

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of A Complaint By The
Joint CLECs Against the Joint Applicants
Regarding OSS For Maintenance And
Repair

Docket No. UT-111254

**JOINT CLECS' MOTION FOR
TEMPORARY RELIEF AND
REQUEST FOR ORAL ARGUMENT**

INTRODUCTION

Advanced Telecom, Inc. dba Integra; Electric Lightwave, LLC dba Integra; Eschelon Telecom of Washington, Inc. dba Integra Telecom; Oregon Telecom Inc. dba Washington Telecom dba Integra; Unicom f/k/a United Communications, Inc. dba Integra (together "Integra"); McLeod USA Telecommunications Services L.L.C., dba PAETEC Business Services ("PAETEC"); and **tw telecom of washington llc** ("**tw telecom**") (collectively "Joint CLECs") respectfully submit this motion for temporary relief pending a final determination on the merits.

By its Order dated March 14, 2011, the Washington Commission approved the merger of Qwest and CenturyLink (collectively, "Merged Company" or "Joint Applicants") subject to certain specified conditions.¹ In this case, the Joint CLECs filed their Formal Complaint and Petition ("WA Complaint") seeking enforcement of certain merger conditions adopted by the Commission relating to Operational Support Systems ("OSS").² CLECs depend on nondiscriminatory access to Qwest's OSS in order to obtain products and services that they require to compete in the local telecommunications

¹ *In the Matter of the Joint Application of Qwest Communications International Inc. and CenturyTel, Inc.*, Docket No. UT-100820, Order No. 14, Final Order Approving and Adopting, Subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction ("*WA Merger Approval Order*").

² Similar allegations are also being raised in proceedings pending in Colorado and Minnesota.

market.³ CLECs have established their own systems to interface with Qwest's OSS and changes to Qwest's OSS would impose significant cost and effort on CLECs and would also be potentially disruptive for CLECs and their customers.⁴ Further, replacement of legacy Qwest OSS with OSS that provides less functionality and/or less reliability would have a detrimental effect of CLECs' ability to serve their customers and damage competition. Assuring continued nondiscriminatory access to Qwest's OSS and providing certainty and predictability in the event of changes to Qwest's OSS were critical issues in the merger proceedings.

The settlement agreement that Joint Applicants entered into with Integra ("Integra Settlement Agreement") restricts how the Merged Company may go about implementing and integrating new OSS to replace legacy Qwest OSS. In particular, the Integra Settlement Agreement provides for a 24 month moratorium on changes to the legacy Qwest OSS⁵ and, for any changes to be implemented after the moratorium, provides for specific procedures that would enable CLECs to participate in the development of replacement OSS before implementation of replacement OSS. The Integra Settlement Agreement is not just an agreement between private parties; the OSS conditions contained in the Integra Settlement Agreement are largely mirrored in the settlement

³ See, e.g., *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 at ¶518 (finding that CLECs would be "severely disadvantaged, if not precluded altogether, from fairly competing," if they did not have nondiscriminatory access to OSS).

⁴ WA Complaint ¶¶ 36-37 (and merger proceeding testimony cited therein).

⁵ The moratorium period was subsequently extended to thirty months throughout Qwest's incumbent service territory, pursuant to an agreement entered into between the Joint Applicants, PAETEC, and other CLECs, as well as pursuant to the FCC order approving the merger. See WA Complaint, ¶¶ 52, 55.

agreement entered into by Staff and Public Counsel,⁶ and the Commission expressly approved the Integra Settlement Agreement as being in the public interest.⁷

Contrary to the merger conditions relating to OSS, the Merged Company has announced plans and taken steps to implement and integrate new maintenance and repair OSS – “MTG” – to replace the legacy Qwest maintenance and repair OSS before the expiration of the moratorium period and without first complying with the procedures set forth in paragraph 12 of the Integra Agreement (and as supplemented by the Joint CLEC Merger Agreement). Absent Commission intervention, Qwest will integrate Qwest systems and replace MEDIACC with MTG for itself by the end of this year,⁸ so that Qwest will use the new system (MTG) instead of using the legacy Qwest OSS (MEDIACC) during the moratorium period and after. The CLECs’ complaint requests, among other things, that the Merged Company be permanently enjoined from proceeding in violation of the settlement agreements and the Commission’s order approving the merger.

After the Joint CLECs filed letters with the public utilities commissions in Colorado and Minnesota regarding the Merged Company’s noncompliance with the OSS merger conditions, the Merged Company issued a revised implementation timeline that makes clear that the Merged Company intends to complete the implementation and integration of the replacement OSS while this case is pending. If the Merged Company is permitted to proceed with its timeline, a decision in favor of the Joint CLECs at the

⁶ *WA Merger Approval Order* ¶ 99.

⁷ *WA Merger Approval Order*, ¶ 281 (Finding of Fact No. 14).

⁸ On July 1, 2011, in CMP, Qwest confirmed in a matrix (on page 54) that “Qwest continues to plan on first ‘moving’ itself to the MTG system once it has been internally installed and tested.” See also, Answer Subject to Motion to Dismiss of Qwest Corporation and CenturyLink (June 20, 2011 (“Qwest/CenturyLink does intend to implement MTG for its own use and this implementation has been presented through CMP.”) A copy of excerpts from the matrix is attached as Exhibit 1 to the accompanying Affidavit of Bonnie Johnson.

conclusion of the case will be a hollow victory because the harm that they brought this action to prevent will have already occurred. Action is needed now to preserve the Commission's ability to grant meaningful relief when the case is concluded.

Accordingly, the Joint CLECs bring this motion seeking a temporary relief directing that all further work relating to the implementation and integration of MTG be suspended during the pendency of this proceeding, until further order by the Commission.

SUMMARY OF RELEVANT FACTS

The facts upon which the Joint CLECs' motion is based are set forth in the Joint CLECs' Formal Complaint and Petition, as verified by the affidavits of Douglas Denney and Bonnie Johnson, which are being submitted with the motion. The Joint CLECs provide the following summary of the relevant facts and refer the Administrative Law Judge to the Complaint for a complete recitation of the facts supporting their motion.

