

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY  
QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

**BEFORE THE WASHINGTON**

**UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of A Complaint By The                      Docket No. UT-111254  
Joint CLECs Against the Joint Applicants  
Regarding OSS For Maintenance And  
Repair

**JOINT CLECS' OPENING BRIEF**

GRAY, PLANT, MOOTY, MOOTY  
& BENNETT, P.A.

Gregory R. Merz  
500 IDS Center  
80 South Eight Street  
Minneapolis, MN 55402  
Telephone: 612-632-3257  
Facsimile: 612-632-4257  
[gregory.merz@gpmlaw.com](mailto:gregory.merz@gpmlaw.com)

Attorney for Integra and PAETEC

DAVIS WRIGHT TREMAINE

Lauren Giles  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101  
Telephone: (206) 757-8259  
Facsimile: (206) 757-7259  
[LaurenGiles@dwt.com](mailto:LaurenGiles@dwt.com)

Attorney for **tw telecom**

TABLE OF CONTENTS

	Page
<b>INTRODUCTION .....</b>	<b>1</b>
<b>I. Merger Conditions and Commitments .....</b>	<b>5</b>
A. The Integra Settlement Agreement.....	5
B. The Commission Staff Settlement.....	7
C. The tw telecom Agreement.....	7
D. The Joint CLEC Merger Agreement .....	8
E. The Commission’s Order Approving The Merger .....	8
<b>II. The Commission Has Authority To Enforce The Commitments Contained In The Joint CLEC Merger Agreement .....</b>	<b>10</b>
<b>III. The Merger Conditions And Commitments Must Be Interpreted And Enforced According To Basic Principles of Contract Law.....</b>	<b>12</b>
<b>IV. CenturyLink’s Violations of the Merger Conditions and Commitments.....</b>	<b>14</b>
A. CenturyLink’s Violation Of The Commission’s Order Approving The Merger .....	14
B. CenturyLink’s Failure To Use Legacy Qwest Repair OSS For At Least Thirty Months After The Merger Closing Date.....	15
C. CenturyLink’s Failure To Offer Legacy Qwest Repair OSS To CLECs For At Least Thirty Months Following The Merger.....	20
D. CenturyLink’s Replacement Of Legacy Qwest OSS Before The Expiration Of The Thirty Month Moratorium Period And Without Following The Process For CLEC Acceptance.....	25
E. CenturyLink’s Replacement Of Legacy Qwest OSS With A System That Fails To Comply With The Wholesale Service Quality Requirement Of The Merger Commitments.....	30
F. CenturyLink’s Integration Of MTG Before The End Of The Thirty Month Moratorium And Without Complying With Required Conditions.....	32
<b>V. CenturyLink’s Discrimination Against CLECs In Favor Of Its Own Retail Customers.....</b>	<b>35</b>
<b>VI. Remedial Action By The Commission Is Necessary To Prevent Further Harm To CLECs As A Result Of CenturyLink’s Breach Of Its Merger Commitments And Discriminatory Conduct.....</b>	<b>39</b>
A. Update MEDIACC .....	39
B. Develop MTG To Speak Both CMIP And XML Languages.....	41
C. Compensation To CLECs For Costs Of Early Transition To MTG.....	44

**INTRODUCTION**

1            Integra Telecom, PAETEC Business Services, and **tw telecom of Washington** (collectively, “Joint CLECs”) commenced this action to force Qwest and CenturyLink (collectively, “Merged Company,” “Joint Applicants,” or “CenturyLink”) to comply with commitments they made in order to obtain regulatory approval of their merger. The commitments at issue here are reflected in settlement agreements entered into between the Joint Applicants and the Joint CLECs and the Washington Commission’s Order imposing conditions on the merger. Those commitments concern the legacy Qwest Operational Support Systems (“OSS”), specifically, the repair OSS used by legacy Qwest – MEDIACC and CEMR.

2            In order to provide certainty and predictability after the merger, CLECs sought and obtained CenturyLink’s commitment to continue to use and offer to wholesale customers the legacy Qwest OSS for a period of at least thirty months after the merger and, thereafter, that it would not retire, replace or integrate legacy Qwest OSS without first complying with specific procedures, including CLEC testing and acceptance of any replacement interface. Notwithstanding those commitments, Qwest, only days after entering into its settlement agreement with Integra, announced plans to implement a new repair OSS – MTG – and to retire MEDIACC and CEMR.<sup>1</sup> The key reasons given were that CEMR and MEDIACC were “unstable”<sup>2</sup> and “unsupported.”<sup>3</sup> Although CenturyLink, under pressure from CLECs, subsequently agreed to defer the retirement of MEDIACC until October 2013 and to defer the

---

<sup>1</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 55, lines 21-25; Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7).

<sup>2</sup> Hearing Ex. DD-9 (CO PUC Docket No.11F-436T, Hearing Tr.) at p. 160, lines 8-19 (testimony of Michael Hunsucker); Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 79, line 11-p. 80, line 2 (quoting Hunsucker AZ hearing testimony).

<sup>3</sup> Hearing Ex. RA-1T (Answer Testimony of Renee Albersheim), p. 6, lines 5-6; p. 10, lines 10-13 (“[B]ecause MEDIACC is no longer fully supported by its vendors, the risk of an unrecoverable failure is increasing. Qwest/CenturyLink considers it prudent to have MTG available as soon as possible, to minimize the impact if such a failure takes place.”)

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

retirement of CEMR indefinitely, it has now implemented MTG as a replacement for MEDIACC,<sup>4</sup> prior to the end of the thirty month moratorium period and without following the required procedures for CLEC acceptance.

3 CenturyLink attempts to reconcile its implementation of MTG with its merger commitments by arguing that, because it is CenturyLink’s intention that MEDIACC will still be available until October 2013 and MTG is only being made available as an “option” for CLECs that wish to use it, CenturyLink will be in compliance with its commitment to continue to use and offer MEDIACC for the required time period.<sup>5</sup> This argument fails, however, because it relies on an incorrect interpretation of the parties’ agreements, as is discussed in detail below,<sup>6</sup> and, perhaps of even greater concern, ignores the serious issues that CenturyLink has itself raised regarding the ongoing viability of MEDIACC. OSS was a key issue of concern in the Qwest/CenturyLink merger proceedings, not only for CLECs, but for the Commission Staff.<sup>7</sup> In entering into their respective settlement agreements, the Joint CLECs reasonably expected that they were assured continued access to existing Qwest OSS on which they could rely confidently. They did not bargain to continue having access to OSS that, in CenturyLink’s words, “will likely begin experiencing problems in the near future” and, therefore, needed a “backup.”<sup>8</sup>

4 The evidence in this case has shown that the CLECs have not received the benefit of their bargain reached in the settlement agreements. When CenturyLink eventually agreed to defer the retirement of MEDIACC, CenturyLink nonetheless stated that “CenturyLink does need to

---

<sup>4</sup> See Hearing Ex. RA-19 (Qwest/CenturyLink’s Notice of Compliance Regarding Postponement of MTG Implementation (December 20, 2011)) (planned Release Production Effective Date for MTG is February 13, 2012).

<sup>5</sup> Hearing Ex. MH-1T (Answer Testimony of Michael Hunsucker), p. 6, line 18 - p. 7, line 4.

<sup>6</sup> See, *infra*, ¶¶ 23-55.

<sup>7</sup> Hearing Tr., Vol. III, p. 336, lines 9-19 (testimony of Robert Williamson).

<sup>8</sup> Hearing Ex. RA-21 (CO PUC Docket No. 11F-436T, Answer of Qwest Corporation and CenturyLink, Inc. to Amended Complaint) ¶2; see also WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer to Complaint, ¶2 (“The MEDIACC system is currently stable, but fourteen years old and could begin experiencing problems in the near future, so developing a backup system and an eventual replacement is important to maintain quality levels of service for CLECs and their customers.”).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

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,” and that, “CenturyLink continues to have concerns that a catastrophic failure could result with MEDIACC and CEMR.”<sup>9</sup> These statements are not an isolated occurrence, but rather, part of a pattern.<sup>10</sup> These claims by CenturyLink must have consequences. In light of the disruption that CLECs and their customers would experience in the event of a MEDIACC failure,<sup>11</sup> neither CLECs nor the Commission can afford to dismiss the potential for failure as idle speculation. Although CenturyLink now claims that it “intends” to keep MEDIACC running for the time period required by the merger commitments,<sup>12</sup> that expression of intent cannot undo the specter of catastrophic failure fostered by CenturyLink’s representations of risk together with its implementation of MTG as a replacement for the legacy Qwest repair OSS.<sup>13</sup>

5           The Joint CLECs have also brought complaints in Minnesota and Colorado regarding the same issues presented here. In the proceedings pending in Minnesota, the Minnesota Public Utilities Commission rejected the same arguments that CenturyLink offers here and prohibited CenturyLink from proceeding with the implementation of MTG before the expiration of thirty months after the merger closing.<sup>14</sup> Additionally, the Minnesota Commission recently ordered CenturyLink and the CLECs to agree on, and retain at CenturyLink’s expense, a third party

---

<sup>9</sup> Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36) at p. JC000294.

<sup>10</sup> See, *infra*, ¶¶ 32-36.

<sup>11</sup> Hearing Tr., Vol. III, p. 342, lines 2-6 (testimony of Robert Williamson) (“an unrecoverable failure of MEDIACC would be catastrophic for all parties”).

<sup>12</sup> Hearing Ex. MH-1T (Answer Testimony of Michael Hunsucker) p. 7, lines 21-22.

<sup>13</sup> Hearing Tr., Vol. II, p. 268, lines 13-18 (testimony of Michael Hunsucker) (CenturyLink’s intention to continue to use MEDIACC assumes that there won’t be an unrecoverable failure of MEDIACC before October 2013).

<sup>14</sup> *In the Matter of the Complaint by Joint CLECs Against Qwest and CenturyLink Regarding OSS Implementation*, MN PUC Docket No. P-5340, et al./C-11-684, ORDER BARRING IMPLEMENTATION OF NEW OPERATIONAL SUPPORT SYSTEMS AND REQUIRING COOPERATION AND FILINGS (Sept. 6, 2011) (“*MN Order Barring Implementation*”).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

expert to review and test CenturyLink’s failover and disaster recovery plans for the MEDIACC/CEMR systems, to assure that the functions of those systems are able to be *seamlessly transferred* in the event of a failure and also to assure that those plans are effective and sufficient to *mitigate harm* in the event of a failure.<sup>15</sup> Similarly, in the parallel Colorado proceedings, Colorado Commission Staff concluded that, even though “potentially costly and difficult, Qwest currently must maintain its MEDIACC system for [the] 30 month timeframe and should be required to invoke any necessary options that will minimize downtime on the system. At a minimum, these plans should be well documented, available and fully executable, if necessary.”<sup>16</sup> In the post-hearing brief filed by the Colorado Commission Staff, Staff also recommended that the Commission consider ordering third party review and testing of the CEMR/MEDIACC failover and disaster recovery plans.<sup>17</sup>

6           The Commission should find that CenturyLink’s implementation of MTG violates the OSS commitments under the settlement agreements with the CLECs and Commission Staff as well as conditions of the Commission’s merger approval order. The Joint CLECs agree, given that CenturyLink has already proceeded with the implementation of MTG over CLEC objections, the focus of an appropriate *remedy* for that breach should be on processes and procedures designed to prevent MEDIACC and CEMR systems failure and to mitigate the harm that would result from a failure. In order to be adequate and nondiscriminatory, such processes and procedures must sufficiently meet the goals of disaster avoidance, disaster recovery, and

---

<sup>15</sup> *In the Matter of the Complaint by Joint CLECs Against Qwest and CenturyLink Regarding OSS Implementation*, MN PUC Docket No. P-5340, et al./C-11-684, ORDER REQUIRING RETENTION OF TECHNICAL EXPERT, NEGOTIATIONS AND COMPLIANCE FILINGS (February 27, 2012) (“*MN Order Requiring Retention of Expert*”). A copy of the Minnesota Commission’s Order was filed in this matter on February 28 as supplemental authority.

<sup>16</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn Notarianni) at p. 21, line 19-p. 22, line 3.

