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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTURYLINK, INC.,

Plaintiff,

v.

WASHINGTON STATE UTILITIES AND
TRANSPORTATION COMMISSION; JEFFREY
GOLTZ, in his official capacity as Chairman of the
Washington State Utilities and Transportation
Commission; PATRICK OSHIE, in his official capacity
as a member of the Washington State Utilities and
Transportation Commission; and PHILIP JONES, in his
official capacity as a member of the Washington State
Utilities and Transportation Commission,

Defendants.

No. _____

COMPLAINT

Plaintiff CenturyLink, Inc. (“CenturyLink”) brings this claim for declaratory and injunctive relief against the Washington State Utilities and Transportation Commission (“WUTC”) and defendants Jeffrey Goltz, Patrick Oshie, and Philip Jones in their official capacities as Commissioners of the WUTC. This complaint arises out of the recent merger between Plaintiff and Qwest Communications International Inc. (“Qwest”). Though Defendants approved the merger in their Order issued March 14, 2011 (Exhibit A), they imposed a number of unlawful conditions challenged here. *Final Order Approving and Adopting, Subject to*

1 *Conditions, Multiparty Settlement Agreements and Authorizing Transaction*, No. UT-100820
2
3 (Wash. U.T.C. March 14, 2011) (“*WUTC Order*”).
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5 In support of its Complaint, CenturyLink alleges as follows.
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7 **NATURE OF THE ACTION**
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9 1. This action arises under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, the
10 Telecommunications Act of 1996 (“the Act”), 47 U.S.C. § 151, *et seq.*, and the Washington
11 Administrative Procedure Act (“WAPA”), RCW Chapter 34.05.
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13 2. Under the Act, the Federal Communications Commission (“FCC”) regulates
14 interstate communications, while states have some power to regulate intrastate communications.
15 47 U.S.C. § 151.
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17 3. The FCC has repeatedly concluded, and courts have affirmed, that Internet
18 services are jurisdictionally interstate and thus subject to regulation only by the FCC. *See, e.g.*,
19 *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1125-26 (9th Cir. 2003).
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21 4. Title II of the Act, 47 U.S.C. §§ 201-276, regulates “telecommunications
22 carriers,” *id.* § 153(44), i.e., those who transmit, “between . . . points specified by the user, . . .
23 information of the user’s choosing, without change,” *id.* § 153(43); telephone calls are the
24 archetypal example. Title II imposes detailed and onerous requirements on “telecommunications
25 carriers,” and though it is largely enforced by the FCC, states play a role.
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27 5. By contrast, those who provide “information services”—i.e., the “capability for
28 generating, storing, transforming, processing, retrieving, utilizing, or making available
29 information via telecommunications,” *id.* § 153(20)—are regulated only by the FCC and only
30 under the FCC’s “ancillary jurisdiction” in Title I of the Act.
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32 6. The FCC has concluded, and courts have affirmed, that broadband Internet
33 service is an “information service,” not a “telecommunications service,” and thus is subject to
34 regulation only by the FCC and only under Title I. *See generally Nat’l Cable & Telecomm.*
35 *Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005).
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1 7. Because broadband Internet service is both interstate and an “information
2 service,” the WUTC “ha[s] no jurisdiction over broadband services,” as it has acknowledged. *In*
3 *the Matter of the Joint Application of Verizon Communications, Inc., and Frontier*
4 *Communications Corp. For an Order Declining to Assert Jurisdiction Over, or, in the*
5 *Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc.*, 2010 WL
6 1619617, at *44 (Wash. U.T.C. 2010).

