[Service Date March 14, 2011]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of	)	DOCKET UT-100820
	)	
QWEST COMMUNICATIONS INTERNATIONAL INC. AND CENTURYTEL, INC.	)	ORDER 14
	)	FINAL ORDER APPROVING AND
For Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp.	)	ADOPTING, SUBJECT TO CONDITIONS, MULTIPARTY SETTLEMENT AGREEMENTS AND AUTHORIZING TRANSACTION
. . . . .	)	

Synopsis: *The Washington Utilities and Transportation Commission (Commission) approves and adopts, subject to conditions, five multiparty settlement agreements resolving all of the disputed issues among Qwest Communications International Inc. and CenturyTel, Inc.(CenturyLink) and 360networks(USA), Integra Telecom, Commission Staff, Public Counsel, the Department of Defense, and tw telecom. The five settlement agreements contain commitments that expand broadband service to unserved and underserved areas of Washington, protect consumers from merger-related costs, and provide rate stability for residential and business retail customers. The agreements also protect service quality performance and provide advanced notice of any modifications to operational support systems. The commitments, together with settlement modifications and additional conditions imposed in this Order, provide sufficient assurance that the proposed merger will be in the public interest. As a result, the Commission authorizes CenturyLink to acquire indirect control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp.*

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SUMMARY

1 **PROCEEDING.** On May 13, 2010, Qwest Communications International Inc. (QCII) and CenturyTel, Inc.[1] (CenturyLink) (collectively referred to as Joint Applicants) filed with the Washington Utilities and Transportation Commission (Commission) a joint application for approval of the indirect transfer of control of QCII's operating subsidiaries, Qwest Corporation, Qwest LD Corp. (QLDC) and Qwest Communications Company LLC (QCC)[2] to CenturyLink.

2 Six parties to this proceeding, 360networks (USA) inc. (360networks), Integra Telecom of Washington, Inc., Electric Lightwave, Inc., Advanced TelCom, Inc., and United Communications, Inc., d/b/a Unicom (collectively, Integra), the Commission's regulatory staff (Commission Staff or Staff),[3] the Public Counsel Section of the Washington Office of Attorney General (Public Counsel), the Department of Defense and All Other Federal Executive Agencies (DoD/FEA), and tw telecom of Washington, LLC (tw telecom),[4] entered into five settlement agreements[5] with Joint Applicants. The settling parties, initially opposed to the proposed merger, support the transaction subject to numerous conditions contained

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[1] CenturyTel, Inc. changed its name to CenturyLink, Inc. with shareholder approval on May 20, 2010. Jones, Exh. No. JJ-1T, n. 1.

[2] Collectively with Qwest Corporation and QLDC, referred to as Qwest.

[3] In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

[4] Tw telecom filed a motion to withdraw from the proceeding on February 15, 2011, in compliance with the terms of its settlement with Joint Applicants. We deny the motion and retain tw telecom as a party to the proceeding in order to consider the settlement agreement and tw telecom's support for it.

[5] Public Counsel and Commission Staff, together, entered into a settlement agreement with Joint Applicants; thus six parties resolved their disputed issues through five agreements.

within the agreements. The nonsettling parties[6] continue to assert that the proposed transaction is not in the public interest and recommend that the Commission reject the joint application and the settlement agreements unless additional conditions are imposed.

3 **PARTY REPRESENTATIVES.** Lisa Anderl, in-house counsel, Seattle, Washington, represents Qwest. Calvin K. Simshaw, in-house counsel, Vancouver, Washington, represents CenturyLink.

4 Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Simon ffitch, Assistant Attorney General, Seattle, Washington, represents Public Counsel. Stephen S. Melnikoff, General Attorney, Arlington, Virginia, represents the DoD/FEA.

5 Mark Trinchero, Davis Wright Tremaine, LLP, Portland, Oregon, represents Pac-West, tw telecom, PAETEC; XO Communications, Covad; and Charter.[7] Theodore Gilliam, in-house counsel, Portland, Oregon, represents Integra. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents Level 3, 360networks, and Cbeyond. Judith A. Endejan, Graham & Dunn PC, Seattle, Washington, and Kenneth Schifman, Sprint's in-house counsel, Overland Park, Kansas, represent Sprint and T-Mobile.[8]

6 **CONFIDENTIALITY.** Some information adduced in this proceeding has been designated as confidential or highly confidential pursuant to protective order. The Commission respects the need for confidentiality but also believes that its orders

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[6] The nonsettling parties include: Pac-West Telecomm, Inc. (Pac-West); McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (PAETEC); XO Communications Services, Inc. (XO Communications); Covad Communications Company (Covad); Charter Fiberlink WA-CCVII, LLC (Charter); Level 3 Communications, LLC (Level 3); Cbeyond Communications LLC (Cbeyond); Sprint Nextel Corporation (Sprint) and T-Mobile West Corporation (T-Mobile).

[7] The Commission will collectively refer to Pac-West, PAETEC, XO Communications, Covad, and Charter as Joint CLECs throughout this order. Having reached a settlement agreement with Joint Applicants, tw telecom will not be included in the discussion of Joint CLECs' opposed to the Joint Application.

[8] For purposes of simplicity, the Commission will collectively refer to Sprint and T-Mobile as Joint Wireless Carriers.

should be comprehensible and transparent. Where possible, references to information designated as confidential or highly confidential will be referred to only in generalities.

COMMISSION DETERMINATION

7 The Commission approves the Joint Application of QCII and CenturyLink to transfer control of Qwest, subject to commitments in the five settlement agreements, as modified in this Order, and subject to the additional conditions set forth herein.[9] The import of Joint Applicants' proposal cannot be overstated; they seek to merge two of Washington's largest wireline telecommunications providers. The acquiring carrier, while experienced in providing wholesale services nationally, utilizes operational support systems (OSS) and wholesale service delivery practices that have not been subject to the same level of testing and regulatory scrutiny as have Qwest's systems over the past decade.

8 The five settlement agreements resolve many disputed issues that the intervenors initially raised with the proposal. The agreements: (1) provide protection for retail and wholesale customers against additional merger-related costs; (2) commit $80 million to broadband investment throughout the state; (3) require financial reports that will provide a baseline for the Commission to measure transaction-related synergies and costs; (4) delay Qwest's Alternative Form of Regulation (AFOR) filing; and (5) guarantee that the current OSS in the Qwest legacy service territory will remain in place for at least two years, and afterward, the competitive local exchange carriers (CLECs) will have the opportunity to participate in coordinated testing.

9 Joint CLECs, Sprint, T-Mobile, Level 3, and Cbeyond remain opposed to the merger. Their concerns relate primarily to wholesale service and OSS issues. We recognize these concerns and acknowledge the risks involved in a transaction of this size and scope.

10 To address these potential harms we adopt additional conditions that will mitigate many of the risks associated with the proposed merger. Thus, subject to the

[9] Chairman Goltz and Commissioner Oshie concur in the entirety of this Order. Commissioner Jones concurs in all parts of this Order except for paragraphs 248 - 250, pertaining to broadband deployment, as to which Commissioner Jones dissents by separate opinion.

commitments in the settlement agreements, as modified in this Order, and the additional conditions we impose, we approve the transaction and adopt and accept the various settlement agreements.

MEMORANDUM

I. Background and Procedural History

11 On May 13, 2010, Joint Applicants filed a request for the Commission to approve the merger of two holding companies, QCII and CenturyLink.[10]

12 On October 21, 2010, Joint Applicants and 360networks filed a settlement agreement and joint memorandum in support of the settlement (360networks Settlement). Joint Applicants and Integra filed a settlement agreement and narrative in support of settlement (Integra Settlement) on November 10, 2010.

13 On December 23, 2010, Joint, Applicants, Staff, and Public Counsel filed a settlement agreement (Staff/Public Counsel Settlement). The signatories later filed testimony in support of the settlement. On December 30, 2010, the DoD/FEA and Joint Applicants filed a settlement agreement (DoD/FEA Settlement) along with a narrative in support of the settlement. Joint Applicants and tw telecom filed a settlement agreement (tw telecom Settlement) along with a narrative in support of the settlement on February 10, 2011.

14 The Commission conducted a public comment hearing at its headquarters in Olympia, Washington, on January 5, 2011. Five individuals presented comments for the record. The Commission received 95 written comments in this proceeding.[11] The Commission convened an evidentiary hearing on January 5-6, 2011. On January 14, 2011, Sprint and T-Mobile, Joint CLECs and Cbeyond, Joint Applicants, and Public

[10] Jones, Exh. No. JJ-1T, at 13.

[11] Exh. No. B-6.

Counsel and Staff filed initial, issue-specific post-hearing briefs.[12] On January 21, 2011, Pac-West, Joint CLECs, Cbeyond, Sprint and T-Mobile, Public Counsel and Staff, DoD/FEA, and Joint Applicants filed final post-hearing briefs.

A. Joint Application

15 CenturyLink and QCII propose to combine their companies through a series of transactions, beginning with the creation of a merger holding company. Following regulatory approval, the holding company, a CenturyLink subsidiary, will merge with and into QCII. At this point, the holding company will cease to exist, and QCII will become a wholly-owned subsidiary of CenturyLink.[13] Shareholders of QCII stock will receive 0.1664 shares of CenturyLink stock at the transaction's closing.[14]

16 CenturyLink is a publicly traded holding company with telecommunications operations in Washington and 32 other states. Several of CenturyLink's indirect incumbent local exchange carrier (ILEC) subsidiaries operate within Washington, including CenturyTel of Washington, Inc., CenturyTel of Inter-Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone of the Northwest (CenturyLink ILECs).[15] These ILECs serve approximately 200,000 access lines in 110 predominantly rural exchanges.[16] The CenturyLink ILECs also provide CLECs with interconnection services throughout the state.[17] CenturyLink's other indirect Washington subsidiaries, CenturyTel Long Distance, LLC, CenturyTel Solutions,

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[12] The DoD/FEA declined to file an issue-specific post-hearing brief on January 14, 2011, and instead relied on Staff/Public Counsel's brief as sufficient to inform the Commission.

[13] Joint Application, Exhibit C, United States Securities and Exchange Commission Form 8-K, at 2.

[14] Jones, Exh. No. JJ-1T, at 4.

[15] *Id.* at 5.

[16] *Id.*

[17] *Id.* at 6.

LLC, CenturyTel Fiber Company II, LLC, and Embarq Communications, Inc. provide CLEC and interexchange carrier services.[18]

17 QCII is also a publicly traded holding company with indirect subsidiaries providing telecommunications services in 14 states including Washington.[19] The company's Washington subsidiaries include Qwest Corporation, QLDC, and QCC.[20] Qwest Corporation, as the state's largest ILEC, serves approximately 1.6 million access lines across the state and provides interconnection services and regulated retail and wholesale services in Washington.[21] QLDC offers resold interexchange services to Washington customers.[22] QCC offers long distance and competitive local exchange services in the state.[23]

18 Joint Applicants provide the following details of the proposed merger:

- It will not result in any additional debt or refinancing and is a tax-free, stock-for-stock exchange transaction.[24]

- Qwest subsidiaries will become affiliates of CenturyLink subsidiaries and each subsidiary will continue to operate separately and distinctly.[25]

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[18] *Id.*

[19] Reynolds, Ex. No. MSR-1T, at 5.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 6.

[23] *Id.*

[24] *See* Joint Application, Exhibit C.

[25] Joint Application, at n. 1 and Reynolds, Exh. No. MSR-1T, at 8.

- Each of the currently regulated companies will remain under the Commission's jurisdiction after the proposed merger.[26]

- The transaction will not affect existing interconnection agreements or the terms and prices for wholesale services under Qwest's and the CenturyLink ILECs' access tariffs.[27]

- Following the merger's closing, the combined company will continue to abide by all applicable regulatory statutes, rules, and Commission orders, and that any subsequent service or price modification would be subject to this framework.[28]

- The proposed transaction would result in a stronger and more competitive consolidated company due to its increased scope and scale nationally, as well as a more balanced rural and urban footprint because CenturyLink primarily operates in rural regions, while Qwest mostly serves urban and suburban areas.[29]

- The combined company will serve more than 17 million access lines and 5 million high speed internet customers across 37 states.[30]

- The acquisition of Qwest's expertise in providing telecommunications services to business and government

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[26] Reynolds, Exh. No. MSR-1T, at 13.

[27] *Id.* at 4.

[28] Jones, Exh. No. JJ-1T, at 6.

[29] *Id.* at 7-8.

[30] *Id.*

customers will enable CenturyLink to expand its service offerings into similar markets.[31]

- CenturyLink's leadership team has the managerial and financial experience needed to complete the merger and expand into new jurisdictions and has been the subject of many mergers and acquisitions throughout its history and has weathered the resulting integrations successfully.[32]

- The combined company will realize greater economies of scale and scope than either company could independently,[33] specifically, optimized network capacity, enhanced purchasing power, greater ability to attract capital on reasonable terms, and the opportunity to provide Washington consumers with a wider array of services and products.[34]

- The transaction will be virtually seamless to consumers.[35] Immediately following the transaction's closing, consumers will receive the same products and services under the same terms and conditions as they did prior to the merger.[36]

- Any subsequent modifications to the terms and conditions of service would be made in accordance with applicable statutes and regulations.[37]

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[31] *Id.* at 10.

[32] *Id.* at 12-13.

[33] Reynolds, Exh. No. MSR-1T, at 13.

[34] *Id.* at 13-16.

[35] Jones, Exh. No. JJ-1T, at 6.

[36] *Id.*

[37] *Id.*

- The two companies had combined annual *pro forma* revenues of $19.8 billion, approximately $8.2 billion in earnings before interest, taxes, depreciation, and amortization (EBITDA), *pro forma* free cash flow of $3.4 billion for the twelve months ended December 31, 2009.[38] This results in a *pro forma* 2009 net debt-to-EBITDA ratio that is 2.4 times before estimated synergies and 2.2 times after on a full run-rate basis, excluding integration costs.[39] The resulting leverage ratio would result in one of the strongest balance sheets in the telecommunications industry.[40]

- Annual merger synergies for the combined company are projected at approximately $625 million over three to five years.[41] This figure is a combination of estimated operating expense synergies of approximately $575 million and projected capital expenditure synergies of approximately $50 million, annually.[42]

- The combined company will likely utilize CenturyLink's go-to-market business model, which incorporates a decentralized local market approach, in Qwest's service territory after the close of the transaction.[43]

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[38] Bailey, Exh. No. GCB-1T, at 4.

[39] *Id.* at 19.

[40] *Id.* at 4.

[41] *Id.*

[42] *Id.* at 11.

[43] Schafer, Exh. No. TS-1T, at 10.

B. Multiparty Settlement Agreements

19 Six parties, 360networks, Integra, Staff, Public Counsel, the DoD/FEA, and tw telecom, entered into five separate settlement agreements with Joint Applicants.[44] Each of the settling parties asserts that their respective settlement agreements, and the individualized conditions they contain, provide sufficient mitigation of potential harms such that the parties now support the transaction and advocate Commission approval. Joint CLECs, Sprint, T-Mobile, Level 3, and Cbeyond continue to oppose the merger. A summary of each of the settlement agreements in the order they were submitted is provided below.

1. Joint Applicants and 360networks Settlement Agreement[45]

20 The 360networks Settlement is narrowly tailored to issues regarding its existing and prospective interconnection agreements (ICA) the company has with Qwest. Specifically, the agreement provides that:

- Qwest will not terminate any 360networks' ICA currently in effect or having expired less than 3 years from the date of closing, for a period of at least 36 months following the closing of the transaction.[46]

- The parties will begin negotiations of an initial replacement ICA, utilizing their existing agreement, as amended, with the

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[44] Although we refer to the proponents of the Joint Application as Joint Applicants for actions taken prior to the effective date of the merger, many of the settlement conditions described obligations of the combined post-merger company. For purposes of identifying the entities to whom the obligations arising from the settlement agreements and the additional conditions we impose herein, we use the term "combined company" when referring to the entirety of the post-merger corporate structure that is responsible for satisfying such obligations. For obligations that apply to specific Washington ILEC operations post merger, we refer to Qwest or CenturyLink ILECs, as appropriate.

[45] 360networks Settlement, Exh. No. 1, is attached and incorporated as Appendix A.

[46] 360networks Settlement, Exh. No. 1, at 1.

option of incorporating the amendments into the body of the negotiated ICA.[47]

- 360networks is permitted to obtain the benefit of any additional conditions placed on the transaction by the Federal Communications Commission (FCC).[48]

2. Joint Applicants and Integra Settlement Agreement[49]

21 By virtue of 15 separate conditions and sub-parts, the Integra Settlement addresses many, but not all, of the wholesale rate and service concerns that its witnesses raised in initial testimony opposing the transaction. Various conditions apply to matters pertaining to the legacy Qwest operating territory, to the pre-merger CenturyLink ILEC companies, or the post-merger combined company. Each of the provisions is summarized below:

- The combined company is prohibited from recovering merger-related costs, including branding costs, transaction-related costs, or increases in management costs, from Integra in any wholesale rates or fees.[50]

- The combined company shall comply with all existing wholesale performance requirements, remedies and penalties in the legacy Qwest ILEC service territory that are required under existing regulation, tariffs, ICAs, or other agreements. The combined company is also required to continue to provide CLECs, as well as, when requested, Commission Staff and the FCC with reports for any wholesale service performance

[47] *Id.*

[48] *Id.*

[49] Integra Settlement, Exh. No. 3, is attached and incorporated as Appendix B.

[50] *Id.* at ¶ 1.

metrics that legacy Qwest previously made available, prior to the merger.[51]

- The Qwest Performance Indicator Definitions (QPID) and Qwest Performance Assurance Plan (QPAP) are left unchanged for 18 months from the transaction's closing, and the combined company will not withdraw or attempt to eliminate the QPAP for at least three years after closing.[52] The agreement also states that the combined company will not terminate any Integra ICA or raise wholesale rates during the unexpired term of the ICA or for at least 36 months after closing, whichever period is longer.[53] Further, the combined company will not terminate any Integra commercial or wholesale agreements for at least 18 months or modify any wholesale tariff offering for 12 months.[54]

- CenturyLink promises to comply with all interconnection provisions of the Telecommunications Act of 1996 (the Act), and the combined company will not assert the rural exemption under § 251 of the Act in the legacy Qwest ILEC service territory.[55]

- Qwest will continue to be classified as a Bell Operating Company (BOC) and will not seek reclassification of any wire

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[51] *Id.* at ¶ 2.

[52] *Id.* at ¶ 2(a)

[53] *Id.* at ¶ 3(a). However, the Integra Settlement does provide for limited circumstances under which the combined company may increase its rates, such as in the event new products or services are offered or should the combined company seek rate changes pursuant to a cost proceeding before the Commission.

[54] *Id.* at ¶¶ 3(b) – 3(d).

[55] *Id.* at ¶ 6.

centers as "non-impaired" or pursue forbearance of any FCC regulation applying to Qwest's existing Washington service territory prior to June 1, 2012.[56]

- With respect to post-closing wholesale service, the combined company agreed that it will maintain up-to-date wholesale escalation information, contact lists, and account manager details and provide these to the wholesale carriers shortly before closing if possible.[57] Likewise, the combined company will supply information regarding Qwest's wholesale OSS functions and wholesale business practices and procedures to wholesale carriers in legacy Qwest's ILEC service territory.[58] It guarantees that wholesale and CLEC operations have sufficient staffing, including IT personnel, to address wholesale order volumes.[59]

- QCII and CenturyLink pledge to utilize and offer the legacy Qwest OSS for use in the Qwest operating territory by wholesale customers for at least two years or until July 1, 2013, whichever is later.[60] Following that period, Joint Applicants agree to offer a "level of wholesale service quality that is not materially less than that provided by Qwest prior to the closing date, including support, data, functionality, performance, electronic flow through, and electronic bonding."[61]

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[56] *Id.* at ¶¶ 7 - 8. This time frame was later extended by the Joint Applicants in the Minnesota Settlement to June 1, 2013.

[57] *Id.* at ¶ 9.

[58] *Id.* at ¶ 10.

[59] *Id.* at ¶ 11.

[60] *Id.* at ¶ 12.

[61] *Id.*

- As to future changes to any Qwest OSS, the combined company agrees that it will not replace or integrate the Qwest systems without providing the FCC, the Commission, and Integra with at least 270 days advance notice.[62] If the combined company decides to replace or integrate the Qwest systems, it will also establish a transition plan including contingencies should the combined company encounter significant problems during the transition.[63] Integra would have an opportunity for comment on the transition plan before the FCC and the Commission if either agency allows comment.[64] The combined company will follow the procedures outlined in the Qwest Change Management Process (CMP) Document.[65]

- Replacement or retirement of the Qwest OSS Interface will not occur unless the company's competitors provide sufficient acceptance of the new interface.[66] Sufficient acceptance of the new interface is to be "determined by a majority vote" of all competitors of the combined company that participate in coordinated testing of a replacement system.[67] Integra is allowed to participate in coordinated testing with the combined company for the time specified in the CMP or for

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[62] *Id.* at ¶ 12(a).

[63] *Id.*

[64] *Id.*

[65] *Id.* at ¶ 12(b).

[66] *Id.* at ¶ 12(c)(i).

[67] *Id.*

120 days, whichever is longer.[68] Further, the combined company agrees not to begin the integration of billing systems prior to two years from the closing date or July 1, 2013, whichever is longer, unless the proposed integration will not affect data, connectively, and system functions that support wholesale services provided to CLECs.[69]

- Finally, the combined company agrees to an amendment to the existing Integra/Qwest ICA governing the terms and conditions under which Qwest will perform line conditioning requested by Integra.[70]

3. Joint Applicants, Staff, and Public Counsel Settlement Agreement[71]

22 As with other recent telecommunications transactions, Staff reached a comprehensive settlement with Joint Applicants that, through 29 separate proposed conditions, addresses a broad range of potential issues involving the transaction.[72] Public Counsel joins this settlement and together with Staff asks the Commission to approve the transaction, asserting the conditions being proposed adequately resolve concerns about the merger's potential adverse effect on consumers and competition. Additionally, the parties to the settlement agreement contend that all of the provisions are sufficiently constructed to ensure that Joint Applicants, by agreeing to its provisions, have not violated the "public interest" standard as described in WAC 480-143-170.[73]

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[68] *Id.* at ¶ 12(c)(ii).

[69] *Id.* at ¶ 12(d).

[70] *Id.* at ¶ 13. Line conditioning is a network function used to test or make operational changes to a local loop in order to make it suitable for use in the provisioning of Digital Subscriber Line (DSL) services.

[71] Staff/Public Counsel Settlement, Exh. No. 5, is attached and incorporated as Appendix C.

[72] Staff/Public Counsel Settlement, Exh. No. 5.

[73] Exh. No. JJ/MR/MV/SJ-7T, at 4.

23 The proposed conditions can be divided into seven broad categories: financial, AFOR and earnings review, broadband, OSS, service quality, rate stability, and miscellaneous.

a. Financial Conditions

24 Condition 1 requires the combined company to file semi-annual reports containing the company's balance sheet; other intercompany receivables, and payables for Qwest and all other CenturyLink ILECs. The reports must include the beginning balances, ending balances, the differences for that period, and any dividend payments to CenturyLink shareholders for each quarter during the year.[74] CenturyLink is required to file its first report with the Commission within 30 days after it files its form 10Q with the Securities and Exchange Commission (SEC).[75] Following this first filing, CenturyLink will file the reports on a semi-annual basis within 30 days of filing financial reports, either 10Q or 10K, with the SEC until the conclusion of an AFOR proceeding involving Qwest and the CenturyLink ILECs.[76]

25 Pursuant to Condition 2, the combined company will not advocate for a higher cost of capital than what it would have been without the merger.[77] This prohibition applies to any general rate case or AFOR proceeding involving the company's rates.[78]

26 Condition 4 requires the combined company to provide detailed synergy reporting for a five-year period following the merger.[79] Specifically, the combined company will

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[74] Appendix A to Staff/Public Counsel Settlement – Conditions, Exh. No. 6, at ¶ 1.

[75] *Id.*

[76] *Id.*

[77] *Id.* at ¶ 2. The Commission notes that our record is devoid of any information regarding how such a condition would actually be implemented or applied in a prospective ratemaking or AFOR proceeding. TR 276:18-277:14.

[78] *Id.*

[79] *Id.* at ¶ 4.

track its merger costs and estimated achieved synergy savings, by functional area, on a company-wide and on an intrastate jurisdictional basis.[80] The combined company will compile these figures into confidential reports and file them annually beginning within 150 days of the first anniversary of the transaction's closing date.[81]

27 Condition 5 prohibits the combined company from seeking recovery from their retail or wholesale customers any increased overall management costs related to the proposed merger,[82] and Condition 6 prevents recovery of any transition, integration, branding, or direct transaction costs in Washington through retail or wholesale service rates.[83] The agreement assigns these costs to CenturyLink shareholders.[84]

28 In Condition 7, the combined company agrees not to pledge the assets of CenturyLink ILECs and Qwest to secure borrowing without the Commission's approval.[85] Condition 8 requires CenturyLink to notify Commission Staff, within 30 days after closing, of the post-merger CenturyLink consolidated 2010 Net Debt/trailing 12-month EBITDA, the price per share of CenturyLink's and QCII's stock at closing, and the number of shares issued to QCII shareholders.[86]

29 Condition 10 requires Joint Applicants to notify the Commission of any material changes to the proposed transaction's terms and conditions as set forth in the Application.[87] Specifically, notification will be given if the change occurs while a

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[80] *Id.* at ¶ 4(a) - 4(b).

[81] *Id.* at ¶ 4.

[82] *Id.* at ¶ 5.

[83] *Id.* at ¶ 6.

[84] *Id.*

[85] *Id.* at ¶ 7.

[86] *Id.* at ¶ 8.

[87] *Id.* at ¶ 10.

Commission order on the merits of the transaction is pending or occurs before the transaction closes.[88]

30 In accordance with Condition 11, CenturyLink ILECs and Qwest will maintain their financial records in a manner that ensures their ability to continue to report Washington-specific operations to the Commission.[89] Condition 12 mandates that the combined company provide a status report to Staff and Public Counsel on its switching infrastructure in Washington.[90] This report, due on the first anniversary of the transaction's closing date, must identify any switch replacements, upgrades, or retirements made in the prior calendar year and projected for the next calendar year.[91]

31 Finally, in Condition 13, the combined company agrees to submit a confidential report to the Commission, with copies to Staff, and Public Counsel, containing the previous calendar year's Washington regulated capital expenditures as a percentage of the total system expenditures.[92] The report will also include "a comparison of the amount of regulated capital expenditures per Washington access line with the amount of regulated capital expenditures per combined company system-wide access line."[93] Condition 13 also requires the combined company to submit an annual report to the Commission, with copies to Staff, and Public Counsel, with projected capital budgets for the CenturyLink ILECs and Qwest for the current budget year.[94]

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[88] *Id.*

[89] *Id.* at ¶ 11.

[90] *Id.* at ¶ 12.

[91] *Id.*

[92] *Id.* at ¶ 13.

[93] *Id.*

[94] *Id.*

b. AFOR and Earnings Review Condition

32 Condition 3 addresses the post-closing expectation of Joint Applicants, Staff, and Public Counsel regarding the potential disposition of synergies arising from the transaction; potential future adjustments to rates, including rate disparities that presently exist between the individual regulated operating entities that will have common ownership; and the prospect of establishing an AFOR to govern the combined company's operations in a changing marketplace.[95] The Condition also takes into account existing merger commitments and existing regulatory requirements pertaining to CenturyLink and Qwest arising from previous Commission proceedings.[96]

33 Condition 3(a) requires the combined company to petition the Commission, prior to the expiration of Qwest's current AFOR later this year, to defer review of the AFOR, thereby leaving it in place until the Commission issues an order on the filings required in Condition 3(b).[97] Condition 3(a) also requires the combined company to ask the Commission to eliminate the existing CenturyTel/Embarq merger conditions that require a results-of-operations filing within three years and an AFOR filing within five years of the closing of the previous merger involving those companies.[98]

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[95] Appendix A to Staff/Public Counsel Settlement – Conditions, Exh. No. 6, at ¶ 3.