<sup>17</sup> CO PUC Docket No. 11F-436T, Statement of Position by Staff of the Colorado Public Utilities Commission, at pp. 3, 7, 22.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

failover. Additionally, in order to comply with the merger commitments, if CenturyLink is permitted to continue to use MTG as a replacement for MEDIACC and offer MTG to its retail and wholesale customers it must assure that the system offers CLECs at least the same functionality as they receive today using CEMR and/or MEDIACC. Currently, PAETEC is electronically bonded with MEDIACC via the CMIP protocol, which enables a high degree of automation of PAETEC's repair functions. MTG does not provide PAETEC with a true back up in the event of a MEDIACC failure because MTG's XML interface will not "talk to" PAETEC's systems, at least not without substantial effort on PAETEC's part.<sup>18</sup> Accordingly, for MTG to serve as a true back up requires, at a minimum, that MTG be developed to communicate using the CMIP protocol in addition to the XML protocol that MTG currently uses or, alternatively, that CenturyLink compensate CLECs for the cost of transitioning to MTG before the end of the thirty month period.<sup>19</sup>

**I. Merger Conditions and Commitments**

7 Each of the Joint CLECs entered into a separate settlement agreement with Qwest and CenturyLink.

**A. The Integra Settlement Agreement.**

8 Integra entered into its settlement agreement on November 6, 2010 ("Integra Settlement Agreement"). Key provisions regarding OSS are contained in Section 12 of the Integra Settlement Agreement,<sup>20</sup> which provides:

12. In legacy Qwest ILEC service territory, after the Closing Date, the Merged Company will use and offer to wholesale customers the legacy Qwest Operational Support Systems (OSS) for at least two years, or until July 1, 2013, whichever is later, and thereafter provide a level of wholesale service quality that is not

---

<sup>18</sup> Hearing Ex. CH-1T (Direct Testimony of Christopher Hansen) p. 2, line 1-p. 4, line 6.

<sup>19</sup> See, *infra*, ¶¶ 59-71, for a more complete discussion of the Joint CLECs' requested remedies.

<sup>20</sup> A copy of the Integra Settlement Agreement in its entirety has been admitted into the record as Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURLINK AS CONFIDENTIAL HAS BEEN REDACTED**

materially less than that provided by Qwest prior to the Closing date, including support, data, functionality, performance, electronic flow through, and electronic bonding. After the period noted above, the Merged Company will not replace or integrate Qwest systems without first establishing a detailed transition plan and complying with the following procedures:

- a. Detailed Plan. The Merged Company will provide notice to the Wireline Competition Bureau of the FCC, the state commission of any affected state and parties to this agreement at least 270 days before replacing or integrating Qwest OSS system(s). Upon request, the Merged Company will describe the system to be replaced or integrated, the surviving system, and steps to be taken to ensure data integrity is maintained. The Merged Company's plan will also identify planned contingency actions in the event that the Merged Company encounters any significant problems with the planned transition. The plan submitted by the Merged Company will be prepared by information technology professionals with substantial experience and knowledge regarding legacy CenturyLink and legacy Qwest systems processes and requirements. CLEC will have the opportunity to comment on the Merged Company's plan in a forum in which it is filed, if the regulatory body allows comments, as well as in the Qwest Change Management Process.
- b. CMP. The Merged Company will follow the procedures in the Qwest Change Management Process ("CMP") Document.
- c. Replacement or Retirement of a Qwest OSS Interface.
  - i. The replacement or retirement of a Qwest OSS Interface may not occur without sufficient acceptance of the replacement interface by CLECs to help assure that the replacement interface provides the level of wholesale service quality provided by Qwest prior to the Closing Date (as described in paragraph 12 above). Each party participating in testing will commit adequate resources to complete the acceptance testing within the applicable time period. The Parties will work together to develop acceptance criteria. Testing will continue until the acceptance criteria are met. Sufficient acceptance of a replacement for a Qwest OSS Interface will be determined by a majority vote, no vote to be unreasonably withheld, of the CMP participants (Qwest and CLECs) in testing, subject to any party invoking the CMP's Dispute Resolution process. The requirements of this paragraph will remain in place only until completion of merger-related OSS integration and migration activity. If a dispute arises as to whether such merger-related OSS integration and migration activity is complete, the state commission will determine the completion date.
  - ii. The Merged Company will allow coordinated testing with CLECs, including a stable testing environment that mirrors production, jointly established test cases, and, when applicable, controlled production testing, unless otherwise agreed to by the Parties. Testing described in this paragraph associated with merger-related system replacement or integration will be allowed for the time periods in the CMP



**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

Document, or for 120 days, whichever is longer, unless otherwise mutually agreed to by the Parties.

iii. The Merged Company will provide the wholesale carriers training and education on any wholesale OSS implemented by the Merged Company without charge to the wholesale carrier.

**B. The Commission Staff Settlement**

9 On December 23, 2011, the Staff of the Washington Utilities and Transportation Commission and the Public Counsel Section of the Washington Attorney General’s Office entered into a settlement agreement with Qwest and CenturyLink that adopted merger conditions in a variety of areas (“Staff Settlement Agreement”).<sup>21</sup> Condition 23, which concerned wholesale OSS, mirrored the OSS conditions contained in the Integra Settlement Agreement, with one important difference relating to wholesale service quality. The Integra Settlement Agreement requires that the wholesale service quality provided by the Merged Company must be “**not materially less than**” than that provided by Qwest before the merger.<sup>22</sup> The Staff Settlement Agreement, in contrast, provides that, after this moratorium period, the Merged Company must continue to provide wholesale service quality “that is **not less than**” that provided by Qwest before the merger.<sup>23</sup>

**C. The tw telecom Agreement**

10 **tw telecom** entered into its settlement agreement with Qwest and CenturyLink on February 4, 2011.<sup>24</sup> Pursuant to that agreement, **tw telecom** opted into the Integra Settlement Agreement, subject to certain clarifications, modifications, and additional commitments. The **tw**

---

<sup>21</sup> *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.* WA Docket No. UT-100820, Order 14, FINAL ORDER APPROVING AND ADOPTING, SUBJECT TO CONDITIONS, MULTIPARTY SETTLEMENT AGREEMENTS AND AUTHORIZING TRANSACTION (March 14, 2011) (“*WA Merger Approval Order*”) at Appendix C.

<sup>22</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12.

<sup>23</sup> *WA Merger Approval Order*, Appendix C at Appendix A to Settlement Agreement – Conditions, Condition 23.

<sup>24</sup> Hearing Ex. LN-1T (Direct Testimony of Lyndall Nipps) at p. 4, lines 9-15.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

**telecom** settlement agreement provided that the terms of that agreement would not prevent **tw telecom** from obtaining the benefit of any inconsistent or additional commitments or conditions imposed or adopted by the FCC or any state commission.

**D. The Joint CLEC Merger Agreement**

11 On March 4, 2011, PAETEC and several other CLECs entered into a settlement agreement with Qwest and CenturyLink (“Joint CLECs Merger Agreement”).<sup>25</sup> Pursuant to that Agreement, the settling CLECs opted into the Integra Settlement Agreement, subject to certain additional terms that provided further protection in specific areas, including OSS. The Joint CLEC Merger Agreement extended the period during which the Merged Company would continue to use and offer the legacy Qwest OSS from two years to thirty months. The Joint CLEC Merger Agreement strengthened the commitment contained in the Integra Settlement Agreement relative to the wholesale service quality and includes additional procedures relating to testing and acceptance of replacement OSS. It is undisputed that the OSS provisions of the Joint CLEC Merger Agreement are, pursuant to the Agreement’s terms, applicable throughout the Qwest 14-state ILEC territory. In correspondence to the Oregon Commission, Qwest and CenturyLink state that “there are no provisions in the agreement that require this Commission’s action in order for them to take effect.”<sup>26</sup> Qwest and CenturyLink characterized some of the provisions of the Joint CLEC Merger Agreement as “self-effectuating” and other provisions as “available to CLECs upon request.”

**E. The Commission’s Order Approving The Merger**

---

<sup>25</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 50, line 1 – p. 53, line 12.

<sup>26</sup> Hearing Ex. BJJ-7 (Direct Testimony of Bonnie Johnson, BJJ-6).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

12 The Washington Commission approved the merger on March 14, 2011.<sup>27</sup> The Commission conditioned its approval on, among other things, the terms of the settlement agreements entered into by Integra, Staff and **tw telecom**.<sup>28</sup> The Commission specifically required, consistent with the Staff Settlement Agreement, that the Merged Company must provide wholesale service quality not less than the level provided by Qwest before the merger, rejecting the “materiality” limitation contained in the Integra Settlement Agreement.<sup>29</sup> The Commission also extended the moratorium period from two years, as provided for by the Integra and Staff settlement agreements, to thirty months, pursuant to the Joint CLEC Merger Agreement, and otherwise took administrative notice of the terms of that agreement.<sup>30</sup>

13 Specifically with respect to merger conditions relating to wholesale OSS, the Commission found that the requirements of Integra and Staff settlements were “extremely important,” but that those requirements did not go far enough.<sup>31</sup> Accordingly, the Commission ordered modifications to the OSS conditions in order to “provide important additional protections for wholesale customers.”<sup>32</sup> First, “before any replacement OSS is put into actual production,” the Commission required the Merged Company to file a “detailed report with the Commission describing, at a minimum, all aspects of the acceptance testing process; identification of all CLEC participants in the testing and voting process set forth in the settlement condition; the identification and discussion of all disputes that arose between the combined company and CLECs regarding any issue pertaining to the replacement OSS; and a

---

<sup>27</sup> *WA Merger Approval Order*, ¶¶292.

<sup>28</sup> *WA Merger Approval Order*, ¶¶ 281, 292. The Commission also adopted the conditions contained in settlement agreements entered into by 360 Networks and the Department of Defense.

<sup>29</sup> *WA Merger Approval Order*, ¶ 124.

<sup>30</sup> *WA Merger Approval Order*, ¶¶ 86, 116.

<sup>31</sup> *WA Merger Approval Order*, ¶ 119.

<sup>32</sup> *WA Merger Approval Order*, ¶ 119.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

comprehensive synopsis of the outcome.”<sup>33</sup> Second, the Commission expressly reserved the right to require “third-party testing of any replacement OSS before it may be implemented for actual production.”<sup>34</sup>

**II. The Commission Has Authority To Enforce The Commitments Contained In The Joint CLEC Merger Agreement**

14 The Commission took administrative notice of the Joint CLEC Merger Agreement, pursuant to WAC 480-07-495(2)(c), noting that no party had objected to the noticing of that agreement.<sup>35</sup> Although the Commission did not adopt the terms of Joint CLEC Merger Approval Agreement as part of its Merger Approval Order, that fact does not prevent the Commission from enforcing the terms of that agreement.

15 The Commission has broad authority under Washington law to “[r]egulate in the public interest, as provided by the public service laws, the rates, services, facilities and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation.”<sup>36</sup> This regulatory authority expressly extends to contractual obligations relating to the provision of telecommunications services in the state. Thus, telecommunications companies are required to file with the Commission “any contract, agreement or arrangement in writing with any other telecommunications company . . . relating in any way to the construction, maintenance or use of a telecommunications line or service by, or rates and charges over and upon, any such telecommunications line.”<sup>37</sup> Such contracts “shall be enforceable by the contracting parties according to their terms . . . .”<sup>38</sup> Washington law further

---

<sup>33</sup> *WA Merger Approval Order*, ¶ 120.

<sup>34</sup> *WA Merger Approval Order*, ¶ 121.

<sup>35</sup> *WA Merger Approval Order*, ¶ 86 and fn. 258. WAC 480-07-495 authorizes the Commission to take official notice of “[a]ny judicially cognizable fact.”

<sup>36</sup> RCW 80.01.040(3).

<sup>37</sup> RCW 80.36.150(1).