On May 13, 2010, the Joint Applicants filed their application with the Commission seeking approval of a merger. A number of parties, including CLECs, wireless carriers, Commission Staff, and the Public Counsel Section of the Washington Attorney General's Office ("Public Counsel") actively participated in the case to express a variety of concerns about the potential impact of the merger and to urge the Commission to adopt conditions necessary to protect the public interest.

Settlement agreements entered into between the Joint Applicants and Integra and between the Joint Applicants and Commission Staff and Public Counsel resolved the majority of the open issues in that docket. One of the most hotly-contested areas of dispute from the CLECs' perspective concerned changes that the Merged Company might make to the legacy Qwest OSS. In paragraph 12 of the Integra Settlement

Agreement, Qwest and CenturyLink, as “the Merged Company,” commit to “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.”⁹ This initial period has been characterized by Qwest and CenturyLink as a “moratorium”¹⁰ and a “freeze.”¹¹ The Integra Settlement Agreement further provides that, before replacing or integrating any Qwest system, the Merged Company will follow certain procedures designed to provide CLECs and regulators with input into the development of the replacement OSS. Those procedures include, among others, requirements that the Merged Company: 1) provide advanced notice and a detailed transition plan to the FCC, state commissions, and CLECs; 2) work jointly with CLECs to develop acceptance criteria for new OSS; 3) participate with CLECs in joint testing; 4) not replace any legacy Qwest OSS until the replacement has been accepted by a majority vote of CLECs.

The Integra Settlement Agreement was filed with the Commission on November 10, 2010.¹² At the time that the Qwest/CenturyLink merger proceeding was before the Commission, similar applications were pending in the other legacy Qwest jurisdictions, including Arizona, Minnesota, Montana, Oregon, Utah, and Washington, as well as pending before the FCC. Similar commitments were made by the Joint Applicants in other jurisdictions. In testimony before the Minnesota Commission, CenturyLink witness

⁹ The length of the time period has been modified, both by later settlement agreement and via Joint Applicants’ commitment to the Federal Communications Commission (FCC), to at least thirty months after the Closing Date. See WA Complaint, ¶¶ 52, 55.

¹⁰ MN Merger Proceeding, MPUC Docket No. P-421, et al./PA-10-456, MN Hrg. Tr. Vol. 2B (October 6, 2010), p. 84, lines 10-11 (Mr. Hunsucker, CenturyLink)(“What we have committed to is the 24-month moratorium before we make any changes.”).

¹¹ WA Merger Proceeding, Docket No. UT-100820, WA Hrg. Tr. Vol. IV (January 6, 2011), p. 407, lines 14-17 (Mr. Simshaw, CenturyLink)(referring to a “freeze” on wholesale OSS for two years under the Integra agreement)

¹² See Petition for Consideration and Approval of Settlement and Narrative in Support of Settlement Pursuant to WAC 480-07-740 on behalf of Qwest Communications International Inc., CenturyTel, Inc., and Integra Telecom of Washington, Inc.; WA Complaint ¶ 24.

Michael Hunsucker recognized that a key purpose of a moratorium on any OSS changes¹³ of not less than two years was so that CLECs would have certainty; that CLECs value operational certainty and continuity; and that continuity, stability, and certainty for the CLECs are in the public interest.¹⁴

This case specifically concerns the legacy Qwest maintenance and repair OSS. Qwest legacy OSS for maintenance and repair are Customer Electronic Maintenance and Repair (“CEMR”) and Mediated Access Electronic Bonding Trouble Administration (“MEDIACC”). One or both may be used by a carrier to exchange maintenance and repair information with Qwest. These interfaces with Qwest are vital to the CLECs’ abilities to conduct business in Washington.¹⁵ Qwest uses and offers CEMR and MEDIACC in Washington today. Qwest uses MEDIACC for itself with a significant percentage of Qwest repair tickets being in MEDIACC. In addition, Qwest offers CEMR and MEDIACC to CLECs to exchange repair information between Qwest and CLECs. For example, Integra currently uses the GUI interface CEMR, and PAETEC uses both the GUI (CEMR) and the application-to-application (MEDIACC) interfaces, in Qwest ILEC service territory. **tw telecom** uses CEMR as well.¹⁶

On November 10, 2010, the same day that the Integra Agreement was filed with the Commission, Qwest via a web posting indicated that Qwest planned to retire and replace Qwest’s legacy OSS for maintenance and repair (CEMR/MEDIACC) with a new

¹³ MN Hrg. Tr., P-421, et al./PA-10-456, Vol. 2B (Oct. 6, 2010), p. 84, lines 10-11 (Mr. Hunsucker, CenturyLink) (“What we have committed to is the 24-month moratorium before we make any changes.”); see also WA Hrg. Tr., Dkt. No. UT-100820, Vol. IV (Jan. 6, 2010), p. 407, lines 14-17 (Mr. Simshaw, CenturyLink attorney) (referring to a “freeze” on the wholesale OSS for the two-year period under the Integra Agreement).

¹⁴ MN Hrg. Tr., P-421, et al./PA-10-456 (Oct. 6, 2010), Vol. 2B, p. 11, lines 6-10; see *id.* p. 78, lines 19-23 (Mr. Hunsucker, CenturyLink); *id.* at Vol. 2B, p. 92 line 19 – p. 93, line 24; *id.* at Vol. 2B, p. 129, lines 9-14.

¹⁵ WA Complaint ¶ 35.