[96] *Id.* at ¶ 3(b)(i). The existing requirements are, in part, a consequence of the Qwest AFOR plan that was adopted in Docket UT-061625. Among the AFOR plan's provisions are financial and service quality reporting requirements, fulfillment of a broadband service deployment plan, compliance with a carrier-to-carrier wholesale service quality plan, and a cap on residential service pricing. Docket UT-061625, Orders 06 and 08, entered July 24, and September 6, 2007, respectively, and Order 11, entered November 8, 2007. Other existing requirements stem from conditions that were either agreed to or imposed in the proceeding involving CenturyLink's recent acquisition of Embarq Corporation, a transaction we approved, subject to conditions, in Docket UT-082119.

[97] *Id.* at ¶ 3(a).

[98] *Id.* Because that merger closed on July 1, 2009, the prior merger's condition requires the earnings review no later than July 1, 2012 and the AFOR filing is required no later than July 1, 2014. See also n. 95.

34 When the combined company petitions the Commission pursuant to the terms of Condition 3(a), Condition 3(b) then requires the combined company to file either a normalized *pro forma* consolidated results-of-operations for the CenturyLink ILECs and Qwest in either a single filing or pursuant to separate results-of-operations for each CenturyLink ILEC and Qwest operating entity.[99] The filing must occur between three and four years following closing of the transaction.[100] The combined company's filing must include information necessary to conduct a full earnings review, similar to a general rate case filing, including merger synergies realized through the historical test year and *pro forma* period as set forth in the CenturyTel/Embarq Merger order.[101] The filing must also include a cost of capital determination, which we interpret to be fully consistent with the requirement set forth in Condition 2, regarding limitations on the requested cost of capital that can be included in such a filing.[102] Finally, Condition 3(b) requires the combined company to file either a single, consolidated AFOR plan or separate proposed AFOR plans for each of the CenturyLink ILECs and Qwest.[103]

35 This condition also provides that the AFOR proceeding shall address: (1) the analysis and disposition of merger synergies, (2) whether and to what extent rate rebalancing is appropriate, (3) whether and to what extent the rate design for residential or business services as well as intrastate access charges should be modified to achieve consistency, and (4) whether other rate changes should be undertaken over time to achieve consistent rate structures for CenturyLink ILECs and Qwest.[104]

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[99] *Id.* at ¶ 3(b)(i).

[100] *Id.* at ¶ 3(b).

[101] *Id.* at ¶ 3(b)(i). See Docket UT-082119, Order 05, ¶¶ 48-50.

[102] *Id.*

[103] *Id.* at ¶ 3(b)(ii).

[104] *Id.* at ¶ 3(d).

c. Broadband Conditions

36 Condition 14 requires the combined company to invest at least $80 million in the State of Washington for retail broadband service infrastructure over a period of five years beginning January 1, 2011.[105] The investment required by the condition is in addition to or net of any investment that remains to be invested as part of the broadband service deployment plan adopted in the current Qwest AFOR and the broadband service improvements established in the CenturyTel/Embarq merger proceeding.[106] At least 33 percent of the new broadband investment is to be dedicated to unserved or underserved areas in Washington.[107] Condition 14 specifically designates part of the $80 million broadband investment requirement towards establishing broadband service in the Clearwater, Glenwood, Willard, Nespelem, and Eureka central offices of the combined company's Washington service area.[108]

37 The combined company is required, no later than 180 days to submit a separate confidential filing identifying the initial wire centers targeted, including the unserved and underserved wire centers and the estimated living units enabled or that may be upgraded.[109] The report must include expenditures per wire center, the number of living units enabled or upgraded as to speed, and the speeds available at each wire center.[110] The combined company would also have to file its initial broadband deployment plan with the commission within 60 days of the anniversary date of the

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[105] *Id.* at ¶ 14. The condition seems unusual in that its starting date of January 1, 2011, precedes the evidentiary hearing for this proceeding, our Order approving the transaction, and the actual date the transaction is consummated.

[106] *Id.*

[107] *Id.* The term "underserved" means an area with wireline broadband service but only at download speeds of 4 megabytes per second (Mbps) and upload speeds of 1 Mbps or less; and "area" means one or more living units.

[108] *Id.* The Joint Testimony supporting the settlement agreement is silent as to why these particular central offices were specifically targeted for broadband deployment.

[109] *Id.*

[110] *Id.*

closing and annually thereafter on the anniversary of the transaction's closing.[111] Both filings will be made with the Commission and copied to Staff and Public Counsel. For five years following closing, or until the $80 million investment requirement has been met, CenturyLink will file an annual report on broadband deployment the company intends to accomplish the following year.[112] The report must include expenditures per wire center, the number of living units enabled or upgraded as to speed, and the speeds available at each wire center.[113]

38 Condition 15 requires CenturyLink to continue to offer stand-alone DSL within Qwest's service territory and to continue offering basic broadband service coupled with discounted, restricted voice and 911 service equivalent to the current "Pure Broadband" service.[114] This commitment shall begin on the closing date and continue until the conclusion of the AFOR proceeding for the CenturyLink ILECs and Qwest.[115]

d. OSS Conditions

39 Four conditions of the Staff/Public Counsel Settlement address OSS and other post-closing back-office integration issues of the combined company. Condition 22 provides that the combined company will submit semi-annual integration status reports to Staff and Public Counsel after closing of the transaction, with the first report due within 90 days of the transaction's close.[116] The reports will be provided for 4 years and include a summary of all integration-related activity completed since the previous report, ongoing deliverables and implementation timelines, and major risks and contingency plans for the upcoming quarter for all substantial integration

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at ¶ 15.

[115] *Id.*

[116] *Id.* at ¶ 22.

team efforts.[117] The combined company will also notify Staff and Public Counsel 180 days in advance of the conversion of any CenturyLink or Qwest retail OSS that impact Washington operations.[118]

40 Like Condition 12 of the Integra Settlement, Condition 23 of the Staff/Public Counsel Settlement is a significant requirement addressing post-closing changes to the combined company's OSS as it integrates Qwest. In accordance with the condition, the combined company has agreed to use, in the legacy Qwest ILEC service territory, Qwest's existing OSS for at least two years, or until July 1, 2013, whichever is later.[119] Following that period, the combined company agreed that any changes to existing OSS or replacement systems will offer 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, performance, electronic flow through, and electronic bonding."[120] The combined company pledges not to replace or integrate Qwest systems without providing the FCC, state commissions, Staff, and Public Counsel with at least 270 days advance notice.[121] If it decides to replace or integrate the Qwest systems after that time, the combined company will also establish a transition plan including contingency actions should it encounter significant problems during the transition.[122] The combined company will allow CLECs the opportunity to comment on any transition plan before the FCC and the Commission if either agency allows comments.[123] The settlement condition also provides that the

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[117] *Id.*

[118] *Id.*

[119] *Id.* at ¶ 23.

[120] *Id.* at ¶ 23.

[121] *Id.* at ¶ 23(a).

[122] *Id.*

[123] *Id.*

combined company will follow the procedures outlined in the Qwest CMP Document.[124]

41 Again, like the Integra Settlement, Condition 23 provides that replacement or retirement of the Qwest OSS Interface will not occur unless CLECs provide sufficient acceptance of the new interface as "determined by a majority vote" of the CLECs that participate in coordinated testing.[125] Further, the combined company agrees to defer integration of any billing systems until after two years from the closing date or July 1, 2013, whichever is longer, and that any changes to its OSS will comply with existing ICA Ordering and Billing Forum (OBF) requirements.[126]

42 Condition 24 requires CenturyLink to provide Staff and Public Counsel 90 days advance notice of any rearrangement of major network components.[127] Major network components include: customer call centers, customer repair centers, E911 systems, maintenance systems that monitor central office and transport systems, engineering systems, and outside plant record systems.[128] This requirement runs from the closing of the transaction until the conclusion of the AFOR proceedings for the CenturyLink ILECs and Qwest required under Condition 3.[129]

43 Condition 25 builds on Conditions 22 and 23, OSS – Retail and OSS – Wholesale, respectively. The combined company must notify the Commission of completion of any OSS conversion or integration for which the company was required to provide advance notification under the retail and wholesale OSS conditions.[130]

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[124] *Id.* at ¶ 23(b).

[125] *Id.* at ¶ 23(c)(i) - (ii).

[126] *Id.* at ¶ 23(d)(i).

[127] *Id.* at ¶ 24.

[128] *Id.*

[129] *Id.*

[130] *Id.* at ¶ 25.

e. Retail Service Quality Conditions

44 Condition 16 addresses changes to the combined company's Service Performance Guarantee (SPG) as well as establishes a number of metrics that will used to measure post-closing retail service quality. The condition requires CenturyLink to establish a $5 daily out-of-service credit for retail consumers experiencing service outages and to modify its existing service guarantee program, which was adopted in the CenturyLink/Embarq proceeding.[131] The SPG will continue until the conclusion of the AFOR proceeding addressed in section b above.[132] Additionally, the existing SPG residential credit will be increased from $15 to $25 after closing.[133] Condition 16 also requires CenturyLink to meet or exceed delayed primary service quality metrics for all of its Washington ILEC operations over a three-year period following the closing date.[134] The initial measurement of the ILECs' performance will compare the first three-month period after the closing to the CenturyLink ILECs' average performance for the twelve months prior to the close or the WAC 480-120-105(1)(a) metric, whichever is higher.[135] If the ILECs' average performance during any post-merger period falls below 95% of the performance standard baseline, CenturyLink will implement a "delayed primary" service program mirroring Qwest's "Delayed Primary Basic Exchange Alternative" tariff until an AFOR proceeding for the ILECs is concluded.[136]

45 Condition 17 provides that Qwest shall continue the monthly service quality reporting as required before the proposed merger, but shall also report payouts under the

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[131] *Id.* at ¶ 16(a)(i) and (ii).

[132] *Id.* at ¶ 16(a).

[133] *Id.* at ¶ 16(a)(ii)(2).

[134] *Id.* at ¶ 16(b)

[135] *Id.* at ¶ 16(b)(i) - (ii). This settlement provision appears to apply only to each of the pre-merger CenturyLink ILECs, including Embarq, but not to Qwest after closing since the remedy for poor performance is a requirement of each of the CenturyLink ILECs to implement a service quality program that already exists in Qwest's tariff.

[136] *Id.* at ¶ 16(b)(iv).

Customer Service Guarantee Program (CSGP) on a quarterly basis until the conclusion of the AFOR proceeding.[137] Condition 18 allows Commission Staff or Public Counsel to initiate a service quality investigation in order to propose the creation of a self-executing service quality penalty mechanism if any CenturyLink ILEC or Qwest has service quality degradation below the average level of retail service quality metrics reported for the six month period prior to the closing date.[138]

46 CenturyLink is required to retain Qwest customer service complaint staff in Washington for at least two years following the transaction's closing.[139] Condition 19 also directs the combined company to maintain sufficient numbers of adequately trained personnel to address executive complaint functions.[140]

f. Retail Rate Stability Condition

47 In accordance with Condition 20, the CenturyLink ILECs and Qwest agree not to seek an increase in stand-alone flat-rated residential (1FR) tariffed access line rates until the ILECs are operating pursuant to a Commission-approved AFOR or individual AFORs, except in the case of exogenous events.[141] The condition caps the competitively-classified stand-alone business service rates at $30 for three years following the merger closing. The ILECs may petition the Commission to seek recovery from the impact of exogenous events materially affecting their operations as a result of orders issued by the FCC or the Commission.[142]

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[137] *Id.* at ¶ 17.

[138] *Id.* at ¶ 18.

[139] *Id.* at ¶ 19.

[140] *Id.*

[141] *Id.* at ¶ 20.

[142] *Id.*

g. Miscellaneous Conditions

48 Condition 9 requires CenturyLink ILECs and Qwest to comply with all state and federal statutes and regulations relating to affiliated interest transactions.[143] Condition 21 provides that the combined company will notify affected customers should a post-merger rearrangement cause a change in the customer's CenturyLink or QCII long-distance provider.[144] This notification will occur no less than 30 days prior to the transfer and the company will offer customers the option of changing long-distance providers without charging the customer a Primary Interexchange Carrier change charge for a period of 90 days.[145]

49 In accordance with Condition 26, CenturyLink ILECs and Qwest will implement a program with the executive complaint handlers for the treatment of Washington Telephone Assistance Program (WTAP) complaints within 60 days after the closing.[146] This program will include: (1) a root cause analysis indicating the cause of the problem that lead to the complaint; (2) the corrective action the company has taken to remedy the underlying problem; (3) issuance of a three-month service credit to the affected customer at the current applicable WTAP, Lifeline, or Link-up rate, plus any additional credits due to the customer; and (4) upon implementation of the Lifeline credit program, CenturyLink shall provide a quarterly report, broken up by month, that shows the total number of Lifeline complaints received and the total number of Lifeline credits issued.[147] The combined company will also notify WTAP, Lifeline and tribal agencies of any name change decisions.[148]

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[143] *Id.* at ¶ 9.

[144] *Id.* at ¶ 21.

[145] *Id.*

[146] *Id.* at ¶ 26(b).

[147] *Id.* at ¶ 26(b)(iv).

[148] *Id.* at ¶ 26(c).

50 Condition 27 requires the combined company to continue to honor all of the contractual agreements held by Qwest relating to the provision of 911 services.[149] Condition 28 addresses Staff's recommendation that certain rate centers should be consolidated in Washington. In the agreement, the combined company agrees to file tariffs prior to the merger's closing reflecting new rate center names within the following consolidated rate centers: Lake Quinault, Friday Harbor, Kingston, Forks, and Long Beach.[150] CenturyLink will also complete consolidation activities prior to the merger's closing in Puget Island/Cathlamet, and Benge/Ritzville.[151] Finally, the combined company agrees to complete consolidation activities in the following rate centers within 12 months of closing: the Basin City, Mesa, Connell, and Kahlotus rate centers will be consolidated into a new "Connell" rate center; the Mathews, Corner, and Eltopia rate centers will be consolidated into a new "Mathews Corner" rate center; the Chewelah and Hunters rate center will be consolidated into the new "Chewelah" rate center; and the Winthrop and Twisp rate centers will be consolidated into the new "Twisp" rate center.[152]

51 In accordance with Condition 29, the combined company will individually notify its customers, after the merger's closing, detailing the transaction's approval subject to conditions.[153] The combined company also pledges to notify customers of any name change experienced by a CenturyLink ILEC or Qwest.[154]

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[149] *Id.* at ¶ 27.

[150] *Id.* at ¶ 28.

[151] *Id.*

[152] *Id.*

[153] *Id.* at ¶ 29.

[154] *Id.*

4. Joint Applicants and the DoD/FEA Settlement Agreement[155]

52 On December 30, 2010, Joint Applicants and the DoD/FEA filed a settlement agreement that addresses DoD/FEA's concerns about the merger's potential impact on business service rates and service quality provided by the combined company after closing of the transaction. Attachment 1 to the DoD/FEA Settlement is a volume and term pricing plan that will govern future DoD/FEA purchases of services from the combined Washington companies for a three-year period following closing of the merger. The volume and term pricing plan:

- Reflects DoD/FEA's commitment to purchase a certain minimum level of telecommunications services from the combined company over a three-year period in exchange for a price cap on existing business local exchange services over that same period.

- Guarantees that business local exchange service rates will not change unless, collectively, DoD/FEA purchases fall below 90 percent of the level of services that, collectively, it was purchasing from Joint Applicants prior to closing; a level that is defined by the average purchases over the four quarters preceding close of the transaction.[156]

- Requires the combined company to extend any service quality requirements, imposed as part of the Commission's consideration of the transaction, to all services purchased by the DoD/FEA pursuant to the provisions of the settlement agreement.[157]

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[155] DoD/FEA Settlement, Exh. No. 8, is attached and incorporated as Appendix D.

[156] *Id.*

[157] *Id.*

- Addresses terms and conditions for employees holding necessary security clearances and service quality conditions for continuation of certain service presently provided by Joint Applicants to the DoD/FEA.[158]

5. Joint Applicants and tw telecom Settlement Agreement[159]

53 On February 10, 2011, well after conclusion of the hearing in this matter and after submission of post-hearing briefs, Joint Applicants and tw telecom filed a Settlement Agreement that contains largely the same terms and conditions as the Integra Settlement except for six additional provisions specifically tailored to tw telecom's situation. These provisions include:

- In the legacy Qwest ILEC service territory, the combined company shall continue to provide to tw telecom at least the reports of wholesale performance metrics that legacy Qwest made available, or was required to make available, to tw telecom as of the closing date for a period of no less than two years.[160]

- In the legacy Qwest ILEC service territory, the combined company shall continue to provide to tw telecom, under the same terms, the quality of service performance comparable to that which Qwest provided to tw telecom for special access and long-haul services as of the closing date for a period of no less than two years from closing.[161]

- In the legacy Qwest ILEC service territory, the combined company shall continue to participate in special access service and long-haul performance

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[158] *Id.*

[159] The tw telecom Settlement Agreement, Exh. No. 11, is attached and incorporated as Appendix E.

[160] *Id.* at ¶ 1.

[161] *Id.* at ¶ 2.

review meetings with tw telecom at the same frequency level as provided as of the closing date for a period of no less than two years from closing.

- In the legacy Qwest ILEC service territory, the combined company shall extend the Qwest Regional Commitment Plan (RCP) currently opted into by tw telecom through the closing date, including its currently effective term, volume, and rate stability commitments, and for another 12 months beyond the expiration of the then existing term or May 31, 2013, whichever is later, unless tw telecom opts out of this extension.[162]

- The combined company shall continue to provide Internet Protocol (IP) peering[163] consistent with the terms and obligations of the Bi-lateral Peering Agreement as of the closing date for a period of 24 months from closing, provided that tw telecom meets all requirements outlined in the Agreement and otherwise complies with the traffic ratios outlined in Qwest's peering policy found at http://www.qwest.com/legal/peering_na.html as published on the date of this Agreement. Qwest agrees not to change the peering policy published on its website after execution of this Agreement and prior to the closing date. In addition, the combined company and tw telecom shall jointly work on capacity upgrades at no greater than 80 percent utilization per circuit or logical circuit bundle to be completed prior to 90 percent utilization to ensure customer traffic and performance is not adversely impacted.[164]

- The combined company shall continue to offer an Annual Incentive Plan (AIP) program to tw telecom through December 31, 2013. The AIP for 2012 and the AIP for 2013 shall be offered under the same basic terms and

[162] *Id.* at ¶ 4.

[163] "Peering" is the process by which telecommunications carriers exchange IP with service providers operating IP Networks.

[164] *Id.* at ¶ 5.

> conditions in effect as of the closing date, subject to the annual renegotiation of the base revenue, credit tiers, and discounts.[165]

54 Like Integra, with respect to its settlement with Joint Applicants, as a consequence of the conditions agreed to in this settlement, tw telecom no longer objects to approval of the transaction even though it had been, prior to settlement, a participant in the Joint CLEC coalition opposing the transaction.

C. Remaining Opponents of the Transaction

55 Having summarized the five settlement agreements submitted to us for approval, we note that nearly all parties have resolved their concerns with the proposed transaction by virtue of specific conditions or requirements that Joint Applicants have agreed to in exchange for withdrawal of the settling parties' opposition. Now only Sprint and T-Mobile (Joint Wireless Carriers), Joint CLECs, and Cbeyond continue to actively oppose the merger, subject to additional conditions they recommend to address specific concerns, collectively or individually, regarding the merger. All of the remaining concerns voiced by the objecting parties pertain to OSS, wholesale service quality and pricing, interconnection issues, and other wholesale contractual issues that they contend are not reasonably or adequately addressed in any of the above settlement agreements. We now turn to a discussion of the remaining parties' principal objections and suggested remedies to the potential harms they identify.

1. Joint Wireless Carriers' Opposition

56 Joint Wireless Carriers raise a number of concerns with the transaction as well as the various settlement agreements because, they claim, the provisions of the settlements are simply insufficient to effectively prevent harm to the continued existence of a robust competitive marketplace.[166] They point to previous Commission decisions in

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[165] *Id.* at ¶ 6.

[166] Although Joint Wireless Carriers reflect participation of both Sprint and T-Mobile in the instant proceeding, the discussion herein reflects primarily the testimony of Sprint witness James A. Appleby regarding intrastate access charges and other interconnection matters. T-Mobile, which successfully petitioned for late-filed intervention in the proceeding, joined Sprint in its post-hearing brief.

telecommunications merger proceedings where particular aspects of a transaction might distort or impair the continued development of competition. Consequently, Joint Wireless Carriers propose additional conditions pertaining to post-merger intrastate access charge levels, extension of existing ICAs, consolidation and porting requirements for ICAs with any or all of the post-merger CenturyLink ILECs in Washington, and CenturyLink ILEC compliance with the FCC's one-day telephone number porting requirement,

57 With respect to the combined company's post-merger intrastate access charge rates, Sprint witness James A. Appleby points to the disparate intrastate access charge rate levels that exist between the various ILEC subsidiaries operating in Washington. Employing an economic principle commonly known as "owner's economics",[167] Mr. Appleby suggests these disparate rates would harm existing marketplace competition by burdening competitors with access charges that the combined company can avoid through common ownership.[168] This means that QCC, as an indirect subsidiary of CenturyLink, could then price its long-distance services lower and experience an economic advantage over its competitors since it will effectively not have to pay the additional access service charges including subsidies that exist in CenturyLink's existing intrastate access charge rate structure.[169] Should QCC choose to not take

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[167] Owner's economics refers to "the economic benefit of network functions that are available only to the owner of the network facilities." Appleby, Exh. No. JAA-7HCT at 5.

[168] Under "owner's economics," each transaction that occurs between affiliates for handling a long-distance call only incurs the actual cost of network functions as opposed to the full retail access charge assessed to unaffiliated long-distance companies that utilize the same network functions. For example, currently, QCC, QCII's long-distance subsidiary, pays the same intrastate access service rates that other carriers competing in the long-distance market pay when originating or terminating long-distance calls to any of the pre-merger CenturyLink ILECs. In other words, QCC pays the cost of the network function and an additional "inflated access service" charge. Appleby, Exh. No. JAA-1CT, at 6. After closing, because it will be part of the combined company, QCC will only incur the actual cost of access service because the tariffed transaction cost is effectively canceled out when financial statements are consolidated at the combined company's holding company level. *Id.* Although it may pay full tariff rates to its affiliate ILECs, the true cost incurred in handling a long-distance call by the combined company is the much lower economic cost of handling a call.

[169] *Id.*

advantage of this competitive windfall by lowering its retail long-distance pricing, the company may continue to charge the same amount for its telecommunications services such that Washington consumers will not experience the benefits of the transaction.[170] Sprint argues that QCC is not the only subsidiary that will benefit from the new, vertically-integrated company. According to Mr. Appleby, after closing, the combined company's other long-distance subsidiaries such as CenturyTel Long Distance, LLC and Embarq Communications, Inc. will also "enjoy discriminatorily favorable costs for interstate and intrastate switched and special access within [the combined company's] legacy local service territories."[171]

58 Sprint contends that the Joint Applicants' argument that they will not be avoiding access costs because they will continue to maintain separate legal entities after closing is a red-herring because accounting rules require intra-company transactions to be offset, or essentially canceled-out at the ultimate parent company level.[172]

59 As a consequence of the inherent economic advantage, Joint Wireless Carriers recommend that the Commission condition any approval of the proposed transaction upon two requirements.[173] First, each of the pre-merger CenturyLink ILECs should be required to reduce their intrastate switched access rates to mirror Qwest's intrastate access rates and rate structure.[174] Compliance with this condition should occur within 30 days of the transaction's closing.[175] Second, sometime after closing, all of the combined company ILECs, including Qwest, should be required to further reduce

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[170] *Id.* at 7.

[171] Appleby, Exh. No. JAA-1CT, at 7.

[172] Joint Wireless Carriers Final Post-Hearing Brief, at 3.

[173] In their brief, Joint Wireless Carriers point out that one of the specific synergy opportunities identified by Joint Applicants in their own internal merger analysis was the opportunity to consolidate third-party transport services to Qwest's backbone and eliminate in-region termination access costs by bringing traffic on-net. Joint Wireless Carriers Final Post-Hearing Brief, at 3 – 4.

[174] *Id.* at 32.

[175] *Id.*

their intrastate switched access rates to mirror Qwest's interstate switched access rates and rate structure.[176]

60 Joint Wireless Carriers also raise the concern of the impact of the merger on ICAs when combined with Joint Applicants stated intention to maintain separate ILEC operating subsidiaries. They contend that competing carriers could save a tremendous amount of money in contract negotiations and potential arbitrations if the combined company would extend the life of existing wholesale agreements.[177] Because competing carriers, including Joint Wireless Carriers, have multiple ICAs in place with various ILEC subsidiaries of the combined company, they claim that the prospect of having to maintain such agreements across different states or even within Washington, is unduly costly and burdensome, and increases the risk of anticompetitive behavior.[178] As a consequence of the Joint Applicants' intention to retain multiple ILEC subsidiaries, Joint Wireless Carriers suggest that existing ICAs should be extended for four years from the date of closing or for three years after an extension request is granted, whichever is longer.[179] In addition, Joint Wireless Carriers recommend that the Commission require the combined company to permit a CLEC to port an existing ICA in its entirety, whether that ICA was entered into in Washington or another state.[180] This requirement would remain in effect for four years following closing.[181] For any agreement ported over 12 months after the merger, the agreement would remain in effect for 36 months after the request is granted.[182] Joint Wireless Carriers also point out that Condition 3 of the Integra Settlement only extends existing Qwest ICAs in Washington for a three year period

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[176] *Id.*

[177] *Id.* at 38.

[178] Joint Wireless Carriers Final Post-Hearing Brief, at 12.

[179] *Id.*

[180] *Id.* at 40.

[181] *Id.* at 41.

[182] *Id.*

following closing. They contend this provision should also apply to all existing CenturyLink ICAs in place in Washington at the time of closing.

61 In addition to extending Washington ICAs, Joint Wireless Carriers urge the Commission to require the combined company to allow competitors to consolidate ICAs or move to a common agreement among CenturyLink ILEC subsidiaries, either directly or by porting ICAs, to reduce the cost of managing separate agreements and interconnection arrangements. These requirements would allow competitors and the combined company to derive significant efficiencies and rationalize interconnection arrangements between competitors and the combined company's Washington ILEC operations.[183]

62 Regarding telephone number portability, Joint Wireless Carriers point out that Qwest currently provides one-day local number porting in accordance with FCC requirements.[184] However, CenturyLink has requested that the FCC delay implementation of the one-day local number porting standard.[185] Joint Wireless Carriers argue that any extension of the one-day standard in local number porting "delays customers who wish to switch carriers, causing some customers not to switch at all."[186] As a condition of merger approval, they propose that the Commission require CenturyLink to implement the one-day standard no later than February 2, 2011.[187]

63 Finally, Joint Wireless Carriers propose that the Commission's order in this proceeding specify that: (1) the Commission will have jurisdiction to enforce the merger conditions, (2) customers of the carriers will have standing to complain to the Commission if the conditions are violated, and (3) the combined company will be

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[183] Joint Wireless Carriers Final Post-Hearing Brief, at 16.

[184] *Id.* at 43.

[185] *Id.*

[186] *Id.*

[187] *Id.*

required to pay the carrier customers' attorney fees if the carrier customers are successful.[188]

64 Joint Wireless Carriers also endorse all of the conditions recommended by Joint CLECs.

2. Opposition of Joint CLECs

65 Joint CLECs present several witnesses in opposition to the Integra Settlement and the Staff/Public Counsel Settlement. Their principal witness, Mr. Timothy Gates, testifies that the settlements do not adequately address the proposed transaction's potentially harmful effect on local competition.[189] His testimony targets five criticisms of the settlements: (1) inadequate extension of Qwest's OSS, (2) inadequate extension of certain wholesale agreements, (3) failure to include an Additional Performance Assurance Plan (APAP), (4) inadequate moratoriums on non-impairment filings and forbearance petitions, and (5) the lack of a "Most Favored State" condition.[190]

66 Mr. Gates argues that the Qwest OSS should remain in place and continue to be offered to wholesale customers in the Qwest legacy territory for a minimum of three years, rather than the two-year minimum contained in the Integra and Staff/Public Counsel agreements.[191] Mr. Gates contends that two years does not adequately cover the synergy timeframe estimated by Joint Applicants,[192] which they have projected

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[188] *Id.* at 45.

