

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

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

Docket No. UT-111254

**JOINT CLECS' REPLY 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 of washington llc**

## TABLE OF CONTENTS

	PAGE
<b>INTRODUCTION .....</b>	<b>1</b>
<b>DISCUSSION.....</b>	<b>3</b>
I.    The Risks Presented By MEDIACC Are, According To CenturyLink, Serious And Unique.....	3
II.   That CenturyLink Has Deferred The Retirement Of MEDIACC Does Not Mean That MTG Is Not A “Replacement Interface” .....	7
III.  CenturyLink’s Attempt To Limit Its Commitments Regarding OSS Integration Is Not Supported By The Language Of The Parties’ Agreements .....	11
IV.  The Commission Has Authority To Enforce The Joint CLEC Merger Agreement .....	13
V.   CenturyLink’s Technical Defense To The Joint CLECs’ Discrimination Claim is Improper and Mischaracterizes The Issue.....	14
VI.  The Joint CLECs Request That The Commission Order A Remedy That Will Adequately Address The Risks That CenturyLink Has Claimed Exist.....	16

## INTRODUCTION

1            Integra Telecom (“Integra”), PAETEC Business Services (“PAETEC”) and **tw telecom of washington llc** (“**tw telecom**”) (collectively, “Joint CLECs”) respectfully submit this reply brief in the above-captioned proceeding.

2            For purposes of its defense in this proceeding, CenturyLink attempts to minimize the risks presented by MEDIACC,<sup>1</sup> accuses the Joint CLECs of exaggeration,<sup>2</sup> and even feigns confusion as to why the Joint CLECs argue that CenturyLink has behaved improperly.<sup>3</sup> However, outside the context of this litigation, CenturyLink has made numerous *alarming* statements highlighting and emphasizing those same risks, designed to encourage CLECs to abandon MEDIACC in favor of MTG and forgo the rights obtained under the merger settlement agreements.<sup>4</sup> CenturyLink, having sounded the alarm, now seeks to paint the Joint CLECs as alarmist. CenturyLink’s latest claims downplaying the risks associated with MEDIACC notwithstanding, the concerns raised by the Joint CLECs regarding the reliability of MEDIACC, based upon CenturyLink’s previous claims, cannot be fairly dismissed as mere speculation.

3            The CLECs *did not*, in entering into their respective settlement agreements, bargain for the right to continue to rely on OSS that is optional and unreliable. What CenturyLink represented the CLECs were getting was the continued use and availability of Qwest systems that were well-established, fully operational and tested and for which no immediate changes were either needed or contemplated.<sup>5</sup> This case arises because the Joint CLECs (and the Commission) did not get the benefit of their bargain.

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<sup>1</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶ 19.

<sup>2</sup> See, e.g., Qwest Corporation and CenturyLink’s Opening Brief at ¶ 7.

<sup>3</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶ 20, stating, “yet for some reason, Joint CLECs argue that Qwest/CenturyLink has behaved improperly.”

<sup>4</sup> Joint CLECs’ Opening Brief at ¶¶ 32-36

<sup>5</sup> Joint CLECs’ Opening Brief at ¶ 31.

4           The key question presented is what should be done to address the unbargained-for risks presented by the potential for catastrophic failure of MEDIACC in the context of the bargained-for merger settlement agreements. CenturyLink’s response to that question is as simplistic as it is unsatisfying: The Commission should do nothing. CenturyLink argues that whatever risks MEDIACC may present are sufficiently addressed by the implementation of MTG and whatever agreements were made as part of the merger proceedings are satisfied by the “optional” label CenturyLink now applies to MTG. Under this do-nothing approach, CLECs who choose to exercise their right to continue using MEDIACC are at risk. CenturyLink’s proposed “solution” ignores: 1) CenturyLink’s merger commitments to assure that legacy Qwest’s OSS, including MEDIACC, continue to be used and available to the same extent and in the same manner as before the merger; 2) CenturyLink’s merger commitments to obtain CLEC acceptance of any replacement interface before such an interface is placed into actual production or integrated; 3) that MTG cannot function as a back-up for electronically bonded CLECs; 4) that MTG is an unproven, poor backup for CLECs that rely on CEMR/MEDIACC, given the unprecedented conversion time required to move from CEMR/MEDIACC to CEMR/MTG.<sup>6</sup> The Joint CLECs, in contrast, urge the Commission to enforce CenturyLink’s merger commitments by taking steps to assure that MEDIACC is properly maintained and to assure that MTG is able to be used by e-bonded CLECs as a back-up in the event of a MEDIACC failure.

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<sup>6</sup> Joint CLECs’ Opening Brief ¶ 33; Hearing Ex. DD-9 (CO PUC Docket No.11F-436T, Hearing Tr.), p. 213, line 11-p. 214, l. 22 (testimony of Renee Albersheim).

## DISCUSSION

### I. The Risks Presented By MEDIACC Are, According To CenturyLink, Serious And Unique

5 As discussed in the Joint CLECs' Opening Brief, the concerns the Joint CLECs have raised about the reliability of MEDIACC are based on CenturyLink's own statements.<sup>7</sup> In its opening brief, CenturyLink attempts to downplay those statements with the assertion that "every system *might* fail"<sup>8</sup> and accuses the Joint CLECs of exaggeration<sup>9</sup> and taking CenturyLink's statements out of context.<sup>10</sup> CenturyLink's broad claim that "every system *might* fail" is, in fact, irrelevant to the issues at hand because CenturyLink has itself claimed that the risks associated with continuing to use MEDIACC are unique. Accordingly, in its report regarding MEDIACC risks filed pursuant to an order of the Minnesota Public Utilities Commission, CenturyLink maintained that "MEDIACC is an exception" because "MEDIACC is the only application identified out of the entire OSS that carries the risk of unrecoverable failure discussed in the report."<sup>11</sup> Further, CenturyLink stated, in this same report, "MEDIACC is the only system that faces the myriad of support issues reported above. No other system has been classified by this team as having reached 'end of life' status."<sup>12</sup>

6 In CMP, CenturyLink explained the significance of a system being classified as "end of life" as follows:

Bonnie Johnson – Integra asked for an explanation of the term "end of life."

Susan Lorence – Qwest said it is a term Qwest IT uses that identifies a system is [sic] at the point where it needs replacement. We do not have the skills and support that we need to continue to run and keep the system going.<sup>13</sup>

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<sup>7</sup> Joint CLECs' Opening Brief at ¶¶ 31-36.

<sup>8</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶ 19 (emphasis in original).

<sup>9</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶ 7.

<sup>10</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶ 18.

<sup>11</sup> Hearing Ex. RA-6, pp. 9 – 10.

<sup>12</sup> Hearing Ex. RA-6, p. 9.

<sup>13</sup> Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000055 – 56.

Although CenturyLink would now characterize MEDIACC as presenting “some risk,” the claims CenturyLink has repeatedly made in CMP when trying to persuade CLECs to accept MTG have been much more dire. Thus, in CMP, a CenturyLink employee, Cim Chambers stated, “[B]oth the hardware and software that is being used for MEDIACC are severely out of date,”<sup>14</sup> and that, “Qwest could get hardware on EBay but the software is not supported at this point. The system has been at the end of life for several years and we do not have a good back up if we need to get something corrected.”<sup>15</sup> These statements by CenturyLink’s IT personnel go far beyond merely, “acknowledg[ing] that a risk exists,” as CenturyLink now argues,<sup>16</sup> and directly contradict CenturyLink’s assurance, as set forth in its opening brief, that it has “years of internal expertise” needed to maintain MEDIACC.<sup>17</sup>

7 CenturyLink claims that it “has been transparent with CLECs about the nature of the risks” associated with MEDIACC.<sup>18</sup> The evidence, however, fails to support that claim. What the evidence shows is that CenturyLink has made numerous and inconsistent assertions regarding the MEDIACC risks which have, in turn, resulted in significant concern on the part of CLECs. A representative, but far from exhaustive, sampling of CenturyLink’s self-contradictory claims includes:

- “CenturyLink and Qwest have **well-established, fully operational and tested systems.**”<sup>19</sup>

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<sup>14</sup> Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000056.

<sup>15</sup> Hearing Ex. BJJ-8 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000056.

<sup>16</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶21.

<sup>17</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶47.

<sup>18</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶20.

<sup>19</sup> 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 (emphasis added).