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12 8. To foster competition, the Act requires “incumbent local exchange carriers”
13 (“ILECs”)—those phone companies operating before the Act’s passage, such as certain Qwest
14 and CenturyLink subsidiaries—to provide “competitive local exchange carriers” (“CLECs”)
15 interconnection services and access to some unbundled elements of their telephone networks
16 through “interconnection agreements.” 47 U.S.C. § 251. ILECs are required to negotiate
17 interconnection agreements in good faith with CLECs, and if they cannot agree, either party may
18 ask the appropriate state commission to conduct binding arbitration. *Id.* § 252. Section 252
19 gives every ILEC and CLEC the right to negotiate and arbitrate individual interconnection
20 agreements that are tailored to each carrier’s specific business needs.

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25 9. The authority of state commissions under Section 252 is limited to the powers that
26 provision expressly grants. Section 252 permits commissions to decide open issues in an
27 arbitration, approve negotiated and arbitrated interconnection agreements, and resolve disputes
28 arising under interconnection agreements. After a state commission has approved an
29 interconnection agreement, however, it has no authority to modify the agreement by imposing
30 new terms. *Pacific Bell*, 325 F.3d at 1125-28.

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32 10. Section 271 of the Act imposes requirements on “Bell Operating Companies”
33 (“BOCs”) created by the breakup of AT&T in the early 1980s; US WEST, which Qwest
34 purchased in 2000, was a BOC (47 U.S.C. § 153(4)), and CenturyLink now has BOC obligations
35 in legacy US WEST service areas. Qwest’s interconnection agreements in Washington impose
36 obligations that are a direct outgrowth of proceedings conducted under Section 271 that
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1 ultimately gave Qwest the authority to offer long distance service in Washington. These
2 contractual obligations are directly tied to Qwest's status as a BOC.
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5 11. The WUTC Order challenged in this case violates each of the federal laws
6 outlined above and is arbitrary and capricious. First, it regulates CenturyLink's provision of
7 broadband Internet service to consumers, even though, as the WUTC has acknowledged, the
8 WUTC lacks jurisdiction to regulate broadband. Second, by unilaterally extending the terms of
9 all of CenturyLink's interconnection agreements by three years, the order modifies binding
10 contracts where the WUTC has no authority to do so. Relatedly, the order unlawfully attempts to
11 modify the agreements by permitting the WUTC to require CenturyLink (at its own expense) to
12 perform costly testing by a third party before being allowed to change the computer systems it
13 uses to provide service to CLECs. Finally, by requiring all CenturyLink subsidiaries in
14 Washington to offer interconnection agreements equivalent to those previously offered by
15 Qwest, the order effectively imposes on non-BOCs improper contractual terms that are unique to
16 Qwest's status as a BOC.
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29 12. The WUTC Order also violates the WAPA. The Order requires CenturyLink to
30 reduce certain of its rates, but it never finds that the revised rates are "fair, just, reasonable and
31 sufficient," as required by RCW 80.36.080, and it never finds that the existing rates violate that
32 standard, as required by RCW 80.36.140; indeed, the Order never mentions the relevant standard
33 or cites the controlling statutes. In addition, the Commission proceeding was conducted pursuant
34 to RCW Chapter 80.12, which requires WUTC approval before utilities may merge, but RCW
35 Chapter 80.12 does not authorize the WUTC to alter a utility's rates as a condition for approving
36 a merger. Finally, the WUTC is supposed to approve mergers if they do "no harm," but the
37 WUTC ordered CenturyLink to revise its rates in the absence of substantial evidence that the
38 revision was necessary to avoid harm. For this reason and those set forth above, the WUTC's
39 Order violates Chapter 80.12.
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JURISDICTION AND VENUE

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3 13. This Court has jurisdiction over Plaintiff’s federal claims under 28 U.S.C. § 1331
4 and 47 U.S.C. § 252(e)(6) and over Plaintiff’s state law claim under 28 U.S.C. § 1367.
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7 14. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(a)(1) and (a)(2)
8 because one or more defendants reside in this District and a substantial part of the events giving
9 rise to the claims occurred in this District.
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12 **PARTIES**