[189] Gates, Exh. No. TJG-20CT, at 3. Mr. Gates points out that the Staff/Public Counsel Settlement primarily focuses on retail issues in contrast to the Oregon settlement reached with that commission's staff which includes extensive wholesale conditions.

[190] *Id.* at 4. The "Most Favored State" condition Mr. Gates references would allow the Commission to impose additional conditions that may be adopted by other state commissions subsequent to a Commission decision in this proceeding.

[191] *Id.* at 12.

[192] *Id.* at 13.

will be realized over a three to five year period after closing.[193] Mr. Gates contends a three-year timeframe would more reasonably protect the interests of wholesale customers "throughout the time that merger-related changes are occurring in order to insulate them from the tendencies of the [combined company] to seek to extract OSS synergies and unwarranted market advantages at the expense of competitors and competition."[194] He also argues that the two-year time frame during which Joint Applicants have pledged to maintain the Qwest OSS "would provide the means for the [combined company] to act upon its incentive to integrate OSS in such a way that degrades the quality or access by CLECs."[195]

67 With regard to any replacement of the Qwest OSS used for wholesale service purposes, Mr. Gates suggests that the Commission require the combined company to conduct third-party testing of the new system to assure no degradation to current performance levels at commercial volumes.[196] He notes that the company has specifically stated that it will not provide this level of testing and assurance absent a requirement to do so.[197] Mr. Gates points out that the existing Qwest OSS went through extensive testing during the course of the Section 271 proceedings involving Qwest's entry into the interLATA long-distance market.[198] He contrasts this condition with the fact that CenturyLink's current OSS has never been rigorously tested, and suggests it is unlikely to be able to handle the commercial volumes

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[193] *Id.*

[194] *Id.* at 15.

[195] *Id.*

[196] *Id.* at 20.

[197] *Id.*

[198] *Id.* at 19. LATA means "Local Access and Transport Area". It is a term used for regulatory purposes and represents geographical areas of the United States that were designated pursuant to the breakup of the original bell system into the separate entities, BOCs. Generally, LATAs were areas within which a BOC could offer local telephone service and long distance calling. BOCs were prohibited from providing long distance calls between LATAs (interLATA) until certain federal approvals were obtained. In this state, Qwest, the successor in interest to US West which was one of the original seven BOCs formed at divestiture, has authority to provide interLATA services.

processed by Qwest's legacy OSS.[199] Mr. Gates dismisses CenturyLink's claim that it rigorously tests its own OSS and contends that such testing cannot replace the independence and objectivity of third-party testing.[200] Furthermore, Mr. Gates recommends that the Commission impose a condition to "ensure that Qwest's current OSS operational capabilities and functionalities are benchmarked so that any successor OSS does not allow the combined company to backslide on wholesale service quality performance."[201] He contends that if CenturyLink is allowed to import its OSS for use in Qwest's legacy service territory, in effect, going from a tested OSS to a non-tested OSS, then the result likely would be Qwest backsliding on its Section 271 obligations to wholesale customers.[202] As a result, Mr. Gates recommends that the Commission require third-party testing of any replacement OSS and benchmark Qwest's OSS functionality and operational capabilities to ensure that these important competition-supporting properties are not degraded or lost in any post-transaction activity.[203]

68 Mr. Gates also addresses the period of time that non-UNE wholesale service agreements will be available to competitors after closing without changes in terms and conditions, revisions to termination or grandfathering provisions, or an increase in rates. The time periods agreed to in the Integra Settlement dealing with the extension of non-unbundled network element (UNE) agreements range from 12 months for wholesale service tariff provisions to 18 months for commercial and other wholesale service agreements.[204] Mr. Gates contends these time periods discriminate against CLECs that rely on non-UNE agreements, versus CLECs such as Integra that purchase wholesale services as UNEs, because the latter group has received assurance

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[199] *Id.*

[200] *Id.* at 20.

[201] *Id.* at 21.

[202] *Id.*

[203] *Id.* at 22.

[204] *Id.* at 25.

of the continued stability of the terms and conditions of their agreements for a full three-year period following closing.[205]

69 According to Mr. Gates, the shorter extension period agreed to by Joint Applicants for non-UNE agreements indicates that the combined company intends to raise rates for these services shortly after expiration of the extension provided in the Integra Settlement.[206] Mr. Gates argues that Qwest dominates the wholesale market and has an incentive to maximize profits for its shareholders.[207] Coupling this incentive with the lack of actual examples where ILECs have voluntarily offered wholesale services at competitive rates, Mr. Gates contends that market forces alone will not keep the combined company's wholesale service prices down.[208]

70 Mr. Gates notes that one of the principal non-UNE elements of competition is special access service, which CLECs use and rely upon to extend the reach and scope of their competitive service offerings. Like the three-year extension allowed for ICAs in the Integra Settlement, Mr. Gates proposes that the Commission also require that Qwest RCPs be extended for three years.[209] He states that Qwest recently introduced a new RCP that drastically reduces discounts from the prior RCP, and therefore increases CLEC costs of using special access services as a means of competing with the retail service offerings of the combined company.[210] Under the Integra Settlement, current RCPs would only be available for 12 months after the expiration of the existing term.[211] Mr. Gates maintains that a 12 month extension may work well for Integra

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[205] *Id.*

[206] *Id.* at 30.

[207] *Id.* at 28.

[208] *Id.*

[209] *Id.* at 30. An RCP is an optional pricing plan that provides interstate special access customers discounted rates for committing to minimum monthly recurring revenue on DS1 and/or DS3 circuits for 48 months. *Id.*

[210] *Id.* at 31.

[211] *Id.*

and others whose RCP does not expire until 2013 or later, but Joint CLECs such as tw telecom have RCPs that are set to expire much sooner.[212] According to Mr. Gates, this situation will require tw telecom to begin paying higher RCP rates long before other CLEC competitors.[213]

71 Further, Mr. Gates notes that there is some confusion regarding which CLEC agreements are eligible for the extension in the first place.[214] Prior to introducing the new RCP, Qwest grandfathered the previous RCP in June 2010.[215] The Integra Settlement provision extending its RCP for 12 months did so for plans offered by Qwest as of the transaction's closing. According to Mr. Gates, Qwest views the existing RCPs as grandfathered and no longer offered by the company.[216] Therefore, Qwest does not believe that the agreements are eligible for extension under the provisions of the Integra Settlement.[217] Mr. Gates recommends that the Commission declare that non-UNE wholesale agreements and tariffs in place at the time of the merger filing, or at least in effect at the end of the current year, should be included in the agreements extended for a period of three years.[218]

72 Mr. Gates further states that the Integra Settlement does not alleviate Joint CLECs concerns regarding adequate conditions for reliable post-closing wholesale service quality of the combined company. He specifically notes that the Integra Settlement fails to require an APAP as recommended by Joint CLECs. Mr. Gates points out that a distinct advantage of the Joint CLECs' APAP requirement, is that it would "compare the [combined company's] monthly post-closing wholesale service performance with Qwest's wholesale service performance for the twelve month

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[212] *Id.*

[213] *Id.*

[214] *Id.* at 32.

[215] *Id.* at 31.

[216] *Id.* at 32.

[217] *Id.*

[218] *Id.* at 34.

period prior to the merger filing date."[219] The purpose of the comparison is to determine whether a significant deterioration in performance has occurred.[220]

73 While the Integra Settlement would leave in place for three years the existing QPAP in Washington, Mr. Gates contends that, unlike the APAP, the QPAP is not designed to measure and provide direct remedies for any merger-related wholesale service quality deterioration that occurs.[221] In addition, Mr. Gates notes that the APAP provides monetary remedies for service quality deterioration that can be directly attributed to the merger.[222] The Integra Settlement does not provide for continuing comparisons between pre- and post-merger wholesale service quality.[223]

74 Mr. Gates also takes issue with Condition 8 of the Integra Settlement that provides that Qwest will not seek to obtain 'unimpaired' status for any of its wire centers or file any new petitions for forbearance under Sections 251 or 271 of the Act before June 1, 2012. Mr. Gates argues that this 15 month time period does not sufficiently mirror the three to five year synergy savings timeframe.[224] He asserts that no reasons have been given for the 15 month moratorium.[225] Therefore, he recommends that the Commission extend the moratorium to at least three years following closing.[226]

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[219] *Id.* at 41.

[220] *Id.* at 42.

[221] *Id.* at 43.

[222] *Id.*

[223] *Id.* at 44. The Integra Settlement would measure service quality on a rolling average basis, so that, after the first three months following closing, each successive month will be added to the average performance. Therefore, the only true measure of pre-merger performance compared to post-merger performance occurs in those first three months. *Id.*

[224] *Id.* at 47.

[225] *Id.*

[226] *Id.*

75 Finally, Mr. Gates advocates for the adoption of a Most Favored State condition. This condition would allow the Commission to expand the protections it imposes upon the transaction following its final order, depending upon the actions of other states.[227] He suggests that, in the alternative, the Commission could wait until every other state has acted before entering a final order so as to assure that it has provided Washington consumers with the maximum benefits and protections.[228]

76 Billy H. Pruitt, on behalf of Charter and Joint CLECs, argues that the Integra Settlement only protects the competitive interests of Integra, and not the interests of other CLECs that have different modes of competitive entry and areas where they compete with Joint Applicants. He points out that unlike Integra, which competes principally in Qwest territory, Charter actively competes in many CenturyLink ILEC service areas. Thus, he distinguishes the Integra Settlement's Qwest-centric post-merger conditions from conditions that should be applied in areas where competitors compete with CenturyLink ILECs.

77 As an example of this difference, Mr. Pruitt raises the issue of whether CLECs should have the right to utilize a single point of interconnection (POI) per LATA. He asserts that CenturyLink has historically forced CLECs to establish multiple POIs per LATA, a practice he characterizes as "burdensome, costly, and inefficient."[229] This condition, Mr. Pruitt contends, would only apply in areas where the combined company has facilities that connect multiple affiliates in a single LATA.[230] He argues that, if the combined company has the ability to carry its own traffic between such areas, then it should be required to carry the traffic of competitors who choose to interconnect at a single POI.[231] He also contends this requirement comports with the non-discrimination standard in Section 251 of the Act which requires that ILECs

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[227] *Id.* at 49.

[228] *Id.* at 51.

[229] *Id.* at 14.

[230] *Id.* at 15.

[231] *Id.*

provide interconnection to CLECs on terms equivalent to those the ILECs provide to themselves.[232]

78 Mr. Pruitt next raises concerns over CenturyLink's potential assertion of the rural exemption with respect to certain interconnection obligations of ILECs. He claims that three of CenturyLink's four Washington affiliates currently operate under the rural exemption[233] and that CenturyLink's assertion of the exemption increases operational costs for CLECs attempting to interconnect with CenturyLink.[234] Mr. Pruitt claims that, in other states, CenturyLink has aggressively used its exemption to refuse CLEC requests for a single POI.[235]

79 Like Joint Wireless Carriers, Mr. Pruitt contests the fact that the Integra Settlement does not include a provision allowing CLECs "to adopt, or opt-into, an interconnection agreement to which Qwest is a party, in the same state, or in any state to which Qwest is an ILEC, subject to state-commission required terms and pricing being included in the ported agreement."[236] He points out that CLECs, like Charter, operating in many of the Joint Applicants' service territories, have different ICAs in different states.[237]

80 Finally, Mr. Pruitt suggests that the Commission also condition its approval upon the combined company's agreement to comply with existing federal law and provide nondiscriminatory access to directory listing and directory assistance.[238] Based on Charter's experience with CenturyLink in other states, Mr. Pruitt claims the combined company will likely attempt to shift its directory listing and directory assistance

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[232] *Id.*

[233] *Id.* at 16.

[234] *Id.* at 17.

[235] *Id.*

[236] Pruitt, Exh. No. BHP-18CT, at 13.

[237] *Id.*

[238] *Id.* at 18.

responsibilities to a third-party vendor in a manner that allows it to attempt to avoid its obligations under Section 251(b)(3) of the Act.[239]

81 Collectively, through the supplemental testimony of Mr. Gates and Mr. Pruitt, Joint CLECs recommend that the proposed merger, regardless of the conditions contained in each of the settlement agreements, be denied unless the Commission modifies or augments certain terms of the Staff/Public Counsel and Integra Settlements to include the following additional requirements:

- The combined company should be required to use and offer to wholesale customers the legacy Qwest OSS for at least three years.[240]

- Robust, transparent third-party testing should be conducted for any OSS that replaces a Qwest system that was subject to third-party testing; and the replacement OSS should be required to perform at current performance levels (which will be benchmarked to measure future performance).[241]

- The Applicable Time Periods for extension of non-UNE commercial and wholesale agreements and tariffs should be the Defined Time Period[242] initially proposed by Joint CLECs, or at least three years.[243]

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[239] *Id.*

[240] Gates, Exh. No. TJG-20CT at 6.

[241] *Id.*

[242] Defined Time Period is defined in Exhibit No. TJG-9 as follows: "a time period of at least 5-7 years after the Closing Date or, alternatively, a time period that is a minimum of 42 months (*i.e.*, 3.5 years) and continues thereafter until the [Joint] Applicants are granted Section 10 forbearance from the condition. With respect to agreements, the Defined Time Period applies whether or not the initial or current term of an agreement has expired ('evergreen' status)." Gates, Exh. No.TJG-9 at 1 (footnotes omitted).

[243] *Id.*

- The extension of non-UNE commercial and wholesale agreements and tariffs, including term and volume discount plans, should apply to wholesale agreements in place as of the merger filing date, not the closing date of the transaction.[244]

- The APAP should be adopted by the Commission as an overlay or additional and complementary wholesale service quality mechanism to the QPAP.[245]

- The moratorium on any requests to reclassify wire centers as "non-impaired" and requests for forbearance should apply for the Defined Time Period initially proposed by Joint CLECs, or at least three years.[246]

- A Most Favored State condition should be adopted to address any different merger requirements adopted subsequent to the Commission's order.[247]

- A merger condition should be adopted that prevents CenturyLink from avoiding its obligations as an ILEC under Section 251(c) by using the rural exemption contained in Section 251 (f)(1) as a shield against network interconnection obligations which are designed to promote competition.[248]

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[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.* at 3.

- A condition that provides CLECs with the right to utilize a single POI per LATA for all of the combined company's subsidiaries operating within a LATA but limited to areas where the combined company physically interconnects the networks of its affiliates within a LATA.[249]

- A commitment from the combined company that it will comply with federal and state law as it relates to its directory assistance and directory listings responsibilities in all of its ILEC territories, as Qwest currently does today.[250]

- A condition that permits a competitor to adopt, or opt-into, any ICA to which Qwest is a party, in the same state, or in any state to which Qwest is an ILEC.[251]

II. Discussion and Decision

A. Introduction

82 CenturyLink's proposal to acquire and operate Qwest involves the largest ILEC operating in Washington and affects telecommunication services statewide. This transaction comes on the heels of last year's acquisition of Verizon Northwest, Inc., by Frontier Communications Corporation[252] and the aforementioned merger between CenturyTel, Inc. and Embarq Corporation in 2009.[253] Whether measured by its cost

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications 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 (April 16, 2010).

[253] *In the Matter of the Joint Application of Embarq Corporation and CenturyTel, Inc. for Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq and Embarq Communications, Inc.,* Docket UT-082119 (May 28, 2009).

or by the number of customers it touches, it is the largest telecommunications acquisition since US West, Inc. was acquired by Qwest in 2000.[254] Given its substantial impact to the state's telecommunications industry, a number of telecommunications companies and customers intervened and filed testimony. Commission Staff and Public Counsel also filed testimony. All parties but the Joint Applicants opposed approval of the transaction.

83 It is notable that most of these parties have successfully negotiated agreements resolving their concerns regarding the proposed transaction. Along with Joint Applicants, they now contend that we should approve the transaction subject to the numerous conditions set forth in their settlement agreements. Collectively, the settling parties contend that the settlement conditions adequately address potential merger-related harms. They assert that these settlement conditions once approved, produce a transaction that is consistent with the 'no harm' standard of review under the Commission's public interest test, and provide the legal foundation for its ultimate approval.[255]

84 On the other hand, a group of Joint CLECs continue to oppose the transaction and seek additional merger conditions to address the issues they believe remain unresolved or are not satisfactorily addressed by the settlement agreements submitted by other parties. Additionally, despite the settling parties' progress in resolving issues they believe important, the Commission has identified a number of additional issues it deems relevant to its evaluation of the proposed transaction. These issues, fifteen in all, pertain to the combined company's post-closing treatment of wholesale customers and competitors and certain regulatory expectations of the Commission following closing of the transaction. They include: (1) the continued use of legacy Qwest's

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[254] *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 No. UT-991358, Ninth Supplemental Order (June 19, 2000).

[255] They also note that some of the commitments in the settlement agreements are patterned after provisions developed in connection with similar transactions the Commission has approved in recent years, while others go further and are more comprehensive than those previously found protective of the public interest.

OSS and third-party testing should the combined company desire to replace the current system; (2) the status of CenturyLink's rural exemption following the merger; (3) regulatory consolidation of the combined company's subsidiaries; (4) consolidation of and opportunity to port existing ICAs within the service territories of legacy Qwest and CenturyLink's ILECs; (5) adoption of the APAP as an overlay to Qwest's existing QPAP; (6) adoption of a merger requirement that the combined company ensure Qwest's continued compliance with federal and state law relating to directory assistance and directory listings and that Qwest's current nondiscriminatory practice apply in legacy CenturyLink territory; (7) allowing interconnection with the combined company's network through a single POI per LATA; (8) extension of non-UNE wholesale and commercial agreements for at least three years, and inclusion of all Regional Commitment Plans (RCPs) within this extension; (9) an additional period of time for a moratorium on any non-impairment and forbearance filings on behalf of Qwest; (10) adoption of a Most Favored State provision; (11) conditions applying to compensation for virtual NXX (VNXX) traffic and non-discriminatory offering to all CLECs for termination of Voice over Internet Protocol (VoIP) traffic on the same rates, terms, and conditions offered to other competitors; (12) the timing and terms of an earnings review and AFOR proceeding involving the combined company; (13) intrastate access charge rate reductions such that CenturyLink's rates are reduced to Qwest intrastate levels and then to interstate levels some time after closing; (14) Commission review prior to the combined company's encumbrance of assets; and (15) provisions pertaining to broadband deployment.

85 Additionally, we will address issues raised by non-parties, the Confederated Tribes of the Colville Reservation (Colville Tribes) and the Affiliated Tribes of Northwest Indians (ATNI), relating to existing telephone service quality and lack of access to broadband service.

86 On March 4, 2011, Joint Applicants and a group of Minnesota CLECs[256] filed a settlement agreement with the Minnesota Public Utilities Commission that modifies several provisions of the Integra Settlement previously been entered into both in the

[256] These CLECs include: McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services; OrbitCom, Inc.; US Link. Inc., d/b/a TDS Metrocom; POPP.com, Inc., Velocity Telephone, Inc.; and Charter Fiberlink, CCO, LLC.

Minnesota and in the Washington proceedings (Minnesota Settlement).[257] We take administrative notice of the provisions of that agreement.[258] The Minnesota Settlement, among other things, addresses commitments relating to OSS, single point of interconnection, and petitions for non-impairment or forbearance. It states that "unless otherwise indicated," the terms of the settlement "apply throughout the Qwest ILEC 14-state territory."[259] To the extent that some of the provisions of that Settlement extend the time frames for the fulfillment of certain commitments also made in Washington in the Integra Settlement, we incorporate those new time frames into this Order.[260]

87 We find that the settlement agreements, attached as Appendices A – E to this Order, as modified in the discussion below, fairly resolve most, but not all, of the issues presented for our consideration in this proceeding. As discussed below, we find the proposed transaction, subject to the commitments in the settlement agreements, as modified in this Order, and as further conditioned below, to be consistent with the public interest and will result in no net harm. Accordingly, we approve the proposed transaction subject to the specific terms of the settlement agreements as modified by this Order, and subject to certain additional conditions we apply to Joint Applicants. Our resolution of each remaining issue is discussed below.

B. Standard of Review for Property Transfers

88 The Commission's authority and responsibility regarding transfers of ownership and control of public services companies are found in RCW 80.12 and WAC 480-143.[261]

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[257] *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, Minnesota Public Utilities Commission Docket No. P-421, et. al./PA-10-456, Settlement Agreement Between Joint Petitioners and Joint CLECs, (March 4, 2011).

[258] On March 8, 2010, the ALJ in this proceeding provided notice of the Commission's intent to take administrative notice of that settlement pursuant to WAC 480-07-495(2)(c). No party objected to the noticing of the Minnesota Settlement.

[259] Minnesota Settlement at 2.

[260] Specifically, we adopt the agreed-to time extensions in paragraphs 1(A), 1(B), 1(C), and 3.

[261] RCW 80.12.020 states:

These statutes and rules require Commission approval whenever a public service company proposes consolidation with another company. The standard governing our review is:

> If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not consistent with the public interest, it shall deny the application.[262]

89 In the *US West/Qwest* Merger Order, the Commission noted:

> There is no bright line against which to measure whether a particular transaction meets the public interest standard. As we observed in another recent merger case, "the approach for determining what is in the public interest varies with the form of the transaction and the attending circumstances." As in prior merger cases, we must be concerned here with whether the transaction might distort or impair the development of competitive markets where such markets can effectively deliver affordable, efficient, reliable, and available service. We turn now to a review of what is proposed, mindful that the transaction, if approved, should strike a balance among the interests of customers, shareholders, and the broader public that is fair and that

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> No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchise, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchise, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do.

RCW 80.12.030 provides that "[a]ny such sale, lease, assignment, or other disposition, merger or consolidation made without authority of the commission shall be void."

[262] WAC 480-143-170.

> preserves affordable, efficient, reliable, and available telecommunications service to Washington customers.[263]

90 In particular, the Commission has historically considered proposed telecommunications mergers in light of six factors that go to the heart of whether the transaction is in the public interest:

- The impact on competition at the wholesale and retail level, including whether the transaction might distort or impair the development of competition.
- Whether the surviving corporation has the technical, managerial and financial capability to operate the operating subsidiary.
- The potential impact on service quality, including the impact on investment in Washington and neglect and abandonment of facilities.
- How any benefits or synergies would be shared between customers and shareholders.
- The financial impacts of the proposed merger on cost of capital, capital structure, and access to financial markets; and
- The impact of the merger on rates, terms, and conditions of service.[264]

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[263] *In the Matter of the Joint Application of Verizon Communications Inc. and MCI, Inc., for Approval of Agreement and Plan of Merger* (Verizon/MCI Merger Order), Docket No. UT-050814, Order No. 07, ¶57 (December 23, 2005), *citing In re Application of US WEST Inc. and Qwest Communications International, Inc.*, Docket No. UT-991358, 9th Supplemental Order, ¶¶ 26-27 (June 19, 2000).

[264] *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications 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, ¶ 117 (April 16, 2010), (Verizon/Frontier Merger Order), *citing* Verizon/MCI Merger Order, ¶ 58.

91 Thus, we must assess the proposed transaction's impact on the interests of customers, shareholders, competitors, and the broader public.[265] It is our responsibility to determine if the transaction is consistent with the public interest balancing the proposed merger's costs and benefits for the public and for affected customers.[266] When the costs outweigh the transaction's benefits, the result is harm, and we will deny or condition the approval so no net harm is felt by those we seek to protect.[267]

C. Federal and State Policies Relevant to the "Public Interest"

92 In a broader context, we note that the Act resulted in competitive entry into local exchange markets under provisions allowing new entrant competitors to use portions of ILEC networks and services. Among the Act's various provisions were a full range of wholesale service requirements that, subject to subsequent rules established by the FCC, mandated competitor access to ILEC networks.[268] These subsequent rulings also addressed access of competitors to ILEC computer systems and operational processes used to facilitate pre-ordering, ordering, installation, maintenance, and billing of wholesale services.[269] To a large extent these provisions of the Act and FCC rulings advanced local telephone service competition significantly.

93 At the state level, among the factors we consider in evaluating transactions brought to us for approval, are the provisions of RCW 80.36.300 which set forth a number of

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[265] *Id. at* ¶ 118.

[266] *Id.*

[267] *Id.*

[268] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, Released August 8, 1996 ("*Local Competition Order"*).

[269] *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming,* Memorandum Opinion and Order, WC Docket No. 02-314, FCC 02-332, Released December 23, 2002 ("Qwest 9 State 271 Order"); WUTC Dockets UT-003022 and UT-003040 (consolidated), 39th Supplemental Order, (July 1, 2002).

components of state telecommunications policy two of which speak directly to telecommunications competition and the need for effective wholesale service conditions: "the policies to "[m]aintain and advance the efficiency and availability of telecommunications service[270] and to [p]romote diversity in the supply of telecommunications services and products in telecommunications market throughout the state."[271]

94 An ILEC merger like the one between CenturyLink and Qwest in this case has unique and profound public interest implications relating to these policies. Absent rigorous scrutiny and establishment of meaningful conditions, the merger could very well disturb the existing wholesale relationship between the two merging ILECs and their competitors and produce harmful competitive conditions in Washington. This is possible because of the dual role with respect to their competitors as both retail competitors and suppliers of important wholesale facilities and services.

95 We agree with Joint CLECs that there is a strong incentive for the combined company to undermine wholesale service commitments through efforts to extract monopoly-like rates for its wholesale services, impose unreasonable terms and conditions in its ICAs and wholesale contracts, and weaken overall wholesale service quality. Should we allow an environment where these are likely to occur, in whole or part, we fear harm to the existing telecommunications market in Washington.

96 In this proceeding, the record is clear that there are marked differences in the wholesale service delivery capabilities of the acquiring entity, CenturyLink, and the company being acquired, Qwest. Qwest is the legacy BOC whose wholesale services and interconnection terms and conditions were established pursuant to rigorous and extensively detailed regulatory proceedings intended to facilitate local telephone service competition.[272] On the other hand, although CenturyLink is a national

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[270] RCW 80.36.300(2).

[271] RCW 80.36.300(5).

[272] Some of the proceedings also involved specific measures designed to prevent back-sliding on wholesale service delivery requirements after the company successfully obtained federal and state authority to enter the interstate interLATA long distance market. *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA*

telecommunications carrier that is also subject to significant wholesale service delivery obligations and systems, it is undeniable that its wholesale service delivery systems, particularly its OSS, have not been subject to the same level or degree of regulatory inquiry and testing that has been applied to Qwest. For this reason, we view the transaction as creating a risk that CenturyLink may not provide the quality and functionality of wholesale service now afforded by Qwest.[273] Simply stated, the regulatory histories of the two companies raise concerns about the effectiveness of the combined company's post-merger wholesale service offerings.

97 Because CenturyLink's acquisition of Qwest could disturb or impair the existing wholesale services market and the availability of non-discriminatory competitive arrangements, we believe specific conditions are necessary to safeguard the effectiveness of wholesale service offerings on which competitors rely in order to preserve the benefits afforded retail customers by robust and effective competition.

98 Reflecting the importance of meaningful wholesale service commitments, we are presented with two major settlement agreements (the Integra Settlement and Staff/Public Counsel Settlement) that address wholesale service quality issues including provisions that address certain post-closing OSS and interconnection arrangements of the merging companies.[274] The Integra Settlement contains a range of wholesale and OSS conditions to which Joint Applicants have agreed in exchange for Integra's withdrawal of its opposition to the proposed transaction. A witness for Integra indicated that the settlement agreement it reached with Joint Applicants resolves Integra's concerns regarding wholesale and OSS delivery primarily within

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Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming. Memorandum Opinion and Order, WC Docket No. 02-314, FCC 02-332, Released December 23, 2002 ("Qwest 9 State 271 Order"); WUTC Dockets UT-003022 and UT-003040 (consolidated), 39th Supplemental Order, (July 1, 2002).