<sup>38</sup> RCW 80.36.150(3).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

requires all contracts entered into by telecommunications companies for telecommunications services to be “fair, just, reasonable and sufficient” and that services rendered pursuant to such a contract be rendered in “a prompt, expeditious and efficient manner” and that the service shall be “modern, adequate, sufficient and efficient.”<sup>39</sup> Finally, the Commission is authorized to adjudicate complaints brought by a public service corporation<sup>40</sup> against a competitor that the competitor’s practices are “unreasonable, unremunerative, discriminatory, illegal, unfair, or intending or tending to oppress the complainant, stifle competition, or to create or encourage a monopoly.”<sup>41</sup> This same statute grants to the Commission the power to “correct the abuse complained of by establishing such uniform rates, changes, rules, regulations or practices in lieu of those complained of.”<sup>42</sup>

16           The Joint CLEC Merger Agreement is a contract that relates to telecommunications service provided in Washington. As required by Washington law, the contract was filed with the Commission and is enforceable according to its terms. The Commission has taken judicial notice of its terms and CenturyLink has acknowledged that none of the provisions of the Agreement require Commission action to take effect.<sup>43</sup> The OSS terms of the Joint CLEC Merger Agreement, which terms are alleged here to have been violated, are expressly applicable throughout the legacy Qwest fourteen state region. The Joint CLECs’ complaint in this matter invokes the Commission’s authority under RCW 80.04.110 to determine whether a competitor’s practices, are, among other things, unreasonable, illegal, or unfair.<sup>44</sup> The complaint alleges that breach of the merger settlement agreements, including the Joint CLEC Merger Agreement, has

---

<sup>39</sup> RCW 80.36.080.

<sup>40</sup> Although the statute does not define “public service company,” it does define “public service corporation” to include “any . . . telecommunications company.” *See* RCW 80.04.010.

<sup>41</sup> RCW 80.04.110(1).

<sup>42</sup> RCW 80.04.110(1).

<sup>43</sup> Hearing Ex. BJJ-7 (Direct Testimony of Bonnie Johnson, BJJ-6).

<sup>44</sup> WA UTC Docket No. UT-111254, Formal Complaint and Petition, preamble.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

caused harm and will cause harm, not only to the Joint CLECs, but to the public interest in fair and reasonable competition.<sup>45</sup> The Commission can and should look to whether CenturyLink has complied with the commitments contained in the Joint CLEC Merger Agreement, as well as the Integra, Staff, and **tw telecom** agreements, in determining whether CenturyLink's implementation of MTG as a replacement for the legacy Qwest repair OSS is unreasonable, illegal and/or unfair.

17 If the Commission were to determine that it does not have jurisdiction over the Joint CLEC Merger Agreement, this would lead to the anomalous result of requiring PAETEC to go to court to enforce an agreement relating to a subject about which the Commission, not the courts, has special expertise, and over which the Commission, not the courts, has been given express regulatory authority. The terms of the Joint CLEC Merger Agreement are very similar to the terms of the Integra Settlement Agreement, modifying the terms of the Integra agreement in only specific respects. Accordingly, if the Commission were to decline jurisdiction over the Joint CLEC Merger Agreement while accepting jurisdiction over the Integra Settlement Agreement—about which there is no dispute regarding the Commission's jurisdiction—this would create a significant possibility of inconsistent results and inconsistent obligations.

**III. The Merger Conditions And Commitments Must Be Interpreted And Enforced According To Basic Principles of Contract Law**

18 Under Washington law, settlement agreements are contracts and their construction is governed by contract principles.<sup>46</sup> Thus, in interpreting the settlement agreements that are at issue in this case, the Commission must attempt to determine the intent of the parties by

---

<sup>45</sup> WA UTC Docket No. UT-111254, Formal Complaint and Petition, ¶ 97.

<sup>46</sup> *McGuire v. Bates*, 169 Wash. 2d 185, 234 P.3d 205, 206 (2010); *Morris v. Maks*, 69 Wash. App. 865, 850 P.2d 1357, 1358 (Wash. Ct. App. 1993).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

focusing, first, on their objective manifestations as expressed in the agreement.<sup>47</sup> Words used in a contract are given their ordinary, usual, and popular meaning unless the entirety of the contract demonstrates a contrary intent.<sup>48</sup> A contract should not be interpreted in a manner that renders a term ineffective or meaningless.<sup>49</sup>

19 If relevant for determining the parties' mutual intent, the Commission may consider extrinsic evidence regarding the contract's "context" including: 1) the subject matter and objective of the contract, 2) all of the circumstances surrounding the making of the contract, 3) the subsequent acts and conduct of the parties, and 4) the reasonableness of the respective interpretations urged by the parties.<sup>50</sup> Such extrinsic evidence may be used to determine the meaning of specific words and terms used, but not to show an intent independent of the written contract or to vary, contradict or modify the written contract.<sup>51</sup>

20 Finally, as a matter of Washington law, every contract includes an implied covenant of good faith and fair dealing.<sup>52</sup> The covenant of good faith and fair dealing imposes an implied obligation on each party to perform in good faith the obligations imposed by their agreement, so that each party may obtain the full benefit of performance.<sup>53</sup>

---

<sup>47</sup> *McGuire*, 234 P.3d at 206; *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 115 P.3d 262, 267 (Wash. 2005).

<sup>48</sup> *Hearst Communications*, 115 P.2d at 267; *Universal/Land Const. Co. v. City of Spokane*, 49 Wash. App. 634, 745 P.2d 53, 55 (1987).

<sup>49</sup> *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wash. 2d 475, 209 P.3d 863, 871 (Wash. 2009); *Nishikawa v. U.S. Eagle High LLC*, 158 P.3d 1265, 1269 (Wash. Ct. App. 2007) ("When interpreting a contract, we give undefined terms their plain, ordinary, and popular meaning and we harmonize clauses that seem to conflict. Our goal is to interpret the agreement in a manner that gives effect to all of the contract's provisions.") (citations omitted).

<sup>50</sup> *Hearst Communications*, 115 P.3d at 266, see also *Berg v. Hudesman*, 115 P.2d 657, 669, 801 P.2d 222, 229 (Wash. 1990) (applying the "context rule" of contract interpretation).

<sup>51</sup> *Hearst Communications*, 115 P.3d at 267.

<sup>52</sup> *Lonsdale v. Chesterfield*, 99 Wash. 2d 353, 662 P.2d 385, 387 (Wash. 1983); *Badgett v. Security State Bank*, 116 Wash. 2d 563, 807 P.2d 356, 360 (Wash. 1991).

<sup>53</sup> *Lonsdale*, 662 P.2d at 388; *Badgett*, 807 P.2d at 360.

**IV. CenturyLink’s Violations of the Merger Conditions and Commitments<sup>54</sup>**

**A. CenturyLink’s Violation Of The Commission’s Order Approving The Merger**

21 This Commission’s order approving the merger includes specific requirements that CenturyLink must meet “before any replacement OSS is put into actual production.”<sup>55</sup> These requirements include detailed reporting to the Commission, and the opportunity for comment from interested parties, regarding the acceptance testing process and, potentially, third party testing of the replacement interface.<sup>56</sup> The evidence shows that CenturyLink’s implementation of MTG violates these requirements.

22 There is no dispute that MTG is the replacement for MEDIACC.<sup>57</sup> That CenturyLink has elected to defer the retirement of MEDIACC does not change the fact that MTG is a “replacement OSS.” Further, it is undisputed that CenturyLink is making the replacement interface – MTG – available for “actual production” without first completing the reporting required by the Commission’s order. According to the notice issued by CenturyLink in CMP, the “Release Production Effective Date” for MTG was February 13, 2012, for every state other than Minnesota, where the Commission has prohibited implementation.<sup>58</sup> This means that MTG is now available for individual customers to begin testing, which would be expected to take only a few weeks, and then those customers could begin using the system in production, without

---

<sup>54</sup> See Hearing Ex. BJJ-75 (Rebuttal Testimony of Bonnie Johnson, BJJ-2A) for a complete chronology of events relevant to this dispute.

<sup>55</sup> *WA Merger Approval Order*, ¶120.

<sup>56</sup> *WA Merger Approval Order*, ¶¶120-121.

<sup>57</sup> Hearing Tr. Vol. II, p. 241, line 20-p. 242, lines 15 (testimony of Michael Hunsucker); Hearing Tr. Vol. III, p. 338, lines 10-12; Hearing Tr. Vol. III, p. 338, lines 10-12 (testimony of Robert Williamson); *see also, infra*, at ¶¶ 37-45.

<sup>58</sup> Hearing Ex. RA-19 (Qwest/CenturyLink’s Notice of Compliance Regarding Postponement of MTG Implementation (December 20, 2011)).



**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

CenturyLink first providing the detailed report and an opportunity for interested party comment, as required by the Commission's order.<sup>59</sup>

**B. CenturyLink's Failure To Use Legacy Qwest Repair OSS For At Least Thirty Months After The Merger Closing Date**

23 Under the Integra Settlement Agreement, as modified by the Joint CLEC Merger Agreement, CenturyLink is obligated to “use and offer to wholesale customers the legacy Qwest Operational Support Systems (OSS)” for at least thirty months after the merger closing. By requiring that the Merged Company continue to use the existing Qwest systems for a specified period after the merger, this provision provides assurance that the systems that CLECs rely on will be properly maintained. In concluding that the implementation of MTG would violate the Integra Settlement Agreement, the Minnesota Commission relied, in particular, on the commitments to continue to “use and offer” legacy Qwest OSS. Specifically with respect to “use,” the Minnesota Commission stated:

Just as important to retaining the stable OSS environment upon which they rely, the CLECs sought – and obtained – assurances that the Merged Company would itself continue to rely on these systems. In this manner, the CLECs gained assurance that the Merged Company had as much stake in maintaining the current OSS as any of the CLECs do.<sup>60</sup>

24 In its December 17, 2010, CMP Announcement, Qwest stated that MTG would allow both “Qwest and wholesale customers” to use the new system.<sup>61</sup> Since then, CenturyLink has made repeated statements that make clear that it intends to use MTG as a replacement for the legacy Qwest repair OSS, for itself and to provide service to retail customers. At a June 15, 2011, CMP Ad Hoc Meeting, a CenturyLink employee stated, that “legacy Qwest uses

<sup>59</sup> Hearing Tr., Vol. III, p. 282, line 6-p. 283, line 8 (testimony of Renee Albersheim); see also Hearing Tr., Vol. III, p. 337, lines 16-19 and 338, lines 12-23 (testimony of Robert Williamson).

<sup>60</sup> *MN Order Barring Implementation* at p. 6.

<sup>61</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 77, lines 9-14 and fn. 210 (citing Qwest Notif. No. SYST.MEDI.12.17.10.F.08642.MTG\_intrfceNewApptoApp (December 17, 2010)).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

MEDIACC today and will have an opportunity to move to MTG.”<sup>62</sup> The CenturyLink-prepared CMP Matrix acknowledges that “MTG will include legacy Qwest data”<sup>63</sup> and that “Qwest continues to plan on first ‘moving’ itself to the MTG system once it has been internally installed and tested.”<sup>64</sup> CenturyLink’s answer to the complaint in this case acknowledges CenturyLink’s plans to use MTG to provide service to large retail customers.<sup>65</sup> In doing so, CenturyLink will be using MTG instead of the legacy repair OSS.

25 CenturyLink also acknowledged its own use of MEDIACC in its filings in the parallel proceeding pending in Colorado. Thus, in its Answer Subject to Motion to Dismiss, filed in response to the Joint CLECs’ May 25, 2011, Letter Complaint, CenturyLink acknowledged that “Qwest/CenturyLink does intend to implement MTG **for its own use** and this implementation has been presented through CMP,” but argued that “there is nothing in the Integra Settlement that requires the settlement steps when the legacy Qwest OSS (CEMR and MEDIACC) continues to be used and offered to CLECs **even if an additional system will be used by Qwest for other end users . . .**”<sup>66</sup> In their Answer to the Joint CLECs’ Amended Complaint, Qwest and CenturyLink admitted that “Qwest uses and offers MEDIACC in Colorado today. Qwest uses MEDIACC for itself with a significant percentage of Qwest repair tickets being in MEDIACC.”<sup>67</sup> In its brief in opposition to the Joint CLECs’ motion for preliminary injunction, CenturyLink continued to acknowledge that Qwest would replace MEDIACC with MTG in providing service to retail customers. To that end, CenturyLink claimed that “preliminary

---

<sup>62</sup> Hearing Ex. BJJ-9 (Direct Testimony of Bonnie Johnson, BJJ-8) at p. JC000940.

<sup>63</sup> Hearing Ex. BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000775.

<sup>64</sup> Hearing Ex. BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000807.

<sup>65</sup> WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer to Complaint, ¶2.

<sup>66</sup> CO PUC Docket No. 11F-436T, Answer Subject to Motion to Dismiss of Qwest Corporation and CenturyLink (June 20, 2011) at p. 5 (emphasis added).

