nextel Corporation to LTD Holding Company*, Docket No. UT-051291, Notice of Prehearing Conference (Jan. 27, 2006) ("The parties filed prehearing briefs concerning the scope of the issues in this proceeding on January 25, 2006. The Commission has considered the briefs and is prepared to inform the parties of its decisions at a prehearing conference to be held on Monday, January 30, 2006.").

proceeding for a number of reasons. In the Commission's view the Staff has failed to establish a sufficient nexus between its access charge adjustments and rate rebalancing proposal, and the transaction before us in this proceeding. These issues in the Commission's view would best be considered in a general rate proceeding brought either by the Company via a [tariff] filing or by the Staff via a complaint that would give the Commission a full record of the relevant facts as far as rates are concerned. It would allow for appropriate notice to customers, and it would alleviate the concerns the Commission has with the problems associated with single issue rate making.³⁹

21 For many of the same reasons Judge Moss cited, reducing access charges is an issue better suited for a proceeding other than this merger proceeding. The Commission is not required to address access charges at this time in order to determine that the transaction is in the public interest.

22 Contrary to the assertion of Sprint and T-Mobile, the Settlement Agreement does not require that intrastate access charges may only be considered in the AFOR proceeding.⁴⁰ As we heard at hearing, Sprint and T-Mobile have the option of filing a complaint against rates with the Commission at any time; similarly, the Commission could initiate a rate proceeding involving access rates.⁴¹ Condition 3 assures, however, that access charges *will* be considered by a date certain, that is, no later than the time of the AFOR, and that CenturyLink will not object to their inclusion in the AFOR proceeding.

23 Sprint opposes the Settlement Agreement to the extent that it would rather have the merger approved without any of the Settlement Agreement conditions.⁴² Approving the merger without the Settlement Agreement conditions, which provide broad benefits to

³⁹ *Id.* at TR. 28:9–29:2 (Jan. 30, 2006).

⁴⁰ Brief of Sprint Nextel Corporation and T-Mobile West Corporation in Response to List of Commission-Identified Briefing Issues (Sprint/T-Mobile brief) at p. 5, ¶ 7.

⁴¹ Vasconi, TR. 280:23–281:23. Examples of specific access charge complaints filed against ILECs follow: in 1999, the UTC filed a complaint against Verizon in UT-990672. In 2002, AT&T filed a complaint against Verizon in UT-020406; and in 2008, Verizon Select Services filed a complaint against United Telephone of the Northwest in UT-081393. In each of these specific instances, intrastate access charges were reduced.

⁴² Appleby, TR. 433:10–12.

consumers and offset the potential risks of the merger, would not be in the public interest.

III. CONCLUSION

24

Adopting the Settlement Agreement in its entirety would secure necessary protections from potential merger harms and would render this transaction in the public interest. Accordingly, Staff and Public Counsel urge the Commission to accept their settlement with the Joint Applicants and approve the transaction.

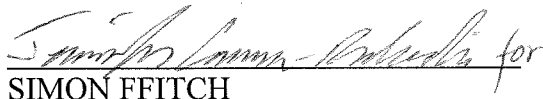
DATED this 21st day of January 2011.


Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

ROBERT M. MCKENNA
Attorney General

Per email authorization:


SIMON FFITCH
Senior Assistant Attorney General
Public Counsel Section


JENNIFER CAMERON-RULKOWSKI
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff