



Colville Business Council

The Confederated Tribes of the Colville Reservation

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March 10, 2011

Mr. David Danner, Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

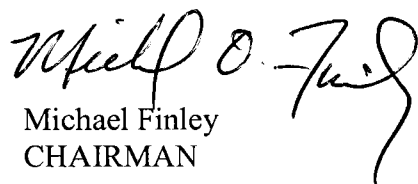
Re: Docket No. UT-100820 – Confederated Tribes of the Colville Reservation Reply
to Joint Applicants' Response to Notice of Opportunity to Respond to Additional
Evidence

Dear Mr. Danner:

Enclosed is the original and 12 copies of the Confederated Tribes of the Colville Reservation's
reply to Joint Applicants' Response to Notice of Opportunity to Respond to Additional Evidence.

The electronic copy is being provided by e-mail.

Sincerely,


Michael Finley
CHAIRMAN

Enclosures

cc: All parties of record

2011 MAR 14 PM 9:00

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

2011 MAR 13 AM 9:32

**CONFEDERATED TRIBES OF THE COLVILLE RESERVATION REPLY TO JOINT
APPLICANTS' RESPONSE TO NOTICE OF OPPORTUNITY TO RESPOND TO
ADDITIONAL EVIDENCE**

March 10, 2011

The Confederated Tribes of the Colville Reservation (“Colville Tribes” or “Tribes”) respectfully provides this Reply to Joint Applicants’ Response to Notice of Opportunity to Respond to Additional Evidence, which was filed on February 23, 2011.

The response from CenturyLink and Qwest (collectively the “Joint Applicants”) is dismissive of the concerns raised by the Colville Tribes and the Affiliated Tribes of Northwest Indians (“ATNI”) in their joint comments and mischaracterizes the nature of the five requested conditions. Curiously, the response also implies that CenturyLink has somehow been responsive to the Tribes’ concerns. This could not be farther from the truth: CenturyLink has not responded to repeated attempts by tribal officials for follow-up discussions on these issues since the January 26, 2011 teleconference call as described in the Colville Tribes’ February 1, 2011 letter.

Through their conduct, it has become apparent to the Colville Tribes that the Joint Applicants believe that they have this proceeding “in the bag,” that the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) will approve their pending settlement without any changes, and that no further communications with the Colville Tribes are necessary.

1. Broadband Deployment

The Joint Applicant’s response to this issue raises serious concerns for the Colville Tribes that these companies have no intention of remedying the longstanding service deficiencies on the Colville Reservation. Indeed, the Joint Applicants seem almost impatient and dismissive in addressing these issues. Fundamentally, the Joint Applicants misperceive their roles and responsibilities as public service enterprises and rely on the concept of “management discretion” as a shield for the baseless assertion that the Commission is without authority to incorporate the changes the Colville Tribes and ATNI seek.

Although it should be obvious, the very fact that the proposed merger is before the WUTC for consideration confirms the special character and responsibility that these companies have to serve the public interest. For more than 100 years, state commissions like the WUTC have regulated a special class of businesses “affected with the public interest.”¹ Regulation was imposed because of perceived market failure in certain critical industries concerned with the provision of essential public services like electric power, water and telephone service. Companies like CenturyLink and Qwest sought and obtained franchises to serve the public and they plainly understood that with those franchises came certain responsibilities and regulatory burdens that do not apply to ordinary businesses in the marketplace.

¹ See, e.g., *Munn v. Illinois*, 94 U.S. 113, 126 (1877) (“When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.”); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1913) (“a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation.”)

Although these markets have changed dramatically in the intervening years market failure is still evident in places like the Colville Reservation. While the residents of cities like Seattle, Tacoma and Spokane may have an array of options for their communications services, many residents of the Colville Reservation lack basic telephone service and most lack broadband service. These services are essential to economic development in the 21st century and the lack of these services consigns the Colville Reservation to a kind of communications ghetto that stifles any chance for development based on the modern information industry. This, coupled with the companies' apparent cavalier attitude toward their public service responsibilities makes clear why this proceeding is so important for the State of Washington and for the parts of the State to be served by these companies that are not participating in the information economy because of the inadequate services provided by the companies.

The Joint Applicants would have the Commission ignore as “outside the scope of this proceeding” the legitimate issues that the Tribes have raised. Of course, determining what the public interest requires is precisely what the Commission does. The Commission is generally empowered to “regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation.”² In addition, the Commission is specifically empowered to order betterments, including repairs, improvements or “any additions or extensions” to any telecommunications line that “should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telecommunications communications.”³ And the Commission may require conditions in connection with the approval of a proposed merger transaction like the one addressed in this proceeding.

The Joint Applicants suggest that the low customer densities of certain regions justifies a failure to provide service, because the economics of serving those low density areas do not warrant the investment necessary for broadband deployment. This is a clear signal that the companies do not intend to resolve the longstanding service deficiencies on the Colville Reservation. Contrary to the apparent understanding of the companies, franchised utilities and telephone companies are not expected to make a profit with respect to every individual customer they serve.