<sup>67</sup> CO PUC Docket No. 11F-436T, Amended Complaint of the Joint CLECs (June 28, 2011) at ¶ 30; Answer of Qwest Corporation and CenturyLink, Inc. to Amended Complaint (July 18, 2011) at ¶ 30. CenturyLink denied the identical allegation in Washington. See WA UTC Docket No. UT-111254, Formal Complaint and Petition, ¶36; WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer to Complaint, ¶36.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

development and provision of MTG on an optional basis for Qwest/CenturyLink’s CLEC **and retail customers** is important now, because the MEDIACC system is old.”<sup>68</sup>

26 CenturyLink, in its Answer to the complaint in this case, puts a new spin on the various admissions it has made regarding its plan to implement MTG for CenturyLink’s own use. CenturyLink claims that “Qwest Corporation’s reference to its own use of MTG, or to moving internal customers, refers to non-CLEC customers who desire to use MTG.”<sup>69</sup> This claim does not excuse CenturyLink from its commitment, however. CenturyLink’s obligation to continue to use the legacy OSS requires CenturyLink to continue to use those legacy systems in the same way that Qwest was using those systems before the merger, to provide service to itself, to its retail customers and to its wholesale customers. Before the merger closing date, there *was no alternative* Qwest Corporation repair OSS for any purpose or customer, and the Joint Applicants assured regulators that the Merged Company would not create a new OSS.<sup>70</sup> The agreement’s language cannot reasonably be read to mean, as CenturyLink attempts to re-define it, that CenturyLink will use the legacy Qwest OSS for some customers and repair purposes while creating and then using new OSS for other customers and repair purposes. Upon implementation of MTG, however, CenturyLink plans to integrate and replace MEDIACC with MTG for its own use, including CenturyLink’s *use* of MTG in performing tasks that were previously performed *using* MEDIACC. For example, CenturyLink admitted that: “Qwest/CenturyLink receives trouble reports from MEDIACC and publishes events relating to those trouble reports back to the

---

<sup>68</sup> CO PUC Docket No. 11F-436T, Qwest/CenturyLink’s Response to Motion for Preliminary Injunction and Request for Hearing and Argument (August 2, 2011) at p. 2.

<sup>69</sup> Qwest Corporation and CenturyLink’s Answer to Complaint, ¶2.

<sup>70</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 101, lines 5-7, and fn 295 (citing Rebuttal Testimony of John Jones, CenturyLink WA Dkt. No. UT-100820 (Nov. 1, 2010), p. 18, lines 18-21; Rebuttal Testimony of John Jones, CenturyLink, MN Dkt. No. P-421, et al./PA-10-456 (Sept. 13, 2010), p. 20, lines 2-3; Rebuttal Testimony of Robert Brigham, Qwest, MN Dkt. No. P-421, et al./PA-10-456 (Sept. 13, 2010), p. 5, footnote 8; MN Hrg. Tr. P-421, et al./PA-10-456 (Oct. 6, 2010), Vol. 2B. p. 9, line 21-p. 10, line 10 (testimony of Michael Hunsucker).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

end users of MEDIACC” today, whereas after implementation of MTG, “Qwest/CenturyLink will have *the same interactions* with end users of MTG.”<sup>71</sup> This illustrates that, in implementing MTG in February of this year, the Merged Company began using MTG to perform tasks for which it agreed to continue using legacy Qwest OSS for at least 30 months after the merger closing date.

27 CenturyLink attempts to re-characterize, and limit, its commitment to use legacy Qwest OSS for at least thirty months as applying only to use to provide service to wholesale customers and excluding use for itself and its retail customers.<sup>72</sup> CenturyLink’s argument is contrary to the plain language of the parties’ agreements. CenturyLink suggests that the phrase “to wholesale customers” modifies both “use” and “offer,” reading the provision as if it said, “use for and offer to wholesale customers,” but this is not what the language says. The word “for” is not included; if “to offer” is eliminated, the phrase “use to wholesale customers” does not make sense.

28 The effect of accepting CenturyLink’s proposed interpretation would be to read the words “use” and “offer” as if they meant the same thing, contrary to the canon of contract construction that a contract should be interpreted, when possible, to give effect to all of its provisions.<sup>73</sup> In another part of Section 12, concerning billing systems, where the parties intended to limit the application of the provision to systems used to serve non-retail customers, the parties included

---

<sup>71</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 101, line 11-p. 102, line 1 (citing Qwest/CenturyLink CO Response to Joint CLECs’ First Set of Information Requests (Aug. 1, 2011), Docket No. 11F-436T, pp. 42-43, Response to Request Nos. 21(a) and 21(d) (emphasis added)).

<sup>72</sup> See WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer to Opposition to “Motion for Declaratory Relief,” at ¶30 (“Qwest/CenturyLink will continue to ‘use and offer’ this legacy Qwest OSS to CLECs until the 30-month period agreed to in the Integra Settlement is over.”); Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) p. 96, line 3-10, p. 98, line 2 (discussing CenturyLink’s interpretation of the “use and offer” requirement).

<sup>73</sup> *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wash. 2d 475, 209 P.3d 863, 871 (Wash. 2009); *Nishikawa v. U.S. Eagle High LLC*, 158 P.3d 1265, 1269 (Wash. Ct. App. 2007) (“When interpreting a contract, we give undefined terms their plain, ordinary, and popular meaning and we harmonize clauses that seem to conflict. Our goal is to interpret the agreement in a manner that gives effect to all of the contract’s provisions.”) (citations omitted).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

the phrase “non-retail OSS” to reflect that intent.<sup>74</sup> There is no basis for implying a similar limitation into another part of Section 12 where the parties could have included that limitation but chose not to.

29 As yet another line of defense, CenturyLink simply denies that it uses MEDIACC to serve retail customers.<sup>75</sup> First, this claim is, of course, inconsistent with CenturyLink’s statements made in CMP as well as the representations that CenturyLink has made to the Colorado Commission. CenturyLink attempts to explain away this inconsistency by noting that CEMR is used by Qwest retail customers and that there was “confusion” because the initial plan was to retire both CEMR and MEDIACC.<sup>76</sup> This does not, however, explain why, even after May 27, 2011, when CenturyLink announced that it would indefinitely defer retirement of CEMR,<sup>77</sup> CenturyLink continued to represent that MTG would replace MEDIACC for Qwest’s own use.<sup>78</sup>

30 Moreover, CEMR interfaces with MEDIACC to communicate with Qwest’s back-end systems.<sup>79</sup> Thus, at the very least, to the extent that CenturyLink used CEMR to serve retail customers—which CenturyLink has acknowledged<sup>80</sup>—then MEDIACC is also being used by CenturyLink to serve those retail customers.<sup>81</sup> Implementation of MTG means that CenturyLink will no longer be using MEDIACC to serve those customers.

---

<sup>74</sup> See Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12(d)(i).

<sup>75</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 12, line 17 - p. 13, lines 1-4.

<sup>76</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 13, lines 7-12.

<sup>77</sup> See Hearing Ex. BJJ-46 (Direct Testimony of Bonnie Johnson, BJJ-44).

<sup>78</sup> See, e.g., Hearing Ex. BJJ-11 (Direct Testimony of Bonnie Johnson, BJJ-9) at p. JC000940; Hearing Ex. BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000807.

<sup>79</sup> Hearing Ex. BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000809.

<sup>80</sup> Hearing Ex. RA-1 (Direct Testimony of Renee Albersheim), p. 13, lines 5-6.

<sup>81</sup> Hearing Ex. DD-9 (CO PUC Docket No.11F-436T, Hearing Tr.), p. 126, lines 19-23 (testimony of Douglas Denney).

**C. CenturyLink’s Failure To Offer Legacy Qwest Repair OSS To CLECs For  
At Least Thirty Months Following The Merger**

31 In addition to CenturyLink continuing to use the legacy Qwest repair OSS itself, the Integra Settlement Agreement, as modified by the Joint CLEC Merger Agreement, requires CenturyLink to continue to offer the legacy Qwest repair OSS to wholesale customers for at least thirty months after the merger closing. CenturyLink’s Mr. Hunsucker, who was involved in the settlement negotiations on behalf of CenturyLink,<sup>82</sup> acknowledges that OSS was one of the greatest areas of concern for CLECs participating in the merger proceedings and that it was important to CLECs that they would be able to continue to use the Qwest systems that they had been using for a period of time following the merger.<sup>83</sup> It was the CLECs’ reasonable expectation that what CenturyLink would offer them during the post-merger period, pursuant to this provision, was access to OSS that was reliable and appropriate for their intended purposes. This expectation was reasonable in light of CenturyLink’s representations in the merger proceedings that “CenturyLink and Qwest have well-established, fully operational and tested systems,”<sup>84</sup> and that, following the merger, it would have “no immediate need (or be under any time pressure) to make any alterations to Qwest’s OSS.”<sup>85</sup>

32 The many statements made by CenturyLink regarding the risks associated with MEDIACC and CEMR show that CLECs did not get the reliable system that they bargained for.

---

<sup>82</sup> Hearing Ex. MH-1T (Answer Testimony of Michael Hunsucker), p. 3, lines 13-14.

<sup>83</sup> Hearing Ex. DD-9 (CO PUC Docket No. 11F-436T, Hearing Tr.), p. 164, lines 4-19.

<sup>84</sup> See Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 80, lines 10-14 and fn. 222, citing CO Rebuttal Testimony of John Johns, CO Dkt. No. 10A-350T (Oct. 15, 2010), p. 17, lines 15-19; WA Rebuttal Testimony of John Jones, WA Dkt. No. UT-100820 (Nov. 1, 2010), p. 18, lines 15-16; AZ Rebuttal Testimony of Jeff Glover, AZ Dkt. No. T-0105B-10-0194, et al. (Oct. 27, 2010), p. 34, lines 19-20; MN Rebuttal Testimony of John Jones, MN Dkt. No. P-421, et al/PA-10-456 (Sept. 13, 2010), p. 18, line 7.

<sup>85</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) p. 84, lines 15-16 and fn. 243, citing Joint Applicants’ Statement of Position, CO Dkt. No. 10A-350T (November 24, 2010), pp. 39-40; Joint Petitioners’ Initial Post-Hearing Brief, MN Dkt. No. P-421, et al/PA-10-456 (Nov. 24, 2010) p. 26; CenturyLink’s and Qwest’s Reply Brief, WA Dkt. No. UT-100820 (January 21, 2011) p. 12.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

CenturyLink has represented that: 1) CEMR and MEDIACC are “very unstable;”<sup>86</sup> 2) that replacement of CEMR and MEDIACC with MTG is necessary in order for CenturyLink to meet its wholesale service quality obligations under the Integra Settlement Agreement;<sup>87</sup> 3) that CenturyLink is concerned about the potential for catastrophic failure of CEMR and MEDIACC.<sup>88</sup> All of these statements were made after CenturyLink entered into the Integra Settlement Agreement. In CMP, on February 25, 2011, Qwest’s Director of IT Operations Ross Rutledge, stated, concerning MEDIACC:

The hardware was sold in the 90’s and it could run for the next two and [a] half years without failure but it might not. There is a higher likelihood that it won’t with each passing month. Ross said if it were less critical systems, we might push it, but with these critical ones, it is very high on our priority list. On the second question, Qwest can provide documentation that vendors long ago dropped support and [Qwest] cannot buy it. The databases and OSs have been out of support many years.<sup>89</sup>

These comments are echoed by the CenturyLink testimony in this case that components of MEDIACC have been unsupported since 2001 and that risk of a MEDIACC failure has been increasing for more than a decade and continue to increase.<sup>90</sup> In its Answer in the Colorado proceeding, CenturyLink alleged that, “The MEDIACC system is currently stable, but is fourteen years old and **will likely** begin experiencing problems in the near future.”<sup>91</sup> In CenturyLink’s Answer in this proceeding, filed only two weeks later, claimed that, “The MEDIACC system is currently stable, but is fourteen years old and **could** begin experiencing problems in the near

---

<sup>86</sup> Hearing Ex. DD-9 (CO PUC Docket No.11F-436T, Hearing Tr.) at p. 161, line 21-p. 162, line 3 (testimony of Michael Hunsucker).

<sup>87</sup> Hearing Ex. BJJ-19 (Direct Testimony of Bonnie Johnson, BJJ 17).

<sup>88</sup> Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36).

<sup>89</sup> Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC00051.

<sup>90</sup> Hearing Ex. DD-9 (CO PUC Docket No.11F-436T, Hearing Tr.) at p. 206, line 15 – p. 207, line 1- (testimony of Renee Albersheim); *see also* Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) at p. 6, lines 9-13.