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14 15. Plaintiff CenturyLink, Inc. is a Louisiana corporation with its principal place of
15 business in Monroe, Louisiana. CenturyLink’s principal place of business in Washington is in
16 Seattle.
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19 16. Defendant Washington State Utilities and Transportation Commission is a
20 governmental body organized under the laws of the State of Washington, and has authority to
21 regulate telecommunications carriers providing intrastate service in Washington. The WUTC is
22 headquartered at 1300 S. Evergreen Park Dr. SW, Olympia, WA 98504.
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25 17. Defendants Jeffrey Goltz, Patrick Oshie, and Philip Jones are the three current
26 members of the WUTC and are named in their official capacities.
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29 **STATEMENT OF FACTS**

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31 **A. The Merger**

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33 18. In April 2010, CenturyLink and Qwest Communications International, Inc.
34 (“Qwest”) announced their intent to merge.
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37 19. CenturyLink is a publicly traded company. Several CenturyLink subsidiaries
38 operate in Washington as ILECs, including CenturyTel of Washington, Inc., CenturyTel of Inter-
39 Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone of the Northwest.
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42 20. Prior to the merger, Qwest was a separate publicly traded company. Qwest had
43 several subsidiaries in Washington, including Qwest Corporation (“Qwest Corp.”), the state’s
44 largest ILEC.
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1 21. Qwest acquired US WEST in 2000. US WEST was a BOC and thus was not
2 permitted to offer long distance service in Washington and other states in its region absent FCC
3 approval under 47 U.S.C. § 271, which Qwest had obtained. Qwest's Washington
4 interconnection agreements contain multiple provisions unique to a BOC that are a direct
5 outgrowth of the process that led to the FCC's approval.
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11 **B. Proceedings Before the WUTC**

12 22. As required by RCW Chapter 80.12, on May 13, 2010, Qwest and CenturyLink
13 filed a request with the WUTC seeking authorization to merge.
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15 23. A number of parties, including several of the combined company's competitors,
16 objected to the merger, and Qwest and CenturyLink reached settlement agreements with many of
17 them. As part of these settlements, the combined company agreed to a number of conditions.
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21 24. For example, the combined company promised to invest at least \$80 million in
22 Washington for broadband infrastructure over a five-year period beginning January 1, 2011.
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27 *WUTC Order*, ¶ 36.

28 25. The combined company also agreed to continue offering some existing Qwest
29 customers the same interconnection agreements they had enjoyed previously for three years
30 following the merger. *WUTC Order*, ¶¶ 20-21.
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33 26. The combined company also agreed to a number of commitments as to the quality
34 and functionality of its "operational support systems" ("OSS"), which are the highly
35 sophisticated computer systems the company uses to provide services. Specifically, the company
36 agreed to submit frequent reports to the WUTC as to progress in integrating OSS, agreed to
37 continue using Qwest's OSS in the legacy Qwest service areas for at least two years and to offer
38 OSS of at least the same quality thereafter, and to give CLECs notice of any proposed OSS
39 changes and power to reject changes to OSS by a majority vote. *WUTC Order*, ¶¶ 39-43.
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48 27. Though the WUTC accepted these conditions as sufficient in many respects, it
49 decided to impose a number of additional obligations on the combined company.
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1 28. First, the WUTC required that the \$80 million the combined company had
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3 pledged to spend on broadband over five years instead be placed into an escrow account outside
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5 the company's control. The escrow is required to be funded over two years. The Order
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7 establishes that money will be released to reimburse the company for broadband expenditures
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9 only on written authorization by the WUTC, effectively giving the WUTC control over the
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11 company's broadband investments in Washington. *WUTC Order*, ¶¶ 248-50. The Order fails to
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13 provide any standard or criteria that the WUTC will apply in deciding whether to reimburse the
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15 company for broadband expenditures. The Order also requires CenturyLink to prepare a "service
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17 quality improvement plan" for all of its services, including broadband, to address claims of
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19 service flaws from certain Native American tribes in Washington. *WUTC Order*, ¶ 263.