¹⁶ WA Complaint ¶ 36.

maintenance and repair system: “Maintenance Ticketing Gateway” (“MTG”).¹⁷ At no point before execution of the Integra Agreement, which prevented Integra from opposing the merger, did Qwest or CenturyLink provide any indication to Integra, this Commission, or other commissions, regarding any intent or make this change or otherwise implement a new system in 2011 to replace CEMR and/or MEDIACC, in 2011 or at a later date.¹⁸

If Qwest changes its OSS, those changes require CLECs to expend resources (*e.g.*, conducting testing and/or reviewing and commenting on technical specifications and any work required to modify the CLECs’ systems and/or conduct training). Moving to MTG would impose significant costs upon CLECs in order to modify their own systems to coordinate with the new OSS changes which Qwest intends to implement.¹⁹ Qwest has said that CEMR points to, or interfaces with, MEDIACC (rather than directly to Qwest’s back-end systems). If a problem arises in transition from MEDIACC to MTG, therefore, it will adversely impact not only MEDIACC users but CEMR users also. Depending on the nature of the problem, the CLECs’ end user customers may be adversely impacted as well.²⁰

On December 17, 2010, Qwest distributed an announcement to CLECs describing a “new application to application interface” called MTG, and Qwest said that the “maintenance ticketing gateway (MTG) will be a replacement for MEDIACC and CEMR.”²¹ In the announcement, Qwest indicated that MTG will allow both “Qwest and wholesale customers” to use the new system. Qwest provided an effective date for the

¹⁷ WA Complaint ¶ 33.

¹⁸ WA Complaint ¶ 31.

¹⁹ WA Complaint ¶¶ 28, 37.

²⁰ WA Complaint ¶ 37.

²¹ WA Complaint ¶ 39.

change of September 19, 2011, which it subsequently moved to mid-December 2011 to accommodate its own needs.²² Both the September and December dates would occur after the Joint Applicants' own estimates for the merger Closing Date, which ultimately occurred on April 1, 2011.

In January, 2011, evidentiary hearings were held before the ALJ in Washington in the Qwest/CenturyLink merger proceeding. On January 6, 2011, Mr. Hunsucker of CenturyLink testified that, per condition 12 of the Integra Agreement, “there is a very robust transparent process *before* we can make this OSS conversion.”²³ He said: “It’s not *just* we’re going *to decide in two years we’re going to make a change* and we can suddenly implement that.”²⁴ Rather, he described the steps that then have to occur under the Integra agreement before the OSS change.²⁵ CenturyLink’s attorney specifically referred to a “freeze” on the wholesale OSS for the two-year period under the Integra Agreement.²⁶ Mr. Hunsucker testified that this is “a 24-month or a few months *longer*” time period before the company “can retire a system and go to a new system” than the “nine-month process” that otherwise would occur without the settlement agreement.²⁷ Mr. Hunsucker concluded, therefore, that condition 12 “goes well beyond the certainty

²² WA Complaint ¶ 39; see http://www.qwest.com/wholesale/cmp/cr/CR_SCR121608-02.html (3/16/11 entry with 23/25/11 revisions). Qwest omitted the discussion from the meeting minutes, which was the subject of CLEC objections. See, e.g., *id.*

²³ WA Hrg. Tr., Dkt. No. UT-100820 (Jan. 6, 2010), Vol. IV, p. 405, lines 1-3 (emphasis added) (Mr. Hunsucker, CenturyLink).

²⁴ WA Hrg. Tr., Dkt. No. UT-100820 (Jan. 6, 2010), Vol. IV, p. 406, lines 9-11 (emphasis added) (Mr. Hunsucker, CenturyLink).

²⁵ WA Hrg. Tr., Dkt. No. UT-100820 (Jan. 6, 2010), Vol. IV, p. 405, lines 1-3; *id.* p. 405, line 14 – p. 406, line 8 (Mr. Hunsucker, CenturyLink).

²⁶ WA Hrg. Tr., Dkt. No. UT-100820 (Jan. 6, 2010), Vol. IV, p. 407, lines 14-17 (Mr. Simshaw, CenturyLink).

²⁷ WA Hrg. Tr., Dkt. No. UT-100820 (Jan. 6, 2010), Vol. IV, p. 406, line 23 – p. 407, line 3 (emphasis added) (Mr. Hunsucker, CenturyLink).

and the status quo that CLECs have to date.”²⁸ In other words, he indicated that condition 12 provides a time period well beyond the nine-month process.

On March 14, 2011, the Washington Commission issued its Final Order approving the merger of Qwest and Century Link.²⁹ The Commission found both the Integra Settlement Agreement and the Staff/Public Counsel Settlement Agreement to be in the public interest and incorporated the conditions set forth in those agreements as part of its Order approving the merger.³⁰ The Commission further found that the CLECs who had not settled with the Joint Applicants “have a legitimate 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.”³¹ Although describing the OSS requirements provided for by the Integra and Staff/Public Counsel Settlement Agreements as “extremely important,” the Commission also found that those protections “do not go far enough.”³² Accordingly, the Commission ordered two modifications to “provide additional important protections for wholesale customers.”³³ First, the Commission required additional detailed reporting by the Merged Company, to be provided after acceptance testing and controlled production.³⁴ Based on that reporting, the Commission reserved the right to impose third-party testing of any replacement OSS before it may be implemented for actual

²⁸ WA Hrg. Tr., Dkt. No. UT-100820 (Jan. 6, 2010), Vol. IV, p. 407, lines 1-4 (Mr. Hunsucker, CenturyLink).

²⁹ *WA Merger Approval Order*.

³⁰ *WA Merger Approval Order*, ¶ 281 (Finding of Fact No. 14).

³¹ *WA Merger Approval Order*, ¶ 118.

³² *WA Merger Approval Order*, ¶ 119.

³³ *WA Merger Approval Order*, ¶ 119.

³⁴ *WA Merger Approval Order*, ¶ 120.

production.³⁵ Additionally, the Commission modified Condition 12 of the Integra Settlement Agreement to require, like the Staff/Public Counsel Settlement Agreement, that any replacement OSS provide a level of wholesale service quality that is “not less than” that provided by Qwest prior to the transaction’s closing (as distinguished from “not materially less than”).³⁶

Integra, PAETEC, and others participating in discussions in CMP sought to obtain information necessary to understand the Merged Company’s plans to implement and integrate MTG as the replacement OSS for CEMR and MEDIACC and also to attempt to assure compliance with the merger conditions. These efforts were, however, largely unsuccessful.³⁷ On May 2, 2011, the Merged Company said in an email to Integra that the Merged Company needs “to implement a replacement system for CEMR and MEDIACC for operations of Qwest Corporation and intends to move forward with installation and implementation of the MTG system at the same time it continues to use CEMR and MEDIACC.”³⁸ After having agreed to terms in executed settlement agreements months earlier, CenturyLink said that it “will agree” to follow the settlement agreement terms or other agreed upon processes. CenturyLink added that “there will be continued discussions regarding a process to be used to withdraw MEDIACC and CEMR *once MTG is implemented.*”³⁹ The procedures in paragraph 12 of the Integra Agreement, however, are supposed to occur before MTG may be implemented. After having executed settlement agreements months earlier that include continuing PAP payments, CenturyLink indicated that due to the alleged instability of the existing system,

³⁵ *WA Merger Approval Order*, ¶ 121.

³⁶ *WA Merger Approval Order*, ¶ 123-24.

³⁷ See *WA Complaint* at ¶¶ 43-51.

³⁸ *WA Complaint* ¶ 60.

³⁹ *WA Complaint* ¶ 60.

it needed an agreement to transition to MTG or relief from PAP payments. Specifically, CenturyLink said: “CenturyLink continues to have concerns that a catastrophic failure could result with MEDIACC and CEMR and it is CenturyLink’s expectation that CLECs remaining on MEDIACC and CEMR would agree to PAP relief if another system is available”

By letters dated May 25 and June 6 to the Colorado and Minnesota commissions, the Joint CLECs expressed their concern that the Merged Company’s plan violated the OSS conditions contained in the Integra Settlement Agreement and approved by the Commission. In that letter, the Joint CLECs requested “the Commission’s assistance in reviewing and obtaining compliance with the Commission’s Order and CenturyLink’s merger commitments and approved agreements.”

On May 27, 2011, only two days after the Joint CLECs filed their letter with the Colorado Commission, the Merged Company reversed course with respect to a “catastrophic failure” of CEMR and sent an email to CMP participants which said the CEMR online interface was recently upgraded to a “stable” hardware and software platform that integrates well with the current MEDIACC application, and will allow it to interface seamlessly to an MTG B2B (i.e., application-to-application) application.⁴⁰ On June 8, 2011, the repair OSS CR was discussed on an ad hoc CMP call. The Merged Company said that due to work by IT the company had been able to “stabilize” the “CEMR platform so that there was not a need to change out CEMR.”⁴¹ On June 14, 2011, the Merged Company distributed a revised timeline to CMP participants.⁴² The revised timeline does not comply with the procedures and requirements of the merger

⁴⁰ WA Complaint ¶ 69.

⁴¹ WA Complaint ¶ 72

⁴² WA Complaint ¶ 73, Ex. 1.

settlement agreements, CenturyLink's commitments to the FCC, and this Commission's Order. In the revised timeline, the Merged Company maintains its earlier schedule, which includes deployment of the replacement system, MTG, by December 12, 2011, during the moratorium period.

On July 1, 2011, the Merged Company sent an email to CMP participants and enclosed a matrix which it indicated contained its responses to an Integra March 18, 2011 matrix, as well as responses to questions in various emails. Excerpts from the Merged Company's July 1, 2011 CMP Matrix are attached as Exhibit 1 to the Affidavit of Ms. Johnson. Among other things, in the Merged Company's responses, it asserts that (1) the company remains concerned about the stability of the MEDIACC platform (pages 14 and 52), which it claims is subject to risk (pages 20-21⁴³); (2) the "upgrades" to CEMR referenced in the Merged Company's May 27, 2011 email were made during the third quarter of 2010 (page 50)⁴⁴; and (3) the Merged Company, before the end of the 30-month moratorium period, "continues to plan on first 'moving' itself to the MTG system once it has been internally installed and tested" (page 54⁴⁵).

⁴³ Qwest said the risk is due to running on unsupported software. See Qwest July 1, 2011 CMP matrix, pp. 20-21. In the same CMP document, Qwest says that CEMR runs on the same unsupported software as MEDIACC. *Id.* at pp. 2-3. If amongst these inconsistencies there is some genuine CenturyLink concern about stability or obsolescence of any legacy Qwest OSS, CenturyLink and Qwest should have brought those concerns forward to regulators as soon as possible. Because they did not and instead proceed with their June 14, 2011 timeline, temporary relief is needed.

⁴⁴ Given that the "upgrades" were made in the third quarter of 2010 (i.e., by the end of September 2010), they were made before Qwest introduced its MTG changes on November 10, 2010 (see WA Complaint ¶33), before Mr. Hunsucker of CenturyLink testified in Arizona that CEMR is unstable (see WA Complaint ¶40), and before CenturyLink said on May 2, 2011 that it was concerned about a catastrophic failure of both CEMR and MEDIACC (see WA Complaint ¶60). Qwest has not explained how CEMR could be subject to concern about catastrophic failure on May 2, 2011, but stable by May 27, 2011 (the date of Qwest's email to CMP participants, see WA Complaint ¶69), when the upgrades did not occur between those two dates but had occurred in the third quarter of 2010. The "upgrades" did not occur between those two dates. Between those two dates, Joint CLECs filed their Letter Complaint on May 25, 2011.

⁴⁵ Similarly, on June 15, 2011, Tracy Strombotne of Qwest said, in a CMP meeting, that "on December 12, we *will* migrate the software and then *we will move over* the first of our *internal* customers." http://www.qwest.com/wholesale/cmp/cr/CR_SCR121608-02.html (emphasis added).

On July 11, 2011, the Joint CLECs filed their Formal Complaint and Petition with this Commission seeking, among other things, a determination that the Merged Company was in violation of the OSS merger conditions and an order requiring compliance. On August 2, 2011, Qwest and CenturyLink filed their Answer to the Complaint in this matter. In their Answer, among other things, they assert in paragraph 2 on page 2 that the “MEDIACC system is currently stable.” They go on to indicate that it is fourteen years old, but they do not indicate that its age distinguishes it from other legacy Qwest OSS (all of which the Merged Company agreed to use for thirty months) or that the age was unknown to them at the time they entered into the merger agreements and encouraged the Commission to approve the merger in part based on their merger commitments.