- The Merged Company will have “**no immediate need (or be under any time pressure) to make any alterations to Qwest’s OSS.**”<sup>20</sup>
- “**CenturyLink does need to implement a replacement system** for CEMR and MEDIACC for operations of Qwest Corporation.”<sup>21</sup>
- “Qwest said IT said they were an old hardware, an old database and old operating system and **the system needed to be replaced** since the system was really old.”<sup>22</sup>
- “CenturyLink continues to have **concerns that a catastrophic failure could result** with MEDIACC and CEMR.”<sup>23</sup>
- The MEDIACC system is currently stable, but fourteen years old and **will likely** begin experiencing problems in the near future....”<sup>24</sup>
- “The MEDIACC system is currently stable, but fourteen years old and **could** begin experiencing problems in the near future....”<sup>25</sup>
- “[I]t is **possible though perhaps unlikely** that MEDIACC could experience an unrecoverable failure.”<sup>26</sup>
- “**MEDIACC is not in Imminent Danger** of an Unrecoverable Failure”<sup>27</sup>
- “CenturyLink QC **cannot predict if or when** MEDIACC might fail.”<sup>28</sup>

8 CenturyLink ignores its own claims about the risks of MEDIACC in asserting that “To examine the true picture of MEDIACC’s performance and risks, the first and most important evidence is how MEDIACC has actually performed.”<sup>29</sup> CenturyLink cites to no evidentiary support for the assertion that past performance is the best evidence regarding risk and, in fact,

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<sup>20</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 (emphasis added).

<sup>21</sup> Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36) at p. JC000294 (emphasis added).

<sup>22</sup> Hearing Ex. BJJ-9 (Direct Testimony of Bonnie Johnson, BJJ-8) at p. JC000939 (emphasis added).

<sup>23</sup> Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36) at p. JC000294 (emphasis added).

<sup>24</sup> Hearing Ex. RA-21 (CO PUC Docket No. 11F-436T, Answer of Qwest Corporation and CenturyLink to Amended Complaint) ¶ 2 (emphasis added).

<sup>25</sup> WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer to Complaint, ¶ 2 (emphasis added).

<sup>26</sup> WA UTC Docket No. UT-111254, Qwest Corporation and CenturyLink’s Answer in Opposition To Motion For Declaratory Relief, ¶ 32 (emphasis added).

<sup>27</sup> Qwest Corporation and CenturyLink’s Opening Brief at p. 9 (emphasis added).

<sup>28</sup> Hearing Ex. RA-6 (Report on MEDIACC Risks) at p. 16 (emphasis added).

<sup>29</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶ 22.

that assertion is contradicted by the statements of CenturyLink’s IT professionals in CMP. To that end, Qwest’s Director of IT Operations stated that “failure may escalate rapidly; **past performance is not necessarily a good indicator.**”<sup>30</sup> Similarly, CenturyLink’s Tracey Strombotne stated in CMP, “there tends to be early high failure rates, a long period of stability and then the possibility of a rapid increase in failure – sort of the shape of a hockey stick. For these systems, **Qwest is reaching the end of the stability period and improvements are necessary.**”<sup>31</sup>

9           Though CenturyLink has claimed the CLEC’s references to CenturyLink statements are exaggerations or taken out of context, CenturyLink does not attempt to describe what it claims to be the proper “context” of those statements. If CenturyLink were correct, then it should have been fairly easy for CenturyLink to demonstrate the full context since the Joint CLECs typically have made the entire documents from which the CenturyLink statements were taken were made part of the record as an exhibit to testimony. CenturyLink has failed to undertake this task because the Joint CLEC citations to CenturyLink’s statements are not exaggerations, but in fact direct quotes in the context they were made. Rather than taking CenturyLink’s statements out of context, as CenturyLink contends the Joint CLECs are doing, the Joint CLECs urge the Commission to consider the context of these various statements. The context is that CenturyLink has emphasized the risk and potential for failure when it is trying to persuade CLECs and State Commissions<sup>32</sup> to ignore the merger settlement agreements and allow CenturyLink to abandon MEDIACC in favor of MTG; and CenturyLink has minimized that risk when it is attempting to

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<sup>30</sup> Hearing Ex. 6 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000051 (emphasis added).

<sup>31</sup> Hearing Ex. 6 (Direct Testimony of Bonnie Johnson, BJJ-7) at p. JC000054 (emphasis added).

<sup>32</sup> For example, when arguing that the Minnesota Commission should allow implementation of MTG, CenturyLink’s attorney said, “Our people say that there’s a risk that’s important that needs to be addressed.... [I]f that risk comes to fruition, it would have been *this Commission* that issued an order that would cause the type of concerns that we’re attempting to proactively address.” (emphasis added) See Hearing Ex. DD-2CT (Response Testimony of Douglas Denney), p. 10, lines 13-16 (citing Hearing Ex. BJJ-64 (Direct Testimony of Bonnie Johnson, BJJ-62), p. 31, line 20-p. 32, line 2).



show that it is complying with its merger commitments through the creation of the “optional” label.<sup>33</sup> The Commission should not give weight to the new unsupported assertions made for purposes of attempting to minimize the issue over the original statements made by CenturyLink and its IT personnel in an attempt to highlight an issue and convince CLECs to move off MEDIACC prior to the expiration of the merger settlement agreements.