[273] In reviewing the transaction, our role must include consideration of the risk or potential harm to local telephone service competition given the disparities in operational capabilities and wholesale service responsibilities that exist between the companies prior to the merger.

[274] Three other settlements address certain wholesale service issues but to a large extent their provisions are effectively encompassed by the provisions of the Integra and Staff/Public Counsel Settlements.

Qwest's pre-merger operating territory, the area which happens to be where Integra largely competes in Washington.[275] During the course of the hearing Integra's witness admitted that, for the most part, the Integra Settlement has no effect on provisions intended to address wholesale service conditions within the pre-merger CenturyLink territory in Washington, except to the extent that it memorializes existing pre-merger wholesale service arrangements.[276]

99 The Staff/Public Counsel Settlement also addresses wholesale service and OSS issues although not to the same level of detail as the Integra Settlement. Through several provisions of proposed Condition 23 ("OSS – Wholesale"), Staff and Public Counsel address, among other issues, requirements for post-closing use of Qwest OSS for at least a two-year period following closing and the specific process that must be followed for any replacement OSS including migration to any new OSS interface or to an existing CenturyLink OSS. They also address any post-closing efforts to integrate any billing systems that implicate wholesale service delivery. These conditions largely mirror the process set forth in Condition 12 of the Integra Settlement.

100 Notwithstanding the terms of the Integra and Staff/Public Counsel settlements, Joint CLECs maintain their opposition to the proposed transaction unless the Commission adopts a number of additional conditions that enhance the wholesale service and interconnection provisions of the existing settlements.

101 Joint CLECs claim that the combined company would have a strong incentive to cut costs and increase its revenues to achieve the substantial synergies which are a material factor underlying the economic basis for the contemplated transaction.[277] They point out that the combined company will be under intense pressure from its investors and Wall Street analysts to increase revenue to cover the substantial debt

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[275] The terms of the Integra Settlement are discussed in Section B2. There are 15 distinct elements to the Integra Settlement some of which include a variety of sub-elements addressing wholesale service delivery, OSS, and interconnection matters.

[276] Denney, TR 382 – 384.

[277] Joint CLEC's Brief on Additional Issues, at 6.

costs associated with the transaction as well as to pay dividends that were promised to post-merger shareholders.[278] They suggest this incentive may imperil the continued availability of wholesale facilities and interconnection as the combined company would be motivated to maximize profit from its retail service offerings by impairing wholesale services and therefore its competitors. More directly, this same motivation could lead to unreasonable rate increases for wholesale services. Consequently, Joint CLECs argue that CenturyLink's financial incentive to eliminate or reduce the quality of and increase the prices for wholesale services should be offset or addressed by equally strong conditions to protect the public interest. Unlike the timeframes generally set forth in the Integra and Staff/Public Counsel Settlements, Joint CLECs suggest the additional conditions they recommend should continue for at least the three to five year period over which the combined company expects to achieve the substantial merger synergies set forth in the testimony of Joint Applicants' own witnesses.[279]

102 In the sections that follow, we discuss each of the proposed additional conditions advocated by Joint CLECs, PacWest, and Joint Wireless Carriers, as well as other issues. We adopt, reject, or modify them based on our evaluation of the public interest aspects of the merger.

D. Issues

1. Operational Support Systems - Timeframe for Replacement of Qwest OSS and Testing.

103 *Positions of the Parties.* Joint CLECs contend that, in the Qwest legacy territory, the Commission should require the Combined Company to use and offer to wholesale customers the legacy Qwest OSS for a minimum of three years following merger closing date.[280] This recommendation is based on the earliest stage of the three to five year "synergy timeframe" that CenturyLink predicts it will take to achieve the

[278] Ankum, Exh. No. AHA-1T, at 46.

[279] Joint CLEC's Brief on Additional Issues, at 2.

[280] *Id.*

integration and operational synergies associated with the transaction.[281] Joint CLECs oppose as inadequate the provisions of the Staff/Public Counsel and Integra settlements that only require the Combined Company to use and offer to wholesale customers the legacy Qwest OSS for at least two years following closing or until July 1, 2013, whichever is later. They claim the timeframe in both settlements is inadequate because it does not even reach the minimum synergy timeframe Joint Applicants have predicted.[282]

104 In support of their position, Joint CLECs point out that many CLECs have developed their own internal interfaces and back-office systems for the specific purpose of electronically bonding and exchanging information with Qwest's existing application-to-application OSS.[283] While some CLECs, including Integra, use Qwest's Graphical User Interface OSS to submit orders, many other CLECs use Qwest's application-to-application (XML) OSS or some combination of both OSS depending on the function. Joint CLECs go on to state that Qwest's systems are naturally more complex than comparable systems presently operated by CenturyLink, and that some CLECs have developed their own internal Qwest-facing OSS interfaces, systems and software to improve provisioning of orders. For these reasons, they simply need more time than two years to adjust to any post-merger changes to Qwest's existing OSS,[284] and suggest this is a fundamental concern about the transaction's potential effects in Washington given the extent to which CLECs currently rely on Qwest's application-to-application OSS. They criticize the two-year timeframe set forth in the Integra Settlement, contending that it reflects one CLEC's decision to accept a two year extension of Qwest's OSS as a compromise for receiving other conditions conducive

[281] The "synergy timeframe" is the time period during which the Combined Company will be integrating and making merger-related changes to achieve synergy cost savings. CenturyLink has stated that it anticipates total synergy savings of $625 million to be "fully recognized over a three-to-five year period following closing." According to Joint CLECs, the initial three years after closing of the transaction reflects the time period during which consumers and CLECs will be most at risk as a result of the integration activities.

[282] *Id.*

[283] Gates, Exh. No. TJG-20CT at 12.

[284] *Id.* at 11.

to its particular business interests; namely, the line conditioning commitment of the same settlement.[285]

105 To meet their needs, they contend that Qwest's OSS should be available to them for three years after close of the transaction. They argue this timeframe is reasonable because it is based on CenturyLink's own projections of the timeframe necessary to realize initial synergy benefits. As Joint CLECs observe, the combined company's integration efforts will extend beyond two years, which means that the time period may be too short to adequately address merger-related harms.[286]

106 Joint CLECs offer Qwest's Section 271 experience as additional support for their position, noting that it took more than three years just to test and evaluate Qwest's OSS to determine if it was sufficient to meet the requirements of Section 271.[287] Therefore, if the combined company seeks to replace Qwest's OSS after the merger, they claim it is also "reasonable to assume that it will take at least three years: (i) to decide which OSS the combined company intends to use going forward, (ii) to make changes to Qwest's OSS, (iii) to test and evaluate the new OSS to ensure that it can handle the commercial volumes in Qwest's territory and continue providing functionality equal to current benchmarked standards, (iv) to allow cooperative testing of the systems with the CLECs to ensure that they meet CLEC needs; and (v) to enable CLECs to develop internal systems to interface with the new OSS systems."[288]

107 In summary, the Joint CLECs contend their request to make Qwest's OSS available for one year longer than that set forth in the settlements is perfectly reasonable, particularly when considering the enormous amount of time, money and effort that has been invested over the last decade to get Qwest's OSS to where they are today

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[285] *Id.* at 10.

[286] *Id.* at 12.

[287] Gates, Exh. No.TJG-3 at 2.

[288] Gates, Exh. No. TJG-20CT at 16 – 17.

and the time and effort that CLEC's undertook to develop their own internal systems to interface with Qwest's OSS.

108 Joint CLECs also seek a merger condition that would require Joint Applicants to submit any replacement OSS of a Qwest system to robust, transparent third party testing such that the results of the testing effectively prove that the replacement OSS is able to perform at current performance levels and in a manner that is *functionally equivalent* to the current OSS for both Qwest and CLECs using such systems.[289]

109 Joint CLECs point out that unlike Qwest, CenturyLink's OSS, the Electronic Administration & Service Order Exchange (EASE) system has never been vetted thoroughly through a Section 271 process and that none of its systems have been found to be 271 compliant.[290] They claim that regardless of whether or not CenturyLink performs its own internal review and takes into account the "wholesale customer perspective", the company should not be allowed to make changes to Qwest's OSS post-merger without the same or similar rigorous analysis that was conducted during Qwest's Section 271 approval process.[291] Pursuant to that process, Washington joined most other states in the Qwest region to undertake an extensive examination of Qwest's OSS over a three-year period including an extensive third-party examination to determine whether Qwest's OSS satisfied the nondiscriminatory access requirement under Section 271 of Act. Qwest ultimately received Section 271 authority to provide in-region interLATA services based, in significant part, on the extensive third-party testing of its existing OSS. Joint CLECs contend that if CenturyLink changes Qwest's existing OSS post-merger without the same level of testing that was previously performed can undermine all of the work that was previously conducted by 14 state commissions (including Washington) and the FCC.[292]

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[289] *Id.* at 18 – 19.

[290] *Id.*

[291] *Id.*

[292] *Id.*

110 Joint CLECs further contend that CenturyLink's proposal to conduct internal OSS testing that is not independent is eminently inferior to an independent third-party test that would be used to determine the level of functionality of a replacement system at commercial volumes. Internal testing, they claim, would be a significant step backwards.[293]

111 As to the adequacy of CenturyLink's EASE system, Joint CLECs also note that Joint Applicants have provided no evidence that it is capable of handling the actual commercial volume of transactions in Qwest's legacy territory should they modify or replace Qwest's OSS. Accordingly, absent actual commercial usage experience, Joint CLECs suggest an appropriate remedy is to require independent, third-party testing of any Qwest OSS replacement or modifications.[294]

112 Joint Applicants contend that the OSS conditions requested by Joint CLECs are unnecessary in light of the provisions of Qwest's current CMP that govern OSS changes, as well as the post-closing OSS commitments they have made in the Integra Settlement.[295] They suggest that if, at some point in the future, CenturyLink decided to adopt all or portions of its OSS for use in Qwest territory, there is nothing in the record that demonstrates that wholesale service quality would be degraded. They argue that EASE is a robust system that processed approximately one million service orders in 2010.[296] As to the third-party testing requested by Joint CLECs, Joint Applicants point to Condition 12 of the Integra Settlement which allows coordinated testing with CLECs pursuant to Qwest's CMP, as well as the submission of a detailed plan that will address the coordinated acceptance and testing process. They suggest these provisions are more than adequate to address the post-closing OSS concerns of Joint CLECs.[297]

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[293] *Id.* at 20.

[294] *Id.*

[295] Joint Applicants' Reply Brief at 11.

[296] *Id.* at 12.

[297] *Id.* at 14.

113 *Discussion and Decision.* We have carefully considered the Joint Applicants' intent to conduct a significant review and evaluation of both companies' OSS capabilities after closing, the merits of the OSS conditions contained in the Integra and Staff/Public Counsel Settlements, and the request of Joint CLECs for extending use of Qwest's OSS to no earlier than three years following close of the transaction. We also recognize that the merger's fundamental premise is based upon the ability to integrate two companies and make various operational changes deemed necessary to derive the significant cost savings that could result from the combination. We also understand fully the concerns expressed by Joint CLECs regarding the perceived inadequacies of Joint Applicants' plans for OSS integration, including their perception of the inadequacies of the OSS-related conditions contained in the Integra and Staff/Public Counsel Settlements. Furthermore, we acknowledge the risks to competition created by the merger should any changes result in deterioration of the combined company's wholesale service quality.

114 Here we must balance the interests of Joint Applicants, who may seek to make changes to the combined operations of the companies, including changes to the OSS, with the uncertainty and potential risks to Washington's competitive environment should such changes result in degradation to wholesale service quality. Joint Applicants have reached agreement with one of their principal competitors, Integra, regarding the conditions for changing or replacing Qwest's OSS used for wholesale purposes. Pursuant to that agreement, any effort to retire or replace its OSS must follow a number of steps including, but not limited to, advance notification to competitors, adherence to the provisions of the CMP, coordinated testing of any replacement OSS in a stable test environment, and training and educational outreach that will be provided without charge to competitors. The agreement also contains a voting process for acceptance of any replacement system, which reflects the majority view among the CLECs that participate in acceptance testing.[298]

[298] We note that the parties in the Minnesota Settlement took a different course, agreeing to a process by which a third-party facilitator will assist in the coordinated testing of any successor OSS. Minnesota Settlement at 3-4. We do not incorporate this provision of the Minnesota Settlement, as the record in this proceeding supports the process set forth above. However, it may be that the third-party facilitation process will render unnecessary some of the contingencies we spell out.

115 We believe that the Joint Applicants have proffered and agreed to conditions sufficient to assuage most CLEC concerns over potential modification or replacement of Qwest's OSS. For the most part, we believe they reflect a careful path forward as the combined company assesses and makes changes necessary to reflect the combination of two companies which, heretofore, operated in differing marketplace conditions and were subject to differing wholesale service and regulatory obligations.

116 Therefore, we are not persuaded to extend the timeframe to three years for post-closing use of Qwest's OSS or to require third party testing of any replacement, at least as an "up front" requirement of the merger. In our view, two years would provide ample time to retain Qwest's OSS and allow the combined company to evaluate the strengths and weaknesses of its various back-office systems. However, we incorporate the provision in the Minnesota Settlement by which the Joint Applicants have agreed to 30 months.[299] Despite Joint CLECs' position, we are reluctant to substitute our judgment and impose a longer timeframe for implementing operational changes that the combined company deems are necessary for it to efficiently and effectively compete with other telecommunications carriers across the country. While we understand Joint CLECs' desire to maintain, for as long as possible, the more reliable Qwest OSS in order to ensure the level of wholesale service performance such systems have traditionally provided, we cannot conclude that there is a logical nexus between the timeframe for retaining Qwest's OSS and the expected synergy time frame put forward by Joint Applicants. In fact, the reverse may well be true.

117 To the extent some of the synergies reflect consolidation or integration of back-office systems, the ability of the combined company to begin to achieve its estimated cost savings may be adversely affected by a merger condition which requires absolute continuance of Qwest's OSS for a period longer than agreed to in the Integra Settlement.

118 Accordingly, we reject Joint CLECs' request to impose a merger condition requiring the combined company to keep in place, unchanged, Qwest's OSS for at least three years. Nevertheless, in doing so, we recognize that Joint CLECs have a legitimate

[299] Minnesota Settlement at 2.

concern about the functionality and capability of any replacement OSS that the combined company intends to put into operation. In our view, the overarching issue is what process and requirements should be applied to a replacement for the tried and true system presently used by Qwest.

119 Joint Applicants agreed to specific conditions with Integra, Staff and Public Counsel which will govern the process for making revisions to or replacing Qwest's OSS. These provisions include advance notification to CLECs, the Commission, and the FCC; coordinated testing with CLECs for at least 120 days in a stable testing environment; controlled production testing, a voting process for determining the adequacy of a replacement system, and a dispute resolution process which may include the Commission. These are extremely important requirements of the Integra and Staff/Public Counsel Settlements. However, they do not go far enough. To address the concerns expressed by Joint CLECs, we require two modifications to the above conditions which, collectively, we believe will provide important additional protections for wholesale customers.

120 First, we modify the condition regarding the voting process amongst CLECs which allows the combined company to replace the Qwest OSS after acceptance testing has been conducted. Specifically, after acceptance testing and controlled production, if any, have been completed, and before any replacement OSS is put into actual production, we require the combined company to file a detailed report with the Commission describing, at a minimum, all aspects of the acceptance testing process; identification of all CLEC participants in the testing and the voting process set forth in the settlement condition; the identification and discussion of all disputes that arose between the combined company and CLECs regarding any issue pertaining to the replacement OSS; and a comprehensive synopsis of the outcome. This report shall be filed with the Commission within 60 days prior to the planned OSS replacement. The combined company also must submit a verification signed by the combined company's senior level official who was ultimately responsible for implementation of the replacement OSS. The verification must include an affirmative statement that the replacement meets all requirements of the Integra and Staff/Public Counsel Settlements, and the modifications we adopt herein. Subsequent to filing, the Commission will open a new proceeding and will provide notice to all interested

parties of the combined company's submission and establish a process to provide feedback on the filing.

121 As a consequence of this additional filing requirement, and depending on the information provided by the combined company and additional information provided by participating CLECs, the Commission reserves the right to impose, and Joint Applicants are specifically required to give consent as a condition of our approval of this merger to, a potential Commission-imposed requirement for third-party testing of any replacement OSS before it may be implemented for actual production. In other words, depending on our assessment of the report and feedback produced by CLECs about the results of the testing process we hold out the prospect of imposing third-party testing prior to implementation of a new OSS. Any third-party testing requirement we are compelled to require will be conducted in accordance with specific procedures and requirements we will establish, if necessary, in the prospective proceeding involving the replacement system. All costs incurred to select and retain a third-party to conduct testing of a replacement OSS, if any, will be borne by the combined company and Joint Applicants consent to this additional merger condition must include acknowledgement of their potential liability for such costs.

122 We do not impose this condition lightly, nor do we expect that our review of the acceptance testing results will necessitate an unduly lengthy process, depending on the circumstances. We simply believe the prospect of potential third-party testing will provide an additional and appropriate incentive to the combined company to ensure that any replacement OSS properly addresses the wholesale service quality requirements of their competitors and the conditions agreed to in the settlements. Collectively, we believe that a vote of those CLECs participating in acceptance testing followed by a Commission proceeding to evaluate the results of acceptance testing, coupled with the potential for third party testing, provides a meaningful backstop for ensuring the adequacy of any replacement of Qwest's OSS.

123 Our second modification addresses an inconsistency between two provisions of the Integra and Staff/Public Counsel settlements. Specifically, we note that both the Integra (Integra Condition 12) and Staff/Public Counsel (Staff/Public Counsel Condition 23) settlement agreements contain terms applying to the process that the combined company must follow for any replacement or integration efforts pertaining

to the legacy Qwest OSS. Although the two proposed conditions are virtually identical there is one subtle difference that could have substantial implications on the quality of any replacement of the Qwest OSS. Condition 23 of the Staff/Public Counsel Settlement states, in part:

> In legacy Qwest ILEC service territory, after the Transaction closes, CenturyLink will use and offer to wholesale customers the legacy Qwest Operational Support Systems (OSS) for at least two years, or until July 1, 2013, whichever is later, and thereafter 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, performance, electronic flow through, and electronic bonding.[300]

124 Condition 12 of the Integra Settlement contains the same language with one exception, it adds the word "materially" before "less" when describing the wholesale service quality performance level that any post-closing OSS must provide, including any replacement or integrated OSS efforts. Given that post-closing OSS performance is a critical element for mitigating the risks to competitive conditions associated with the merger we find the term "materially less" in the Integra Settlement to be inconsistent with the public interest because it may result in an unreasonably lower wholesale service performance level than "less," as set forth in the Staff/Public Counsel Settlement. Accordingly, we condition approval of the transaction on the version of the provision of the Staff/Public Counsel settlement so that all post-closing wholesale service quality is not "less" than the level provided by Qwest prior to the transaction.

2. Rural Exemption

125 *Positions of the Parties.* Several CLECs suggest that the proposed merger will impair competition because some CenturyLink subsidiaries will retain their eligibility for the rural exemption under Section 251(f) of the Act, despite the fact that their parent company will have become the third largest ILEC/BOC in the country.[301] They

[300] Appendix A to the Staff/Public Counsel Settlement, Exh. No. 6, at 9 (emphasis added).

[301] Joint CLEC/Cbeyond Initial Post-Hearing Brief at 14-15.

request that the Commission condition any approval of the merger upon a commitment from CenturyLink that its subsidiaries will waive their right to employ the rural exemption.

126 Joint CLECs and Cbeyond argue that the rural exemption was intended to alleviate some of the ILEC responsibilities contained within the Act[302] for only the smallest ILECs that would be monetarily ill-equipped to bear these responsibilities.

127 In Washington, three of CenturyLink's subsidiaries currently assert the rural exemption: CenturyTel of Washington, Inc., CenturyTel of Inter-Island, Inc., and CenturyTel of Cowiche, Inc.[303] Joint CLECs and Cbeyond contend that these three companies do not operate independently, but they are part of a corporate organization with extensive telephone operations across the country. They assert that "the majority of operational tasks necessary to provide services in Washington occur at the national level, out of the CenturyLink corporate headquarters in Monroe, Louisiana."[304] The competitors argue that not only does the rural exemption result in additional expense for a CLEC to negotiate basic interconnection terms, but it also impedes competitive entry into CenturyLink markets by any CLEC that relies on UNEs, resale, or collocation as a means of providing service to their customers.[305] Additionally, they claim that competitors that attempt to interconnect with CenturyLink ILECs will be forced to do so using multiple POIs which necessarily increases the costs of interconnection.[306]

128 Joint CLECs and Cbeyond argue that Condition 6 of the Integra Settlement is a hollow condition because it merely prohibits post-closing assertion of the rural

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[302] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.).

[303] *Id.* at 8-9.

[304] *Id.* at 9.

[305] *Id.* at 10.

[306] *Id.*

exemption in the legacy Qwest ILEC service territory as a consequence of CenturyLink's ownership. This waiver of the rural exemption in Qwest's territory, they argue, is pointless since Qwest is not eligible to claim the rural exemption at this time and has not operated under it for the last 14 years.[307] According to the competitors, the real failure of the condition is that it does not address the CenturyLink ILECs' ability to continue to assert the rural exemption in its legacy service territory after closing. While they assert that the Commission should eliminate this distinction between Qwest's service territory and CenturyLink's, Joint CLECs and Cbeyond do not appear to argue that the Integra Settlement commitment should be rejected.[308]

129 Joint Wireless Carriers echo this concern and suggests that the Commission could terminate the rural exemptions for CenturyLink's subsidiaries in this proceeding through application of the public interest standard.[309] They contend that under 47 C.F.R. § 51.403, ILECs whose parent company operates more than 2 percent of the access lines nationwide may not take advantage of the rural exemption under Section 251(f)(2).[310] According to Joint Wireless Carriers, Joint Applicants are attempting to maintain the CenturyLink ILECs as separate subsidiaries in order to enjoy the rural exemption pursuant to Section 251(f)(1) and thus negate the obligation to provide UNEs, resale, and collocation services.[311] As a result, Joint Wireless Carriers recommend that the Commission find that CenturyLink's subsidiaries are ineligible for the rural exemption under Section 251(f)(1).

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[307] *Id.* at 7-8.

[308] They recommend that the Commission "eliminate the distinction created by the Integra Settlement and instead condition approval of the transaction on the merged company's waiver of the ability to claim the rural exemption on behalf of ***any and all*** of its operating subsidiaries in Washington." *Id.* at 10-11.

[309] Sprint/T-Mobile Initial Post-Hearing Brief at 13.

[310] *Id.*

[311] *Id.* at 14.

130 While Staff and Public Counsel take no position on this issue, they argue that the Act only provides for termination of a rural exemption following the submission by a competitive carrier of a request for Section 251(c) interconnection from a CenturyLink subsidiary that asserts the exemption.[312] They suggest the instant proceeding involves no such request and is therefore an inappropriate venue to decide the issue.

131 Joint Applicants note that the Act does not provide an avenue for an ILEC to request the rural exemption; rather these carriers either meet the definition contained within the Act of a 'rural telephone company' eligible for the exemption or they do not.[313] They point out that an ILEC that fits the definition can only lose that exemption after a review of the economic burden, technical feasibility, and consistency with Section 254 or the universal service objectives of the Act.[314] Accordingly, Joint Applicants argue that neither the proposed merger nor the various settlement provisions affect the status of the CenturyLink ILECs' rural exemption.[315] In addition, they suggest that Section 251(f)(2), a provision for suspension or modification of various ILEC obligations, only applies to local exchange carriers with fewer than 2 percent of the access lines nationwide, not rural carriers or even local exchange carrier operating entities.[316] Finally, Joint Applicants claim the burden of proof in any termination proceeding would fall to the CLECs, and in this proceeding they have failed to provide the Commission with any evidence as to economic burden, technical feasibility, and consistency with Section 254 of the Act.[317]

132 Joint CLECs and Cbeyond argue that the Commission has previously addressed the issue of a carrier's rural exemption in separate, non-termination proceedings. They

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[312] Staff/Public Counsel Initial Post-Hearing Brief at 14.

[313] Joint Applicants Initial Post-Hearing Brief at 18.

[314] *Id.* at 19.

[315] *Id.* at 20.

[316] *Id.*

[317] *Id.* at 21.

point first to the Commission's order in a proceeding to designate an eligible telecommunications carrier (ETC).[318] In that case, the Commission adopted a stipulation containing the commitment that Citizens Telecommunications Company of Idaho would not assert its rural exemption to avoid interconnection.[319] They also note that the Commission limited the right of Frontier Communications Corporation (Frontier) to assert its rural exemption.[320] In the merger proceeding involving Frontier and Verizon Communications, Inc., Joint CLECs and Cbeyond contend that the Commission approved a settlement agreement with a provision prohibiting Frontier from avoiding its interconnection obligations by asserting its rural exemption.[321]

133 *Discussion and Decision.* We agree with competitors that the continuing ability of the CenturyLink subsidiaries' to assert the rural exemption after consummation of the merger is a legitimate concern. We share their view that Congress never intended to allow one of the largest phone companies in the country, albeit one with a host of smaller subsidiaries permeating a number of states, to retain the benefit of an exemption that was clearly designed to assist only the smallest carriers. Allowing the CenturyLink companies, post-merger, to continue to avoid their Section 251(c) obligations would effectively give the combined company the best of both worlds: the ability to merge and become one of the largest telephone companies in the country, while hiding behind the rural exemption as a means to limit competitive access to its telecommunications network. While Joint Applicants may be legally correct that some of the CenturyLink ILECs in Washington can continue to assert the exemption, we do not agree that retaining the exemption is good public policy or consistent with the Commission's obligation to promote competition in Washington.

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[318] Joint CLEC and Cbeyond Initial Post-Hearing Brief at 12, citing to *Petition of Citizens Telecommunications Company of Idaho for Designation as an Eligible Telecommunications Carrier*, Order Granting Petition as an Eligible Telecommunications Carrier, Docket No. UT-003070, 2000 WL 33125120 (July 31, 2000) (Citizens' ETC Order).

[319] Citizens' ETC Order, 2000 WL 33125120 (Wash. U.T.C.) at * 2.

[320] Joint CLEC and Cbeyond Initial Post-Hearing Brief at 14.

[321] *Id.* citing to Verizon/Frontier Merger Order, Appendices B and C at 6.

134 That being said, Joint Applicants are correct that, under the Act, termination of a carrier's rural exemption can only occur pursuant to the regulatory process set forth in Section 251(f)(1)(B). Under that provision, the Commission conducts an inquiry into an ILEC's status as a rural telephone company and its resulting exemption from its interconnection obligations, after receiving notice and a request from a carrier to lift the exemption after it made a *bona fide* request to the ILEC in question for interconnection, network elements, or services, and the request was denied.[322] Following this notice, the statute requires that the Commission conduct an inquiry into the possible termination. It is the notice from the requesting carrier that we receive indicating that a *bona fide* request has been made and then denied that is the appropriate vehicle for lifting a rural exemption.[323]

135 The argument, advanced by Joint CLECs and Cbeyond, that we have terminated rural exemptions in past merger and ETC proceedings is misleading. The cases cited by Joint CLECs and Cbeyond involved settlement agreements where the eligible ILEC voluntarily agreed to refrain from asserting its exemption. In those cases, the Commission simply approved and adopted an agreement between the parties and did not, on its own motion, terminate a company's rural exemption.

136 In this proceeding, CenturyLink, on behalf of its existing pre-merger subsidiaries, has not voluntarily agreed to such a condition. Joint CLECs and Cbeyond have failed to provide us with any legal authority that would permit us to terminate rural exemptions absent a notice of a *bona fide* request and we are reluctant to attempt to impose such a condition here without additional administrative process. However, were we to

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[322] 47 U.S.C. § 251(f)(1)(B) states:

> **STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE –** The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

[323] *Id.*

receive such a notice in the future, we would promptly initiate a proceeding pursuant to 47 U.S.C. § 251(f)(1)(B), and we would expect the Joint CLECs and Cbeyond to reiterate their arguments in such a proceeding. Thus, prospectively, requesting carriers should not hesitate to avail themselves of this remedy if their interconnection requests are rebuffed by assertion of the rural exemption. In the meantime, Joint CLECs' request to impose a merger commitment upon CenturyLink to waive the Section 251(f)(1) exemption for all operating entities in Washington is denied.