<sup>91</sup> Hearing Ex. RA-21 (CO PUC Docket No. 11F-436T, Answer of Qwest Corporation and CenturyLink, Inc. to Amended Complaint) at ¶ 2, second paragraph (emphasis added).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

future.”<sup>92</sup> Although given an opportunity to explain this discrepancy at the hearing, CenturyLink’s witness was unable to do so.<sup>93</sup>

33 Although CenturyLink has asserted that there are “no plans at this time to retire CEMR”<sup>94</sup> and that CEMR users are not impacted by the implementation of MTG,<sup>95</sup> the record does not inspire confidence regarding CEMR’s stability. On May 2, 2011, CenturyLink stated that it “continue[d] to have concerns that a catastrophic failure could result with MEDIACC **and CEMR.**”<sup>96</sup> Just weeks later, on May 27, CenturyLink claimed that, as a result of actions taken in response to feedback from CLECs, “[T]he CEMR online interface was recently upgraded to a stable hardware and software platform that integrates well with current MEDIACC applications, and will allow it to interface seamlessly to an MTG B2B application.”<sup>97</sup> CenturyLink states in its testimony that “Due to hardware upgrades to CEMR, Legacy Qwest determined that it was not necessary to replace CEMR.”<sup>98</sup> Thus, CenturyLink takes the position that in the slightly more than three weeks between May 2 and May 27, 2011, CEMR went from being a system that was at risk of catastrophic failure and needed to be replaced to one that was stable and would remain in use indefinitely. The facts do not support this claim, however. First, although CenturyLink asserts that CEMR was made stable as the result of changes to the hardware used by the system, this overlooks Qwest’s own statement that, like MEDIACC, the database used by CEMR is not supported by the vendor.<sup>99</sup> Further, according to CenturyLink, the updates that were made to CEMR were made in the third quarter of 2010, before Qwest’s Change Request announcing the

---

<sup>92</sup> WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer to the Complaint, ¶2, second paragraph (emphasis added).

<sup>93</sup> Hearing Tr. Vol. 3, p. 311, line 2-p. 312, line 10.

<sup>94</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) p. 4, line 17.

<sup>95</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 22, lines 2-4.

<sup>96</sup> Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36) at p. JC000294 (emphasis added).

<sup>97</sup> Hearing Ex. BJJ-46 (Direct Testimony of Bonnie Johnson, BJJ-44) at p. JC000329.

<sup>98</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) at p. 4, fn. 2.

<sup>99</sup> See Hearing BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000755 ; Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 137, lines 8-15.



**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

planned retirement of CEMR, before Mr. Hunsucker was told in December 2010 that both CEMR and MEDIACC were unstable, and before CenturyLink stated on May 2 that CEMR was at risk of catastrophic failure and required replacing.<sup>100</sup> In all events, because CEMR relies on MEDIACC to access the Qwest back office systems, if MEDIACC is at risk, then so is CEMR.<sup>101</sup> According to CenturyLink, it will take forty eight hours for a CEMR user to convert from CEMR/MEDIACC to CEMR/MTG, which would be longer than any previous CEMR outage.<sup>102</sup>

34 Of course, in an attempt to show that it is meeting its obligations under the Integra Settlement Agreement, CenturyLink has also claimed that MEDIACC is “stable,”<sup>103</sup> that CenturyLink “has no evidence to suggest that MEDIACC will experience an immediate unrecoverable failure,”<sup>104</sup> and that CenturyLink “intends” to offer MEDIACC for at least thirty months after the merger.<sup>105</sup> However, as Mr. Rutledge observed in CMP:

[T]he curve on the slide is known as a “bathtub” curve and is widely used in engineering to refer to electronic component failure. Normally there is not a scale on the curve. Ross reiterated the stages: “infant mortality” followed by stability but then failure may escalate rapidly; past performance is not necessarily a good indicator. Qwest cannot wait to the failure point due to lead time required. Ross said based on experience with a large infrastructure, we must act now since Qwest only has best effort support from any vendors – hardware, OS, database.<sup>106</sup>

---

<sup>100</sup> See Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) p. 138, line 1 – p. 140, line 13; *see also* Hearing Ex. BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000803. At the hearing, CenturyLink’s witness, Renee Albersheim claimed that the statement made on May 2 that CEMR was at risk of catastrophic failure was inaccurate. See Hearing Tr. Vol. III, p. 315, line 12-p. 316, line 5. This does not explain, however, how updates made to CEMR in the third quarter of 2010 were able to fix a system that Mr. Hunsucker claimed in December 2010 was very unstable.

<sup>101</sup> Hearing Ex. RA-9C, p. 1; Hearing Ex. DD-1T (Direct Testimony of Douglas Denney), p. 135, lines 3-21.

<sup>102</sup> Hearing Ex. DD-9 (CO PUC Docket No.11F-436T, Hearing Tr.), p. 213, line 11-p. 214, l. 22 (testimony of Renee Albersheim).

<sup>103</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) at p. 25, lines 1-2.

<sup>104</sup> Hearing Ex. RA-18T (Response Testimony of Renee Albersheim) p. 6, lines 9-10.

<sup>105</sup> Hearing Ex. MH-1T (Direct Testimony of Michael Hunsucker) at p. 4, lines 1-2.

<sup>106</sup> Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000051.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

Thus, CenturyLink’s assertions that MEDIACC is currently stable does not alter the repeated statements made by its IT personnel that the system is at risk. Indeed, as the above quote reflects, CenturyLink’s own IT personnel have clearly stated that “past performance is not necessarily a good indicator.”<sup>107</sup> As the Colorado Commission Staff witness, Ms. Notarianni, stated, “While Qwest appears to be managing the stability of CEMR and MEDIACC, it none-the-less is at risk for extensive outages based on its own articulation of the hardware and software environment currently in place.”<sup>108</sup>

35 In attempting to reconcile the polar extremes in CenturyLink’s positions regarding the reliability of MEDIACC, Integra’s Mr. Denney has testified:

To the extent that a pattern can be discerned among the Qwest and CenturyLink inconsistencies, the pattern appears to be that instability justifies Qwest moving to MTG for itself and its retail customers but not for its CLEC customers, who are left to risk the consequences of an unrecoverable failure despite merger obligations to provide wholesale service quality with legacy Qwest OSS. Particularly 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 try to shift any risk to CLECs. That is not what CLECs bargained for in the very recent merger settlement agreements promising certainty and continued use of the legacy Qwest OSS for 30 months. When the audience is regulators or 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 is seeking to have it both ways by protecting itself by moving to MTG while attempting to shift the burden to CLECs if they do not move, though that result is contrary to the merger agreement terms.<sup>109</sup>

---

<sup>107</sup> See also, Hearing Tr., Vol. III, p. 306, lines 8-14 (testimony of Renee Albersheim):

Q. Well, the fact that MEDIACC is stable, and I think this has been your company’s position, the fact that MEDIACC is stable doesn’t mean that the system isn’t at risk of failure.

A. Okay. Yes, that’s true. I would say we don’t have a measure of the risk of failure. We don’t know if or when it will.

<sup>108</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) at p. 23, line 19 – p. 24, line 3.

<sup>109</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) p. 141, line 7 – p. 142, line 5.

36 As the Minnesota Public Utilities held in concluding that CenturyLink’s implementation of MTG violated the Integra Settlement Agreement:

Throughout the merger proceedings CLECs sought—and ultimately obtained—assurances that they would have a stable OSS environment while Qwest was undergoing a period of merger-related change. Because OSS enable CLECs to purchase elements and services from the incumbent’s network, OSS are crucial to competition in the local exchange market as envisioned by the Telecommunications Act of 1996.<sup>110</sup>

Thus, the Minnesota Commission prohibited CenturyLink from implementing MTG, concluding that CenturyLink could not meet its commitments to CLECs by providing MTG as an alternative, instead of a reliable MEDIACC.

**D. CenturyLink’s Replacement Of Legacy Qwest OSS Before The Expiration Of The Thirty Month Moratorium Period And Without Following The Process For CLEC Acceptance**

37 The Integra Settlement Agreement provides that the “replacement or retirement of a Qwest OSS Interface may not occur without sufficient acceptance of the replacement interface by CLECs to help assure that the replacement interface provides the level of wholesale service quality provided by Qwest prior to the Closing Date.”<sup>111</sup> That Agreement further details procedures to be followed to assure sufficient acceptance of the replacement interface by CLECs, including joint development of acceptance criteria and joint testing until the acceptance criteria are met.<sup>112</sup> Acceptance of a replacement interface for a Qwest OSS interface is to be determined by a majority vote of CMP participants in testing, including CLECs and Qwest.<sup>113</sup>

38 The Joint CLEC Merger Agreement includes additional requirements relating to the testing and acceptance of a replacement interface. The Joint CLEC Merger Agreement requires that, if CenturyLink seeks to replace the legacy Qwest OSS, it must provide the CLECs with

<sup>110</sup> *MN Order Barring Implementation* at p. 6.

<sup>111</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12(c)(i).

<sup>112</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12(c)(i).

<sup>113</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12(c)(i).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

historical transaction volume data for use in determining appropriate volume thresholds for testing.<sup>114</sup> Under the Joint CLEC Merger Agreement, acceptance of the replacement interface requires a majority vote reflecting at least two-thirds of the transaction volumes.<sup>115</sup> The Joint CLEC Merger Agreement also requires that a third party facilitator be used to assist in testing any successor OSS, with the cost of the facilitator borne by CenturyLink.<sup>116</sup>

39 CenturyLink acknowledges that MTG is the replacement interface for MEDIACC.<sup>117</sup>

There is also no dispute that CenturyLink did not follow the procedures required under the Integra Settlement Agreement and the Joint CLEC Merger Agreement before implementing MTG.<sup>118</sup> CenturyLink takes the position that it need not follow the requirements for CLEC testing and acceptance of a replacement interface before the replacement interface—MTG—is implemented, so long as it meets these requirements before the legacy Qwest OSS—MEDIACC—is retired.<sup>119</sup> CenturyLink’s interpretation of its merger commitments cannot withstand scrutiny.

40 The plain language of the Integra Settlement Agreement provides that CenturyLink “will not replace or integrate Qwest systems **without first**” establishing a detailed transition plan and complying with the CLEC testing and acceptance procedures. Further, the Integra Settlement Agreement, in providing that the replacement of Qwest OSS “**may not occur without** sufficient acceptance of the replacement interface,” requires that acceptance of the replacement interface must come **before** that replacement is implemented. In order for the testing and acceptance

---

<sup>114</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.C.

<sup>115</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.C.

<sup>116</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.C.

<sup>117</sup> Hearing Tr. Vol. II, p. p. 241, line 20-p. 242, lines 15 (testimony of Michael Hunsucker); Hearing Tr. Vol. III, p. 338, lines 10-12; Hearing Tr. Vol. III, p. 338, lines 10-12 (testimony of Robert Williamson); Hearing Ex. DD-9 (CO PUC Docket No. 11F-436T, Hearing Tr.), p. 156, lines 10-16 (testimony of Michael Hunsucker).

<sup>118</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim); Hearing Ex. RA-14 (MTG implementation schedule).

<sup>119</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) at p. 27, lines 13-20.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

requirements to provide any significant protections for the CLEC interest in assuring that any replacement interface is sufficient, those requirements must be met before the replacement interface is implemented, not after. CLECs' ability to have meaningful input into the development of a replacement system will be eviscerated if the opportunity to provide that input does not come until the replacement system has been implemented and is in use.<sup>120</sup>

41 The Commission's order provides further support for an interpretation that requires that the procedures regarding CLEC acceptance must be complied with before MTG is implemented. The Commission's order requires a report to be filed with the Commission, with an opportunity for comment by interested parties, before a replacement interface is placed into "actual production." Such reporting must provide detailed information regarding the acceptance testing process that is required by the Integra Settlement Agreement<sup>121</sup> Further, the report is to be accompanied by a verification signed by a CenturyLink senior official who affirms that all of the requirements of the Integra and Staff settlement agreements have been satisfied. Clearly such reporting and verification, which, pursuant to the Commission's order, must precede use of the replacement interface for actual production, can only be completed after CLEC acceptance testing has been completed and the CLECs have voted to accept the replacement interface.

42 CenturyLink may claim that MTG cannot be considered to be a "replacement interface" because MEDIACC will not be retired and, thus, will not be replaced, until October 2013.<sup>122</sup> By this logic, MTG would not be considered a replacement interface until the last CLEC has migrated off of MEDIACC. By CenturyLink's own admission, however, MTG will replace MEDIACC for CenturyLink's own use and for any wholesale customers who elect to begin

---

<sup>120</sup> Hearing Ex. DD-2CT (Rebuttal Testimony of Douglas Denney) at p. 122, line 3 – p. 123, line 5.

<sup>121</sup> *WA Merger Approval Order*, ¶120.

<sup>122</sup> Hearing Ex. MH-1T (Direct Testimony of Michael Hunsucker) at p. 6, line 18 – p. 7, line 8; Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) at p. 18, line 7-p. 19, line 2.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

using MTG before MEDIACC is retired.<sup>123</sup> The requirements of the Integra Settlement Agreement and the Joint CLEC Merger Agreement apply broadly to “replacement” of legacy Qwest OSS; they do not provide an exception if replacement is only for some customers and not others.

43 Furthermore, the Integra Settlement Agreement and the Joint CLEC Merger Agreement provide that the CLEC testing and acceptance requirements are triggered by “replacement or retirement of a Qwest OSS.” Use of both “replacement” and “retirement” means that those terms were not intended to be synonymous and meaning must be given to both terms.<sup>124</sup> CenturyLink implemented MTG as the replacement for MEDIACC in February 2012, when MTG was made available for use, even though MEDIACC will not be retired until a later date. Contrary to CenturyLink’s treatment of the terms as synonymous, system retirement and replacement do not occur at the same time, because the replacement system is tested and in place before the predecessor system is retired; otherwise, the CLEC would have no tested system to move to.<sup>125</sup> Increasing the time between replacement of MEDIACC and retiring MEDIACC does not change the fact that CenturyLink is replacing MEDIACC without first obtaining sufficient acceptance of the replacement system by CLECs in the manner required by the merger conditions.<sup>126</sup>

44 CenturyLink asserts that the CLEC interest in assuring the adequacy of the replacement interface is protected because MEDIACC will not be retired without a majority vote of CLECs.<sup>127</sup> However, if some CLECs elect to replace MEDIACC with MTG early, this may skew

---

<sup>123</sup> See, *supra* at ¶¶ 24-26.

<sup>124</sup> *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wash. 2d 475, 209 P.3d 863, 871 (Wash. 2009); *Nishikawa v. U.S. Eagle High LLC*, 158 P.3d 1265, 1269 (Wash. Ct. App. 2007) (“When interpreting a contract, we give undefined terms their plain, ordinary, and popular meaning, and we harmonize clauses that seem to conflict. Our goal is to interpret the agreement in a manner that gives effect to all of the contract’s provisions.”) (citations omitted).

<sup>125</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 115, lines 12-15.

<sup>126</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 116, lines 1-3.

<sup>127</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 19, line 17 – p. 20, line 5.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

the voting process in a manner that prejudices the interests of the CLECs who elect to continue using MEDIACC for the full thirty month period provided by the merger commitments.<sup>128</sup>

CLECs that have already implemented MTG will be much more likely to resist changes in the system that might be sought by other CLECs that have not implemented MTG and will be more likely to vote in favor of accepting MTG “as is.” This is because changes to MTG could impose changes on CLECs that have already implemented MTG. To address this issue, the Colorado Commission Staff recommends that only those CLECs who have not previously deployed MTG be permitted to participate in the acceptance vote.<sup>129</sup> This recommendation recognizes that, if MTG is implemented before the CLEC testing and accepting requirements have been met, in order to assure that the voting process serves its intended purpose, that process must, itself, be modified. The need to modify the voting process in order to accommodate CenturyLink’s preferred contract interpretation only further shows that the parties never envisioned that implementation of a replacement interface might occur before the CLEC testing and acceptance procedures, including the CLEC vote. A contract interpretation that fails to harmonize all of the contract’s provisions must be rejected.<sup>130</sup> The interpretation advocated by the CLECs, in contrast, avoids the problem Colorado Commission Staff has identified.

45 CenturyLink’s proposed interpretation also introduces unnecessary ambiguities with respect to the application of the merger conditions relating to volume testing. The Joint CLEC Merger Agreement includes a number of provisions designed to assure that the replacement

---

<sup>128</sup> Hearing Ex. DD-8 (Cross Answer Testimony of Lynn M.V. Notarianni) at p. 12, lines 3-17; *see also* Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney) at p. 127, lines 14-17.

<sup>129</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) at p. 12, lines 17-19. Mr. Denney recommends, in the event that CenturyLink is given an exception to the merger conditions in order to implement MTG before the end of the thirty month moratorium period, that the CLEC vote process be broken into two groups—CLECs who implemented MTG early and CLECs who have not—with a majority vote from each group required before any system retirement. *See* Hearing Ex. DD-2CT (Responsive of Douglas Denney) at p. 129, line 10 – p. 130, line 11.

<sup>130</sup> *Nishikawa*, 158 P.3d at 1269.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

system is able to handle necessary volumes of transactions. To that end, the Joint CLEC Merger Agreement requires CenturyLink to provide historical data regarding transaction volumes, that testing of a successor system include sufficient transaction volumes at no less than 125% of the peak volumes of all CLECs, and that acceptance require a CLEC vote reflecting at least two-thirds of the transaction volumes.<sup>131</sup> Implementation of MTG before the CLEC testimony and vote creates questions regarding which transaction volumes are to be used. Are the “transaction volumes” referred to in the Joint CLEC Merger Agreement the transaction volumes for the replacement system or the legacy system? Or both? How will the requirement for an affirmative vote reflecting two-thirds or more of the transaction volumes apply if some CLECs are using MTG and some are using MEDIACC? These issues would not arise but for CenturyLink’s implementation of MTG before the procedures for CLEC testimony and acceptance have been completed.

**E. CenturyLink’s Replacement Of Legacy Qwest OSS With A System That Fails To Comply With The Wholesale Service Quality Requirement Of The Merger Commitments**

46 Under the Integra Settlement Agreement, after the expiration of the moratorium period, at such time as CenturyLink is no longer continuing to use and offer the legacy Qwest OSS to wholesale customers, CenturyLink must still “provide a level of wholesale service quality that is not materially less than that provided by Qwest prior to the Closing date, including support, data, functionality, performance, electronic flow through, and electronic bonding.”<sup>132</sup> The Joint CLECs Merger Agreement provides additional protection for wholesale service quality, requiring that any new OSS provide wholesale service quality that is “not less than” that provided by Qwest prior to the merger (as distinguished from the “not materially less than”

---

<sup>131</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.C.

<sup>132</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12.



**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

standard of the Integra Settlement Agreement).<sup>133</sup> Further, the Joint CLEC Merger Agreement requires that a replacement system must provide “**functionally equivalent** support, data, functionality, performance, electronic flow through and electronic bonding.”<sup>134</sup> This functional equivalency condition “requires the provision of functionally equivalent data flowing into the CLEC system sufficient to enable the CLEC to maintain its existing level of back office system automation.”<sup>135</sup>

47 PAETEC uses MEDIACC to electronically bond with Qwest’s repair system.<sup>136</sup> This electronic bonding allows for automated handling of trouble tickets, which greatly reduces the amount of manual handling that is necessary and also greatly reduces the cost of repairs.<sup>137</sup> However, because PAETEC’s systems interface with MEDIACC using the CMIP protocol and MTG, as it is being implemented by CenturyLink, interfaces using an XML protocol, MTG will not permit the same degree of automated functionality as MEDIACC provides.<sup>138</sup> Without a CMIP interface, MTG will not provide PAETEC with functionally equivalent electronic flow through and electronic bonding and will not allow PAETEC to maintain its existing level of back office automation and, accordingly, violated the merger conditions regarding service quality provided by replacement OSS.

48 PAETEC estimates that, in order to develop an XML interface to MTG, it would take at least six months of work, if PAETEC were to stop all other IT projects and dedicate its resources to MTG.<sup>139</sup> Although the Joint CLEC Merger Agreement recognizes that changes in Qwest OSS

---

<sup>133</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.A.

<sup>134</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.A.

<sup>135</sup> Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.C.

<sup>136</sup> Hearing Ex. JB-1T (Direct Testimony of Justine Blanchard) at p. 3, lines 16-17.

<sup>137</sup> Hearing Ex. JB-1T (Direct Testimony of Justine Blanchard) at p. 3, line 16 – p. 6, line 2.

<sup>138</sup> See Hearing Ex. CH-1T (Direct Testimony of Christopher Hanson) at p. 2, line 13 – p. 3, line 5 and p. 6, lines 3-9; Hearing Ex. CH-4T (Rebuttal Testimony of Christopher Hanson) at p. 6, line 16 – p. 7, line 14.

<sup>139</sup> Hearing Ex. CH-1T (Direct Testimony of Christopher Hanson) at p. 2, lines 16-20.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

may require changes in CLEC back office systems in order to maintain automated functionality,<sup>140</sup> what the Agreement does not anticipate is that such changes would be necessary sooner than thirty months after the merger. In entering into the Joint CLEC Agreement, PAETEC reasonably expected that it had secured a period of time when it would not be forced into making unscheduled changes to its OSS.<sup>141</sup> Concerns raised by CenturyLink regarding the future reliability of MEDIACC, together with its implementation of MTG as a replacement for MEDIACC, are contrary to those reasonable expectations.

**F. CenturyLink’s Integration Of MTG Before The End Of The Thirty Month Moratorium And Without Complying With Required Conditions**

49 The Integra Settlement Agreement provides that, “After the period noted above [i.e., at least two years, extended to thirty months under the Joint CLEC Merger Agreement], the Merged Company will not replace or integrate Qwest systems with first establishing a detailed transition plan and complying with the following procedures [i.e., regarding a detailed plan and procedures for CLEC testing and acceptance].”<sup>142</sup> By the plain terms of the Agreement, the thirty month moratorium applies to not just replacement or retirement of legacy Qwest OSS, but integration of Qwest systems.<sup>143</sup> The generally understood meaning of “integrate” is “to make into a whole by bringing parts together: unify “or” to join (e.g., parts) together: unite.”<sup>144</sup> In order for MTG to operate as an interface to the legacy Qwest repair systems, MTG must be joined to those legacy systems.<sup>145</sup> CenturyLink’s decision to defer retirement of MEDIACC cannot cure the breach

---

<sup>140</sup> See Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.C.

<sup>141</sup> Hearing Ex. CH-1T (Direct Testimony of Christopher Hanson) at p. 2, line 18-22.

<sup>142</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 12.

<sup>143</sup> See Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 105, line 11 – p. 106, lines 1-14.

<sup>144</sup> Free Online Dictionary, <http://www.thefreedictionary.com/integrate>.

<sup>145</sup> See, e.g., Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni), Confidential Ex. LMVN-1 at p. 11; see also Hearing Ex. BJJ-55 (Direct Testimony of Bonnie Johnson, BJJ-53) at p. JC000775.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

resulting from the integration of MTG for CenturyLink’s own use and for the potential use by retail and wholesale customers, before the end of the moratorium period.

50 CenturyLink seeks to avoid the plain meaning of the parties’ agreement by attempting to limit “integrate” to the integration of Qwest and CenturyLink systems.<sup>146</sup> In support of this argument, CenturyLink points, not to any language in the Integra Settlement Agreement, but to the settlement negotiations and testimony by the CLECs in the merger proceedings discussing integrating Qwest and CenturyLink’s systems.<sup>147</sup> First, CenturyLink’s argument violates the parol evidence rule, which prohibits reliance on extrinsic evidence to contradict or vary the unambiguous language of a written contract.<sup>148</sup> To extent that there is any need to look beyond the plain terms of Integra Settlement Agreement, then the more appropriate source of evidence regarding the parties’ intent may be found in CenturyLink’s commitments to the FCC. Although parol evidence may not be used to modify the written terms of a contract, documents executed together as part of a single transaction should be considered together in ascertaining the parties’ intent.<sup>149</sup> In order to obtain the FCC’s approval for the merger, CenturyLink committed that, “In Qwest ILEC territory, following the Merger Closing Date, CenturyLink will not replace Qwest OSS **or integrate it with any other OSS** for at least 30 months following the Merger Closing Date.”<sup>150</sup> This commitment demonstrates that CenturyLink’s claim that the concern about integration of OSS was limited to integration of legacy Qwest OSS with legacy CenturyLink OSS is simply *post hoc* rationalization.

51 Further, the evidence CenturyLink relies on fails to support its interpretation.

CenturyLink cites testimony offered by the CLECs to support its claim that the focus of the

---

<sup>146</sup> Hearing Ex. MH-1 (Direct Testimony of Michael Hunsucker) at p. 10, line 15 – p. 11, lines 1-2.

<sup>147</sup> Hearing Ex. MH-1 (Direct Testimony of Michael Hunsucker) at p. 12, line 5-p. 13, lines 1-8.

<sup>148</sup> *Hearst Communications*, 115 P.3d at 267.

<sup>149</sup> *Lynch v. Higley*, 8 Wn. App. 903, 919, 510 P.2d 663, 673-74 (Wash. Ct. App. 1973).

<sup>150</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney), p. 53, line 18 – p. 54, lines 1-6.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

CLECs' concern in the merger proceeding was replacement of Qwest legacy OSS with CenturyLink OSS.<sup>151</sup> CenturyLink represented in the merger proceedings in Washington and elsewhere that there would be no need to create new OSS post-merger.<sup>152</sup> This testimony, however, can only be understood in the context of the representations CenturyLink made in Washington and other jurisdictions that there would be no need to create new OSS post-merger.<sup>153</sup> Mr. Gates explained this in later testimony in Washington when he testified as follows:

I agree that the Joint Applicants' post-merger OSS integration plans are largely unknown... ***Because the Joint Applicants' have stated that the proposed transactions will not involve any 'new' OSS systems*** (i.e., systems not currently in use by either Qwest or CenturyLink), it is logical to conclude that Joint Applicants plan to ultimately replace Qwest's . . . OSS interface with CenturyLink's OSS.<sup>154</sup>

The CLECs' testimony focused on the integration of CenturyLink legacy OSS with Qwest legacy OSS because they had been told by CenturyLink that that was the context in which integration would occur.<sup>155</sup>

---

<sup>151</sup> Hearing Ex. MH-1T (Direct Testimony of Michael Hunsucker), p. 11, line 17-p. 122, line 18.

<sup>152</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 101, lines 5-7, and fn 295 (citing Rebuttal Testimony of John Jones, CenturyLink WA Dkt. No. UT-100820 (Nov. 1, 2010), p. 18, lines 18-21; Rebuttal Testimony of John Jones, CenturyLink, MN Dkt. No. P-421, et al./PA-10-456 (Sept. 13, 2010), p. 20, lines 2-3; Rebuttal Testimony of Robert Brigham, Qwest, MN Dkt. No. P-421, et al./PA-10-456 (Sept. 13, 2010), p. 5, footnote 8; MN Hrg. Tr. P-421, et al./PA-10-456 (Oct. 6, 2010), Vol. 2B. p. 9, line 21-p. 10, line 10 (testimony of Michael Hunsucker).

<sup>153</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 101, lines 5-7, and fn 295 (citing Rebuttal Testimony of John Jones, CenturyLink WA Dkt. No. UT-100820 (Nov. 1, 2010), p. 18, lines 18-21; Rebuttal Testimony of John Jones, CenturyLink, MN Dkt. No. P-421, et al./PA-10-456 (Sept. 13, 2010), p. 20, lines 2-3; Rebuttal Testimony of Robert Brigham, Qwest, MN Dkt. No. P-421, et al./PA-10-456 (Sept. 13, 2010), p. 5, footnote 8; MN Hrg. Tr. P-421, et al./PA-10-456 (Oct. 6, 2010), Vol. 2B. p. 9, line 21-p. 10, line 10 (testimony of Michael Hunsucker).

<sup>154</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney), p. 108, line 10 and fn 314, *quoting* WA Cross Answering Testimony of Timothy Gates, QSI for Joint CLECs, WUTC Dkt. No. UT-100820, p. 6, lines 5-13 (emphasis added)

<sup>155</sup> Hearing Ex. DD-1T (Direct Testimony of Douglas Denney), p. 108, lines 4-11.

**V. CenturyLink’s Discrimination Against CLECs In Favor Of Its Own Retail Customers**

52 Section 251 of the Federal Telecommunications Act prohibits an incumbent local exchange carrier from discriminating against CLECs. To that end, incumbents are required to provide interconnection “that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party”<sup>156</sup> “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”<sup>157</sup> In implementing the local competition provisions of the Act, the FCC has found that CLECs would be “severely disadvantaged, if not precluded altogether, from fairly competing,” if they did not have nondiscriminatory access to OSS.<sup>158</sup> Compliance with Section 251 of the Act is one of CenturyLink’s merger commitments.<sup>159</sup> Discrimination is also prohibited by Washington state law.<sup>160</sup>

53 Evidence uncovered as a result of discovery served by Colorado Commission Staff in the parallel Colorado proceeding shows that there is a discriminatory difference between MEDIACC and systems that CenturyLink uses to provide retail service with respect to the failover capabilities of those systems. “Failover” refers to “automatically switching to a different, redundant system upon failure or abnormal termination of the currently active systems.”<sup>161</sup> Failover includes the “process by which an alternate system takes over and emulates the primary system if the primary system becomes unusable.”<sup>162</sup> With failover, in the event of a physical disruption to a network component, “data is immediately rerouted to an alternative path so that

---

<sup>156</sup> 47 U.S.C. § 251(c)(2)(C).

<sup>157</sup> 47 U.S.C. §251 (c)(2)(D).

<sup>158</sup> *In the Matter of Implementation of the Local Competitive Provisions in the Telecommunications Act 1996*, First Report and Order, CC Dkt, No. 96-98, FCC 96-325 (rel. Aug. 8 1996) at ¶ 10.

<sup>159</sup> Hearing Ex. BJJ-4 (Direct Testimony of Bonnie Johnson, BJJ-3) at Section 6.

<sup>160</sup> RCW 80.36.170.

<sup>161</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 38, lines 4-6 and fn. 130.

<sup>162</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 38, lines 8-9 and fn 132 (citing <http://www.expertglossary.com/storage/definition/failover>).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

services remain uninterrupted.”<sup>163</sup> Qwest retail repair systems have failover, MEDIACC does not.

54 In CMP, CenturyLink candidly acknowledged MEDIACC’s lack of failover capability. Specifically, in response to a question from Ms. Notarianni of Commission staff regarding Qwest’s failover plan for MEDIACC, Mr. Rutledge, who was at that time Qwest Director of IT Operations with responsibility for IT infrastructure, stated that, “[T]he current environment is not built in a high availability cluster environment which is more resilient. If it fails, it is down until it is fixed .... There is no failover.”<sup>164</sup> This was confirmed by CenturyLink’s discovery responses to Staff.<sup>165</sup> Because CEMR relies on MEDIACC to access Qwest’s systems,<sup>166</sup> MEDIACC’s lack of failover capability also affects CEMR users.<sup>167</sup>

55 The Qwest retail systems, in contrast, have failover capability. When asked in discovery about the failover capabilities of Qwest retail systems, CenturyLink stated that [Begin

**Confidential** [REDACTED]

[REDACTED]

[REDACTED] **End Confidential]**<sup>168</sup> As the Colorado Commission Staff observes, “To the extent an ‘unrecoverable’ event occurs with regard to MEDIACC, and a manual process is required for submittal of repair tickets versus the existence of automated repair

<sup>163</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 38, lines 6-8 and fn 131 (citing <http://www.expertglossary.com/storage/definition/failover>).

<sup>164</sup> Hearing Ex. BJJ-9 (Direct Testimony of Bonnie Johnson, BJJ-8) at p. JC000956.

<sup>165</sup> See Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) at p. 21, lines 18-19 and fn. 16 (citing Response to Staff Data Requests 01-03, attached to Ms. Notarianni’s Cross Answer Testimony as Confidential Exhibit LMVN-5).

<sup>166</sup> Hearing Ex. BJJ-55 (Bonnie Johnson Direct Testimony, BJJ-53) at p. JC000809.

<sup>167</sup> See Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) p. 20, lines 14-18.

<sup>168</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni), LMVN-6 (CenturyLink/Qwest Response to Staff Request 01-006); see also Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) p. 22, lines 16-19 (“Qwest appears to have such [failover] capabilities for both is Repair Call Expert (RCE) and Qwest Repair Expert (RX) OSS. To not have the same level of service available to the CLECs with regard to the MEDIACC system may indicate to Staff some level of risk of discriminatory treatment.”)

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

capabilities for Qwest/CenturyLink retail business creates a potential violation of the § 251 requirement.”<sup>169</sup>

56 CenturyLink does not dispute the factual claim that Qwest’s retail repair OSS possesses failover capabilities nor does CenturyLink attempt to explain how that difference in treatment does not constitute unlawful discrimination. In a filing in Minnesota, CenturyLink asserted, contrary to its representations made in CMP, that “There is a failover plan specifically designed to address any failure of the server that houses the database and hardware used by MEDIACC. These are the steps that CenturyLink QC will follow to restore the server. These steps do not guarantee that the server can be restarted.”<sup>170</sup> To the extent that CenturyLink points to its filing in Minnesota as its defense to a claim of discrimination, the evidence shows that this purported failover plan is inadequate.

57 CenturyLink describes the MEDIACC application as running on four servers, identified as ebco-1, ebco-2, ebco-3 and ebco-4.<sup>171</sup> Three of these servers—ebco-2, ebco-3 and ebco-4—are used for the components of the application. According to CenturyLink, “If one of these servers is unavailable for any length of time, **most of** the components on the other two servers can still be used.”<sup>172</sup> There is no indication as to which components would be unavailable or how that might impact CLECs’ ability to use the system. Also, according to CenturyLink, “The fourth server, ebco-1, houses the MEDIACC database and some HP operating system middleware. If this server is unavailable for any length of time, a more significant effort is required to move the database and the middleware, and get the system back up and running either on the original

---

<sup>169</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) p. 23, lines 4-7.

<sup>170</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 41, lines 1-10; Hearing Ex. DD-7 (Responsive Testimony of Douglas Denney, DD-5).

<sup>171</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 41, lines 14-16; Hearing Ex. DD-7 (Responsive Testimony of Douglas Denney, DD-5).

<sup>172</sup> Hearing Ex. DD-7 (Responsive Testimony of Douglas Denney, DD-5) p. 5 (emphasis added).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

server or an alternative server.”<sup>173</sup> Thus, CenturyLink acknowledges that, unlike the Qwest retail systems, MEDIACC’s ability to transition to a redundant system is not automatic, but rather, something that requires significant effort.

58 Cross examination by CenturyLink’s counsel at the hearing suggests that CenturyLink may claim that, because it does not need mediated access to access Qwest’s back office systems for its own retail customers, MEDIACC’s lack of failover capability does not result in discrimination.<sup>174</sup> CenturyLink’s theory is apparently that the failover capabilities of Qwest’s back office systems provide equal protection for CenturyLink retail customers and CLEC customers, accordingly there is no discrimination. If CenturyLink does, in fact advance this argument, it misses the point. Because of the risk of failure of MEDIACC, combined with the lack of failover in the event of a failure, CLECs and their customers are exposed to risk in a way that is not the case for most CenturyLink retail customers.<sup>175</sup> At some point, Qwest funded automated capability for its retail customers but did not fund this same capability for CLECs using MEDIACC – either directly or indirectly via CEMR.<sup>176</sup> As a result of that difference in systems used to provide service to retail customers and CLECs, CLECs are receiving access to Qwest repair systems that is inferior to the access that CenturyLink provides itself for the purpose of serving retail customers.

---

<sup>173</sup> Hearing Ex. DD-7 (Responsive Testimony of Douglas Denney, DD-5) p. 5.

<sup>174</sup> Hearing Tr., Vol. II, p. 193, line 3-p.194, line 13 (testimony of Douglas Denney).

<sup>175</sup> CenturyLink has acknowledged that a few retail customers use CEMR to request repairs (Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 13, lines 5-6) and these retail customers would similarly be affected by a failure of MEDIACC. *See* DD-9 (Cross Answer Testimony of Lynn Notarianni), p. 19, line 21-p. 20, line 13; Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 13, lines 7-8.

<sup>176</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 53, lines 14-17.



