

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Joint Application of

QWEST COMMUNICATIONS
INTERNATIONAL INC. AND
CENTURYTEL, INC.

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

DOCKET NO. UT-100820

(REDACTED VERSION)
PUBLIC COUNSEL'S RESPONSE
TO PETITION FOR RELEASE OF
FUNDS FROM BROADBAND
ESCROW ACCOUNT AND
ELIMINATION OF
REQUIREMENTS FOR FUTURE
ESCROW PAYMENTS

1. Pursuant to the Commission's Notice of Opportunity to Respond, issued April 3, 2012, Public Counsel files this Response to CenturyLink, Inc.'s ("CenturyLink" or "Company") Petition for Release of Funds from Broadband Escrow Account and Elimination of Requirements for Future Escrow Payments ("Petition"). Public Counsel recommends that the Petition be denied because the escrow requirement is still needed and disbursement of funds from the escrow account is premature.¹

**I. THE ESCROW REQUIREMENT SHOULD CONTINUE AND FUTURE
PAYMENTS ARE REQUIRED**

2. The Commission approved the merger between Qwest Communications International Inc. ("Qwest") and CenturyTel, Inc. ("CenturyLink") in its Order No. 14 in this proceeding. However, the Commission expressly conditioned its approval of the merger on the commitments in the multiparty Settlement Agreements and the additional modifications imposed by the

¹ The Commission, in its Notice of Opportunity to Respond, notes that the Company's request for reimbursement would be bifurcated from its request to eliminate the escrow requirement. Public Counsel addresses both issues in this Response because the issues are closely related to one another and are equally affected by the overarching question posed by the Company's Petition, namely whether the Company has complied with Order No. 14.

**(REDACTED)PC'S RESP TO PET FOR
REL OF FUNDS FROM BROADBAND
ESCROW ACCNT AND ELIMINATION
OF REQ FOR FUTURE ESCROW
PAYMENTS**

1

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Commission in Order 14.² These commitments and modifications were “sufficient to protect Washington customers and the public interest from risks of harm associated” with the merger.³ Qwest and CenturyLink were required to accept the modifications to the settlement agreements and the additional conditions imposed by the Commission within 15 days of the date of Order 14, or elect to not proceed with the merger.⁴ Both Qwest and CenturyLink accepted the modifications and additional conditions and proceeded with the merger.⁵

3. A major condition imposed by the Commission was the escrow requirement that is addressed in the Petition. The Commission required that the Company deposit \$80 million over three years into an account controlled by a third-party escrow agent. The Company would be able to access the money only after the Commission provides the third-party escrow agent with written authorization to release the funds.⁶

4. The escrow requirement arose from the Commission’s concerns with the broadband commitment’s strength under the original Settlement Agreement. The Commission was concerned that the \$80 million broadband commitment “may not be as robust as advertised”⁷ and that the actual, incremental benefits to Washington customers over and above “business as usual” may be smaller than the pledge.⁸ The Commission imposed the escrow requirement to preserve the broadband commitment made to Washington customers and to ensure that the funds

² Order No. 14, ¶¶ 286, 292.

³ Order 14, ¶ 287.

⁴ Order 14, ¶ 294.

⁵ Letter from Qwest and CenturyLink to the Commission, dated March 28, 2011 and filed with the Commission on March 29, 2011.

⁶ Order 14, ¶ 250. The Commission has the authority to review the Company’s spending for compliance with Order 14. The Commission’s review is not simply a rubber stamp, but the Commission could, if the situation necessitated, deny the Company’s request for reimbursement and not authorize the third-party escrow agent to release funds.

⁷ Order 14, ¶ 249.

⁸ Order 14, ¶ 248.

would be spent on appropriate purposes.⁹ In addition, the escrow requirement ensures that no reimbursement would occur until the facilities were installed and placed in service.¹⁰ The reasons for imposing the escrow requirement have not been mitigated and still exist.