137 With regard to the Joint Applicants' waiver of the rural exemption in legacy Qwest service territory, we agree that the commitment offers little in the way of assurance given that Qwest has never been eligible to assert the exemption. Nevertheless, the condition of the settlement is not contrary to the public interest.

3. Consolidation of Subsidiaries

138 *Positions of the Parties.* Joint Applicants estimate that the proposed merger will accomplish annual run-rate operating and capital synergies of $625 million over a three to five year period.[324] During the evidentiary hearing, Sprint raised the issue of additional synergies being achieved if the combined company were to legally consolidate all of its subsidiaries into one carrier with CenturyLink witness, Mr. Bailey.[325]

139 Joint Applicants urge the Commission to reject Sprint's proposal, asserting that consolidation of the subsidiaries into one company would not be a simple endeavor and that the **"**regulatory accounting basis for the CenturyLink ILECs and Qwest is based upon study areas established by 47 C.F.R. Part 36."[326] According to Joint Applicants, because the FCC froze all existing study area boundaries for ILECs in 1984, any consolidation of the operating companies after closing would involve merging study areas and "likely would trigger the need for an FCC waiver of the

[324] Bailey, Exh. No. GCB-1T at 4-5.

[325] Bailey, TR 478:14-479:9.

[326] Joint Applicants Final Post-Hearing Brief at ¶ 40.

study area freeze."[327] Joint Applicants also argue that a consolidation of its operating companies would directly impact the calculation of federal universal service funding (USF) since such funding is related to the subsidiaries' study areas.[328] Finally, Joint Applicants assert that consolidation could trip debt covenants held by the various operating entities resulting in a potential default of $20 million.[329] CenturyLink and QCII contend that the transaction as proposed is sufficiently complex, especially when coupled with the ongoing Embarq transition, so as to foreclose any thoughts by Joint Applicants of further disruption of the current reporting and accounting procedures in place among the separate companies.[330]

140 Joint Wireless Carriers state that Joint Applicants have failed to provide any specific information to support or even explain the debt covenant default scenario.[331] They also point out the potential impact of this merger on competition is tremendous. Following the transaction, the combined company will have 74 percent of the ILEC lines in the State.[332] Joint Wireless Carriers assert that the combined company will not only have enhanced market power nationwide, but it will also be able to derive significant economic benefits that stem from owning and interconnecting the network functions and facilities needed to transmit telecommunications across Washington thereby putting CLECs at a tremendous disadvantage.[333] Owning all of the network facilities necessary to provide telecommunications services to its customers at the parent level would mean that the ILEC subsidiaries would not have to pay for transport or termination functions (or they would in effect wind up paying

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[327] *Id.*

[328] *Id.* at 41.

[329] Bailey, TR at 478-479.

[330] *Id.* at ¶ 42.

[331] Sprint/T-Mobile Initial Post-Hearing Brief at ¶ 15.

[332] Sprint/T-Mobile Final Post-Hearing Brief at ¶ 3.

[333] *Id.* at ¶ 8

themselves).[334] Joint Wireless Carriers contend that, by avoiding these expenses, CenturyLink ILECs would have a distinct advantage over competitors and would have the ability to undercut the CLECs' competitive service offerings.[335]

141 As an alternative, the Joint Wireless Carriers propose the Commission require the combined company to consolidate its ILEC entities in Washington for regulatory purposes only.[336] They make three arguments in support of this alternate proposal.

142 First, such regulatory treatment would resolve a number of issues including the current disparity in intrastate access charges that exists between the CenturyLink operating subsidiaries.[337]

143 Second, the Joint Wireless Carriers contend that consolidation for regulatory purposes would alleviate their concern regarding the added expense of negotiating separate ICAs with each of the CenturyLink ILECs[338] because it would reduce the complexities of implementation and billing for interconnection services under a single ICA across the state of Washington. [339]

144 Third, the Joint Wireless Carriers argue that a merger for regulatory purposes would result in greater network efficiency. While the combined company's ILECs interconnect their network and enjoy network efficiencies, if the companies were merged for regulatory purposes, the CLECs could also benefit from the network efficiencies and interconnect using a single point of interconnection (POI).[340] Further,

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[334] *Id.*

[335] *Id.* ¶ 14.

[336] *Id.*

[337] *Id.*

[338] *Id.* ¶ 19.

[339] *Id.*

[340] Sprint/T-Mobile Initial Post-Hearing Brief at ¶ 21.

a single regulatory ILEC entity would not be eligible for the federal rural exemption and thus CenturyLink's ILECs would be prevented from avoiding any of their interconnection obligations under the Act.[341]

145 The Joint Applicants' claim that any consolidation of their subsidiaries will result in a reduction in USF allocations. However, the Joint Wireless Carriers note that Joint Applicants cite no record evidence for this argument.[342] Assuming *arguendo*, that federal USF reductions would result from consolidation, Joint Wireless Carriers point out that such an effect would be beneficial to customers of all of the other carriers in Washington that contribute to the fund via the federal USF surcharge.[343]

146 Like Joint CLECs and Cbeyond, Joint Wireless Carriers acknowledge that actual consolidation of the ILEC subsidiaries is not directly required to accomplish the principal objectives of the CLECs which are the reduction of intrastate access charges, ICA extensions and porting availability, interconnection through a single POI, and continued assertion of the rural exemption to deny interconnection.[344]

147 Joint CLECs and Cbeyond take no position on this issue except to argue that the combined company should not be permitted, after the merger, to continue to use the factual condition of separate legal subsidiaries, to avoid its wholesale and competitive obligations.[345] Their concerns also involve the ability of the separate CenturyLink ILECs to continue to claim the rural exemption even though the separate companies will be part of and rely heavily on the same consolidated systems post-merger.[346] Joint CLECs and Cbeyond support Joint Wireless Carriers' proposal that competitors of the separate ILEC entities should be allowed to: 1) interconnect at a single POI

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[341] *Id.* ¶ 22.

[342] Sprint/T-Mobile Final Post-Hearing Brief at ¶ 55.

[343] *Id.*

[344] *Id.* at ¶ 56.

[345] Joint CLEC/Cbeyond Initial Post-Hearing Brief at 16.

[346] *Id.* at 17.

within a LATA,[347] 2) enter into a single ICA with all of the CenturyLink ILECs,[348] and 3) rely on CenturyLink to provide directory assistance and directory listings in proper databases as Qwest currently does instead of shifting the obligation to a third-party vendor.[349]

148 Commission Staff and Public Counsel agree with Joint Applicants that legal consolidation of the operating subsidiaries at this time would be problematic. They point out that the integration of CenturyTel and Embarq must be completed within the next few months[350] and that customers might be harmed if the Commission were to impose a condition requiring the subsidiaries to consolidate at this late stage in the regulatory process.[351] They also argue that Joint Applicants have proposed a carefully crafted integration of their two companies and that any requirements to modify their plan, especially by adding further company integrations into the mix, could result in a "hasty cut over to consolidated service … [whereby c]ustomers could well experience disruptions and degradations of service."[352]

149 They maintain that, should the separate ILEC entities file individual AFOR plans and results-of-operations, the Commission could always consolidate the filings if it chose to do so.[353] Commission Staff and Public Counsel further suggest that the ILEC entities are currently regulated separately, and the merger does not appear to exacerbate the existing regulatory burden of these companies individually.[354] They

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[347] *Id.* at 18.

[348] *Id.* at 21.

[349] *Id.* at 22. This issue, like the previous two, will be addressed more fully outside of the discussion relating to the consolidation of subsidiaries.

[350] Staff/Public Counsel Initial Post-Hearing Brief at ¶ 21.

[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] *Id.* at ¶ 24.

suggest that the Commission re-examine this question during the prospective AFOR proceeding after the operational consolidations have occurred.[355]

150 *Discussion and Decision.* Although we believe it ultimately would make sense, we do not require the combined company to legally consolidate all of its ILEC subsidiaries in the state of Washington in this proceeding. We accept Staff and Public Counsel's position that such a provision could frustrate the ongoing transition process for both retail and wholesale customers arising from the CenturyLink/Embarq merger.

151 However, we do believe that Joint Applicants' competitors have demonstrated a legitimate concern about the burden and potential for harm to CLECs should they have to deal with a number of separate, but commonly controlled, ILEC subsidiaries. In particular, we agree with Joint Wireless Carriers that while CLECs will be dealing with the same number of pre-merger competitors, CenturyLink ILECs now have a distinct advantage in the form of "owner's economics" associated with the effects of internal consolidation. We do not believe it is appropriate to allow the consolidated entity to enjoy the full benefit of merging while insisting on retaining separate operating entities for regulatory and interconnection purposes. Therefore, as part of this decision, we establish an overarching policy with respect to the combined company's Washington operations, that wherever and whenever possible, for regulatory purposes we will look to apply state law, regulations, and our own policies to CenturyLink's Washington ILEC operations as if they were a single common entity. Because we are not requiring actual consolidation, we need not address arguments advanced by Joint Applicants regarding possible FCC study area waivers, default on debt covenants, and other such issues.

152 As explained in the sections that follow, we apply this regulatory consolidation policy to issues such as establishment of new ICAs, the level of the combined company's intrastate access charges, and the single POI per LATA issue. As to future issues that may arise after the merger is completed, including those that may be raised during the forthcoming earnings review and AFOR proceedings, we notify all parties of our intention to apply this policy prospectively whenever and wherever possible. By

[355] *Id.* at ¶ 26.

virtue of its acquisition of Qwest, CenturyLink has assumed greater obligations and responsibilities with respect to telecommunications competition and other policy matters. Going forward, we intend to hold the combined company to this higher standard.

4. Consolidation and Porting of ICAs

153 *Positions of the Parties.* The CLECs also raised issues relating to the cost and complexity of having to negotiate individual ICAs with the various operating subsidiaries of Joint Applicants. Joint CLECs and Cbeyond maintain that, by continuing to operate as separate carriers, the CenturyLink ILECs needlessly force competitors to negotiate and establish separate ICAs.[356] These separate agreements each have distinct billing, trouble reporting, and dispute resolution provisions, as well as their own wholesale accounts.[357] Joint CLECs assert that the combined company's enormous market share post-merger will give it the incentive to employ anticompetitive behavior.[358] They argue the FCC has specifically recognized this concern when it described the "Big Footprint" theory during its consideration of the CenturyLink/Embarq merger:

> a merger between two [ILECs] may increase the merged entity's incentive to engage in anticompetitive behavior by allowing it to capture or internalize a higher proportion of the benefits of such anticompetitive strategies against regional or national competitors.[359]

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[356] Joint CLEC/Cbeyond Initial Post-Hearing Brief at 18.

[357] *Id.*

[358] Joint CLECs Final Post-Hearing Brief at ¶ 40.

[359] *Id.* (*citing In the Matter of Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 8741, n.106 (2009).

154 Joint Wireless Carriers agree and propose a merger condition that would allow carriers to port an ICA from one CenturyLink ILEC to another and allow ICAs to be ported across state lines.[360] As Sprint witness Mr. James A. Appleby states, this would permit CLECs to "[avoid] the burdensome incremental cost of contract negotiations and potential arbitration to establish a new contract…. A carrier wishing to interconnect with the [combined company] in multiple locations would need to negotiate with the [combined company] on a myriad of issues over and over again."[361] Joint Wireless Carriers argue that because Joint Applicants tout the financial synergies that will be realized by the running of a combined company, the combined company should be required to enable competitors to derive efficiencies by taking concrete steps to consolidate multiple ICAs into a single agreement.[362]

155 Joint Wireless Carriers dispute Joint Applicants' claim that porting ICAs from one state to another, and between ILECs, would be overly complicated.[363] They point out that Joint Applicants' position is belied by the fact that they have entered into a multi-state settlement agreement with Integra whose provisions will be commonly implemented across multiple states.[364] Furthermore, they note that CenturyLink has already acknowledged the absence of any technical difficulties preventing ICA porting.[365] Joint Wireless Carriers claim that the abject refusal of Joint Applicants' to consider porting ICAs is evidence that the combined company intends to use its new post-merger market power to exact less favorable terms and conditions from competing carriers.[366] They assert that ICA porting is not a new and novel concept because both the FCC and the Illinois Commerce Commission have directed merging

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[360] Sprint/T-Mobile Initial Post-Hearing Brief at ¶ 18. They would, however, carve out an exception for the porting of state-specific rates which would not be ported.

[361] *Id.* (*citing* Appleby, Exh. No. JAA-1CT at 38-39.

[362] Sprint/T-Mobile Final Post-Hearing Brief at ¶ 34.

[363] Sprint/T-Mobile Initial Post-Hearing Brief at ¶ 20, *citing* TR 403.

[364] *Id.*

[365] *Id. citing* Exh. No. JAA-1CT at 39.

[366] Sprint/T-Mobile Final Post-Hearing Brief at ¶ 37.

telecommunications carriers to port ICAs between states and legal operating entities.[367]

156 Joint Wireless Carriers raise a separate ICA issue which is the refusal of Joint Applicants to apply the Integra Settlement condition that extends the duration of Qwest ICAs by 36 months to the ICAs of any of the CenturyLink ILECs.[368] They argue that certainty and continuity of terms and conditions are just as important for CLECs interconnecting with CenturyLink ILECs as they are for those interconnecting with Qwest.[369] They note that Joint Applicants have not provided any technical reason why extending the existing CenturyLink ICAs for a 36 month period would be inappropriate.[370] Joint Wireless Carriers argue that in order to realize true synergy benefits, carriers competing with CenturyLink ILECs should also have their ICAs extended.[371] That being said, Joint Wireless Carriers recommend that the Commission dispense with the three-year ICA extension in the Integra Settlement and instead adopt a four-year extension for all ICAs.[372] Doing so would provide CLECs with an additional safeguard against increased wholesale costs and would further minimize the expenses the combined company could impose upon competitors.[373]

157 Joint CLECs echo Joint Wireless Carriers' ICA porting and extension recommendation; however they go further by recommending a condition that would

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[367] *Id.* at ¶ 39 *citing In the Matter of AT&T and Bellsouth Corporation Application of Transfer of Control*, WC Docket 06-74 (released March 26, 2007) and ICC Docket Nos. 98-0555 and 98-0866.

[368] *Id.* at ¶ 30.

[369] *Id.*

[370] *Id.* at ¶ 31.

[371] *Id.* at ¶ 32.

[372] *Id.* at ¶¶ 6 and 33.

[373] *Id.*

allow competitors to opt-in to Qwest's Washington ICAs and then port them to another state.[374]

158 Pac-West agrees with Joint Wireless Carriers and Joint CLECs and suggests that the Commission implement such a condition which would be valid, instead, for a period of five years.[375] Pac-West proposes that should the combined company find it technically infeasible to implement a ported ICA, the combined company could request that the Commission modify the agreement after it is effective "rather than holding the entire ICA hostage to disputes over a limited number of issues."[376]

159 Joint Applicants contend that the CLECs' proposal goes beyond what was intended by the Act. They cite to the Minnesota recommendation in which the Administrative Law Judge (ALJ) stated that "it would be contrary to the expectations of the parties that an ICA could be imposed upon another entity's network and facilities."[377] Joint Applicants also point out that not all terms contained in an ICA are applicable to every form of interconnection making the use of a single ICA amongst its various ILEC subsidiaries impractical.[378] Further, porting agreements across state lines would undermine the Commission's authority "to review and approve ICAs applicable to operations in the state of Washington."[379]

160 Joint CLECs assert that their proposed language would allow the Commission to modify the ICA prior to its opt-in if the total element long-run incremental cost

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[374] Joint CLECs Final Post-Hearing Brief at ¶ 45. Joint CLECs assert that "the Commission must adopt an additional ICA condition that permits competitors to opt-in to Qwest's ICAs in Washington and then 'port' such agreements to another state." We remind the parties that our jurisdiction extends only to the state of Washington, and, just as we would not expect another state to force our hand, we cannot require other states to accept ICAs ported from Washington.

[375] Pac-West Final Post-Hearing Brief at ¶ 13.

[376] *Id.* *See also* Falvey, Exh. No. JCF-1T.

[377] Joint Applicants Final Post-Hearing Brief at ¶ 52 *citing* Attachment F to their Final Post-Hearing Brief, Minnesota ALJ's Recommended Decision at ¶ 206.

[378] *Id.*
[379] *Id.*

(TELRIC) - based rates would be inconsistent with Washington or if the combined company demonstrates technical infeasibility.[380]

161 *Discussion and Decision.* We find Joint Wireless Carriers' argument persuasive that the duration of CenturyLink ICAs, not just Qwest ICAs, should be extended. Accordingly, we modify Condition 3(a) of the Integra Settlement to include and extend all existing Washington ICAs of the CenturyLink ILECs for the three year period following closing. That being said, we decline to modify the extension of all ICAs for longer than the three-year period since the CLECs failed to establish that a longer time period is necessary.

162 We also disagree with the Joint Applicants' position that porting ICAs between CenturyLink ILECs within Washington goes beyond what the Act intended. To the contrary, the Act mandates that ILECs make network elements, services, or interconnections provided under an agreement *to which it is a party* available to other carriers on the same terms and conditions as those in the agreement.[381] The Act is silent with respect to having a common ICA apply to multiple affiliated ILEC entities. As discussed above, some of the potential harms to competition can be mitigated by the consolidation of the combined company's subsidiaries in this state, at least for regulatory purposes. We are persuaded to apply this principle to the combined company's Washington operations in establishing ICAs. Because we require the subsidiaries to be consolidated for regulatory purposes, we generally agree with the combined company's competitors that it would be reasonable to allow them to pursue negotiation, arbitration, and implementation of a common ICA for all CenturyLink ILECs, including Qwest, after the merger is completed. Therefore, we require that, as existing ICAs expire or as competitors seek to establish new ICAs, the combined company will allow requesting carriers to negotiate a common agreement that would apply to interconnection with one or more of the CenturyLink ILECs operating in Washington. Permitting common ICAs would mitigate somewhat the cost of individually negotiating and maintaining separate agreements with each CenturyLink ILEC subsidiary.

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[380] Joint CLECs Final Post-Hearing Brief at ¶ 46.

[381] 47 U.S.C. § 252(i). (emphasis added). The FCC implemented this requirement in 47 C.F.R. § 51.809(a).

163 Finally, we do not adopt Pac-West and Joint CLECs' request to allow CLECs to adopt ICAs from other states. Joint CLECs' proposed language, which only provides for cross-state adoption where there is no Qwest ILEC, is not applicable in Washington because Qwest operates here. Additionally, we are reluctant to permit adoption of out-of-state ICAs for use in Washington because we find the condition unnecessary to advance competition. However, we do require Joint Applicants to prospectively allow common ICAs for interconnection with all affiliated Washington ILEC entities. We believe this requirement is sufficient to address at least some of the cost and complexity issues involving interconnection arrangements with the entities subject to our jurisdiction. We believe the issue of cross-state porting of ICAs is a federal matter better left to the FCC for resolution. To the extent this issue is raised in the FCC's merger proceeding and a federal condition for cross-state porting is required, we will abide by the requirement and take steps to ensure that it is implemented correctly in Washington for any matters brought to our attention.

5. Additional Performance Assurance Plan

164 *Positions of the Parties.* In Washington today, Qwest is subject to a QPAP that compares its wholesale service quality performance to comparable measures of its retail service quality. The QPAP was originally created as a function of the Section 271 process which allowed Qwest to enter the interLATA long distance market. The QPAP was expanded to include other wholesale services, including special access services, as part of Qwest's AFOR proceeding, which is the manner in which the company is currently regulated in Washington. Joint CLECs, through the testimony of Integra witness Douglas Denney, propose a new service quality performance mechanism they refer to as an APAP, which would operate as an overlay to the QPAP.[382] Joint CLECs' Condition 4 would measure and impose penalties for poor wholesale service quality for the entire combined company after closing as well as to special access services provided by Qwest in its legacy operating territory.[383]

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[382] Mr. Denney, a witness for Integra, was the principal witness supporting the APAP. Regardless of the Integra Settlement which did not include a provision pertaining to the APAP proposal, Joint CLECs continue to advocate its adoption by the Commission.

[383] Gates, Exh. No. TJG-20 at 41 - 42.

165 Section 4(a) of proposed Condition 4 would compare pre- and post-merger wholesale performance, and require the combined company to meet or exceed Qwest's average wholesale performance history for each CLEC, as measured for one year prior to the merger filing date. The APAP would apply to each performance indicator definition (PID), product, and disaggregation that exists in the current QPAP. If the combined company fails to meet the wholesale service standard, then it would be obligated to make remedial payments to each affected CLEC in an amount calculated using the methodology in the QPAP for each missed occurrence. This remedial payment would apply in addition to any payment obligations arising from the existing QPAP.

166 Section 4(b) of proposed Condition 4 addresses Qwest's post-merger special access service quality performance in the legacy Qwest ILEC territory. Similar in operation to Section 4(a), the combined company would be required to meet or exceed the average monthly special access service performance provided by Qwest to each CLEC in the year prior to the merger filing date. This standard would apply to each metric in the CLEC-specific monthly special access performance reports Qwest currently provides to CLECs. For each month that the combined company fails to meet Qwest's average monthly special access performance for each metric, the combined company will make remedial payments, calculated on a basis to be determined by the Commission or FCC, on a per-month, per-metric basis to each affected CLEC. Neither Joint CLECs nor Integra witness Mr. Denney proposes a specific remedial payment plan.

167 Finally, proposed Condition 4 also seeks to retain the existing QPAP that currently applies in the legacy Qwest territory for five years following the merger closing, a fact the Joint CLECs point out is the period Joint Applicants anticipate synergy savings from the merger. Taken as a whole, Joint CLECs contend the provisions of Condition 4 are intended to assure that the combined company maintains wholesale service quality at current levels and imposes a deterrent for the combined company to achieve synergies through a deterioration of its wholesale service delivery operations.[384]

[384] Gates, Exh. No. TJG-20CT at 42.

168 Condition 2 of the Integra Settlement reflects Integra and Joint Applicants' compromise on post-merger wholesale service quality measurement, reporting, and remedies for poor performance. Notably, it does not include the APAP proposal of Joint CLECs' Condition 4 even though Integra witness Douglas Denney was the primary sponsor of the recommendation.

169 Not surprisingly, Joint Applicants oppose Joint CLECs' APAP proposal contending that the existing QPAP, coupled with Joint Applicants' commitment in the Integra Settlement to maintain current levels of wholesale service performance for three years following closing, is adequate to address any potential reduction to wholesale service quality relative to the level provided prior to the merger.[385] According to Joint Applicants, if wholesale service quality declines during this period, they are required to perform root cause analysis and take steps to remedy each deficiency. Joint Applicants argue the APAP would be a substantial new wholesale service requirement that transcends the current QPAP mechanism. While the QPAP is aimed at comparing retail and comparable wholesale service quality results to ensure non-discrimination, the APAP compares pre- and post-merger wholesale service quality and imposes a new range of potential penalties for any observed deterioration. Joint Applicants contend this overlay is unnecessary, and question the imposition of exceedingly large penalties for even minor variations in performance.[386] They also argue that specific elements of the proposal are unsound because fluctuations in monthly wholesale service quality levels can be linked to causes unrelated to Joint Applicants. Finally, Joint Applicants assert that adoption of the APAP raises the prospect of the Commission exceeding its statutory authority.[387]

170 *Discussion and Decision.* We decline to impose an APAP as recommended by the Joint CLECs. The current QPAP was adopted as part of the federal and state regulatory process addressing Qwest's efforts to enter the interLATA long distance

[385] Joint Applicants' Reply Brief, at 18.

[386] *Id.* at 19.

[387] *Id.* at 20.

market, a process that results from the company's legacy BOC obligations under the Act. Additionally, as noted above, the QPAP was augmented during the Commission proceeding involving Qwest's current AFOR.[388] Among its provisions is a requirement that:

> The [AFOR] plan must also contain a proposal for ensuring adequate carrier-to-carrier service quality, including service quality standards or performance measures for interconnection, and appropriate enforcement or remedial provisions in the event the company fails to meet service quality standards or performance measures.[389]

171 Qwest's current wholesale service quality plan encompasses a number of services used by competitors and builds on the QPAP which was in place at the beginning of the AFOR period. It also reflects broad input from the competitive segment of the telecommunications industry who actively participated in the proceeding. At this time, we are reluctant to impose a new APAP overlay. The APAP's principal sponsor was Integra, which later reached a settlement with Joint Applicants that did not include the proposed plan. Additionally, we are persuaded by Joint Applicants that the APAP proposal may produce unnecessarily high remedial payments for even minor swings or aberrations in pre- and post-merger wholesale service performance.

172 We note that Condition 3 of the Staff/Public Counsel Settlement requires Joint Applicants to submit a new AFOR in the future. In doing so, the plan must comply with RCW 80.36.135, including the provision requiring a specific carrier-to-carrier wholesale service quality plan. To the extent that material wholesale service quality problems arise after closing, we would expect competitors, Staff, and other interested parties to propose specific elements of a prospective wholesale service quality plan which may consist of changes to the current QPAP or an APAP overlay along the lines of that requested by Joint CLECs in this proceeding.

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[388] Order Accepting, Subject to Conditions, AFOR Carrier-To-Carrier Service Quality Plan and Granting Motion to File Reply to Comments, Order 08, Docket UT-061625, September 6, 2007.

[389] RCW 80.36.135(3).

6. Compliance with Federal and State Law Relative to Directory Assistance and Directory Listings

173 *Positions of the Parties.* CLECs raise concerns about the combined company's apparent unwillingness to provide directory assistance and directory listings services at the same level and in the same fashion currently provided by Qwest. Specifically, Charter witness Billy H. Pruitt asserts that Qwest does not charge CLECs for Directory Service Requests that retain, add, or change a CLEC directory listing in either the yellow or white page directories that Qwest publishes for its own customers.[390] Mr. Pruitt also asserts that, currently, Qwest automatically updates its directory listing database with the CLEC directory listing at no charge to the CLEC so that Qwest customers can obtain the name, address, and/or telephone number of the CLEC's customer.[391]

174 Charter and Joint CLECs contend that, in the past, CenturyLink has refused to negotiate directory assistance and directory listing ICA provisions that offer CLEC customers the same access as CenturyLink's own customers.[392] According to Joint CLECs, in the past CenturyLink has attempted to implement a recurring Directory Listing Storage and Maintenance charge on a per customer basis in numerous states.[393] Joint CLECs note that Charter recently experienced difficulties in having its customer listing information made available to CenturyLink subscribers.[394] They claim that CenturyLink put the blame on its third-party vendor, and the issue was ultimately resolved.[395]

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[390] Pruitt, Exh. No. BHP-18CT at 19.

[391] *Id.*

[392] Gates, Exh. No. TJG-1HCT at 167.

[393] *Id.* at 168.

[394] *Id.*

[395] *Id.* at 168-69.

175 Joint CLECs contend that 47 U.S.C. § 251(b)(3) and 47 C.F.R. § 51.5 both require that an ILEC publish CLEC business customers in the ILEC's directory on a nondiscriminatory basis.[396] Furthermore, 47 U.S.C. § 251(b)(3) also mandates that all LECs provide competitors with nondiscriminatory access to directory listing and assistance.[397] Joint CLECs acknowledge CenturyLink's right to have a third-party vendor administer its listing databases.[398] However, they assert that a provision noting this third-party vendor arrangement should be included in an ICA so CenturyLink cannot evade its statutory responsibility with respect to this issue.[399]

176 Joint Applicants argue that this issue is unrelated to the proposed transaction and entirely unnecessary. Specifically, they claim that the disagreements between the CLECs and CenturyLink regarding directory assistance and directory listings have existed for years and will continue to exist after the merger.[400] Joint Applicants also contend that the language of the proposed condition involves more than simply complying with federal and state law.[401] Terms and conditions relating to directory services would be better addressed in ICA negotiations and not in a merger proceeding.[402]

177 *Discussion and Decision.* It goes without saying that we expect all ILECs, including CenturyLink and Qwest, to comply with federal and state laws, whether or not they are seeking merger approval. However, there is no evidence in the record that indicates that a violation is taking place. Rather, the record shows there is simply a difference between the rates, terms and conditions of pre-merger Qwest and

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[396] *Id.* at 170.