As the facts show, when the audience is business and operational personnel, the Merged Company causes uncertainty and doubt by focusing on instability, risk, and the possibility of catastrophic failure in an attempt to intimidate CLECs into agreeing with their position and to shift any risk to CLECs. That is not what CLECs bargained for in the very recent merger settlement agreements promising certainty. When the audience is regulators or when the legal issue of compliance with the merger agreements is being discussed, the Merged Company makes assurances that CEMR and MEDIACC are stable and argues that the Merged Company may meet its merger commitments by leaving those stable systems in place and offering them to CLECs. The Merged Company cannot have it both ways. To protect the public interest and the integrity of the Commission’s process and merger order, the Commission should grant the relief sought in this motion.

ARGUMENT

I. The Commission Has Inherent Authority To Enter An Order To Preserve Its Ability To Grant Meaningful Relief.

The Commission has a statutory duty to regulate the provision of telecommunications services in the public interest.⁴⁶ As a part of this power, the Commission is empowered to investigate the “practices and activities” of regulated companies⁴⁷ and is charged with a duty to enforce the public service laws.⁴⁸ The Commission’s obligation to enforce the law is so strong, in fact, that the Commission is authorized to designate its employees as peace officers, with the power to arrest those who violate the public utility laws or the Commission’s regulations and orders.⁴⁹ The Commission’s orders have the force of law: public service companies “**shall** obey and observe and comply with **every order** . . . made by the Commission.”⁵⁰

Mergers among public service companies and acquisitions of their property are subject to the review and approval of the Commission.⁵¹ The Commission may approve a merger only if it finds the proposed transaction is consistent with the public interest.⁵² Thus, the Commission imposes conditions on its approval of utility mergers when doing so is necessary to ensure that a net benefit results.

The Commission’s authority to grant the order requested by the Joint CLECs is part and parcel of the Commission’s authority to impose conditions on its approval of the Qwest-CenturyLink merger. The Joint CLECs have alleged, and the evidentiary record provided by the Joint CLECs establishes, that the Merged Company has violated the

⁴⁶ R.C.W. 80.01.040(3).

⁴⁷ R.C.W. 80.20.020.

⁴⁸ R.C.W. 80.04.470.

⁴⁹ *Id.*

⁵⁰ R.C.W. 80.04.380 (emphasis added).

⁵¹ R.C.W. 80.12.020(1).

⁵² W.A.C. 480-143-170.

conditions upon which the Commission approved their merger by, among other things, proceeding to implement and integrate new maintenance and repair OSS before the expiration of the moratorium and without following processes that enable CLECs to participate meaningfully in OSS changes. According to the MTG implementation timeline attached as Exhibit A to the Joint Applicants' Answer to the Letter Complaint, Qwest/CenturyLink will:

1. Publish draft specifications on August 12, 2011;
2. Publish final specifications on September 2, 2011;
3. Issue a "final release notice" with training information on November 11, 2011; and
4. Begin deployment of MTG on December 10, 2011.

Qwest has said in CMP that it will move first itself to MTG, to replace its use of MEDIACC, starting in December of 2011.

Unless the Commission acts, key implementation deadlines will pass and the Merged Company will complete implementation and integration of the replacement OSS while this case is pending. Under the Merged Company's schedule, all of these activities, including the deployment of the replacement OSS, will take place before the end of the moratorium period and without first complying with the requirements of paragraph 12 of the Integra Agreement. According to the Merged Company's MTG implementation timeline, it is only after MTG has been deployed that the Merged Company will provide its detailed transition plan to state commissions, the FCC and CLECs; finalize acceptance criteria; and conduct a CLEC vote to determine acceptance of the new interface. In other words, the Merged Company intends to provide CLECs

which exercise their rights under the merger agreement with an opportunity for input into the development of new OSS and a vote on the new system only after the new system has already been developed and implemented. Although the Integra Settlement Agreement provides that testing is to be conducted until all jointly developed acceptance criteria have been met, as determined by a majority vote of CLECs participating in the testing, the Merged Company's MTG implementation timeline treats testing and the CLEC vote as mere formalities to be completed after MTG has already been deployed, with the "final implementation" a *fait accompli*, scheduled for a date certain without regard to CLEC testing and acceptance. If Qwest and CenturyLink are permitted to continue with their efforts to implement and integrate new maintenance and repair OSS before the expiration of the moratorium period and without first complying with the procedural requirements, the very harm that the Commission's OSS conditions were intended to prevent will have occurred.

The Attorney General is empowered to enforce the Commission's orders in court.⁵³ However, the Commission is not obligated to wait for an Attorney General enforcement action. The Commission's statutory duty to approve utility mergers and its obligation to enforce the public service laws necessarily implies that the Commission can enter an order mandating that a regulated company cease from engaging in conduct that may be in violation of law while a complaint regarding such action is pending. If the Commission here determines that the Merged Company has violated the OSS merger conditions and directs the Merged Company to cease its implementation and integration activities, yet the Merged Company persists in those efforts, it may become necessary for the Commission to seek judicial relief. The first step, however, is for the Commission to

⁵³ R.C.W. 80.01.100.

complete its investigation of the Joint CLECs' allegations. However, unless the Merged Company is ordered not to proceed with the replacement of the legacy OSS during the pendency of this case, any order that the Commission might make based on its investigation may be futile.