5. The escrow requirement was not included in the negotiated terms of the Staff/Public Counsel Settlement, which established \$80 million commitment. However, the escrow requirement is now the law of this case, an order of the Commission, and a requirement in which the Company acquiesced. Public Counsel views the Commission's requirement as a strong tool towards ensuring that a meaningful broadband investment is made in Washington. The escrow requirement is in place to ensure that the Company's expenditures comply with Order 14 prior to obtaining reimbursement.

6. Although CenturyLink asserts that it has spent a considerable amount of money –nearly three quarters of the \$80 million commitment – it has not demonstrated that the spending has been appropriate and that the spending complies with the Commission's Order. Indeed, the process for determining what is "appropriate" has not been completed.

7. The Company was required to file within 180 days of the Transaction's close a separate, confidential filing identifying the initial wire centers targeted for the investment.¹¹ The purpose of this filing, often referred to by the Parties as the "180-Day Plan,"¹² was to outline the broadband deployment parameters that would comply with the requirements under Order 14. The Plan must include information regarding unserved and underserved wire centers and the

⁹ Order 14, ¶ 249 and n.491.

¹⁰ Order 14, n.491.

¹¹ Order 14; Appendix A to Staff/Public Counsel Settlement Agreement, p. 6.

¹² In discussions with Commission Staff and Public Counsel, the Company presented the information as a 5-year deployment plan. Whether the 180-Day plan was an initial deployment plan or a 5-year deployment plan, it has not

estimated living units that would be enabled or upgraded.¹³ The Parties agreed that CenturyLink would evaluate the unserved and underserved areas in its initial broadband evaluation with an emphasis on those wire centers with 85 percent broadband availability or less.¹⁴ The Parties also agreed that the evaluation would be used in developing the broadband deployment plan.¹⁵

8. The Company filed a 180-Day Plan on September 28, 2011.¹⁶ This plan has not been agreed to by Public Counsel or Commission Staff, and the Company committed to further discussions with both parties and to refile the 180-Day Plan to the extent that changes result from those discussions.¹⁷ Those discussions have not yet concluded.¹⁸ As such, there are no effective broadband deployment parameters by which to evaluate the Company's investment.¹⁹ It also appears that the plan, as filed, is not in compliance with Order 14.

9. A key aspect of the \$80 million commitment was the requirement to spend one-third of that amount in unserved and underserved areas, with a particular emphasis on areas with 85 percent broadband availability or less. One of the fundamental deficiencies with the 180-Day Plan as filed is the lack of emphasis on wire centers with 85 percent broadband availability or

been completed and is still a critical step in determining the appropriate parameters of broadband deployment as required under Order 14.

¹³ Order 14, ¶¶ 37, 288, 292; Appendix A to Staff/Public Counsel Settlement Agreement, p. 6.

¹⁴ Appendix A to Staff/Public Counsel Settlement Agreement, p. 6.

¹⁵ *Id.*

¹⁶ Up until this point in time, discussions among the parties were primarily focused on the form of the report. First drafts of the proposed format was not provided until July 13, 2011. Public Counsel did not see the content of the report until it was filed with the Commission in September.

¹⁷ Letter filed with Commission in this Docket on October 4, 2011, from CenturyTel and Qwest.

¹⁸ Indeed, Public Counsel and Commission Staff have been in discussions with CenturyLink since the close of the Transaction, and the Parties have yet to reach agreement on the appropriate deployment parameters.

¹⁹ Notably, CenturyLink does not refer to the 180-Day Plan in its Petition and does not assert that its spending is consistent with the Plan. Concurrently with filing its Petition, the Company filed its Highly Confidential Compliance with Condition 14 ("Compliance Report") with the Commission in this Docket (March 30, 2012). Attachment A to the Highly Confidential filing is the Annual Report showing purported actual spending in 2011. Attachment B shows the deployment plan for 2012. The relationship among these filings – the 180-Day Plan, and Attachments A and B – is unclear. The 180-Day Plan should inform the Company's actual spending, and the annual

less. Public Counsel and Commission Staff communicated this concern to CenturyLink, in an email correspondence sent on November 3, 2011, in which both parties reserved judgment regarding whether the plan was compliant with the Order. Specifically, the 180-Day deployment plan did not appear to adequately emphasize wire centers with 85 percent availability or less, and as a result, that the plan did not appear to comply with Order 14.

