

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application  
of

QWEST COMMUNICATIONS  
INTERNATIONAL INC. AND  
CENTURYTEL, INC.

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

DOCKET NO. UT-100820

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

REPLY TO STAFF'S JULY 12, 2012  
RESPONSE

1. Pursuant to Notice of Opportunity to File Reply dated July 13, 2012, Public Counsel files this Supplemental 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") and Reply to Commission Staff's July 12, 2012 Response. Public Counsel submitted its Response on the original due date of April 13, 2012. Since that time, Public Counsel has engaged in further discussions with CenturyLink and Commission Staff, which have necessitated this supplemental response and reply.

**I. FUNDS RELATED TO THE COMMITMENT TO INVEST IN UNSERVED AND  
UNDERSERVED AREAS SHOULD REMAIN IN ESCROW**

2. The Commission's approval of the merger between Qwest and CenturyLink required the companies to accept modifications to the multiparty Settlement Agreements and the additional

commitments imposed by the Commission in Order 14.<sup>1</sup> Both companies accepted the modifications and the additional commitments.<sup>2</sup>

3. A major condition imposed by the Commission was the escrow requirement that is addressed in CenturyLink's Petition. The Commission imposed the escrow requirement based on concerns regarding the strength of the Company's broadband commitment under the Settlement Agreement. Specifically, the Commission was concerned that the \$80 million broadband commitment was not "as robust as advertised"<sup>3</sup> and that the incremental benefits to Washington customers above "business as usual" may be smaller than the pledge.<sup>4</sup>

4. The rationale behind the escrow requirement is noteworthy in light of the discussion at the settlement hearing. For example, at the time of the hearing, the Parties did not have an investment plan for the \$80 million broadband commitment, as illustrated by the testimony provided by Ms. Stefanie Johnson on behalf of Public Counsel.

Johnson: ....But, again, I think we have assumed there would be an ongoing investment of broadband. And we don't – this isn't all necessarily a new commitment but felt that the other pieces that were targeting it to different areas and the planning processes that were going to look at the wire centers with lower deployment numbers. And also to the unserved areas that that was really important to Public Counsel.

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<sup>1</sup> Order No. 14, ¶ 294. The multiparty Settlement Agreements commitments and modifications imposed by the Commission were "sufficient to protect Washington customers and the public interest from risks of harm associated" with the merger. Order 14, ¶ 287; See also ¶¶ 286, 292.

<sup>2</sup> Letter from Qwest and CenturyLink to the Commission, dated March 28, 2011 and filed with the Commission on March 29, 2011.

<sup>3</sup> Order 14, ¶ 249.

<sup>4</sup> Order 14, ¶ 248.

Q: So have those areas already been determined?

Johnson: No, they haven't. Well, the five...have been stated. And, *other ones haven't been decided as of yet. The companies have indicated that that was something they wouldn't be able to do until after the merger...* So that would be something that would be done after the fact that it would be worked on by the parties.<sup>5</sup>

The Commission included the escrow requirement to preserve the broadband commitment made to Washington customers, ensure that funds are spent on appropriate purposes, and allow reimbursement to occur when facilities are installed and placed in service.<sup>6</sup> In reviewing the Company's request for release of funds from the escrow account, the value of the escrow requirement becomes apparent.

5. The Staff / Public Counsel Settlement Agreement included a provision that the combined company would spend no less than one-third of its \$80 million broadband commitment in areas that are unserved<sup>7</sup> or underserved<sup>8</sup> (hereinafter referred to as "the unserved / underserved commitment").
6. In developing the broadband investment plan, CenturyLink was required to "evaluate each of the unserved and underserved areas, *with an emphasis on those Qwest and CenturyLink*

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<sup>5</sup> Hearing to present Multi-Party Settlements on January 5, 2011, 303:14-304:7 (emphasis added).

<sup>6</sup> Order 14, ¶ 249 and n.491.

<sup>7</sup> "Unserved" is defined as an area that has no wireline broadband service from any carrier or no wireline service available from CenturyLink or Qwest. Staff / Public Counsel Settlement Agreement, Appendix A, Commitment 16, Page 6.

<sup>8</sup> "Underserved" is defined as an area with wireline broadband service but only at download speeds of 4 Mbps and upload speeds of 1 Mbps or less. Staff / Public Counsel Settlement Agreement, Appendix A, Commitment 16, Page 6.

*ILEC wire centers with 85% broadband availability or less, to determine if the combined networks overcome the existing challenges in provision of broadband services.”*<sup>9</sup>

7. In its Petition, CenturyLink asserts that it has spent approximately \$18 million toward the unserved / underserved commitment in 2011. However, this investment does not reflect an adequate emphasis on enabling or upgrading service in wire centers with lower broadband availability.<sup>10</sup> As described in Highly Confidential Attachment B, submitted herewith, a large portion of the \$18 million should not qualify toward the unserved / underserved commitment<sup>11</sup> because it was spent in areas with very high broadband availability.
8. To allow the unserved / underserved commitment to be met by spending in areas with very high broadband availability essentially renders the commitment meaningless. Even though the Settlement Agreement language may be subject to alternate interpretations, the intent was to provide focus to areas with 85% broadband availability or lower<sup>12</sup> and broaden the benefit beyond those areas in which the Company would invest in as business as usual. Indeed, the Settlement Agreement included a mechanism to relieve the Company of this commitment if it is too cost prohibitive.
9. A provision allowing CenturyLink to address whether investment is cost prohibitive would not have been necessary if the investment was not intended to be made in areas with lower

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<sup>9</sup> Staff / Public Counsel Settlement Agreement, Appendix A, Commitment 16, Page 6 (emphasis added).