**II. That CenturyLink Has Deferred The Retirement Of MEDIACC Does Not Mean That MTG Is Not A “Replacement Interface”**

10 The various settlement agreements at issue here, as well as the Commission’s order approving the merger, impose specific obligations on CenturyLink with respect to a “replacement interface.” Thus, the Integra, Staff and Joint CLEC settlement agreements all require “sufficient acceptance” by CLECs of a “replacement interface.” The settlement agreements further provide that the process for obtaining CLEC acceptance must include jointly developed acceptance criteria, acceptance testing, and a majority vote. Pursuant to the Commission’s order, these requirements must be met before the “replacement interface” is put into “actual production.” If MTG is a “replacement interface,” then CenturyLink has violated its settlement commitments by implementing MTG before the end of the moratorium period and without first following the requirements relating to CLEC acceptance.

11 CenturyLink contends that “the offering of MTG now does not constitute a replacement of MEDIACC because the original system is still in use.”<sup>34</sup> Thus, CenturyLink takes the position that, so long as any CLEC (or any other customer) is using MEDIACC, it has not been replaced and MEDIACC cannot be considered the replacement interface. Staff, similarly, equates “retirement” and “replacement.”<sup>35</sup> Not only does this interpretation of CenturyLink’s merger

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<sup>33</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶¶ 16, 17, 21, 33, 40 & 45.

<sup>34</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶17.

<sup>35</sup> Initial Post-Hearing Brief of Commission Staff at ¶¶11, 16.

commitments violate a well-established canon of contract construction by failing to give both of the terms used in the agreements—“replace” and “retire”—meaning,<sup>36</sup> it fails to reflect the reality of how systems are replaced.

12 While retirement may be considered to be an event—*i.e.*, the system is no longer available—replacement is a process and not a specific event. Replacement of OSS can be a complex and lengthy process involving numerous steps and extensive testing.<sup>37</sup> When an OSS is being replaced, all CLECs do not migrate from the old system to the new system at the same time. Although the old OSS has not yet been retired, it is gradually replaced as customers transition to the new replacement interface. In this case, CenturyLink has acknowledged this fact by stating that MTG is now available for those customers who wish to transition to it.<sup>38</sup> Those customers who do decide to switch will begin using MTG instead of MEDIACC; that is, MTG will replace MEDIACC for those customers. MTG is, therefore, the replacement interface and the settlement commitments relating to CLEC acceptance of the replacement interface are triggered before that replacement is put into “actual production,” not after.

13 CenturyLink states that it “modified its plans regarding MEDIACC and MTG, and announced on March 7, 2011, that MTG was no longer *identified* as a replacement to MEDIACC.”<sup>39</sup> Regardless, however, of how CenturyLink has “identified” MTG, it continues to be the case that MTG is the replacement for MEDIACC. On this point, CenturyLink’s position is crystal clear:

Q. Well, Ms. Johnson was asked questions this morning about a change to the CR that removed a reference to MTG as the replacement to MEDIACC,

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<sup>36</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)

<sup>37</sup> *See, e.g.*, Hearing Ex. BJJ-74T (Responsive Testimony of Bonnie Johnson) at p. 13, line 6 – p. 15, line 7; Hearing Ex. DD-1T (Direct Testimony of Douglas Denney) at p. 115, line 10 – p. 116, line 3.

<sup>38</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶8 (MTG “can be used now by customers who wish to convert”).

<sup>39</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶3 (emphasis added).

and I understand that reference was removed, but that removal didn't change CenturyLink's plans with regard to replacing MEDIACC with MTG.

A [by Mr. Hunsucker]. I agree with that, yes.<sup>40</sup>

CenturyLink's argument that MTG is not the replacement for MEDIACC is based on semantics, not reality, and should be rejected.

14 CenturyLink cites the testimony of PAETEC and **tw telecom** witnesses for the proposition that "The CLEC witnesses agree that so long as MEDIACC is offered, and not retired without compliance with the merger commitments, there will be no violation of the Agreements."<sup>41</sup> CenturyLink misstates the CLEC testimony. The **tw telecom** witness testified as follows:

Q. As long as Qwest/CenturyLink complies with the provision of paragraph 12 of the merger settlement in terms of the steps that it has to take and the timeline that it would take before retiring MEDIACC or replacing it with MTG, then tw's interests would be satisfied?