10. Indeed, Public Counsel continues to have substantial concerns regarding the overall choices made by the Company in both the 180-Day Plan and its more recently filed Compliance Report, which describes broadband investments made during 2011.²⁰ The vast majority of Company's broadband investment is targeted to the biggest, most densely-populated markets in Washington, which would be investments the Company would make absent any regulatory mandate. Such selection appears to mock the Commission's broadband condition and further supports upholding the escrow requirement to ensure proper investment is made in compliance with Order 14.²¹

11. The foregoing unresolved issues highlight the value of the Commission's decision to establish the escrow requirement to ensure meaningful broadband investment in Washington. The Commission should deny CenturyLink's request that the requirement be eliminated.

deployment plan for the upcoming year should be consistent with, and modifying as needed, the 180-Day Plan. Since the 180-Day Plan has not been completed, this relationship is not occurring among the reports.

²⁰ Highly Confidential Compliance with Condition 14, filed with the Commission in this Docket on March 30, 2012; Attachment A.

²¹ It is not the case that CenturyLink would be able to invest in broadband deployment in any way it wished with regard to the portion of the \$80 million commitment that is not explicitly associated with unserved and underserved wire centers. The Commission imposed the escrow requirement on the entire commitment amount in order to ensure that the commitment would be spent in Washington on broadband deployment and to increase deployment and access speeds in a meaningful manner.

(REDACTED)PC'S RESP TO PET FOR
REL OF FUNDS FROM BROADBAND
ESCROW ACCNT AND ELIMINATION
OF REQ FOR FUTURE ESCROW
PAYMENTS

II. DISBURSEMENT FROM THE ESCROW ACCOUNT IS PREMATURE

12. The Company asserts that it has already spent \$57 million towards the \$80 million commitment. This level of spending is surprising given that the Company negotiated a 5-year spending period, and the Commission imposed escrow deposit requirements to be made over a 3-year time period. This level and pace of spending could only have been completed pursuant to Company plans for broadband deployment that were already in place prior to the Commission's approval of the merger. However, Order 14 contemplated that a deployment plan would be in place prior to substantial spending occurring.
13. If the process had worked as envisioned by the Commission in Order 14, and by the Parties to the Staff/Public Counsel Settlement Agreement, a broadband deployment plan would have been in place approximately 180 days after the date of the order. The Company would then have invested in broadband pursuant to the deployment plan and would be in a position to present the Commission with a report regarding the investment. The report would then support a request for a disbursement. The Commission would be able to compare the investment made with the deployment plan to determine whether the investment complied with its Order.
14. This is not the situation we have before the Commission currently. The Company has essentially placed the cart before the horse and created a chicken-and-egg scenario by bypassing the complete development of the deployment plan and proceeding directly to the reimbursement request. By doing so, the Commission does not have adequate information to evaluate whether the Company's expenditures qualify as proper investments in Washington broadband under Order 14.

15. The Company uses its Highly Confidential Compliance with Condition 14 report²² (“Compliance Report”) to support its Petition. The Compliance Report is inadequate to support a request for reimbursement for several reasons.
16. First, it is unclear why the wire centers identified in the Compliance Report were chosen to receive broadband investments or why the investments qualify under the requirements of Order 14. The Compliance Report (and the original 180-Day deployment plan) does not clearly articulate the criteria for the Company’s choices. Discussions are underway to determine criteria used by CenturyLink, but those discussions are in the initial stages and we have limited information at the current time.
17. Second, a review of the investments made by the Company with respect to wire centers with 85 percent broadband availability or less reveals that there has been little emphasis on these areas of low deployment. For example, nearly **[Begin Highly Confidential] XXXX [End Highly Confidential]** of the amount purportedly spent on unserved or underserved living units is in areas where broadband availability is greater than 85 percent. To compound the issue, even in the majority of instances where the Company invested in wire centers with low availability, the investment was not directed toward customers who are unserved or underserved.²³
18. Third, the Company does not provide speed information for any wire center, despite being required to provide such information in its annual reports.²⁴