[397] *Id.*

[398] *Id.* at 171.

[399] *Id.*

[400] Joint Applicants Final Post-Hearing Brief at ¶ 68.

[401] *Id.*

[402] *Id.*

CenturyLink's handling of directory listings. Such a difference does not, in and of itself, constitute discrimination or unlawful behavior.

178 In Washington, RCW 80.04.110 provides a remedy should CenturyLink fail to act according to the state law. Should Qwest, CenturyLink and its other affiliated ILECs in Washington resolve this issue in a disparate manner post-merger, then the competitive carriers may bring a complaint against the combined company for discriminatory practices.

179 We agree with Joint Applicants that we should leave such disputes to interconnection negotiations, arbitrations, and potential dispute proceedings should they arise. We accept that there may be legitimate views on both sides of the issue regarding the exact requirements of federal law regarding directory listings, including the rates, terms and conditions for handling them, but we agree that such differences are best resolved in other proceedings, if necessary.

180 It is clear from Joint CLECs' persistent reference to Qwest's practice of providing directory listing and directory assistance without charge that Joint CLECs are attempting to obtain a concession from CenturyLink without demonstrating a merger-related harm that such a concession would remedy. In other words, they have failed to tie the proposed condition to the larger issue of the combined company's market power or other legitimate risk associated with the proposed transaction. Although there may be merit in Joint CLECs' concerns we decline to adopt their recommendation here.

7. Single POI in LATAs Where the Combined Company Is Interconnecting the Networks of Its Affiliates

181 *Positions of the Parties.* Joint CLECs and Charter ask the Commission to impose a merger condition that would require Joint Applicants to allow competitors to interconnect at a single POI per LATA. Apparently this concern stems from past interconnection disputes between Charter and CenturyLink in other state proceedings, where CenturyLink argued that its "rural" affiliates are exempt from the FCC's rules which require incumbent telephone companies to allow interconnection at a single

POI per LATA.[403] Specifically, CenturyLink required Charter to establish separate POIs in each of the CenturyLink affiliates' territories, even when those affiliates all operate within a common LATA.[404] Charter and Joint CLECs propose that Joint Applicants be required to allow competitors to utilize a single POI per LATA. They contend this condition would minimize the need for duplicative interconnection facilities, and allow for efficient use of network resources by aggregating traffic at a single POI for mutual traffic exchange.[405] Joint CLECs point out that another deficiency of the Integra Settlement is that it is silent with respect to the single POI issue.[406]

182 Charter and Joint CLECs contend there are several FCC rulings that have affirmed that Section 251 of the Act permits competitors to interconnect via a single POI.[407] For example, in an FCC proceeding involving another BOC's efforts to enter the interLATA long distance market in Texas, the FCC addressed the single POI issue as follows:

> Section 251, and our implementing rules, requires an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. *This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.* The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible. Thus, new entrants may select the "most efficient points at which to exchange traffic with incumbent LECs, thereby

[403] Joint CLEC Initial Brief on Commission-Identified Issues, at 18.

[404] *Id.*

[405] *Id.*

[406] Pruitt, Exh. No. BHP -18CT at 14.

[407] *Id.*

> lowering the competing carriers' costs of, among other things, transport and termination."[408]

183 Similarly, in a 2002 ruling by the FCC's Wireline Competition Bureau, the FCC determined:

> Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. *This includes the right to request a single point of interconnection in a LATA.*[409]

184 In its Supplemental Testimony, Charter witness Mr. Pruitt modified the company's proposal for single POI interconnection by limiting its scope to interconnection at a single POI in areas where the combined company's affiliates' networks are actually interconnected.[410] According to information provided to Charter by Joint Applicants, there are many Qwest and CenturyLink (including Embarq) exchanges in Washington that are contiguous to one another. This means that, after closing, the combined company, through its various affiliates, will provide service to many exchanges that are both commonly owned and physically contiguous; areas where it is likely that facilities exist or new facilities will be established to connect the networks of the separate, but commonly-controlled entities.[411] According to Charter, the significance of this additional condition is that it limits its application to contiguous areas, and the combined company would only be able to require competitors to interconnect at several points in the same LATA where there were no connecting facilities. If the

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[408] *Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas; CC Docket No. 00-65; 15 FCC Rcd 18354, ¶78 (2000) (emphasis added; footnotes omitted).*

[409] *Petition of Worldcom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, Wireline Competition Bureau, Memorandum and Order*, 17 FCC Rcd 27039, ¶52 (2002) (emphasis added; footnotes omitted).

[410] Pruitt, Exh. No. BHP-18CT at 14.

[411] *Id.* at 15.

combined company has established facilities between several of its ILEC service areas in the same LATA to carry its own traffic between such areas, it should also be required to carry the traffic of competitors that choose to interconnect at only one point on the combined company's network.[412] According to Charter, such an approach would be consistent with the non-discrimination standard of Section 251 of the Act which requires ILECs to provide interconnection according to terms that are equivalent to what an ILEC provides to itself.[413]

185 In their brief, Joint Applicants continue to oppose Joint CLECs' single POI per LATA proposed condition, arguing it goes beyond the requirements of the Act and any relevant FCC orders.[414] They also point to an ALJ's ruling in Minnesota recommending that the Minnesota Public Utilities Commission not impose the merger condition that Joint CLECs and Charter seek here.[415]

186 *Discussion and Decision.* This issue arises as a consequence of the combined company's intent to continue to operate separate Washington subsidiaries after closing, despite the fact that they will have common ownership. With respect to interconnection matters such as this one, we believe our policy to treat all of the post-closing CenturyLink telephone company subsidiaries as one for regulatory purposes is appropriately applied here. We do not believe it is in the public interest or meets the pro-competitive provisions of state and federal law to allow a telecommunications operating entity to evade or hinder lawful and efficient interconnection arrangements simply because it chooses to maintain and operate multiple operating entities for undisclosed reasons.

187 Our role is to examine the transaction for its effect on the public interest and to ensure no harm affects Washington consumers. We find it contrary to the public interest to allow CenturyLink to require multiple POIs per LATA which only serves

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[412] *Id.*

[413] *See* Section 251(c)(2).

[414] Joint Applicants' Reply Brief, at 23.

[415] *Id.*

to unnecessarily raise its competitors' cost of interconnection. While we do not require actual consolidation of the Washington operating entities, as discussed above, we view the consolidation of the various combined company's subsidiaries for regulatory purposes as sufficient to mitigate the merger's potential impingement of competition. We are simply not willing to allow the combined company to perpetuate an inefficient arrangement that needlessly imposes costs on competitors and their customers.

188 Thus, as a condition of our approval of the merger, we require Joint Applicants to allow interconnecting CLECs, including Charter, to establish a single POI per LATA to reach all areas served by some or all of Joint Applicants' operating subsidiaries, at least to the extent an area selected by a CLEC for interconnection includes areas that are contiguous and may be reached through facilities that Joint Applicants have deployed to interconnect such areas to handle their own telecommunications traffic. To the extent existing ICAs between Joint Applicants and their competitors require revision as a consequence of this merger condition, we expect interconnecting parties to negotiate and submit for approval the necessary amendments to implement our decision. Moreover, if disputes arise as to our intent or specific factual circumstances surrounding the scope of this requirement, we will act swiftly in resolving such disputes when brought to our attention.[416]

8. Non-UNE Commercial and Wholesale Agreements

189 *Positions of the Parties.* The Joint CLECs assert that non-UNE wholesale service arrangements should be available after consummation of the merger without material, or mutually-agreed to, revision of the rates, terms and conditions that were present in such agreements at the time the merger was initiated.[417]

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[416] We note that the Minnesota Settlement includes a qualifying condition stating that "ILEC affiliates within that LATA are directly interconnected over the interconnection facilities." Minnesota Settlement at 4. We accept that clarification for the single POI per LATA condition and would expect parties to resolve any issues between this condition and in the position articulated by the Joint CLECs in our record.

[417] Joint CLECs' Final Post-Hearing Brief at 10.

190 Many CLECs rely significantly on non-UNEs purchased from Qwest under commercial and wholesale agreements and tariffs. These non-UNE services and arrangements are typically the exact same facilities as their UNE counterparts the principal difference being the terms, conditions, and rates pursuant to which the services and arrangements are provided. Joint CLECs argue that an essential protection against merger-related harm is to preserve, for some time, the measures that support all manner of local competition resulting from the use of various wholesale services on which CLECs rely to provide competitive alternatives.

191 Condition 3 of the Integra Settlement addresses the timeframes under which Integra and Joint Applicants have agreed that existing Qwest ICAs, Qwest commercial agreements, Qwest wholesale agreements, and Qwest tariffs containing wholesale services will be extended after closing. Generally, the settlement agreement provides that such arrangements will be extended for the unexpired term of existing agreements or a specific defined time period, whatever is later.[418] In essence, under this condition, ICAs are extended for an additional 36 months, commercial agreements and wholesale agreements for 18 months, and tariffs containing wholesale services for 12 months beyond the expiration of the existing term of any plan that was in place on the closing date of the transaction. There are no provisions in the Integra Settlement addressing an extension to any existing agreement or wholesale tariff applying to arrangements between CenturyLink and Integra.

192 According to Joint CLECs, the problem with the periods specified in the Integra Settlement for non-UNE commercial and wholesale agreements and tariffs is that they are significantly shorter than the three-year timeframe applicable to ICAs.[419] Noting that these time periods are significantly shorter than the three to five year timeframe for which the Joint Applicants state that synergies will be realized, Joint

[418] Throughout Joint CLECs testimony, particularly that of Mr. Gates, references are made to the timeframe that Joint CLECs believe each of their proposed conditions should remain in effect after closing. Despite questioning from the bench during the hearing, the time periods specifically advocated by Joint CLECs for each proposed condition were never established. Indeed, Mr. Gates admitted such during questioning by Chairman Goltz. Gates, TB 516:10-23.

[419] Joint CLECs Brief on Additional Issues at 17.

CLECs object to the significantly shorter time period pertaining to ICAs.[420] Joint CLECs also claim these shorter timeframes place CLECs, who tend to rely on such agreements to a greater extent than Integra, at a significant competitive disadvantage relative to other CLECs that primarily rely on and purchase UNEs and other interconnection services under ICAs.[421] Joint CLECs argue they should not be discriminated against or penalized as a consequence of the type of agreements they tend to rely on as their particular mode of competitive entry. Instead, they contend that all commitments related to continued wholesale service availability after completion of the merger should be consistent for all wholesale agreements, whether ICAs, commercial agreements, wholesale agreements, or tariffed products. In essence, Joint CLECs ask the Commission to extend the post-closing time period for all agreements for the same three-year extended time period for ICAs agreed to by Integra and Joint Applicants.[422]

193 Joint CLECs argue that CenturyLink's refusal to promise Integra that it will leave in place commercial and wholesale agreements and tariffs for the same agreed-upon three-year time period applying to ICAs implies there is a strong risk that CenturyLink will not provide rate and term stability for the non-UNE wholesale services after closing.[423] Thus Joint CLECs suggest that the Commission address this competitive imbalance by extending the term of such agreements for at least three years following merger, to match the minimum three-year synergy timeframe and agreed to time period for ICAs.[424]

194 Joint CLECs also raise concerns about the appropriate starting point for determining which agreements should be available over any extended time period following closing. The concern is raised because Condition 3(d)(i) of the Integra Settlement states that term and volume discount plans "offered by Qwest as of the Closing Date"

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[420] *Id.*

[421] *Id.*

[422] *Id.* at 18.

[423] *Id.* at 19.

[424] *Id.*

will be extended by twelve months beyond the expiration date of the then existing term, unless the CLEC opts out. They contend the phrase "offered by Qwest as of the Closing Date" is a problem for some CLECs who rely on RCP agreements[425] whose terms and availability changed materially not long after the merger was first announced.[426] Apparently, Qwest grandfathered its existing RCP in June 2010 and replaced it with a new RCP that is materially less beneficial to CLECs because its terms impose higher pricing for interstate special access services. Because the extended time period of the agreements subject to Condition 3(d)(i) of the Integra Settlement only applies to the new agreements, the pre-merger RCP agreements with CLECs, which are now grandfathered RCPs, are no longer "offered by Qwest as of the Closing Date," and thereby are not eligible for extension. Joint CLECs argue this produces an unreasonable and unfair market condition because it significantly reduces the effectiveness of the extended time period commitments in the Integra Settlement and conveys a competitive advantage to some CLECs over others.[427] They request that the Commission ensure that all CLECs benefit from merger commitments regardless of when they entered into their agreement and regardless of the date on which the merger may close. They argue it is not in the public interest to allow Qwest to raise prices for wholesales services while the proposed transaction is being reviewed, and then tie negotiated merger commitments to the merger's closing date, rather than the date the merger was announced, in order to lock in higher prices prospectively.[428] Accordingly, in addition to asking the Commission to extend the existing term of such agreements for the three-year timeframe discussed above, Joint CLECs suggest that any extension also apply to non-UNE wholesale agreements and

[425] RCPs are interstate agreements that provide reduced pricing for interstate special access services according to term and volume commitments by the purchaser. These agreements are important to competition because some competitors extensively rely on Qwest's special access services (primarily interstate special access services under an RCP) for transport or to gain access to customers instead of using UNE wholesale service elements purchased under ICAs.

[426] Joint CLECs Brief on Additional Issues at 14-16.

[427] *Id.*

[428] *Id.*

tariffs that were in place as of the merger filing date to provide better and more meaningful price stability that CLECs contend they require to compete effectively.[429]

195 The Joint Applicants oppose the additional conditions sought by Joint CLECs, contending they are without merit and there is no evidentiary basis for extending the time frames for any non-UNE agreements above those extensions agreed to in the Integra Settlement.[430] Joint Applicants assert that the extensions they have agreed to are reasonable given the fact that the agreements themselves are not required under Section 251 of the Act and given that they are "not within the Commission's jurisdiction."[431] Joint Applicants contend the discrimination argument raised by Joint CLECs is really a red herring because, for the most part, the agreements to which the extension would apply are not required under either the Act or by the FCC, rather they are offered as an alternative for those CLECs that choose to continue to lease Joint Applicants' network elements where no Section 251 UNE obligation exists. They also oppose Joint CLECs attempt to tie extension of wholesale agreements to the timeframe for achieving merger synergies.

196 *Discussion and Decision.* We understand Joint CLECs' concerns regarding extension and availability of certain contractual or tariffed wholesale services after closing. However, we also recognize that, for the most part, the agreements at issue are either voluntary commercial offerings subject to marketplace, rather than regulatory, discipline, or are creatures of federal policy overseen by the FCC. For example, the term "commercial agreements" refers to agreements that ILECs began offering as substitutes for UNEs in light of or as part of the FCC's Triennial Review and Remand Order[432] governing the terms and conditions of removing certain unbundling obligations applying to geographic areas meeting FCC-defined competitive tests.

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[429] *Id.* at 17.

[430] Joint Applicants' Reply Brief, ¶ 34.

[431] *Id.* ¶ 35.

[432] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, FCC Rcd. 04-290 (commonly referred to as the Triennial Review Remand Order or TRRO) (March 11, 2005).

Commercial agreements replaced ICA-based UNEs where such tests were met and provided continuity to CLECs desiring to maintain use of ILEC network facilities. Similarly, interstate special access tariffs, including the RCP overlay that is a volume and term discount plan on interstate special access rates, are federally regulated service offerings that are simply beyond the scope of our jurisdiction. Both commercial agreements and interstate special access services are direct creatures of federal policy and law.

197 At the state level, as a means to supplement or extend their networks, CLECs may choose to purchase certain services pursuant to existing tariffs and price catalogs as wholesale inputs to the retail service offerings they offer to consumers. However, to the extent such services are purchased from Qwest, changes to any rate, term or condition for these service offerings are governed by the terms of the AFOR plan that is currently in place for Qwest's operations in Washington.[433]

198 Although we sympathize with Joint CLECs' position that non-UNE services are important inputs to their competitive service offerings, we decline to adopt their requested conditions regarding the post-closing time frames for the availability of such offerings, beyond the extensions set forth in the Integra Settlement. And while we understand Joint CLECs' contention that it is discriminatory to have different time periods for ICAs versus those pertaining to other agreements and tariffs used for competitive purposes, we disagree with the notion that there must be equal or comparable treatment for all manners of competitive entry. The rates, terms, and conditions of ICAs are direct outcomes of the pro-competitive requirements set forth in the Act. They reflect and govern the various forms of competitive entry in the telecommunications marketplace envisioned by Congress according to rules subsequently established by the FCC and enforced by state commissions.

199 Non-UNE commercial agreements and tariffs, however, are not cut from the same cloth. As Joint Applicants point out, although they may be used as a means of competing, their use derives from each competitor's unilateral and voluntary decision to utilize such services as an alternative to the specific competitive means afforded in

[433] Although Qwest's AFOR is scheduled to expire later this year, as discussed in Section II.D.12, the plan will be extended at least 3 years as a result of Condition 3(a) of the Staff/Public Counsel Settlement.

the Act. With Integra, Joint Applicants agreed to extend the life of these service offerings, unchanged, for a period of time following closing in order to assuage the merger-related concerns of a principal competitor. We are unwilling to impose the additional time requested by Joint CLECs.

200 As to the scope and starting date for agreements that should be subject to the extended time period set forth in the Integra Settlement, we understand that the primary concern of Joint CLECs is the prospect of less favorable terms and conditions being forced on purchasers of interstate special access services pursuant to Qwest's RCP. That issue now appears moot in light of the settlement agreement between Joint Applicants and tw telecom. Specifically, paragraph 4 of that settlement agreement involves Joint Applicants' concession to extending tw telecom's expiring RCP for an additional year beyond the one-year extension (or at least until May 31, 2013) already established in the extended time period set forth in the Integra Settlement. Because the concern articulated by Joint CLECs was ascribed to problems resulting from changes to Qwest's RCP just after the merger was announced, and those concerns now appear resolved by virtue of the tw telecom Settlement, we decline to modify Condition 3 of the Integra Settlement in the manner originally requested by Joint CLECs.

9. Moratorium on Reclassification of Wire Centers as Nonimpaired and Requests for Forbearance by Qwest

201 *Positions of the Parties.* Over the past ten years or so, ILECs such as Qwest have sought to reduce or eliminate existing unbundling obligations arising from Section 251(c) of the Act. They have done so by way of two paths available under federal law. The first is a petition for non-impairment as set forth in the provisions of the FCC's Triennial Review Order (TRO)[434] and Triennial Review Remand Orders

[434] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications* Capability, CC Docket No. 98-147, Report and Order and Order on Remand, and Further Notice of Proposed Rulemaking, FCC Rcd 03-36 (October 2, 2003), (commonly referred to as the "Triennial Review Order or TRO)

(TRRO)[435] which enabled ILECs to seek elimination of unbundling obligations in specific geographic locations where certain competitive conditions were observed. The second path to ILEC unbundling relief is the submission of a forbearance petition pursuant to Section 10 of the Act.[436]

202 Condition 8 of the Integra Settlement contains a prohibition on Joint Applicants seeking to eliminate any Section 251 or 271 obligations under the Act by submitting any non-impairment or Section 10 petitions prior to June 1, 2012. Joint CLECs contend the timeframe for the Integra Settlement condition is too short and urges the Commission to extend it for no less than three years following the merger.[437]

203 *Discussion and Decision.* We are not inclined to adopt Joint CLECs' request for an extension of the moratorium on non-impairment or forbearance petitions. Both approaches for easing unbundling requirements are creatures of federal law and policy. Our focus in this proceeding is to assess potential risks or harms to Washington consumers as a direct consequence of the transaction. We do so by examining such risks and harms and attempting to resolve them with specific conditions or adopt additional counterbalancing measures to produce an acceptable outcome for the public interest. Extending a prohibition on non-impairment or forbearance petitions does not directly address a potential risk or harm of the transaction.

204 At the federal level both unbundling relief paths are available as a means to address changing telecommunications market conditions. In essence, as competition develops, federal law allows ILECs to seek to reduce some or all of their federal regulatory obligations, including their Section 251(c) obligations. We are not persuaded to extend the prohibition as a means to shield competitors from altered regulatory obligations that might arise from Joint Applicants' lawful exercise of their

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[435] Triennial Review Remand Order. *See* also n. 422.

[436] *See* 47 U.S.C. § 160(c).

[437] Joint CLECs' Brief on Additional Issues at 23.

existing rights under federal law.[438] Although we do not extend the reclassification and forbearance moratorium on our own, we note that the Minnesota Settlement extends the moratorium set forth in the Integra Settlement to no earlier than June 1, 2013. As discussed in paragraph 86 above, because we incorporate all of the extended timeframes of the Minnesota Settlement into our Order, this means the combined company is also prohibited from petitioning for wire center reclassification or forbearance before June 1, 2013, with respect to its Washington operations.

10. Most Favored State

205 *Positions of the Parties.* Joint CLECs and Joint Wireless Carriers recommend that the Commission adopt a "most favored state" provision, which would incorporate into the conditions of this Order any conditions imposed on the merger by another state or the FCC.[439] Joint CLECs claim that Joint Applicants' request for expedited approval of the merger should be balanced by a most favored state condition.[440] Joint Wireless Carriers go one step further by requesting that the Commission impose all conditions upon the combined company that have or will be imposed by other state commissions and the FCC.[441]

206 *Discussion and Decision.* We decline to include a most favored state condition although the merits of such a provision may make some sense where the consummation of the transaction is time sensitive. However, in this case, given that any FCC conditions that are imposed would apply to Washington operations regardless of whether we have adopted a most favored state condition or not and we

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[438] We note that there is certainly no guarantee that if Joint Applicants pursue reduced unbundling opportunities with the FCC, their efforts would be successful. We also note that past efforts by Qwest and other ILECs have been subject to extensive opposition and development of a lengthy and detailed record upon which the FCC reached decision. If such filings arise, Joint CLECs will have the opportunity to participate, submit information, and express their view on the merits of such petitions.

[439] Joint CLECs Final Post-Hearing Brief , ¶ 52.

[440] Gates, Exh. No. TJG-20CT at 48.

[441] Sprint/T-Mobile Final Post-Hearing Brief at ¶ 41.

have given careful consideration to how the transaction will affect consumers and competition in Washington, we see no material benefit to imposing this condition.

11. Compensation for VNXX

207 *Positions of the Parties.* Pac-West asks the Commission to consider the proposed merger's impact on its customers and, in turn, their end users.[442] It alleges that Qwest has engaged in anticompetitive behavior by refusing to allow Pac-West to add a VoIP termination amendment to their existing ICA.[443] Pac-West contends that Qwest refuses to permit it to terminate traffic originating as VoIP to Qwest in Washington[444] despite the fact that Qwest has had VoIP termination agreements with other carriers in Arizona and elsewhere for some time.[445] Pac-West's preference is to terminate VoIP traffic on a bill-and-keep basis, or, in the alternative, at the rate of $0.0007 per minute.[446] Instead, Qwest has offered VoIP termination at $0.0007 per minute if Pac-West will forego its right to bill reciprocal compensation at the Washington TELRIC-based rates.[447] Accordingly, Pac-West recommends that the Commission condition any approval of the proposed transaction on the requirement that Qwest offer the same amendment terms, such as VoIP, to all CLECs in Washington without exacting concessions like lower reciprocal compensation rates.[448]

208 Further, Pac-West asks that the Commission condition any approval of the transaction on Qwest's compliance with the FCC's rules and orders and to make payment for all

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[442] Its customers include: VoIP providers, Internet service providers, and other new service providers.

[443] Falvey, Exh. No. JCF-1T at 17.

[444] *Id.*

[445] *Id.* at 18.

[446] Pac-West Final Post-Hearing Brief at 7.

[447] *Id.*

[448] *Id.* at 7-8.

ISP-bound traffic, including VNXX[449] traffic, at the reciprocal compensation rate without regard to the geographic reach of the call.[450] Pac-West maintains that the FCC found that ISP-bound traffic is subject to the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5)[451] and that the D.C. Circuit affirmed the FCC's ruling.[452] Pac-West notes that it filed a complaint regarding these VNXX issues against Qwest with the Commission in 2005 and has been litigating this issue for over five years.[453]

209 According to Pac-West, Qwest refused to pay the company for VNXX ISP-bound traffic and even demanded that Pac-West pay originating access charges to Qwest on such traffic in Qwest's service territory.[454] It maintains that the rate it sought for termination, $0.0007 per minute, is the level set by the FCC for ISP-bound traffic and is much lower than the rate the ILECs bill for termination of local traffic.[455] Pac-West contends that the combined company may continue to stonewall Pac-West's efforts since CenturyLink has taken a much more aggressive stance than Qwest in regard to VNXX traffic.[456]

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[449] VNXX is telecommunications traffic involving a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number.

[450] Falvey, Exh. No. JCF-1T at 17.

[451] *Id.* at 11. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98, 99-68, 01-92, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (Nov. 5, 2008).

[452] Falvey, Exh. No. JCF-1T at 11. *See Core Comm'ns, Inc., v. FCC,* 592 F.3d 139 (D.C. Cir. 2010).

[453] Falvey, Exh. No. JCF-1T at 11.

[454] *Id.* at 12.

[455] *Id.* at 12-13.

[456] *Id.* at 16.

210 Joint Applicants argue that Commission Docket UT-063038 is the appropriate venue to address how VNXX traffic should be characterized and compensation-related issues.[457] They assert that the Commission should not allow Pac-West to use this merger proceeding "to resolve individual complaints or to revisit previous determinations regarding VNXX."[458] In addition, Joint Applicants point out that Level 3 and Pac-West's individual complaints are currently before the Commission in Docket Nos. UT-053036 and UT-053039.[459]

211 *Discussion and Decision.* We agree with Joint Applicants that this is not the appropriate venue to rule on VNXX and VoIP interconnection issues, because these issues are already before us in existing dockets. Given the extensive history in Docket Nos. UT-053036, UT-053039, and UT-063038, it would be counterproductive, unwise, and a waste of Commission and the affected parties' resources to needlessly duplicate consideration of such issues in this proceeding. Thus, we reject Pac-West's proposed condition.

12. AFOR and Extension of Earnings Review

212 *Positions of the Parties.* One of the complicating aspects of the proposed merger between CenturyLink and Qwest is that it comes on the heels of the previous merger between CenturyLink and Embarq.[460] There, like here, the merging entities pointed to the possibility of deriving significant merger related synergies as one of the primary factors driving the proposed transaction. The Commission's decision in the previous merger proceeding included specific conditions regarding prospective examination of merger synergies, a requirement for submission of an earnings review within three years (by July 2012), and a requirement for an AFOR filing within five years of closing (by July 2014). However, because the instant merger arose less than one year following the CenturyLink/Embarq merger closing, there has been insufficient time

[457] Joint Applicants Final Post-Hearing Brief , ¶ 59.

[458] *Id.*

[459] *Id.* ¶ 60.

[460] The CenturyLink/Embarq merger was approved by the Commission on May 28, 2009, and was consummated on July 1, 2009.

for many of the commitments made by the merging entities to be realized and evaluated with respect to the public interest.

213 In this proceeding, Staff, Public Counsel, and Joint Applicants agreed to a series of conditions that, among other things, require an AFOR filing by the combined company, annual reporting of synergies associated with the merger, and submission of a *pro forma* results-of-operations filing. These are designated by the settling parties as Conditions 3 and 4. By design, Condition 3 specifically takes into account commitments made in the previous merger proceeding as well as the anticipated expiration of Qwest's AFOR plan sometime later this year. Condition 3(a) requires that:

> Prior to the expiration of the existing Qwest AFOR, CenturyLink will petition the Commission for the following:
>
> i. deferral of the Qwest AFOR review until the filings required in the next section of this condition are made;
>
> ii. extension of the Qwest AFOR period until the Commission issues an order on the filings required in the next section of this condition; and
>
> iii. elimination of the CenturyTel/Embarq merger conditions requiring a results-of-operations filing within three years and an AFOR filing within five years of the close of the CenturyTel/Embarq merger.