A. Correct.<sup>42</sup>

The PAETEC witness's testimony is the same:

Q. And so long as Qwest follows the timelines and performance duties set forth in the settlement agreement to retire or replace MEDIACC, would that address PAETEC's concerns?

A. Yes, as long as we had the time to develop and be able to talk to the system without losing any of our existing automation.

Q. Sure.

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<sup>40</sup> Hearing Tr., Vol. II, p. 243, lines 6-12. See also Hearing Ex. DD-9 (CO PUC Docket No. 11F-436T, Hearing Tr.) at p. 156, lines 10-16 (testimony of Michael Hunsucker):

Q. And MTG is the replacement for MEDIACC; is that correct?

A. Yeah. I think that's correct, yes.

<sup>41</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶¶ 6, 27-28.

<sup>42</sup> Hearing Tr. Vol. II, p. 88, lines 20-25 (testimony of Lyndall Nipps).

A. And that testing, as far as test loads and so forth, was equivalent to what we have today with MEDIACC.<sup>43</sup>

Both witnesses were asked to assume that CenturyLink would comply with the procedures required by the settlement agreements for obtaining CLEC acceptance of MTG before retiring **or replacing** MEDIACC. In neither instance did the witness agree that CenturyLink could, consistent with the settlement agreements, implement a replacement interface so long as MEDIACC was not retired. Since the hearing, CenturyLink has placed MTG into actual production, contrary to the settlement agreements and this Commission's order.

15 CenturyLink argues that "There is no prohibition in the Agreement against *adding* an optional wholesale OSS such as MTG"<sup>44</sup> and that it is doing nothing more than "providing CLECs with the opportunity to make their own decision"<sup>45</sup> regarding whether to continue to using MEDIACC or replace it with MTG. Prior to the commencement of this case, however, CenturyLink did not characterize transitioning to MTG as merely an additional "option." Thus, on May 2, 2011, in an email regarding CenturyLink's decision to withdraw its Change Request regarding the retirement of MEDIACC, CenturyLink's lawyers stated:

While CenturyLink is willing to withdraw the CR at this time, CenturyLink continues to have concerns that a catastrophic failure could result with MEDIACC and CEMR and it is CenturyLink's expectation that CLECs remaining on MEDIACC and CEMR would agree to PAP relief if another system is available and there will be continued discussion regarding a process to be used to withdraw MEDIACC and CEMR once MTG is implemented. In order to avoid the potential need for resubmitting the CR, CenturyLink seeks rapid resolution with affected customers on either an agreed upon transition process to the replacement system or the PAP relief discussed above.<sup>46</sup>

CenturyLink's message, before it was called upon to justify its conduct to regulators, was loud and clear: Although transitioning to MTG would be technically optional, in the sense that

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<sup>43</sup> Hearing Tr. Vol. III, p. 106, lines 11-21 (testimony of Christopher Hansen).

<sup>44</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶ 16 (emphasis added).

<sup>45</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶ 21.

<sup>46</sup> Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36) at p. JC000294.

MEDIACC would continue to be available to those CLECs who might be foolhardy enough to want to continue to use it, CenturyLink plainly intended that CLECs who chose to continue to use MEDIACC would do so at their own substantial risk. Although CenturyLink has claimed that the Performance Indicator Definitions (“PIDs”) that are contained in the Qwest Performance Assurance Plan (“PAP”) provide an incentive for CenturyLink to maintain wholesale service quality,<sup>47</sup> CenturyLink previously insisted that CLECs who continue to use MEDIACC must agree to PAP relief.<sup>48</sup>

16 CenturyLink argues that, had the parties intended to prohibit CenturyLink from adding an OSS, they would have included language that said so.<sup>49</sup> But this is exactly what the parties did. They agreed that CenturyLink would not add OSS as a replacement for existing Qwest OSS before the end of thirty months after the merger closing and without CLEC acceptance. Although the settlement commitments would not prohibit CenturyLink from implementing new OSS to perform functions that were not already being performed by existing Qwest OSS, that is not what is happening here. MTG is being offered to perform functions that, as of the time of the merger closing, were already being performed by legacy Qwest OSS – CEMR and MEDIACC – as a replacement for those OSS. Customers using MTG will not be using it in addition to MEDIACC, but as the replacement for MEDIACC.