<sup>10</sup> This is likely due to the Company moving forward with broadband investment prior to establishing agreement with Commission Staff and Public Counsel regarding the investment plan. Due to the passage of time, however, the Parties are moving forward to review the spending that has occurred and are focusing on future plans, rather than attempting to recreate the 180-Day Plan called for in the Staff / Public Counsel Settlement Agreement.

<sup>11</sup> The portion of broadband spending that does not qualify for the one-third commitment would nonetheless qualify towards the total \$80 million broadband commitment.

<sup>12</sup> Hearing to present Multit-Party Settlements on January 5, 2011, 263:9-14; 280:1-5; 301:24 – 302:3; 303:14 – 304:7; 310:6-20.

deployment. Such areas generally have higher deployment costs per living unit. Under the Settlement Agreement, CenturyLink could request Commission approval to invest less than one-third of the total commitment in unserved or underserved areas. In order to obtain such approval, the Company would have to show that the investments would not be appropriate based on deployment costs, availability of other broadband services in those areas, or other pertinent factors.<sup>13</sup> CenturyLink has not requested such approval.

10. Areas with very high broadband availability are more likely to receive broadband investment from CenturyLink without a regulatory mandate because the Company will make these investments to remain competitive. In addition, allocating money spent in areas with very high broadband availability to the unserved / underserved commitment seems inconsistent with representations made in press releases<sup>14</sup> and the Parties' comments to the Commission regarding broadening the availability of broadband to more rural areas of our State.

11. To preserve the intent of the unserved / underserved commitment, the Commission should deny recovery from the escrow account for spending in areas with very high broadband availability, while allowing recovery of funds used to deploy or increase speed (per the definitions of "unserved" and "underserved") in areas with lower broadband availability. An appropriate metric to measure whether an investment qualifies towards the unserved /

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<sup>13</sup> Staff / Public Counsel Settlement Agreement, Appendix A, Commitment 16, Page 6. The Company would still be required to meet its entire \$80 million broadband deployment commitment.

<sup>14</sup> The Company described, generally, the merger commitments it made with respect to broadband deployment on its merger website. The Company noted that it committed to state commissions to expand broadband deployment, particularly in "rural and underserved communities" and to continue deploying broadband services throughout the combined company's service area. The Company also noted that the service territories of the two merging companies had little overlap, connecting rural and urban areas to "better enable the deployment of advance services to more customers." <http://www.centurylinkqwestmerger.com/index.php?page=regulatory-information>

underserved commitment would be to require investment in areas with 85% beginning broadband availability or less. Please see Highly Confidential Attachment B for application of this metric to CenturyLink's 2011 spending.

**II. SUSPENDING FUTURE PAYMENTS INTO THE ESCROW ACCOUNT MAY BE ACCEPTABLE**

12. If the Commission adopts Public Counsel's recommendation regarding reimbursement from the escrow account, as described in Highly Confidential Attachment B, Public Counsel would not object to suspending the requirement that CenturyLink make future escrow payments for 2012 and 2013. In addition, Public Counsel agrees with Staff's recommendation to condition such a suspension on compliance and requiring reinstatement of the escrow requirement upon non-compliance.

**III. REPLY TO STAFF'S JULY 12, 2012 RESPONSE**

13. Public Counsel does not agree that the Commission should both suspend the requirement to make future escrow payments *and* disburse the entire balance of the escrow account to CenturyLink. Staff bases much of its position on the level of 2011 spending, noting in particular the amount spent towards the unserved / underserved commitment. As discussed above and in Highly Confidential Attachment B, Public Counsel recommends that a portion of the \$18 million purportedly spent towards this commitment should instead be counted towards the general \$80 million commitment, and not towards the more specific unserved / underserved commitment.
14. Staff notes that they did not negotiate for the escrow requirement. Although neither Staff nor Public Counsel negotiated for the escrow requirement, it is now the law of this case, an order of the Commission, and a requirement in which the Company acquiesced. The escrow

requirement is a strong tool towards ensuring that a meaningful broadband investment is made in Washington.

15. Staff asserts that the Parties have resolved their disagreements relating to the 180-day plan. It is true that the Parties are not attempting to recreate what was intended by the 180-day plan provision in the Settlement Agreement. Instead, due to the passage of time, the Parties are moving forward to review the spending that has occurred and are focusing on future deployment plans, rather than attempting to recreate the 180-Day Plan called for in the Staff / Public Counsel Settlement Agreement.

16. Lastly, as noted above, Public Counsel supports Staff's recommendation to condition such any suspension on compliance and requiring reinstatement of the escrow requirement upon non-compliance.

#### IV. CONCLUSION

17. For the reasons stated above and those in Highly Confidential Attachment B, the Commission should retain the escrow account requirement with respect to the unserved / underserved commitment. This will preserve a critical piece of the overall broadband commitment for Washington customers, ensure that funds are appropriately allocated to fulfilling the unserved / underserved commitment, and will allow reimbursement after facilities are installed and placed in service. Further, Public Counsel does not object to suspending the

requirement for future escrow payments in 2012 and 2013, so long as the recommendations in Highly Confidential Attachment B are adopted.

18. DATED this 16<sup>th</sup> day of July, 2012.

ROBERT M. McKENNA  
Attorney General



LISA W. GAFKEN  
Assistant Attorney General  
Public Counsel Division