**VI. Remedial Action By The Commission Is Necessary To Prevent Further Harm To CLECs As A Result Of CenturyLink’s Breach Of Its Merger Commitments And Discriminatory Conduct**

59 The Joint CLECs urge the Commission to find that CenturyLink has breached its OSS commitments under the settlement agreements with the CLECs and Commission Staff as well as conditions of the Commission’s merger approval order. The Joint CLECs further request that the Commission act to prevent further harm resulting from CenturyLink’s breach of its commitments under the merger commitments and discriminatory conduct. The focus of any remedy should be on mitigation of risk of a failure of MEDIACC and should include some or all of the following steps and such other actions as the Commission may find appropriate.

**A. Update MEDIACC**

60 Qwest initially “identified critical gaps in the MEDIACC support model” in either 2003 or 2004.<sup>177</sup> In 2007, in order to attempt to address these issues, Qwest performed an analysis that compared upgrading the existing MEDIACC system with replacing MEDIACC with a new system.<sup>178</sup> Based upon that analysis, Qwest determined that it was feasible to update MEDIACC and that it would be no more costly to update MEDIACC than to replace it with a new system.<sup>179</sup> At that time, Qwest concluded that it “made more sense to develop a new system.”<sup>180</sup> In December 2008, Qwest announced a Change Request in CMP to introduce a new system, then referred to as “CTG,” as a replacement for MEDIACC.<sup>181</sup> In April 2009, Qwest indicated that it was deferring the implementation of the new system indefinitely.<sup>182</sup> Although no reason was

---

<sup>177</sup> Hearing Ex. RA-7C; Hearing Tr., Vol. III, p. 291, line 19-p. 293, line 21 (testimony of Renee Albersheim).

<sup>178</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) p. 6, line 14 – p. 7, lines 1-2; Hearing Tr., Vol. III, p. 302, line 21-p. 303, line 23 (testimony of Renee Albersheim).

<sup>179</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 6, line 16-p. 7, line 8; Hearing Tr., Vol. III, p. 304, lines 15-19 (testimony of Renee Albersheim).

<sup>180</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) p. 7, lines 1-2.

<sup>181</sup> Hearing Ex. BJJ-1T (Direct Testimony of Bonnie Johnson) p. 21, lines 13-15 and Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000058.

<sup>182</sup> Hearing Ex. BJJ-61 (Direct Testimony of Bonnie Johnson, BJJ-59).

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

given at the time, Qwest chose to defer the implementation of CTG indefinitely because it chose not to fund the project.<sup>183</sup>

61 Since then, however, CenturyLink entered into a number of merger commitments and, as a result of those commitments, deciding to not pay to update MEDIACC is no longer available as an option. CenturyLink has committed to continuing to use and offer the legacy Qwest repair OSS for at least thirty months after the merger closing. If MEDIACC fails before thirty months after the merger closing and before CLECs have accepted a replacement interface, CenturyLink will not have complied with its commitments.<sup>184</sup> The Commission need not, and should not, however, await disaster before ordering that remedial action be taken. The Commission Staff has recognized that a MEDIACC failure would be catastrophic and that, in light of the settlement agreements entered into by CenturyLink with Integra and Staff, CenturyLink has an obligation to do everything it can to keep MEDIACC up and running for the full thirty months after the merger.<sup>185</sup> As the Colorado Commission Staff observed, the stability of CEMR/MEDIACC is of critical importance and “As Qwest must maintain these systems for a minimum of 30 months and until the CLECs vote affirmatively to migrate to MTG and retire MEDIACC, Qwest must find ways to assure its operational stability.”<sup>186</sup>

62 The Joint CLECs agree with Colorado Staff’s recommendation that CenturyLink be required to implement a business continuation plan for MEDIACC.<sup>187</sup> The necessary components of any adequate plan would include a disaster avoidance plan that describes specific steps CenturyLink will take to reduce the likelihood of a MEDIACC failure,<sup>188</sup> an updated disaster

---

<sup>183</sup> Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000055.

<sup>184</sup> Hearing Tr. Vol. III, p. 341, lines 8-14 (testimony of Robert Williamson).

<sup>185</sup> Hearing Tr., Vol. III, p. 341, lines 1-19 (testimony of Robert Williamson).

<sup>186</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) p. 19, lines 7-11.

<sup>187</sup> Hearing Ex. DD-9 (Cross Answer Testimony of Lynn M.V. Notarianni) p. 25, lines 23-26.

<sup>188</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 57, line 9-p. 59, line 13.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

recovery plan that describes what CenturyLink will do in the event of a MEDIACC failure to get the system running again,<sup>189</sup> and a failover plan that provides MEDIACC with the same failover capabilities as are available with CenturyLink’s retail repair systems.<sup>190</sup>

63 The Minnesota Commission recently ordered relief similar to that being sought here.<sup>191</sup> In particular, the Minnesota Commission has ordered that CenturyLink adopt: 1) a failover plan that is shown to be effective and sufficient in the provision of a seamless transfer of functions in the event of failure of MEDIACC/CEMR; and 2) a disaster recovery plan that is shown to be effective and sufficient for the mitigation of harm in the event of a MEDIACC/CEMR failure. Both plans must provide a detailed description of all software, hardware, tasks, deadlines and operational procedures; be reviewed and tested by a third party expert selected mutually by the parties and retained at CenturyLink’s expense; and be filed with the Minnesota Commission for review and approval by May 1, 2012.

**B. Develop MTG To Speak Both CMIP And XML Languages**

64 Although CenturyLink would characterize MTG as the solution for the problem of MEDIACC risk, that solution does not help PAETEC, which has electronically bonded its systems with the back end Qwest systems in order to implement a high level of automated functionality. This is because, as CenturyLink has acknowledged, in order for PAETEC to be able to use MTG in a manner that provides the same degree of automated functionality as PAETEC currently has using MEDIACC, PAETEC must build its own interface to MTG using an XML protocol.<sup>192</sup> PAETEC estimates that it, if it drops all other IT projects and devotes its

---

<sup>189</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 56, line 4-p. 57, line 8.

<sup>190</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 53, line 7-p. 55, line 2.

<sup>191</sup> *MN Order Requiring Retention of Expert.*

<sup>192</sup> See Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) p. 24, lines 13-14. (“If CLECs have already developed an interface to MTG, they should be able to transition fairly quickly from MEDIACC to MTG”); see also

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

resources to developing an MTG interface, will take at least six months to complete the project.<sup>193</sup> However, PAETEC entered into its settlement with CenturyLink precisely to avoid the cost and disruption associated with this kind of unanticipated systems change.<sup>194</sup>

65 In order to reduce the amount of effort required for PAETEC to be able to rely on MTG as a backup in the event of a MEDIACC failure, PAETEC has proposed that MTG be developed to use both an XML-based interface and a CMIP-based interface.<sup>195</sup> This would allow PAETEC to continue to interface using CMIP, as it does today using MEDIACC, and greatly reduce the work needed to build an interface with MTG.<sup>196</sup> Although adopting this proposal would require an exception to the thirty month moratorium, it would address the issue of MEDIACC risk in a way that assures that CenturyLink will remain in compliance with its merger commitments regarding wholesale service quality. PAETEC first made this proposal to CenturyLink in CMP in August 2011.

66 CenturyLink states that it does not consider PAETEC's proposal to be a viable alternative.<sup>197</sup> CenturyLink offers essentially two objections to the PAETEC proposal. First, CenturyLink claims that development of an additional CMIP interface would be too costly. Second, CenturyLink claims that the PAETEC solution would benefit only one company, PAETEC, for only a few months while MEDIACC continues to be available. The Commission should reject both these arguments.

---

Hearing Ex. CH-1T (Direct Testimony of Christopher Hansen) p. 2, line 22 – p. 3, line 1; Hearing Ex. BJJ-66 (Direct Testimony of Bonnie Johnson, BJJ-64).

<sup>193</sup> Hearing Ex. CH-1T (Direct Testimony of Christopher Hansen) at p. 2, lines 15-18.

<sup>194</sup> Hearing Ex. CH-1T (Direct Testimony of Christopher Hansen) p. 2, lines 18-22.

<sup>195</sup> Hearing Ex. BJJ-66 (Direct Testimony of Bonnie Johnson, BJJ-64).

<sup>196</sup> Hearing Ex. CH-4T (Rebuttal Testimony of Christopher Hansen), p. 8, lines 4-16; Hearing Ex. DD-9 (CO PUC Docket No. 11F-436T, Hearing Tr.), p. 70, line 16 – p. 71, line 18 (testimony of Christopher Hansen).

<sup>197</sup> Hearing Ex. RA-18T (Response Testimony of Renee Albersheim), p. 7, line 15-p. 8, line 20.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

67 With respect to cost, CenturyLink offers no support for its broad assertion regarding the cost of the PAETEC proposal. In any event, however, the cost is a direct result of CenturyLink's violation of its merger commitments and it is therefore reasonable that CenturyLink should be required to bear that cost.

68 Second, it is not the case that the PAETEC proposal will benefit only PAETEC. There are eight CLECs that use a vendor in order to interface with MEDIACC.<sup>198</sup> As CenturyLink recognized, in cases of CLECs who use a vendor to interface with MEDIACC, either the CLEC or the CLEC's vendor will need to build an interface to MTG.<sup>199</sup> Developing MTG so that it can communicate in both CMIP and XML will simplify the task of converting to MTG for these CLECs as well.

69 Even more importantly, however, the argument that the PAETEC proposal will benefit only one company is logically invalid. PAETEC is a party to the merger settlements, just as a number of CLECs are. If PAETEC were the only CLEC complainant in this case, CenturyLink would not be heard to argue that PAETEC was not entitled to any relief because that relief would only benefit one CLEC. The Commission should reject any notion that PAETEC is somehow not entitled to the full protection of the merger commitments that CenturyLink made and on which PAETEC has relied.

70 The argument that PAETEC's solution would be available for only a short time is also factually incorrect. First, this argument presumes that MEDIACC, itself, will retire relatively soon. This is not, however, a foregone conclusion. Before MEDIACC is retired, there must be CLEC acceptance of the replacement interface. It cannot be determined now when that will occur. Furthermore, even after MEDIACC is no longer functioning, there is no reason why

---

<sup>198</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 16, line 9-p. 17, line 8.

<sup>199</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim) p. 19, line 21; *see also* p. 5, lines 4-6.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

PAETEC and any other CLECs or vendors who chose to could not continue to use the CMIP interface to MTG. The CMIP interface is currently meeting PAETEC’s needs and, if MTG were developed with a CMIP interface, PAETEC would be under no time pressure to transition to an XML protocol interface with MTG.<sup>200</sup>

**C. Compensation To CLECs For Costs Of Early Transition To MTG**

71 As an alternative to requiring that CenturyLink develop MTG with a CMIP interface, the Commission could direct CenturyLink to bear the costs of PAETEC and possibly others to expedite the development of CLECs’ interface to MTG.<sup>201</sup> Like PAETEC’s CMIP proposal, this remedy would require an exception in order to allow MTG to be implemented before the end of the thirty month moratorium, but would enable CenturyLink to meet its merger commitments regarding wholesale service quality. Like PAETEC’s CMIP proposal, this remedy would require the party causing the cost – CenturyLink – to bear the costs.

---

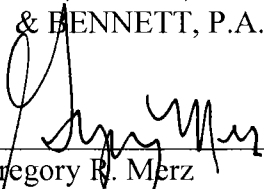
<sup>200</sup> Hearing Ex. DD-8 (CO PUC Docket No.11F-436T, Hearing Tr.) at p. 57, lines 7-19.

<sup>201</sup> Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 64, line 4- p. 65, line 11.

**NON-CONFIDENTIAL VERSION – INFORMATION DESIGNATED BY  
QWEST/CENTURYLINK AS CONFIDENTIAL HAS BEEN REDACTED**

Dated: March 14, 2012

GRAY, PLANT, MOOTY, MOOTY  
& BENNETT, P.A.

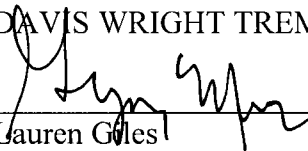


---

Gregory R. Merz  
500 IDS Center  
80 South Eight Street  
Minneapolis, MN 55402  
Telephone: 612-632-3257  
Facsimile: 612-632-4257  
[gregory.merz@gpmlaw.com](mailto:gregory.merz@gpmlaw.com)

Attorney for Integra and PAETEC

DAVIS WRIGHT TREMAINE



---

Lauren Giles  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101  
Telephone: (206) 757-8259  
Facsimile: (206) 757-7259  
[LaurenGiles@dwt.com](mailto:LaurenGiles@dwt.com)

Attorney for **tw telecom**

GP:3138576 v1