²² Highly Confidential Compliance with Condition 14, filed with the Commission in this Docket on March 30, 2012.

²³ Please refer to Highly Confidential Attachment A, which illustrates portions of the purported investment made in areas with greater than and less than 85 percent broadband availability.

²⁴ Appendix A to Staff/Public Counsel Settlement Agreement, p. 6.

19. Based on the record before it, the Commission is unable to authorize reimbursement from the escrow account at this time. As such, the Commission should deny the request and require the Company to complete the process as contemplated in Order 14.

III. PUBLIC COUNSEL PROPOSES FURTHER PROCESS TO ENSURE COMPLIANCE WITH ORDER 14

20. In order to complete the development of the broadband deployment parameters and to allow the Company the opportunity to properly justify its investment and seek reimbursement, while simultaneously protecting the public interest and Washington consumers, Public Counsel requests that the Commission impose the following requirements:

21. First, the Commission should require CenturyLink to refile its Compliance Report by May 1, 2012, to include information regarding the broadband speeds at each wire center, as required by the Staff/Public Counsel Settlement Agreement.

22. Second, the Commission should require the Parties to complete development of broadband deployment parameters consistent with the Staff/Public Counsel Settlement Agreement terms as adopted by Order 14 and file its annual broadband deployment plan for the next year. In particular, the deployment parameters should reflect an emphasis on unserved and underserved areas, and areas with less than 85 percent broadband availability. The plan should include estimates of the anticipated capital investments. The deployment parameters and plan should be filed no later than June 1, 2012. If the Parties are unable to come to a consensus by June 1, 2012, CenturyLink should file its proposed deployment parameters on that date, and the Parties shall file comments within 15 days. The Commission will then render a decision regarding the broadband deployment parameters that will govern compliance with Order 14.

23. Third, the Commission should require Commission Staff to file proposed documentation and procedural requirements for reimbursement requests by June 1, 2012. Commission Staff should work with Public Counsel and CenturyLink in developing the requirements. Public Counsel and CenturyLink should be afforded the opportunity to comment if the requirements are not agreed.

24. Fourth, the Commission should require CenturyLink to file a certification that the broadband deployments made under the merger requirements are and will be separate from any deployments using CAF expenditures or proceeds from building sales. This certification should be filed no later than June 1, 2012.

IV. CONCLUSION

25. For the foregoing reasons, Public Counsel requests that the Commission deny CenturyLink's Petition for Release of Funds from Broadband Escrow Account and Elimination of Requirements for Future Escrow Payments. Public Counsel further requests that the Commission enter an order requiring certain actions and filings as described above.

26. DATED this 13th day of April, 2012.

ROBERT M. McKENNA
Attorney General



LISA W. GAFKEN
Assistant Attorney General
Public Counsel

**Highly Confidential Attachment A:
CenturyLink's 2011 Broadband Capital Expenditures**

	Total Broadband Capital Expenditure	Broadband Capital Expenditures to Unserved and Underserved Areas
	Column (B)	Column (D)
	[Begin Highly Confidential]	
85% Availability and above	XXXXXXXXXXXX	XXXXXXXXXXXX
Below 85% Availability	XXXXXXXXXXXX	XXXXXXXXXXXX
	[End Highly Confidential]	
TOTAL	\$57,417,634	\$18,113,482

Source: CenturyLink's Broadband Expansion Report, Attachment A, filed in Docket No. UT-100820, March 30, 2012.

REDACTED VERSION