Instead, such entities offer service under a standard rate schedule or tariff which applies to all customers. Some customers are less expensive to serve and the company makes a nice profit serving them. Others are more expensive to serve and the company may actually lose money serving them. Overall these winners and losers are expected to balance in a way that the company makes a reasonable overall profit. This postalized rate structure has been a feature of utility and telephone rates for more than 100 years and is well understood by the companies. Thus claims that they need not extend their networks to reach unserved customers because those customers are expensive to serve flies in the face of the obligation and responsibilities that they took on as public service enterprises. Indeed, the population density arguments that CenturyLink

² Wash Rev. Code Ann. § 80.01.040 (2011).

³ *Id.* at § 80.36.260.

advances are as true for telephone service as they are for broadband service, yet the Washington State Legislature has specifically found that universal service is an important policy goal of the state, and generally requires telecommunications companies to furnish service on demand.⁴

The Joint Applicants also twice refer to the concept of “management discretion” in an apparent effort to suggest that further Commission inquiry into the substantive issues raised in this proceeding is inappropriate. Generally speaking, utilities have discretion to conduct their affairs in such manner that they see fit, consistent with their public service responsibilities. When the exercise of that discretion, however, does not yield a result that serves the public interest – as in the case of the Colville Reservation where that discretion leads them to redline certain low density areas within their certificated exchange area – then regulators may and should intervene to review and overrule that discretion. “Management discretion” is not unfettered, particularly where a utility’s actions may be inconsistent with the Commission’s directive to regulate in the public interest. For example, the Commission has the authority to direct a management audit to provide a complete picture of a utility’s performance should the Commission feel that a utility’s management choices demand greater scrutiny.⁵ The fact that the companies are allowed to exercise management discretion in no way forecloses inquiry by the WUTC into whether that discretion is being exercised in a way that serves the public interest.

The companies rely heavily on the fact that they have agreed to a process for determining what areas will receive broadband service in the future. While this process may be useful, the Colville Tribes are seriously concerned about two aspects of the way it is structured. First, the process is not transparent. The company’s first filing identifying the initial wire centers targeted under the broadband commitment will be confidential and yet this filing provides the roadmap for any broadband deployment plans in subsequent years. Thus, the very people who will benefit and, importantly, *those who will not benefit*, will not know how the companies arrived at their decisions on service expansion, will not have an opportunity to identify errors and defects in the analysis and will not have the information they need if they deem it appropriate to challenge the results. This, coupled with the companies’ cavalier attitude and retreat to “management discretion” does not bode well for those consumers who look to the process as a pathway to long-denied broadband services in their communities. The Colville Tribes urge the Commission to evaluate these issues when considering whether the parties’ agreed-to Condition 14 is indeed in the public interest.

Second, the process has no teeth from an enforcement perspective. Given the Joint Applicants’ dismissive response, the following question arises: what, if anything, will happen if the merger is approved and CenturyLink fails to carry out the process envisioned by the settlement agreement? Presumably, such a failure to perform would not lead to an order to reverse the merger transaction. Short of that, however, it is not clear what remedy the WUTC or the communities identified for broadband deployment will have. If it approves the merger, the

⁴ *Id.* at §§ 80.36.090, 80.36.300, and 80.36.410.

⁵ *See, e.g.*, Washington Utilities And Transportation Commission, Complainant, vs. Pacific Northwest Bell Telephone Company, Respondent, Cause No. U-79-66, 1980 Wash. UTC LEXIS 3; 39 P.U.R.4th 126 (WUTC 1980); Washington Utilities And Transportation Commission, Complainant, vs. Pacific Northwest Bell Telephone Company, Respondent, Cause No. U-77-87, 1978 Wash. UTC LEXIS 2; 26 P.U.R.4th 495; (WUTC 1978).

Commission should make this process transparent, ensure that interested parties may participate fully, and make clear what remedies are available to it and to interested parties should the companies fail to carry out their obligations.

2. Establish a Tribal-Liaison Office

The Joint Applicants “question the merits” of establishing a Tribal Liaison office while championing that it put the Colville Tribes “in direct contact” with CenturyLink’s Area Operations Manager for the Colville Reservation following the Commission’s public hearing—an apparent attempt to appear responsive to the Tribes’ concerns. The Joint Applicants posit that this “direct access” (via teleconference call) to CenturyLink’s local manager is much better for the Colville Tribes than a separate point of contact for tribal issues and that this issue is, in any event, a matter of “management discretion” that is beyond the scope of this proceeding.