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21 29. Second, the WUTC required that the combined company extend for three years
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23 not only existing Qwest interconnection agreements, but also the interconnection agreements of
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25 all CenturyLink subsidiaries in Washington. *WUTC Order*, ¶ 161.

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27 30. Third, the WUTC required that the combined company offer a common
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29 interconnection agreement with all of its Washington subsidiaries, even though some of the
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31 subsidiaries are separate ILECs that have the right under Section 252 to negotiate and arbitrate
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33 their own agreements. Moreover, the WUTC imposed this requirement even though any
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35 common interconnection agreement would either contain provisions that are unique to the BOC
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37 obligations and are inapplicable to the other ILECs, or omit BOC obligations that Qwest must
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39 comply with. *WUTC Order*, ¶ 163. In other words, a common interconnection agreement will
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41 necessarily include provisions that do not apply to some of the ILEC subsidiaries and may also
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43 exclude provisions that apply to Qwest.

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45 31. Fourth, the WUTC imposed a variety of open-ended obligations on any changes
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47 to the combined company's OSS, including requiring the company to fund whatever third-party
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49 testing of its OSS the WUTC later deems appropriate. *WUTC Order*, ¶¶ 119-24.

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51 32. Finally, the WUTC required all CenturyLink subsidiaries in Washington to reduce

1 their intrastate access charges to match those charged by Qwest. *WUTC Order*, ¶¶ 235-37.

2
3 **FIRST CAUSE OF ACTION--**
4 **(Violation of the Supremacy Clause, U.S. CONST., art. VI, cl. 2)**

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6 33. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the
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8 allegations in paragraphs 1 through 32 above.

9
10 34. The regulation of broadband Internet service falls under the exclusive jurisdiction
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12 of the FCC pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.*

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14 35. The WUTC Order thus violates federal law and is preempted because it seeks to
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16 regulate CenturyLink's deployment of broadband Internet service.

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18 **SECOND CAUSE OF ACTION--**
19 **(Violation of the Telecommunications Act of 1996: Unauthorized Imposition of Contractual**
20 **Terms)**

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22 36. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the
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24 allegations in paragraphs 1 through 35 above.

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26 37. Under 47 U.S.C. §§ 251-252, the WUTC's authority over interconnection
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28 agreements is limited to arbitrating open issues relating to the terms of prospective agreements,
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30 approving negotiated and arbitrated agreements, and enforcing them according to their terms.

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32 38. The WUTC exceeded its limited authority under these provisions by imposing
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34 new terms in existing interconnection agreements—namely, extending the length of agreements
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36 by three years and requiring as a condition that CenturyLink agree to potential third party testing
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38 requirements for OSS.

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40 39. The WUTC Order thus violates federal law because the WUTC has no authority
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42 under the Act or any other provision of federal law to impose these requirements. Further, the
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44 requirements conflict with federal law, in particular, the Act's strong preference for voluntarily
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46 negotiated interconnection agreements between ILECs and CLECs over agreements that are
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48 dictated by state commissions.

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THIRD CAUSE OF ACTION--
(Violation of the Telecommunications Act of 1996: Unlawful Interference with the
Rights of the ILEC Subsidiaries)

40. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations in paragraphs 1 through 39 above.

41. Under Sections 251 and 252 of the Act, each ILEC has the right to negotiate and arbitrate its own interconnection agreement with a CLEC.

42. By requiring the combined company's ILEC subsidiaries to use a common interconnection agreement, the WUTC Order unlawfully interferes with the right of the ILEC subsidiaries to enter into their own interconnection agreements.

43. The WUTC also has no authority under Sections 251 and 252 to impose on the ILEC subsidiaries new interconnection agreement terms that reflect unique BOC obligations that some of the subsidiaries have never agreed to or had imposed in a Section 252 arbitration.