214 Collectively, the effect of these provisions, if approved by the Commission, extend the current life of Qwest's AFOR and delay consideration of the consolidated earnings and synergies arising from the CenturyLink/Embarq merger until a future AFOR and earnings proceeding that involves all of the companies controlled by CenturyLink, including Qwest. Specifically, Condition 3(b) of the Staff/Public Counsel Settlement requires Joint Applicants to submit normalized *pro forma* results-of-operations and an AFOR filing no earlier than three years and no later than four years following closing of this transaction. Assuming the merger closes in the second

quarter of this year, this requirement would fall between July 2014 and July 2015, or some five to six years following the closing of the CenturyLink/Embarq merger.

215 *Discussion and Decision.* We think five or six years is too long to wait to examine the synergies from the CenturyLink mergers. Both mergers were brought forward based on claims of substantial synergies arising from consolidation of telephone operating entities and the ability to generate substantial efficiencies that, arguably, would make the surviving entity a financially stronger and more competitive player in an increasingly competitive market. As part of our review and approval of the previous transaction, we required specific measures intended to provide us with the information necessary to assess an appropriate share of merger synergies, whether past or present, for the benefit of Washington's retail and wholesale consumers. The merger condition we impose here reflects similar intent: to monetize merger synergies and share these synergies with the customers of the combined company.

216 We find no compelling reason to wait until 2015 to determine whether merger synergies have actually materialized, and, if so, how they should be shared with customers. Should we wait, we would allow the combined company to capture and retain all derived synergies between 2009 and 2015, with no apparent benefit flowing to Washington consumers, particularly those benefits from the Embarq merger. We do not believe this result is reasonable.

217 We certainly recognize that synergies arising from mergers do not manifest themselves on the first day following a merger. Rather, synergies accrue over time as operational changes occur and as consolidation and other post-closing adjustments are implemented. We also recognize that the CenturyLink/Qwest merger is a substantially larger transaction with a greater level of predicted synergies than that from the 2009 Embarq acquisition. However, we do not believe that delay is necessary to accommodate the layered transaction we have before us.

218 Accordingly, we modify Condition 3(b) of the Staff/Public Counsel Settlement to require a *pro forma* results-of-operations filing from the combined company no later than two years following closing, a deadline we expect would be no later than June

30, 2013.[461] This requirement is in addition to the earnings and AFOR filings expected from the combined company between July 2014 and 2015. It is through our added condition that we expect to capture the synergies realized as of June 30, 2013, and to share these benefits with customers sooner than the timeline proffered by Staff and Public Counsel.

219 Finally, we note that Condition 3(d) of the Staff/Public Counsel Settlement reflects the parties' understanding of some of the issues that will likely be considered as a consequence of any proceeding involving the required *pro forma* results-of-operations and AFOR filing. Specifically:

> The Parties agree that the issues in the AFOR proceedings shall include the analysis and disposition of merger synergies, the question of whether and to what extent rate rebalancing is appropriate, and whether and to what extent the rate design for residential or business services, and intrastate access charges should be modified to achieve consistency of rate structures among the companies. Issues also include whether any rate changes associated with achieving consistency of rate structures among the CenturyLink ILECs and Qwest should be accomplished over time and whether or not they would result in a single statewide rate for residential or business services, or intrastate access charges.

220 As discussed below in this Order, we require Joint Applicants to reduce the intrastate access charge rates of the CenturyLink and Embarq Washington ILECs to Qwest's intrastate access charge levels in order to achieve consistency between the Washington operating entities that will be commonly controlled by CenturyLink after closing. These adjustments reflect our view that to the greatest extent possible, the various operating entities should be treated as one for regulatory and ratemaking purposes. By virtue of Condition 3(d), the parties to the settlement have, in our view, appropriately recognized the need to rationalize a distinctively haphazard intrastate rate structure as part of a proceeding involving the disposition of merger synergies

[461] Although we establish this filing deadline as the expected point in time in which a comprehensive examination of the combined company's Washington operations, nothing prevents any party or the Commission from initiating, sooner or later, any proceeding involving its intrastate rates at any time.

and potential adjustment to the form of regulation to be applied prospectively to the combined company.

13. Reduction in Access Charges

221 *Positions of the Parties.* For many reasons, the telecommunications industry has come to rely on a complex array of intercarrier compensation mechanisms, including implicit subsidies intended to support certain telecommunications carriers providing universal service.[462] Since the advent of competition in the long-distance market, regulatory agencies have maintained implicit subsidies of local telephone service through a regulated intercarrier compensation system, commonly known as switched access charges.[463] As competition developed in the telecommunications market, long-distance carriers and others began challenging the assessment of above-cost intercarrier compensation rates. More recently, new forms of competition as well as the development and deployment of new technological platforms have further eroded the fundamental underpinnings of the intercarrier compensation regime. In other words, while the access charge system worked well for an extended period, recent marketplace developments have undermined the ability to sustain it in an increasingly competitive market that is undergoing substantial structural and technological changes.

222 Recognizing these developments, the Commission took various steps to address the deficiencies of the intrastate access charge system by looking to require end-users to bear a greater proportion of the cost of the local network in order to make more rational choices in their use of telephone service. For example, in April 1996, the

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[462] Universal service is the long standing policy of the United States and the State of Washington to enable persons, regardless of location, to have access to affordable high-quality telecommunications and, more recently, advanced telecommunication services including information services. The policy encourages telecommunications carriers to invest in and operate advanced telecommunications networks that enable the provision of telecommunications services in less dense and higher cost areas of the country at prices that are reasonably comparable to those offered in more dense and lower cost areas. *See* Report Reviewing State Telecommunications Policies on Universal Service, Docket UT-100562,(November 29, 2010).

[463] Switched access charges are federal and state fees that long-distance service providers pay local telephone companies to originate and terminate long-distance calls.

Commission ordered substantial reductions to Qwest's switched access rates, finding that:

> The reduction in access rates can be expected to have substantial economic benefit for residential and business customers of this state. Toll calls are a substantial portion of the total telephone bill of many customers, and this reduction will make their overall telephone service more affordable."[464]

223 Just two years later in a proceeding involving the adoption of WAC 480-120-540, a new rule requiring ILECs to reduce their terminating switched access rate elements to levels approaching their costs for providing the services, the Commission set limits on the intrastate terminating access charge rates that all telecommunications carriers could impose on long-distance carriers, finding that:

> The [new] rule conforms Washington's telecommunications access charge system with state and federal laws encouraging competition. The rule will convert a pricing structure that retards competition to one designed to support emerging competition without favoring any class of participants. Ultimately this will enable greater customer choice throughout the state of Washington.[465]

224 In adopting the rule, the Commission specifically determined that implicit contributions should be removed from terminating intrastate switched access charges in order to encourage long-distance competition and enhance marketplace efficiency. As an interim measure, the Commission permitted ILECs to maintain their existing revenue stream by assessing an "interim universal service charge" on terminating traffic. The Commission's intention was clear: ILECs were to adjust or eliminate interim universal service charges over time.[466] Adopting the rule was a step forward in moving the state's intercarrier compensation scheme toward a more competitive

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[464] *See Wash. Util. & Trans. Comm'n v. U.S. West Comm.*, Docket No. UT-950200, Fifteenth Supplemental Order at 112 (1996).

[465] *In the Matter of Adopting WAC 480-120-540*, Docket No. UT-970325, General Order No. R-450, September 23, 1998.

[466] *Id.* at 25.

environment. This "interim" charge, however, has continued for over a decade without substantial modification.

225 In 2003, the Commission addressed a complaint filed by AT&T alleging that Verizon Northwest's access rates violated Washington law.[467] In that proceeding, the Commission ordered Verizon Northwest to substantially reduce its intrastate switched access charges as a result of the investigation triggered by AT&T's complaint. In its final order, the Commission observed that "competitive circumstances have changed radically" since Verizon Northwest's rates had been established, and stated that "we – and Verizon – must face the competitive realities of the 21st century and bring access charges more in line with current conditions."[468] In particular, the Commission found that:

> The excess charges of Verizon allow it to export costs of the Verizon local network to the customers of Qwest and/or the interexchange companies that offer intrastate toll service. Verizon's pricing structure results in some combination of higher profits and lower rates for its local exchange services. It also can distort competition in the long-distance market to the disadvantage of any company that chooses to offer long-distance service to Verizon's local exchange customers. This is unjust, unfair, and unreasonable.[469]

226 Based on that analysis, the Commission concluded that Verizon's then-existing access charge rates gave it an undue preference, and that the charges subjected AT&T to a competitive disadvantage.

227 Most recently, in a complaint involving the level of Embarq's intrastate access charges, the Commission found that:

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[467] Recently, Verizon Northwest was acquired by Frontier Communications pursuant to a Commission's decision in Docket UT-090842, Order 06, issued April 16, 2010.

[468] *AT&T Communications of the Pacific Northwest, Inc., vs. Verizon Northwest, Inc.,* Docket No. UT-020406, Eleventh Supplemental Order, ¶ 39 (Aug. 12, 2003)..

[469] *Id.* at ¶ 48 (quoting the testimony of Dr. Glenn Blackmon).

> [h]igher intercarrier compensation, such as the disputed intrastate access charges at issue in this proceeding, have traditionally supported and promoted lower local telephone rates particularly in the more rural and remote operating areas served by Embarq. Yet lower intercarrier compensation rates require carriers to recover more of their ongoing investment and operating costs from their own end users, a condition that is clearly necessary in an increasingly competitive market. As competition supplants traditional monopoly-based delivery of telecommunication services there is a compelling need to revisit this balance, particularly the intercarrier compensation rates that competing companies impose on each other.[470]

228 Once again, in response to competitive entry, the Commission sought, where possible, to address legacy intercarrier compensation matters by requiring adjustments to intrastate access charge rates to align them with the economic principle that costs should be more directly recovered in the way they are incurred.

229 In this proceeding, Sprint[471] testified against the merger arguing that it created a competitive imbalance by requiring carriers such as Sprint to incur the full burden of the combined company's tariffed intrastate switched access charges while those same charges are avoided by the combined company's affiliated long-distance operations: – its competitors in Washington. Sprint asserts that intrastate access charges represent a significant portion of the costs to provide residential and business long distance services. It goes on to argue that so long as the combined company is allowed to charge above-cost rates, it is provided an unreasonable competitive advantage.

230 Specifically, Sprint points out CenturyTel Long Distance LLC., Embarq Communications, Inc., and QCC, will be vertically-integrated subsidiaries of CenturyLink upon closing. This family of companies will compete with Sprint, and other interexchange carriers, for long distance service in Washington. Sprint

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[470] *Verizon Select Services, Inc.; MCImetro Access Transmission Services, LLC; MCI Communications Services, Inc.; Teleconnect Long Distance Services and Systems Co. d/b/a Telecom USA; and TTI National, Inc., v. United Telephone Company of the Northwest, d/b/a Embarq,* Docket UT-081393, Order 05 (November 13, 2009).

[471] Sprint is an unaffiliated long-distance competitor of Joint Applicants.

contends that CenturyLink's family of long distance providers will not truly incur the tariffed price of intrastate access charges when one subsidiary's customer calls a customer of another subsidiary. Rather, any intra-corporate billing for intrastate access services merely reflects a corporate transaction between affiliates where the entire difference between tariff prices and actual economic costs of intrastate access inure to the benefit of the parent company. Sprint claims this condition would produce an unfair competitive advantage for CenturyLink, whose affiliated long-distance operations no longer have to pay the inflated switched access rates that the combined company will continue to charge all unaffiliated long distance service providers after the merger.

231 Sprint highlights the dramatic disparity that exists between charges assessed by the present CenturyLink companies versus those assessed by Qwest. All four of the CenturyLink operating subsidiaries in Washington, including Embarq, presently charge intrastate access rates that are greater than those assessed by Qwest.[472] In fact, of the four CenturyLink operating subsidiaries, the entity with intrastate access charge rates most closely aligned with current Qwest rates is the Embarq operating subsidiary that recently became part of CenturyLink.[473] Immediately prior to that merger, the Commission approved a settlement agreement between Embarq and Verizon Access, pursuant to which Embarq agreed to reduce its intrastate access charges over a two-year period beginning December 31, 2009.[474] The remaining three CenturyLink operating subsidiaries assess intrastate access charge rates that are between three and six times those presently assessed by Qwest. Sprint also produced evidence showing even greater disparity exists between intrastate access charges relative to the Joint Applicants' interstate rates.

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[472] Confidential Responsive Testimony of James A. Appleby, Exhibit JAA – 3.

[473] *In the Matter of the Joint Application of Embarq Corporation and CenturyTel, Inc. For Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq and Embarq Communications, Inc.*, Docket UT-082119, Order 05 (May 28, 2009).

[474] *Verizon Select Services, Inc.; MCImetro Access Transmission Services, LLC; MCI Communications Services, Inc.; Teleconnect Long Distance Services and Systems Co. d/b/a Telecom USA; and TTI National, Inc., v. United Telephone Company of the Northwest, d/b/a Embarq*, Docket UT-081393, Order 05, (November 13, 2009).

232 As a consequence of these disparities and to avoid continuing negative effects to the competitive long distance market in Washington, Sprint proposes that the Commission impose a merger condition to reduce the intrastate access rates of the pre-merger ILECs as follows:

> Phase 1:
>
> No later than 30 days after the closing date of the merger, all legacy CenturyLink ILECs in Washington (CenturyTel and Embarq ILECs) must reduce their intrastate switched access rates to mirror the intrastate access rates and rate structure of the Qwest ILEC in Washington.
>
> Phase 2:
>
> No later than 120 days after the closing date of the Merger, all CenturyLink ILECs in Washington (CenturyTel, Embarq and Qwest ILECs) must reduce their intrastate switched access rates to mirror the interstate switched access rates and rate structure of Qwest.[475]

233 As justification for its recommendation, Sprint points out that Joint Applicants anticipate that the combined company will realize substantial annual cost savings as a result of the merger; savings which are expected to rise to approximately $575 million annually in operating expenses and $50 million annually in capital expenditure over a three to five year time period following the merger's closing. Sprint estimates that approximately $57.5 million of these savings, once realized, will be attributable to the Washington operations of the combined company based on the ratio of Washington access lines relative to total lines.[476] It argues that the magnitude of these savings

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[475] Using 2009 intrastate access charge demand information for both Qwest and CenturyLink, Sprint estimates the annual revenue effect of Phase 1 and Phase 2 to be approximately $12.0 million and $28.2 million, respectively for the combined company.

[476] Post-Merger Washington access lines are projected to be approximately 1.7 million out of approximately 17 million nationally or approximately 10 percent of the scope of the combined company's total operations after the merger is completed. Applying this ration to the $575 million in estimated operating cost synergies and the $50 million in capital expenditure synergies

warrants consideration of immediate reductions to wholesale service prices. Simply stated, Sprint requests a specific merger condition that ensures that Washington wholesale customers will receive some direct, tangible benefits from the merger transaction.

234 Joint Applicants oppose this condition, saying that:

> CenturyLink believes that the intervenors have no right to claim a financial share of the efficiencies or other benefits. First, CenturyLink believes that the Commission is evaluating this Transaction to determine whether the merger results in "no harm," in part as measured by the merged company's financial capabilities. Second, the intervenors here are recommending the redirection of cash flows narrowly to benefit CLECs and other wholesale customers, in spite of the fact that wholesale-specific synergies are estimated to be only approximately 2% of the entire synergy savings.[477]

235 *Discussion and Decision.* We are persuaded that CenturyLink's intrastate access charges should be reduced now to prevent harm to the long distance market in Washington. A significant element of this transaction is the prospect of a smaller entity, CenturyLink, assuming ownership and control of a much larger entity, Qwest, including all of its obligations. As discussed in Section D(3) above, regarding the regulatory treatment of the various operating subsidiaries that will exist after the merger is closed, we adopt the principle that, where possible, arbitrary distinctions between all CenturyLink operating companies in Washington should be reduced or eliminated so that they are treated as a common entity with respect to their public interest obligations. Intrastate access charges are a prime example of the application of this principle.

236 Eliminating arbitrary distinctions between the intrastate access charges levied by the four, soon to be five, operating subsidiaries of CenturyLink, is in the public interest

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results in approximately $57.5 million in operating cost synergies and $5 million in capital expenditure costs that should accrue to the benefit of Washington operations.

[477] Bailey, Exh. No. GCB-6HCRT at 43.

because: it maintains relative balance in Washington's long-distance market; it prevents "arbitrage" of CenturyLink's common ownership to unduly benefit its affiliates in the long distance market; and, it removes, or at least reduces, access charge rate elements that have far exceeded their "temporary' status established when first imposed.

237 Even if we were to allow the CenturyLink subsidiaries in Washington to remain separate for financing or other purposes, we are convinced that the five entities should share a common intrastate access charge regime. We agree with Sprint that such a requirement would avoid potential harm to customers from allowing regulatory gamesmanship made possible by virtue of maintaining separate entities. We also agree with Sprint's assertion that retaining disparate intrastate access charges, after merger, conveys an unfair and discriminatory advantage to the combined company's long distance affiliates. We address this problem here by reducing the CenturyLink ILECs intrastate access charge rates to Qwest levels. We expect the combined company to comply with this requirement through a tariff filing within 30 days of closing, to become effective 30 days after filing.

238 Finally, we agree with Sprint that permitting the combined company to retain an artificial regulatory structure that allows the existing CenturyLink subsidiaries, including Embarq, to continue to assess their intrastate access rates at levels that far exceed Qwest's rates, perpetuates a subsidized revenue stream that derives simply from their legacy status as unaffiliated, stand-alone companies. The merger brings this era to a close and with it the elements of its history that encumber the legislature's intent to encourage effective competition in the telecommunications market.

239 In reaching our conclusions, we reject Joint Applicants' position that the merger proceeding is the wrong forum for considering changes to intrastate access charge rates. To the contrary, both the earlier CenturyTel/Embarq merger and the one at issue here are premised, in part, on the substantial synergies that the merging entities expect to derive both immediately after closing and over a five-year horizon. We believe it is reasonable to require an access charge adjustment now, as opposed to some indeterminate point in the future, to address some of the imbalances. As discussed in Section C, because we find there are inherent risks to Washington

consumers and to competition, we find it appropriate to impose conditions where possible to mitigate such risks with specific pro-competitive benefits. Reducing intrastate access charges is one such measure.

240 At this time, we do not adopt Sprint's proposed second phase of intrastate access charge reductions that would require the combined company to reduce intrastate access charge rates to Qwest's interstate levels. Although the access charge reductions we require are substantial, we recognize there remains significant room for further downward adjustment at some point in the future. Indeed, as discussed in Section II.D.12 of our Order, Conditions 3 and 4 of the Staff/Public Counsel Settlement require an AFOR filing and annual synergy reports that will allow the Commission to track and potentially make further adjustments to the combined company's intrastate rates as may be warranted. In particular, the earnings review contemplated in Condition 3(b)(i) of the Staff/Public Counsel Settlement requires that:

> The filing shall provide the Commission the information necessary to conduct a full earnings review consistent with that required in a general rate case, and which captures merger synergies realized throughout the test year and *pro forma* period, as specified in the CenturyTel/Embarq Merger Order, Docket No. UT-082119, Order 05, ¶¶ 48-50. For Qwest, results-of-operations shall be consistent with the reporting required in the AFOR and set forth in attachments to Order 06, Docket UT-061625, at pp. 49 and 50, Qwest's Modified Proposal for an AFOR, Transition Period Requirement #3 and #5, and at p. 55, Appendix B to the proposal.

241 We interpret this filing requirement, incorporated as part of Joint Applicants' commitment to submit an AFOR plan, to mean there will be an opportunity within the next four years to make further adjustments to intrastate access charges based on information gleaned from a required earnings review process.

242 Finally, we note that nothing precludes the Commission, or another interested party such as Sprint, to seek additional access charge rate reductions beyond those required in this Order at any earlier point in time according to changes in federal and state law,

modifications to Commission rules, or a complaint proceeding.[478] Our action in this Order should be viewed as another significant step in the process of reforming the state's intercarrier compensation regime, and we are prepared to act aggressively and swiftly as new circumstances develop at the federal or state level.

14. Encumbrance of Assets

243 *Positions of the Parties.* Another provision within Appendix A to the Staff/Public Counsel Settlement is Condition 7 which requires that "CenturyLink will not pledge the assets of the CenturyLink ILECs and Qwest to secure borrowing undertaken by CenturyLink without approval of the Commission."[479] Under questioning at the hearing, Qwest and CenturyLink witnesses indicated that the provision was intended to require Commission approval only before encumbering Washington-specific assets.[480] However, the parties to the agreement do not provide any additional information on such a filing than the one sentence contained within the settlement. Joint Applicants suggest that they would work with Staff at the time such a filing were to be made to determine what information should go into the filing and the process that should be employed to review the filing.[481]

244 Staff argues that the settlement condition is consistent with RCW 80.08.020 which vests regulation of utility liens with the Commission.[482] Staff points out that, absent

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[478] We recognize that the debate surrounding these issues may move more quickly than expected due to the recent FCC Notice of Proposed Rulemaking regarding intercarrier compensation and USF reform. *See generally, In the Matter of Connect American Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*; WC Docket Nol. 10-90, GN Docket No. 09-5, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109; Federal Record Vol, 76, No. 41, March 2, 2011.

[479] Exh. No. 6 at 3.

[480] TR 289:19-290:7.

[481] TR 292:12-21.

[482] Staff/Public Counsel Final Post-Hearing Brief at ¶ 7.

this condition, the combined company would only be obligated to *notify* the Commission before issuing debt or securities.[483] The requirement above goes further, mandating that the combined company not only notify the Commission but also seek Commission approval prior to encumbering any Washington based assets.[484] Staff asserts that, once received, the Commission would review the filing to determine whether the proposed transaction was in the public interest.[485]

245 *Discussion and Decision.* As is evidenced by the discussion during the hearing, this condition as written fails to provide the procedural certainty necessary for the Commission to have adequate time to review any encumbrance filing. WAC 480-120-365 provides that telecommunications carriers requesting an order affirming that a proposed debt issuance complies with RCW 80.08.040 should file the request at least fifteen days prior to the proposed effective date. Due to the size of the combined company, and the level of complexity that may be associated with any prospective encumbrance of assets, we modify the condition by requiring the combined company to provide the Commission with at least thirty days to review any encumbrance request.

15. Broadband Deployment

246 *Positions of the Parties.* It is increasingly clear that access to broadband services is vital to a community's economic and social fabric. Indeed, in a previous merger proceeding, we specifically recognized and took into account the fact that "broadband service is rapidly becoming an essential service for Washington households and businesses."[486] For example, absent meaningful access to broadband services,

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[483] *Id.* (emphasis added).

[484] *Id.* at ¶ 8.

[485] *Id.*

[486] *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications 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, ¶ 193 (April 16, 2010).

students cannot participate in online college classes and job seekers cannot locate potential employers. Washington's residents and businesses "use broadband connections to access the Internet, as a means to expeditiously communicate, obtain access to information and applications, and to conduct transactions, among other activities."[487]

247 In this proceeding, the Staff/Public Counsel Settlement provides that the combined company will invest no less than $80 million towards retail broadband infrastructure in Washington over a five-year period following closing.[488] The commitment specifically requires that unserved and underserved areas of Washington are targeted to receive no less than 33 percent of the $80 million investment required. In addition, the commitment specifically directs the combined company to enable broadband in CenturyLink's central office locations in Clearwater, Glenwood, Willard, Nespelem, and Eureka. Only one of these central offices, Nespelem, is on the Colville Reservation, and Joint Applicants have not indicated how much of the total pledged broadband investment will be utilized for deployment on Tribal lands.[489]

248 *Discussion and Decision*. During the hearing, Joint Applicants, Staff, and Public Counsel could not verify that the entire pledged broadband investment was incremental to Joint Applicants' existing capital expenditure budgets for Washington.[490] Accordingly, while the $80 million figure appears substantial, the real number that is in excess of "business as usual" may be considerably less. Accordingly, to the extent that this broadband construction commitment is intended to offset the harms, real or potential of other aspects of the transaction, we are wary of affording the commitment too much weight in that calculus of harms and benefits.

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[487] *Id. See* Enhancing Broadband in Washington - Effective Means to Improve Connectivity and Awareness, Report of the Governor's Broadband Advisory Council (July 17, 2009).

[488] The signatories agree that this commitment is in addition to broadband commitments previously made in the Qwest AFOR and the CenturyTel/Embarq merger.

[489] As another condition of our approval of the merger, we require Joint Applicants to file a service quality improvement plan to address, among other things, the low broadband penetration rates in the Colville Reservation within 60 days after closing. *See* below, ¶ 262.

[490] TR 300:20-307:14.

249 In part because the broadband commitment may not be as robust as advertised, we need to ensure that the entire Washington broadband commitment will be met and met wisely. While we do not foresee that there will be financial difficulties in that regard, we want to ensure that the combined company will not be distracted by similar commitments it has made in other states. Therefore, as we required in the previous proceeding involving the sale of Verizon Northwest to Frontier, and to preserve the broadband commitment made to Washington's consumers, we require that the pledged $80 million investment amount should be separated from general corporate funds and deposited in an escrow account over a period of three years.[491] Thus, the combined company will establish an irrevocable escrow account within 30

[491] We determine that the $80 million broadband commitment should be fulfilled by placing that amount, over time, in an escrow account, expenditures from which must be approved by the Commission. This is similar to the mechanism agreed to by the parties in the Verizon-Frontier proceeding in Docket UT-090842. *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications 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 96 (April 16, 2010). Commissioner Jones, in his dissent, disagrees with this escrow arrangement, distinguishing the Verizon-Frontier situation because "[t]he primary concern there was whether Frontier had the financial and operation acumen to acquire Verizon Northwest, along with other Verizon operation entities in other states, and meet the broadband investments commitment of its settlement with Staff."

Commissioner Jones is correct that there may be differences in the financial risks surrounding the two transactions, but he overlooks the primary purpose of the required escrow arrangement in this transaction.

In the Verizon-Frontier proceeding, we did perceive some risk that the resulting company could ultimately honor its broadband deployment commitment. Indeed, such concerns prompted us to require, as a condition of the merger, an opinion letter from counsel verifying that the escrowed funds would be secure, even in the unlikely event of a Frontier bankruptcy. *Id.* ¶ 206. However, in the Verizon-Frontier transaction, the justification for putting funds into an escrow account was not solely for financial reasons. The parties agreed, and the Commission approved, a mechanism by which Frontier was to petition the Commission on a quarterly basis for reimbursement of the funds. This was intended to enable the Commission to both ensure that the funds would be spend on appropriate purposes and that no funds would be spent until the facilities were installed and placed in service. *See* Frontier Settlement Agreement ¶ 13.

So, we agree that financial circumstances surrounding this merger and those in the Verizon-Frontier transaction are different. However, the need to ensure that broadband deployment funds are spent appropriately once facilities are installed and placed in service is the same in both. We believe that the escrow arrangement is the best way to accomplish that purpose.

days following the transaction's close and deposit the first annual payment, in the amount of $30 million, in the escrow account immediately thereafter. The next two payments, in the amount of $25 million each, shall be deposited on the transaction's anniversary dates in 2012 and 2013.[492]

250 All funds deposited in escrow are to be controlled by a third-party escrow agent that will be instructed to release monies only upon written authorization from the Commission. The combined company may petition the Commission on a quarterly basis for reimbursement of expenses relating to broadband investment that has been deployed in Washington. As with the earlier Verizon/Frontier transaction, we will review the combined company's quarterly petitions and accompanying documentation in order to alert the escrow agent whether the request for reimbursement is authorized.