II. The Evidence Shows That The Merged Company Is Acting In Violation Of The Merger Conditions Relating To OSS.

The record provided by the Joint CLECs in support of their motion amply demonstrates that Joint CLECs are likely to prevail on their claims that the Merged Company is violating the merger conditions set forth in the Integra Settlement Agreement and adopted by this Commission when it approved the merger. In particular, pursuant to the Integra Settlement Agreement, the Merged Company agreed that it would “use and offer to wholesale customers, the legacy Qwest Operational Support Systems (OSS) for a least two years, or until July 1, 2013 whichever is later.” The Merged Company further agreed that, before it would “integrate Qwest systems” or replace Qwest systems, it would not only wait until expiration of the moratorium period but also would follow certain procedures, including providing a detailed transition plan, providing an opportunity for CLEC input into acceptance criteria for any replacement OSS, and participating with CLECs in joint testing of any replacement OSS. The Integra Settlement Agreement also provided that no replacement OSS would be implemented until accepted by a majority vote of CLECs participating in testing. OSS that is implemented to replace legacy Qwest OSS is required to provide service quality that is not materially less than that provided by Qwest prior to closing of the merger.

The purpose of the Integra Settlement Agreement in general and the OSS provisions in particular was to offer CLECs some measure certainty and predictability in

their relationship with the Merged Company.⁵⁴ The Merged Company's compliance with the OSS requirements offers certainty in two ways. First, the moratorium period protects CLECs from having to incur expense and effort associated with new OSS at the same time that they are becoming accustomed to working with the new Company. Second, the provisions relating to CLEC participation in OSS changes implemented after the moratorium period are intended to maintain pre-merger levels of service quality by assuring that before any replacement OSS is implemented, CLECs and regulators will have a role in the development, testing, and acceptance of replacement OSS. In this way, those provisions provide some assurance that OSS that is implemented to replace legacy Qwest OSS will provide the functionality and reliability that is at least equal to that provided by the legacy Qwest OSS.

The very same day that the Integra Settlement Agreement was filed with the Commission, Qwest indicated that it was replacing the legacy Qwest maintenance and repair OSS with a new system.⁵⁵ A little more than a month later, Qwest announced that it would implement MTG as a replacement for MEDIACC and CEMR effective September 19, 2011,⁵⁶ well before the expiration of the two year moratorium agreed to in the Integra settlement agreement. Although the deployment date was later pushed back by approximately three months, to December 10, 2011, it still fails to comply with the moratorium period. When asked by Integra and PAETEC in CMP to explain how Qwest's plan to replace legacy Qwest maintenance and repair OSS with new OSS was consistent with the Integra Settlement Agreement, Qwest claimed that, unless it replaced the legacy Qwest maintenance and repair OSS, it might not be able to meet its service

⁵⁴ WA Complaint, ¶¶ 19, 25-27, 42.

⁵⁵ WA Complaint ¶ 33.

⁵⁶ WA Complaint ¶ 39.

quality commitments. Qwest further took the position that the OSS provisions of the Integra Settlement Agreement do not apply to a replacement initiated before the merger.⁵⁷

The Merged Company's Answer tells a different story, however. Contrary to previous claims that the systems must be replaced because they are "unstable,"⁵⁸ the Merged Company now states that "the CEMR online interface was upgraded to a stable hardware and software platform" and that MEDIACC, although 14 years old, "is currently stable."⁵⁹ Although previously claiming that MEDIACC and CEMR needed to be replaced because those systems were at risk for "catastrophic failure,"⁶⁰ the Merged Company now states that it has withdrawn its plan to retire CEMR and has deferred retirement of MEDIACC until October 2013.⁶¹ When asked why the Merged Company is proceeding with its December 12, 2011 implementation date despite the alleged system stability, the Merged Company returned to its earlier claim that MEDIACC is unstable or obsolete.

Since the Joint CLECs began calling these issues to the attention of state commissions, the Merged Company has become increasingly evasive about its plans. Thus, in CMP, the Merged Company clearly stated that, Qwest "uses" MEDIACC today⁶² and, when MTG was implemented, it would be used by Qwest's "internal customers."⁶³ In the proceeding now pending in Colorado regarding the Merged Company's compliance with the OSS-related merger conditions, the Merged Company

⁵⁷ WA Complaint ¶ 46.

⁵⁸ See, e.g., WA Complaint, ¶¶ 40, 46.

⁵⁹ Answer at p. 2.

⁶⁰ WA Complaint, ¶ 60.

⁶¹ Answer at p. 3.

⁶² Qwest-prepared June 15, 2011 CMP meeting minutes: "Tracy Strombotne – Qwest . . . Tracy said legacy Qwest uses MEDIACC today and will have an opportunity to move to MTG." Minutes available at: http://www.centurylink.com/wholesale/cmp/cr/CR_SCR121608-02.html

⁶³ WA Complaint, ¶ 73.

admitted that Qwest “uses MEDIACC for itself with a significant percentage of Qwest repair tickets being in MEDIACC.”⁶⁴ Now, apparently recognizing that its admission in Colorado is inconsistent with the merger conditions, in Washington the Merged Company has denied the very same allegation that admitted in Colorado⁶⁵ and further alleges that “Qwest Corporation does not use MEDIACC internally.”⁶⁶

The Integra Settlement Agreement requires the Merged Company to “use and offer to wholesale customers the legacy Qwest Operational Support Systems” for the specified time period. Nonetheless, the Merged Company has recently argued that, if Qwest Corporation uses MTG for its retail customers, that this does not violate the “use and offer to wholesale customers” language of the settlement agreements. Specifically, the Merged Company argues:

Integra suggests that if CenturyLink uses MTG for its *retail* customers that this somehow violates the ‘use and offer to wholesale customers’ requirements. This section has nothing to do with retail customers. CenturyLink has repeatedly stated that it will continue to use MEDIACC *for its CLEC customers* that wish to continue to use it. In other words, it will continue to be ‘used and offered to wholesale customers’ as required.⁶⁷

In other words, the Merged Company argues that “use and offer to wholesale customers the legacy Qwest Operational Support Systems (OSS)”⁶⁸ actually means ‘use the non-retail legacy Qwest OSS and offer to wholesale customers the legacy Qwest non-retail Operational Support Systems (OSS).’” The agreements do not say that. Significantly, when the parties intended in paragraph 12 to refer only to “non-retail” legacy Qwest

⁶⁴ CO Amended Complaint ¶ 30, Qwest/CenturyLink Answer to Amended Complaint ¶ 30.