44. The Order thus violates the Act by requiring a common interconnection agreement.

FOURTH CAUSE OF ACTION--
(Violation of the Telecommunications Act of 1996: Denying CenturyLink's Right of Cost
Recovery)

45. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations in paragraphs 1 through 44 above.

46. Section 252 of the Act permits ILECs to recover the costs they incur to provide CLECs with access to unbundled network elements. Operation support systems are among the unbundled network elements to which CenturyLink is required to provide access.

47. To comply with the ruling in the WUTC Order that CenturyLink agree to potential third party testing requirements for OSS, CenturyLink will incur significant costs that are directly related to the requirement under Section 252 to provide access to OSS and other unbundled network elements. The requirement in the WUTC Order for CenturyLink to pay all the costs of this OSS testing violates CenturyLink's right under the Act to recover the costs it

1 incurs to provide access to unbundled network elements and conflicts with federal law.
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3 **FIFTH CAUSE OF ACTION--**
4 **(Violations of the Washington Administrative Procedure Act, RCW Chapter 34.05)**

5 48. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the
6 allegations in paragraphs 1 through 47 above.
7

8 49. Under the Washington Administrative Procedure Act, the WUTC is required to
9 apply Washington law properly and to engage in reasoned decision-making.
10

11 50. RCW 80.36.080 requires that the WUTC set rates that are “fair, just, reasonable
12 and sufficient,” and RCW 80.36.140 imposes procedural and substantive requirements on the
13 Commission before rates can be changed.
14

15 51. The WUTC Order imposes revised rates on Plaintiff without ever finding that
16 those rates are “fair, just, reasonable and sufficient,” or even mentioning the controlling statute.
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18 52. The rates the WUTC imposed are not “fair, just, reasonable and sufficient.”
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20 53. Washington law generally prohibits the Commission from engaging in single
21 issue or piecemeal ratemaking. The Commission is thus required to determine whether a rate
22 meets the standard of “fair, just, reasonable and sufficient” by conducting a comprehensive
23 review of a company’s rate base and operating expenses, determining an appropriate rate of
24 return, and equitably allocating rate changes among ratepayers.
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26 54. The WUTC arbitrarily and capriciously ignored these rules here. Rather than
27 engaging in the comprehensive review required under Washington law, the WUTC engaged in
28 piecemeal, single-issue ratemaking, never making an ultimate determination that the rates
29 required under its Order are fair, just, reasonable, and sufficient.
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31 55. The WUTC Order is arbitrary and capricious in that it asserted jurisdiction to
32 regulate CenturyLink’s broadband investments, directly contrary to the WUTC’s own earlier
33 finding that it lacks jurisdiction to regulate broadband.
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35 56. The WUTC also failed to provide adequate notice to allow CenturyLink to present
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1 meaningful evidence on the issue of broadband investment requirements such as the required
2 escrow account and the “service quality improvement plan.”
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5 57. RCW Chapter 80.12 authorizes the WUTC to review proposed mergers of “public
6 service companies,” but not to review rates in merger proceedings, and the WUTC is to approve
7 mergers if they do “no harm.”
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11 58. The WUTC Order improperly revised rates in a merger proceeding, and in the
12 absence of substantial evidence that the revision was necessary to avoid harm. The Order is not
13 supported by evidence that cost savings CenturyLink allegedly would experience would bring
14 harm to the market for long distance services.
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19 59. The WUTC also failed to show any link between the remedy it imposed and the
20 supposed harms it found.
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23 **PRAYER FOR RELIEF**

24
25 CenturyLink requests that the Court enter judgment on its behalf:

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27 A. Declaring that the conditions discussed above imposed by Defendants are
28 preempted by federal law, violate the Telecommunications Act of 1996, or were imposed in
29 violation of the WAPA;
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32 B. Enjoining Defendants and their agents from attempting to enforce these
33 conditions and affirmatively requiring them to take any necessary steps to undo the conditions;
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37 C. Granting such other and further relief as the Court deems just.
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41 DATED this 13th day of April, 2011.
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