16. Confederated Tribes of the Colville Reservation and the Affiliated Tribes of Northwest Indians.[493]

251 *Positions of Colville Tribe, ATNI and the Parties.* At the public comment hearing on January 5, 2011, several representatives from the Colville Tribes and the ATNI testified as customers of both CenturyLink and Qwest. Together, the Colville Tribes and ATNI argue that the Commission should find that the Staff/Public Counsel Settlement is not in the public interest and either reject it or impose additional conditions upon the merger. Specifically, they recommend the following additional conditions:

- Including of the Colville Reservation communities of Keller (an unserved area) and Inchelium (an underserved area) to the five communities identified in Condition 14 of the Staff/Public Counsel Settlement for which CenturyLink has pledged to extend broadband

[492] As discussed more fully in Commissioner Jones' separate concurrence with dissent, he disagrees with the majority opinion requiring the combined company to establish an escrow account in furtherance of its broadband investment commitment.

[493] Although not a formal party to the proceeding, during their public testimony, the Colville Tribes and ATNI sufficiently identified and discussed telephone service quality and broadband availability concerns within Joint Applicants' territories, so we feel compelled to address them.

service. Further, CenturyLink should consult with the Colville Tribes regarding the design, engineering, and build out of the facilities.

- Creating a Tribal-Liaison office to provide Indian tribes with a direct point of contact for service quality issues, inquiries, or other matters that arise within tribal lands that are dependent on or otherwise implicate CenturyLink's operations.

- Establishing a training program available to Indian tribes to enable tribal personnel to service and make repairs to CenturyLink legacy switches and infrastructure.

- Promoting educational activities, at CenturyLink's sole expense, to inform residents of the Colville Reservation and other tribal lands in Washington of Enhanced Lifeline and Link-Up assistance programs available for tribal members.

- Imposing a reporting requirement for CenturyLink on areas it serves within Indian lands.[494]

252 The Colville Tribes and ATNI state that CenturyLink provides some DSL and telephone service to Inchelium and telephone-only service to Nespelem and Keller communities, while Qwest provides some DSL and telephone service to the Omak and Coulee Dam communities.[495] They maintain that most of the residents of the Colville Reservation do not have access to terrestrial broadband service which "affects health service, law enforcement, educational capacity, tribal governance, economic development, tourism, homeland security, entrepreneurship, and community quality of life" in these rural, isolated communities.[496] The Colville Tribes and ATNI provide two illustrative examples. First, officials with the Indian

[494] Exh. No. B-8 at 1.

[495] *Id.* at 3.

[496] *Id.*

Health Services (IHS) recently proposed to use the Colville Tribes' health facility in Nespelem as a regional IHS service hub for the region including four communities on the Colville Reservation, the IHS facilities on the Spokane and Kalispell Reservations, and the urban health clinic in Spokane, Washington.[497] CenturyLink, the incumbent provider, could not provide the requisite DS-3connection in Nespelem, so the IHS had to put the proposal on hold, thus delaying health care improvements in the northwest tribal area.[498] Second, they point to the need for broadband capacity to establish educational opportunities for Reservation residents. As higher education institutions transition to online class and degree offerings, Tribal members are severely limited in their educational opportunities due to the remoteness of the Reservation and its lack of broadband access.[499] This is especially difficult for a community experiencing 65 percent unemployment.[500]

253 The Colville Tribes assert that they pay a substantial amount of money to both CenturyLink and Qwest to maintain antiquated voice infrastructure on the Reservation.[501] They claim that Joint Applicants are often unresponsive to out-of-service circuits, resulting in health clinics, correctional facilities, and fish & wildlife enforcement without service for up to 72 hours before dispatching repair personnel.[502] The Colville Tribes and ATNI recommend that the Commission require the combined company to establish a training program for Tribal technical staff so that Tribal personnel can make the necessary circuit repairs quicker and at a lower cost than the Spokane-based company CenturyLink currently contracts with to do the work.[503]

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[497] *Id.*

[498] *Id.* at 3-4.

[499] *Id.* at 4.

[500] *Id.* at 3.

[501] *Id.* at 4.

[502] *Id.*

[503] *Id.* at 8.

254 The Colville Tribes and ATNI recommend that the Commission require the combined company to create a Tribal Liaison office within CenturyLink's Washington operations. This office would provide the Tribes with a direct point of contact within the company to address all service quality, broadband, and other concerns[504] and facilitate sharing information between CenturyLink and the Tribes including siting and infrastructure dynamics located on leased Reservation lands.[505]

255 They also recommend that the Commission require CenturyLink to do a better job of promoting Lifeline and Link-Up awareness and participation at CenturyLink's own expense and work with Tribal authorities to implement this educational requirement.[506] The Colville Tribes and ATNI note that Joint Applicants are obligated to verify eligibility for these programs with the Washington State Department of Social and Health Services offices.[507] They point out that the Tribal Lifeline and Link-Up programs recognize Indian-specific benefit programs administered by the Tribes.[508] Thus, Joint Applicants need to work with the Tribes to determine eligibility for these programs so that Reservation residents are not mistakenly denied program benefits.[509] The Colville Tribes and ATNI also request that the Commission direct CenturyLink to annually file a report, including maps, detailing the list of Tribes the company serves in its territory.[510]

256 On February 10, 2011, the Colville Tribes filed a letter updating the Commission on discussions their representatives had with CenturyLink subsequent to the public comment hearing. The Colville Tribes contend that CenturyLink officials refused to reach an agreement on any of their recommendations and the company indicated that

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[504] *Id.* at 7.

[505] *Id.*

[506] *Id.* at 9.

[507] *Id.*

[508] *Id.*

[509] *Id.*

[510] *Id.* at 10.

the issues are now subject to the Commission's decision.[511] The Colville Tribes point to the FCC's finding that Tribes have typically been left behind in the telecommunications revolution.[512] This, they suggest, is factually proven by telecommunications infrastructure conditions on the Colville Reservation.[513] Further, the Colville Tribes argue that CenturyLink's only response to the Tribes' request for a Tribal-Liaison office was to refer them to the company's existing area manager.[514] The Colville Tribes suggest that the potential benefits of having such an office "would impose no burden on CenturyLink while providing CenturyLink a valuable window into the unique needs and concerns of Indian communities within the state."[515]

257 Joint Applicants responded to the Colville Tribes' letter on February 23, 2011. They state that the Nespelem exchange has a very low customer density with less than one access line per square mile.[516] Joint Applicants assert that the Staff/Public Counsel Settlement provision committing to enable broadband in five central offices including Nespelem will mean that many of the access lines on the Colville Reservation at Nespelem will become broadband enabled.[517]

258 Joint Applicants state that, in general, broadband funds are very limited, and decisions about how to prioritize the deployment of broadband must be made only after a full evaluation of the combined company's networks and service areas.[518] They ask that

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[511] Exh. No. B-9 at 1.

[512] *Id.* at 2 (*citing* to the FCC's National Broadband Plan).

[513] *Id.*

[514] *Id.*

[515] *Id.*

[516] Joint Applicants' Response at ¶ 3.

[517] *Id.*

[518] *Id.* at ¶ 7.

the Commission not become involved in hand-selecting certain areas to receive deployment funding.[519]

259 In addition, Joint Applicants contend that they have already referred the Colville Tribes to the Area Operations Manager serving CenturyLink's customers on the Colville Reservation.[520] Joint Applicants assert that CenturyLink's "local" customer model empowers local managers to take control of local issues.[521] This, they argue, is the most efficient way to address the Tribes' concerns.[522] Furthermore, Joint Applicants maintain that the creation of a Tribal Liaison office is a management decision beyond the scope of this proceeding.[523]

260 Joint Applicants also point out that, contrary to the Tribes' request for use of its own, local technicians for service outages and repairs, access to CenturyLink facilities is limited to CenturyLink employees and authorized CenturyLink subcontractors.[524] They state that, should any members of the Tribes wish to, Tribal members are free to apply for employment with the carrier as positions arise.[525]

261 According to Joint Applicants, any concerns regarding the Lifeline program should be addressed at the FCC, not this Commission.[526] Joint Applicants note that any mapping requested from CenturyLink can be accomplished if the Tribes are willing to provide the carrier with maps showing the boundaries of Colville tribal lands.[527]

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[519] *Id.*

[520] *Id.* at ¶ 9.

[521] *Id.* at ¶ 10.

[522] *Id.*

[523] *Id.*

[524] *Id.* at ¶ 11.

[525] *Id.*

[526] *Id.* at ¶ 13.

[527] *Id.* at ¶ 14.

262 *Discussion and Decision.* We are concerned by the facts brought forward by the Tribes' representatives regarding service quality conditions and low penetration rates of broadband on the Colville Reservation. All telecommunications service providers subject to our jurisdiction have a responsibility to provide adequate, reliable telecommunications services throughout the service areas governed by their local exchange service tariff. We take seriously our responsibility to safeguard the service quality and availability of telecommunications services to all Washington customers and we should take into consideration issues such as those raised by the Tribes as we evaluate the merits of the proposed transaction. If, as the Tribes contend, service quality is poor or even nonexistent, we must assess the effect of the merger on such specific conditions as we do generally for any impact the transaction may have across the state. Pursuant to RCW 80.36.140, the Commission is tasked with the responsibility of ensuring that the telecommunications service provided to Washington citizens is adequate, efficient, proper, or sufficient. In accordance with RCW 80.36.260, where service is inadequate, the Commission has the authority to require specific improvements, changes, additions or extensions to address such situations.

263 While the Tribes' service quality issues are somewhat subjective and their representatives were not subject to examination by the parties, the testimony received at the public hearing was sufficiently detailed to raise significant concern. This is especially true when it appears that some of the customers affected by poor service quality are important to public safety such as local health clinics and correctional facilities. Accordingly, as one initial step to get to the root of the apparent service quality conditions on the Colville Reservation we require Joint Applicants to prepare and file, within 60 days after closing of the merger, a specific and detailed service quality improvement plan to address the Tribes' claims regarding the quality of Qwest and CenturyLink services, including broadband.[528] The plan shall detail specific actions the combined company will take, as well as timeframes to accomplish this

[528] If the Joint Applicants need more time to undertake a comprehensive review of the Tribes' needs, they may petition us for more time. Given the vast expanse and low density of the Colville Reservation, we recognize that these issues may require further vetting and study. Moreover, we recognize that large-scale improvements of facilities on one reservation goes well beyond what is before us here as well as the Tribes' request that we require the combined company to undertake a comprehensive study of the broadband needs of all Tribes in Washington.

over the next five years, as a means to address the service conditions described by the Tribal representatives.

264 We recognize that CenturyLink is already required under Condition 14 of the Staff/Public Counsel Settlement to file a statewide broadband plan within 180 days of closing. Notwithstanding the specific service quality plan we require above, we also +expect the statewide broadband plan to include consideration of the benefits and costs of extending broadband service beyond the Nespelem exchange to other Colville Reservation communities. We also expect the Tribe to share with CenturyLink any studies it may have that examine factors related to extending broadband service on the reservation.

265 We further conclude that the combined company should designate a Tribal Liaison officer to address the concerns raised by the Tribes. The combined company is to create this dedicated liaison position within 180 days of entrance of this Order, and shall notify the Tribes, Staff, and Public Counsel when it has done so. Contrary to Joint Applicants' assertion, we view the Tribes' request as a service quality issue and not simply a management decision.

E. Modifications to Settlement Provisions and Additional Conditions

266 As more fully discussed and described above, we believe that modifications to the commitments contained within the settlement agreements and additional conditions on our acceptance of the multiparty settlements are reasonably necessary to further regulatory efficiency and protect the public interest. Our approval of this transaction is specifically conditioned upon the following:

- A written report reviewing all aspects of the new or revised OSS acceptance testing process, the CLECs involved in the testing, and the voting process 60 days prior to the planned OSS replacement;[529]

- Modification of the Integra Settlement, Condition 12, so that the combined company's OSS "will … thereafter provide a level of

[529] Subject to third-party testing of any replacement OSS which may be imposed depending on our evaluation of the report.

wholesale service quality that is not less than that provided by Qwest prior to the Closing date …;"

- Where possible, treatment of the combined company's ILEC subsidiaries as a single entity for regulatory purposes in the state of Washington;

- Extension for three years of all CenturyLink ICAs in Washington as Joint Applicants have agreed to do for Qwest ICAs;

- A requirement that the combined company allow competitors to utilize a single, common ICA that would apply to interconnection between CLECs and all of the combined company's subsidiaries post-merger;

- Allowance for CLECs to establish a single POI per LATA for all areas where the combined company's exchange service areas are contiguous and may be reached through common facilities that are used to interconnect and handle the combined company's own traffic;

- Adoption of all of the extended timeframes of the Minnesota Settlement, which modified the Integra Settlement, with respect to the corresponding issues raised in this proceeding;

- An additional review of the combined company's *pro forma* results-of-operations according to a filing to be submitted no later than two years from the date of closing or by June 30, 2013, whichever comes later;

- Review of Qwest's AFOR between three and four years from the date of closing, and in no event, later than June 30, 2015;

- Reduction of the intrastate access charges of CenturyLink ILECs to mirror the intrastate access rates and rate structure of Qwest in Washington pursuant to a tariff filing no later than 30 days following closing, to be effective 30 days following filing;

- Written notification to the Commission, Staff, and Public Counsel 30 days prior to the encumbrance of any Washington assets;

- A requirement that, within thirty days following the transaction's close, the combined company will open an irrevocable escrow account and deposit $30 million as the first installment on the broadband investment agreed to in the Staff/Public Counsel Settlement, with two additional installments, in the amount of $25 million each, to be deposited annually on the first and second anniversary of the transaction's close.

- A written report detailing the combined company's plan for specific actions and timeframes to address service quality conditions and broadband raised by Tribal representatives of the Colville Reservation within 60 days of closing; and

- Creation of a dedicated tribal liaison within 180 days of entrance of this Order.

FINDINGS OF FACT

267 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

268 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with authority to regulate rates, rules, regulations, practices, and account of public service companies, including telecommunications companies.

269 (2) Qwest Communications International, Inc. (QCII) is a publicly traded Delaware corporation providing telecommunications services in 14 states. QCII owns and operates three subsidiaries in the State of Washington: Qwest

Corporation, Qwest LD Corp. (QLDC), and Qwest Communications Company LLC (QCC).

270 (3) Qwest Corporation provides incumbent local exchange services, intrastate interexchange services, and interconnection services in Washington. QLDC provides interexchange services in Washington. QCC provides long distance and competitive local exchange services in Washington.

271 (4) CenturyTel, Inc. (CenturyLink) is a publicly traded Louisiana corporation providing telecommunications services in 33 states. CenturyLink owns and operates many subsidiaries in the State of Washington, including: CenturyTel of Washington, Inc., CenturyTel of Inter-Island, Inc., CenturyTel of Cowiche, Inc., CenturyTel Long Distance, LLC, CenturyTel Solutions, LLC, CenturyTel Fiber Company II, LLC, United Telephone Company of the Northwest, and Embarq Communications, Inc.

272 (5) CenturyTel of Washington, Inc., CenturyTel of Inter-Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest are all incumbent local exchange carriers (ILECs).

273 (6) On May 13, 2010, QCII and CenturyLink filed a join application requesting approval of an indirect transfer of control of Qwest Corporation, QLDC, and QCC.

274 (7) QCII will, in this stock-for-stock transaction, become a wholly-owned, first tier subsidiary of CenturyLink. The combined company will serve approximately 17 million access lines in 37 states, including Washington.

275 (8) On October 21, 2010, QCII and CenturyLink filed a Settlement Agreement entered into with 360networks which they propose the Commission approve and adopt.

276 (9) On November 10, 2010, QCII and CenturyLink filed a Settlement Agreement entered into with Integra which they propose the Commission approve and adopt.

277 (10) On December 23, 2010, QCII and CenturyLink filed a Settlement Agreement entered into with Commission Staff and Public Counsel which they propose the Commission approve and adopt.

278 (11) On December 30, 2010, QCII and CenturyLink filed a Settlement Agreement entered into with the Department of Defense and all other Federal Executive Agencies which they propose the Commission approve and adopt.

279 (12) On February 10, 2011, QCII and CenturyLink filed a Settlement Agreement entered into with tw telecom which they propose the Commission approve and adopt.

280 (13) QCII and CenturyLink agreed to a number of commitments in these five multiparty settlements, in addition to those in the original Merger Agreement, including:

- Reporting commitments by CenturyLink to track synergy savings.
- Guarantees that CenturyLink and Qwest retail and wholesale customers will not incur management costs related to the merger.
- Capital commitments to deploy broadband service.
- Quality of service commitments.
- Retail residential and business services rate cap.
- Reporting and notification commitments for replacement of the Qwest operations support systems.

281 (14) CenturyLink's acquisition of QCII under the terms of the joint application as modified by the five Settlement Agreements attached to and made a part of

this Order by prior reference, and the additional conditions imposed in this Order, is consistent with the public interest.

CONCLUSIONS OF LAW

282 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

283 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.

284 (2) Qwest Corporation, QLDC, QCC, CenturyTel of Washington, Inc., CenturyTel of Inter-Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest are all "public service companies" and telecommunications companies as those terms are defined in RCW 80.04.010, and as those terms are otherwise used in Title 80 RCW.

285 (3) Chapter 80.12 RCW requires public service companies to secure Commission approval before they can lawfully sell or otherwise dispose of the whole or any part of their franchises, properties, or facilities that are necessary or useful in the performance of their duties to the public. Any sale or disposition made without Commission authority is void.

286 (4) WAC 480-143-170 governs the Commission's standard of review for a transfer of property and requires finding that the transaction is consistent with the public interest. To be consistent with the public interest, the transaction must not harm the public interest.

287 (5) The commitments in the five multiparty Settlement Agreements, in conjunction with the additional conditions in this Order, are sufficient to protect Washington customers and the public interest from risks of harm associated with this change of control transaction.

288 (6) The Commission should authorize, as consistent with the public interest, CenturyLink's indirect acquisition of Qwest Corporation, QLDC, and QCC on the terms provided by the joint applications, as conditioned by the terms of the five multiparty Settlement Agreements attached to and made a part of this Order by prior reference and as further conditioned by this Order.

289 (7) QCII and CenturyLink should be authorized and required to make any compliance filings necessary to effectuate the terms of this Order.

290 (8) The Commission Secretary should be authorized to accept by letter, with copies to all parties to this proceeding, a filing that complies with the requirements of this Order.

291 (9) The Commission should retain jurisdiction over the subject matter and the parties to effectuate the terms of this Order.

ORDER

THE COMMISSION ORDERS THAT:

292 (1) CenturyLink's indirect acquisition of Qwest Corporation, Qwest LD Corp, and Qwest Communications Company LLC on the terms provided by the joint application as conditioned by the terms of the five multiparty Settlement Agreements attached to and made part of this Order by prior reference, as amended herein, and the additional conditions in this Order, is approved.

293 (2) CenturyLink is authorized and required to make any compliance filing and any other filing necessary to effectuate the terms of, or required by, this Order.

294 (3) Within 15 days from the date of this Order, QCII and CenturyLink must accept the modifications to the settlement agreements and the addition conditions imposed by the Commission or elect not to proceed with the transaction.

295 (4) The Commission Secretary is authorized to accept all filings or submissions that comply with the requirements of this Order with copies to all parties to this proceeding.

296 (5) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective March 14, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

Commissioner Jones, Dissenting in Part

I concur with the majority view in this Order. But I respectfully dissent from the Commission's decision in Section D(15) of the Order requiring the combined company to establish an escrow account for the $80 million broadband service investment in Washington. While I agreed with my colleagues in assuming this approach for Frontier's purchase of Verizon Northwest, I do not believe it is necessary here. In the earlier proceeding we were faced with a much smaller entity, Frontier, which had no material presence in Washington, seeking to acquire Verizon Northwest, the second largest wireline carrier in Washington. The primary concern there was whether Frontier had the financial and operational acumen to acquire Verizon Northwest, along with other Verizon operating entities in other states, and meet the broadband investment commitment of its settlement with Staff.[530] Specifically, based on the multiple financial and operational challenges that Fairpoint Communications faced as it integrated Verizon properties in northeastern states, and the resulting bankruptcy, we were focused on the issue of potential bankruptcy and how that would affect the broadband deployment condition in that Order.

Here, we are also faced with a smaller carrier, CenturyLink, seeking to acquire a much larger entity, Qwest, but the circumstances are much different than the Frontier transaction. First, CenturyLink is a known entity with a long and respected history of providing telecommunications services in Washington. Moreover, both entities, Qwest and CenturyLink, have made broadband deployment commitments in previous regulatory proceedings. Such commitments were approved and required broadband investment over a certain time period, were monitored by our Staff and were achieved without controversy, in some instances before the deadlines. In my view, the companies should be given credit for their past history of compliance and responsiveness to regulatory requirements, including broadband investment, a factor which I believe mitigates in favor of not imposing an escrow requirement for

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[530] *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications 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 (April 16, 2010). ¶13.

prospective broadband investment. Second, the Staff/Public Counsel Settlement specifically requires the combined company to submit a broadband deployment plan within 60 days of the anniversary date of closing and provide annual reports over the next five years to measure progress towards the $80 million investment commitment. I feel these reports are more than adequate to allow the Commission to monitor the broadband investment. I see no reason to impose an escrow condition which only serves to tie up precious capital while the combined company attempts to integrate Qwest's operations and people in the new combined company. While I believe the broadband investment commitment of $80 million is a substantial factor in favor of approving the transaction and $10 million larger than any other state commitment, I do not believe it is either necessary or appropriate to directly involve the Commission in the detailed workings of overseeing funding and disbursements from an escrow fund. I believe it is more appropriate to focus our attention at a higher oversight level of directing our Staff to work closely with the combined company, Public Counsel, the Colville and other Tribes in achieving an appropriate broadband deployment plan, and monitoring its results based on the review and reports required under Condition 14.

For the foregoing reasons, I dissent, in part

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Philip B. Jones, Commissioner

Separate Statement of Chairman Goltz

I join in the foregoing decision approving the CenturyLink/Qwest transaction, but I write separately to set forth my views, though tentative, on the appropriate standard of review for property transfers by telecommunications companies.

All parties to this proceeding appear to concur that the Commission should adhere to the "no harm" standard for judging this transaction.[531] Because no party has advocated for a higher standard, and the issue has not been briefed, the Commission should not *in this case* revisit the issue.

However, I do not think it is self-evident that the "no harm" standard is the correct one. It is not the statutory standard, as the statute requiring Commission approval of transfers of property is silent on any standard.[532] Nor is the "no-harm" standard embodied in any Commission regulation. The Commission's general authority is to "regulate in the public interest,"[533] and the Commission has incorporated that general standard in its rule on transfers of property. WAC 480-143-170 states:

> If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds that the proposed transaction is not consistent with the public interest, it shall deny the application.

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[531] Joint Applicants' Initial Post-Hearing Brief at 1-2; Joint CLECs' Final Post-Hearing Brief at 2; Staff/Public Counsel's Final Post-Hearing Brief at 1-2.

[532] RCW 80.12.020(1) states in part that "[n]o public service company shall sell, lease, assign or otherwise dispose of the whole or part of any of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it to do so."

[533] RCW 80.01.040(3).

After considerable debate among interested parties, the Commission has historically interpreted "public interest" to be met by a finding of "no harm."[534] But that determination is an administrative application of an administrative standard. There is ample case law that suggests that the Commission could change its administrative position and even adopt a rule setting forth a different standard.[535]

In this proceeding Qwest suggests that we should derive some meaning from the 2009 legislation that established a "net benefits" standard for transfers of property by energy utilities. In 2009, the Attorney General successfully sought legislation that would codify the more stringent "net benefits" test for energy cases by adding to the preexisting provision in RCW 80.12.020: "The commission shall not approve any transaction under this section that would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electric company without a finding that the transaction would provide a net benefit to the customers of the company."[536] Qwest argues that this amendment "clarifies" that the "no harm" standard applies to transfers of property for telecommunications companies.[537] However, I find it difficult to conclude from the 2009 statutory change that the Washington Legislature, in requiring a higher standard for transfers of property by energy companies, intended to limit the Commission's administrative discretion in setting, or revising, a standard for review of transfers of property by telecommunications companies. In other words, I do not share Qwest's inference about any legislative intent with regard to telecommunications property transfers as a consequence of a change to the statute governing energy property transfers.

Accordingly, I think the Commission continues to have the discretion to articulate administratively a standard for review of transfers of property by telecommunications companies. There may be good policy reasons why we should reject the "no harm"

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[534] *See, e.g., In the Matter of Puget Holdings LLC & Puget Sound Energy, Inc.*, Order 08, ¶¶ 106-121(Dec. 30, 2008).

[535] *See, e.g., Federal Communications Comm'n v. Fox Television Stations*, __U.S.__, 129 S.Ct. 1800, 1810, 173 L.Ed.2d 738 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subject to more searching review.").

[536] Chapter 24, Laws of 2009, §3.

[537] Joint Applicants' Initial Post-Hearing Brief at 1.

standard as inconsistent with the "public interest" that we are bound to protect. To adhere to a "no harm" standard would mean that, hypothetically, if there were no harms to the public, but there were hundreds of millions of dollars worth of synergy savings, all those savings would go to the company shareholders. That would seem to fly in the face of the overwhelming body of public service case law that articulates a duty on the part of the Commission to "balance" the interests of ratepayers and shareholders.[538] A "net benefits" test would seem to be at least minimally more consistent with our mission to balance these competing interests. Further, as a practical matter, the Commission has sought to ensure that ratepayers actually benefit from property transfers. For example, in reviewing the transfer of the Centralia coal-fired plant from various Washington utilities, including Puget Sound Energy and Avista Corporation, to TECWA Power, the Commission applied a "no harm" standard, but then went on to allocate half of the gains on the sale of the plant to the ratepayers.[539]

Therefore, I believe that it may be appropriate for the Commission to revisit its past decisions articulating merely a "no harm" standard for transfers of property by telecommunications companies. However, as I noted earlier, because no party advocated this outcome, I do not view this proceeding as the proper vehicle to undertake to update our analysis of the proper standard.

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Jeffrey D. Goltz, Chairman

[538] *See People's Organization for Washington's Energy Resources v. Washington Utilities & Transportation Comm'n*, 104 Wn. 798, 819, 711 P.2d 319 (1985), *citing Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

[539] *Avista Corp.*, Dkt. Nos. UE-991255, UE-991262, 2000 WL 827167 (March 6, 2000).

APPENDICIES A – E

Multiparty Settlement Agreements

GLOSSARY TERMS

AFOR	Alternative Form of Regulation authorized by RCW 80.36.135.
Act	The Telecommunications Act of 1996. 47 U.S.C. Section 101, *et. seq.*
AIP	Annual Incentive Plan
APAP	Additional Performance Assurance Plan
BOC	Bell operating company
CLEC	Competitive local exchange company. Not an ILEC, and generally subject to very limited regulation.
CMP	Change Management Process
CSGP	Customer Service Guarantee Program
DSL	Digital Subscriber Line – A feature that allows existing telephone circuits to carry additional signals including relatively high bandwidth. These frequencies enable a customer to access the internet or send and receive information or data.
EBITDA	Earnings before interest, taxes, depreciation, and amortization
ETC	Eligible telecommunications carrier
FCC	Federal Communications Commission.
ILEC	Incumbent local exchange company; a company in operation at the time the Act was enacted (August 1996).
ICA	Interconnection agreement
IP	Internet protocol
LATA	Local Access and Transport Area
Mbps	Megabytes per second
OBF	Ordering and Billing Forum
OSS	Operational Support Systems – the computerized information systems used to provision, maintain, repair, and bill for telecommunications services
POI	Point of interconnection
QPAP	Qwest Performance Assurance Plan
QPID	Qwest Performance Indicator Definitions

RCP	Regional Commitment Plan
SEC	Securities and Exchange Commission
SPG	Service Performance Guarantee
TELRIC	Total element long-run incremental cost
UNE	Unbundled network element
VNXX	Virtual NXX – assignment of a telephone number to a customer who is not physically located in the exchange to which the NXX is assigned.
VoIP	Voice over Internet Protocol
USF	Universal service fund
WTAP	Washington Telephone Assistance Program.