⁶⁵ Compare WA Complaint at ¶ 36 and Answer at ¶ 36.

⁶⁶ Answer at p. 1.

⁶⁷ See CenturyLink MN Reply Comments, MN Dkt. No. P-421, et al./PA-IO-456, July 22, 2011, p. 9, footnote 11 (emphasis added).

⁶⁸ Exhibit BJJ-3, Integra Settlement Agreement, ¶12; Exhibit BJJ-4, Joint CLEC Merger Agreement, p. 2; see also Exhibit BJJ-5, CO Staff Agreement, ¶17 (referencing conditions and commitments in the Integra agreement).

OSS, they showed they were fully able to do that. Subparagraph (d) to paragraph 12 of the Integra Settlement Agreement, relating to billing systems, specifically refers to “legacy Qwest *non-retail* OSS”⁶⁹ when the parties intended to limit the phrase legacy Qwest OSS to only non-retail OSS. No “non-retail” qualifier applies with respect to the maintenance and repair legacy Qwest OSS that Qwest Corporation is required to use for at least 30 months following the merger closing date. The Merged Company cannot re-define away its noncompliance in this manner.

There is no exception to this provision in the event Qwest itself or an individual CLEC chooses to use a different system during the moratorium period. The Merged Company cannot satisfy its commitment by continuing to offer the legacy Qwest OSS to CLECs; it must also continue to use the legacy Qwest OSS itself. By requiring that the Merged Company continue to use the legacy Qwest OSS, the Integra Settlement Agreement assures that those systems will be adequately maintained and also that CLECs will receive service quality that is at parity with what the Merged Company provides to itself. If the Merged Company implements MTG for its own use, this may create a situation in which the Merged Company provides better service for itself with a new system than for CLECs using the existing system.⁷⁰ The Merged Company’s plan to implement MTG as a replacement for legacy Qwest maintenance and repair OSS for its own use is contrary to the plain language of the Integra Settlement Agreement, which requires that the Merged Company continue to use legacy Qwest OSS for at least 24 months.

⁶⁹ Exhibit BJJ-3, Integra Settlement Agreement, ¶12(d); see also Exhibit BJJ-5, CO Staff Agreement, ¶17 (referencing conditions and commitments in the Integra agreement).

⁷⁰ WA Complaint ¶78.

The Merged Company suggests that the commitments under the Integra Settlement Agreement do not apply until a legacy Qwest OSS has been retired.⁷¹ Contrary to the Merged Company’s suggestion, the obligations relating to CLEC participation in the development, testing, and acceptance of replacement OSS is not triggered by retirement of a legacy Qwest OSS. Rather, the Integra Settlement Agreement requires that the Merged Company not “replace or integrate Qwest systems” without first complying with those obligations. The Joint Applicants’ commitment to the FCC is also clear, providing broadly that “CenturyLink will not replace Qwest OSS or integrate it *with any other OSS* for at least 30 months following the Merger Closing Date.”⁷² Thus, regardless of whether or when the Merged Company retires a Qwest OSS (e.g., MEDIACC), there are prerequisites that the Merged Company must first follow before it can integrate systems.⁷³ Although the Merged Company may attempt to narrow the term “integrate” to mean only integration with other CenturyLink entity OSS,⁷⁴ the merger commitments more broadly provide that “the Merged Company will not replace or integrate Qwest systems” for at least the moratorium period, and even then, only after following the procedures set out in the Integra Settlement Agreement relating to development of replacement OSS.

The Merged Company’s plan to offer MTG as an “option” for CLECs undermines the important protections provided by the OSS merger conditions. In testimony in support of the Integra Settlement Agreement, both CenturyLink and Integra recognized

⁷¹ Answer at p. 3.

⁷² FCC Memorandum Opinion and Order, WC Docket No. 10-110 March 18, 2011), p. 30, Appendix C (emphasis added).

⁷³ E.g., Integra Agreement, ¶12; Joint CLEC Merger Agreement, p. 2, ¶A; see also FCC merger commitment, ¶IV(A)(2).

⁷⁴ See Answer, ¶ 16.

that the procedures relating to CLEC participation in the development of replacement OSS would necessarily take place **before** that replacement OSS was implemented and integrated.⁷⁵ The Merged Company's implementation timeline creates two implementation tracks: an "internal" schedule and an "external" schedule. The internal schedule (for Qwest "internal" customers) does not include the merger procedures, including a CLEC vote on whether to accept the replacement OSS after collaborative development of acceptance criteria by all participating CLECs (and not only any CLEC that may participate early, despite a merger agreement right to participate later). However, the result of the internal schedule is implementation of MTG, the replacement system. CLECs who choose to assert their rights guaranteed by the Integra Settlement Agreement to be free from having to monitor, test, and participate in OSS changes, and the associated expense, burden, and disruption, for at least the moratorium period do so at the risk of losing their right, also guaranteed by the Integra Settlement Agreement, to provide meaningful input into the development of the OSS that will replace the legacy Qwest maintenance and repair OSS. The opportunity for CLECs to obtain significant changes to a system that is being used by the Merged Company and, perhaps, by some CLECs is likely to be very limited, at best. That is a key reason why the Integra Settlement Agreement requires that such CLEC participation occur before the replacement OSS has been implemented, not after.

⁷⁵ See, e.g., WA Complaint, ¶¶ 16, 27, 42.

III. Temporary Relief Is Necessary To Protect The CLECs And The Public Interest From Irreparable Harm.

As discussed above, a primary purpose for the merger conditions relating to OSS was to provide CLECs with certainty, predictability and consistency.⁷⁶ Before this Commission, the FCC, and other state commissions around the country, CenturyLink repeatedly asserted, in connection with its efforts to obtain approval of the merger, that it had not yet made any decisions regarding OSS and that it had no immediate plans to make changes to Qwest's OSS following the merger.⁷⁷ Accordingly, to address the uncertainty arising from CenturyLink's own professed uncertainty about the OSS that the Merged Company would use, the merger conditions provide specific timelines and establish specific procedures relating to OSS changes that the Merged Company might seek to implement in the future. Certainty and predictability are crucial to operating a business, but are also intangible and extremely difficult, if not impossible, to value.