While the Colville Tribes certainly appreciate that it now has the telephone number for CenturyLink’s local area manager in its rolodex, this is simply no substitute for a dedicated policy person within the company who can serve as a conduit for issues and concerns that Indian tribes statewide may experience, whether service or policy related. The Colville Tribes understand the concept of “management discretion” and respects that CenturyLink may have its own operating model. The Tribes, however, pose this question: if CenturyLink’s operating model is such that a majority of the residents on the Colville Reservation lack broadband and in many cases even basic telephone service, then that model—however “empowering” it may be to CenturyLink’s local managers—is simply broken.

In the Colville Tribes’ experience, the local area managers are consumed first and foremost with keeping the system running and have little if any experience with policy issues, particularly those affecting Indian tribes, hence the need for a new centralized point of contact.

3. Promote Tribal LifeLine and Link-Up Program Benefits to Residents of Indian Lands

The Joint Applicants point to general language in agreed-to condition 26 for the proposition that the Colville Tribes’ and ATNI’s concerns and suggested condition language are addressed therein. This is not the case.

The Tribes’ comments were directed to the enhanced Tribal Lifeline Program. In that regard, the Joint Applicants argue that that program “is under the jurisdiction of the FCC” and therefore this Commission should not entertain this issue. While that program is described in federal regulations, nothing in those regulations precludes state regulatory commissions from addressing these issues in the form of conditions. To the contrary, the pertinent federal regulations explicitly condition participation in the enhanced tribal program on the carriers’ ability to demonstrate that they have received “any non-federal regulatory approvals necessary to implement the required rate reduction.” *See* 47 C.F.R. §§ 54.403(4)(ii). Without explicit condition language applicable to tribal lands, the Joint Applicants will continue to neglect promoting these programs to Indian people in these areas.

4. Training Program for Indian Tribes and Tribal Personnel

The Joint Applicants' response to the Colville Tribes' proposed condition that CenturyLink "develop and implement a program whereby CenturyLink shall provide training to Indian tribes and their personnel ... to provide repairs or service to switches or other CenturyLink infrastructure" is curious because it apparently assumes that the Colville Tribes are simply seeking employment for tribal members. While unemployment on the Colville Reservation currently hovers near 50 percent, the requested condition is based on the Colville Tribes' reliance on CenturyLink infrastructure for its governmental health and safety programs and the past delays that it has experienced in getting qualified service technicians to address service interruptions. As noted in the Colville Tribes' January 3, 2011 comments, in one case critical circuits relied upon by the Tribes' health clinics were inoperable for 72 hours before a technician was dispatched. Ensuring that these types of unfortunate incidents are not repeated on the Colville Reservation or other tribal communities in the State of Washington is squarely within the public interest and within the Commission's authority to condition as part of any merger approval.

5. Reporting on Tribal Service Areas

The Joint Applicants suggest that the Colville Tribes' request for service maps for the combined company's service territory is somehow limited to the Colville Reservation. Contrary to the Joint Applicants' response, the fifth condition proposed by the Colville Tribes and ATNI would require CenturyLink to "track and file annually a report identifying the Indian tribes in Washington State where CenturyLink provides service within the tribes' Indian lands, together with accompanying maps for each tribe." While the Colville Tribes certainly appreciate CenturyLink's apparent willingness to provide the Colville Tribes with such a map of service areas on the Colville Reservation, the requested condition applies to *all Indian tribes* in Washington State where a post-merger CenturyLink provides services.

The Colville Tribes characterized this request as "minor" in its February 11, 2010 letter solely to communicate that CenturyLink's compliance with this request is appropriately considered as such, not to diminish the importance of the request, as the Joint Applicants' response implies. It is certainly in the public interest for Indian tribes in Washington State to have readily available access to maps that identify the service areas on their respective tribal lands. The Colville Tribes held out what was ultimately false hope that CenturyLink would voluntarily agree to provide the Commission maps of its service areas on tribal lands. Since the Joint Applicants are not willing to do so, the Commission should impose this requirement as a condition should it approve the merger.

Since the Joint Applicants have refused to incorporate or otherwise agree to any of the changes sought by the Colville Tribes or ATNI, the Commission should impose these changes as conditions to any approval of the proposed merger.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael O. Finley". The signature is written in a cursive style with a prominent flourish at the end.

Michael O. Finley
CHAIRMAN

CERTIFICATE OF SERVICE

Docket No. UT-100820

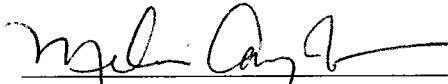
Confederated Tribes of the Colville Reservation Reply to Joint Applicants' Response to February 23, 2011 Notice of Opportunity to Respond to Additional Evidence

I certify that I have caused to be served copies of CONFEDERATED TRIBES OF THE COLVILLE RESERVATION REPLY TO JOINT APPLICANTS' RESPONSE TO NOTICE OF OPPORTUNITY TO RESPOND TO ADDITIONAL EVIDENCE by **email and U.S. Mail** on the following parties:

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DATED this 10TH day of March, 2011.



Melissa Campobasso