More importantly, the harm resulting from the Merged Company's violation of the merger conditions regarding OSS is not confined to private interests. In its review of the proposed merger, the Commission noted the public interest, arising as a matter of both state and federal law, in promoting competition in the telecommunications market.⁷⁸ The Commission succinctly described the potential for harm to competition that was presented by the merger of Qwest and CenturyLink:

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.

⁷⁶ WA Complaint, ¶¶ 19, 25-27, 42.

⁷⁷ See, e.g., WA Complaint ¶¶ 17-18, 38.

⁷⁸ WA Merger Approval Order at ¶¶ 92-94.

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.⁷⁹

Thus, the Commission imposed conditions, including the conditions relating to OSS, to prevent harm to competition:

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.⁸⁰

These findings by the Commission amply establish the need for immediate relief to protect against harm to the public interest.

IV. The Equities Weight Heavily In Favor Of Temporary Relief.

As already discussed, the Joint CLECs will be substantially and irreparably harmed if the Merged Company is permitted to proceed with its plan to implement and integrate MTG. The Merged Company, in contrast, will suffer no harm if a preliminary injunction is granted. The Merged Company's own admissions show that there is no pressing need to implement MTG now. Both Qwest and CenturyLink told this Commission that "CenturyLink will have no immediate need (or be under any time pressure) to make any alterations to OSS in Qwest areas."⁸¹ To the extent the Merged Company attempts to claim urgency or change in circumstances, the Merged Company has provided no new fact regarding the alleged instability or obsolescence of MEDIACC

⁷⁹ *WA Merger Approval Order* at ¶¶ 94-94.

⁸⁰ *WA Merger Approval Order* at ¶ 97.

⁸¹ Joint Applicants' Statement of Position, CO Dkt. No. 10A-350T (Nov. 24, 2010), pp. 39-40.

and/or CEMR of which Qwest was not aware when the companies made their pre-merger representations to regulators.⁸² After CenturyLink was also on notice of the alleged system instability,⁸³ both Qwest and CenturyLink reaffirmed their commitment to both “use” and “offer” legacy Qwest OSS, including repair OSS, for a moratorium period and, in fact, agreed to lengthen that period from 24 to 30 months.⁸⁴ The Merged Company has declared that it intends to deploy MTG for its own use by the end of this year while offering MEDIACC to CLECs for their use. If MEDIACC is adequate for CLECs, it should also be adequate for the Merged Company, and there is no reason why the Merged Company cannot comply with the condition that it continue to use the legacy Qwest OSS, as well as offer that OSS to CLECs, for at least thirty months after the closing of the merger.

In return for the various commitments reflected in the Integra Settlement Agreement, including the commitments relating to OSS, Integra agreed that it would not oppose the merger.⁸⁵ During October and early November, 2010, representatives of CenturyLink, and in some cases representatives of Qwest, communicated with Integra about potential settlement, including telephone communications, as well as in-person meetings on October 14, 2010 and November 4-5, 2010. CenturyLink indicated that it was in communication with Qwest. Neither of the Joint Applicants informed Integra of any plan to initiate changes or begin integration regarding Qwest OSS for maintenance and repair, and/or to introduce a new system (e.g., MTG), in November of 2010 or to implement MTG or other new system by the end of 2011. They did not mention any

⁸² Vendor documentation that Qwest provided in CMP to allegedly verify its concerns dates back to 2003 and before.

⁸³ See Complaint, ¶40 (quoting December 20, 2011 Arizona testimony).

⁸⁴ Complaint, ¶52.

⁸⁵ Integra Settlement Agreement, p. 12, § C.

claim of or concern about instability of Qwest OSS for maintenance and repair (CEMR and/or MEDIACC).

Further, CenturyLink repeatedly asserted that it had no plans to make changes to the Qwest legacy OSS; Mr. Hunsucker of CenturyLink testified before this Commission that the Merged Company had no plans to create any new OSS.⁸⁶ Yet, the very same day that Mr. Hunsucker provided this testimony and only two days after filing the Integra Settlement Agreement with the Commission, Qwest updated its website to indicate it will replace CEMR and MEDIACC with a new system, MTG. If Qwest and CenturyLink intended that their OSS commitment would be somehow limited or subject to exception, it was incumbent upon them to disclose that to the Commission and the CLECs before obtaining approval for their merger. Qwest and CenturyLink certainly understood and intended that the Commission and CLECs would rely on those commitments. Equity does not favor allowing the Merged Company to act in a manner that is contrary to those commitments now that the merger has been completed.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

If the Merged Company is permitted to continue during the pendency of this case with its activities relating to the implementation and integration of MTG, notwithstanding the commitments set forth in the Integra Settlement Agreement and this Commission's order approving the merger, the harm that the Joint CLECs brought this action to prevent will occur. Accordingly, in order to assure compliance with the Commission's order and preserve the Commission's ability to grant meaningful relief at the conclusion of the case, the Commission must act now. The Joint CLECs request that the Commission grant temporary relief directing that the Merged Company suspend all further MTG

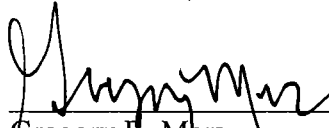
⁸⁶ Amended Complaint ¶¶ 15, 24.

implementation activities (including Qwest moving itself to MTG first or separately from CLECs) until further order of the Commission.

A prehearing conference is schedule in this matter for August 25, 2011. The Joint CLECs respectfully request the opportunity to present oral argument in support of their motion at the time of the prehearing conference.

Respectfully submitted on this 10th day of August, 2011.

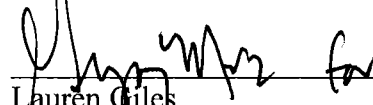
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