### **III. CenturyLink’s Attempt To Limit Its Commitments Regarding OSS Integration Is Not Supported By The Language Of The Parties’ Agreements**

17 CenturyLink’s merger commitments prohibit it from integrating MTG with Qwest systems before thirty months after the merger and without following the specified procedures for

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<sup>47</sup> Hearing Ex. RA-1T (Direct Testimony of Renee Albersheim), p. 19, lines 7-12.

<sup>48</sup> See Hearing Ex. BJJ-38 (Direct Testimony of Bonnie Johnson, BJJ-36) at p. JC000294. Although CenturyLink was given an opportunity at the hearing to explain that this was not CenturyLink’s position, they did not clearly do so. Ms. Albersheim said she did not know CenturyLink’s position on this issue (See Hearing Tr. Vol. III, p. 316, lines 6-10).

<sup>49</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶16.

CLEC acceptance.<sup>50</sup> CenturyLink does not deny that MTG will be integrated with Qwest's systems; indeed, MTG is an interface to Qwest's systems and, in order to operate, it has to be integrated with those systems. Instead, in order to argue that it is meeting its commitment regarding integration, CenturyLink would impose a limitation on that commitment that is nowhere to be found in the parties' agreements. Specifically, CenturyLink takes the position that "integration" is limited to the combination of "two existing systems."<sup>51</sup> Neither the Integra Settlement Agreement nor the Staff Settlement Agreement includes language that limit the commitment to "existing" systems. Certainly the parties could have included such a limitation, but did not. Instead, the language of the agreements provides that CenturyLink will not "integrate Qwest systems" prior to expiration of the moratorium period. As discussed in the Joint CLECs' opening brief, the FCC's merger approval order, which provides that CenturyLink "will not replace Qwest OSS or integrate it with any other OSS for at least 30 months following the Merger Closing Date,"<sup>52</sup> lends further support for rejecting CenturyLink's proposed limitation on the commitment regarding integration of systems.

18 Nor is it the case that the requirements of the settlement agreements regarding integration are limited to the integration of two systems "that are combined to produce one system."<sup>53</sup> CenturyLink argues that there can be no integration of MTG until MEDIACC is no longer available. CenturyLink's attempt to limit the integration provision in this regard suffers from the same flaw as its proposed interpretation of "retire or replace;" it conflates "integration" with "retirement" and fails to give the term "integration" independent meaning. The generally understood meaning of "integrate" is "to make into a whole by bringing parts together: unify" or

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<sup>50</sup> CenturyLink's breach of its commitment regarding integration of systems is discussed in the Joint CLECs' Opening Brief at ¶¶49-51.

<sup>51</sup> Qwest Corporation and CenturyLink's Opening Brief, ¶¶ 4, 13.

<sup>52</sup> Joint CLECs' Opening Brief at ¶ 50.

<sup>53</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶ 13.

“to join (e.g., parts) together: unite.”<sup>54</sup> This definition does not require that the integration of two systems produce a single system, it only requires that two systems be joined. MTG has been joined to Qwest’s back end systems and databases<sup>55</sup> and, therefore, the merger commitments regarding integration apply.

#### **IV. The Commission Has Authority To Enforce The Joint CLEC Merger Agreement**

19 In their opening brief, the Joint CLECs discussed the legal basis for the Commission to assert jurisdiction to enforce the commitments contained in the Joint CLEC Merger Agreement, to which PAETEC is a party,<sup>56</sup> and will not repeat that discussion here. The Joint CLECs did, however, wish to clarify a point of potential confusion. Staff asserts that the Joint CLEC Merger Agreement was never filed in Washington.<sup>57</sup> The Joint CLEC Merger Agreement appears in the Commission’s docket as an attachment to an email dated March 8, 2011, from Administrative Law Judge Friedlander advising the parties that the Commission was taking official notice of the Agreement.

20 CenturyLink takes the position that the issue of the Commission’s authority to enforce the Joint CLEC Merger Agreement is “largely if not wholly moot, because there are terms identical to the PAETEC [Agreement] in both the Integra and Staff settlement agreements.”<sup>58</sup> The Joint CLECs disagree with the characterization of the OSS terms of the Joint CLEC Merger Agreement as identical to the terms of the Integra and Staff settlement agreements. Although there is substantial overlap among the agreements, the Joint CLEC Merger Agreement contains

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<sup>54</sup> Free Online Dictionary, <http://www.thefreedictionary.com/integrate>.

<sup>55</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.

<sup>56</sup> Joint CLECs’ Opening Brief at ¶¶ 14-17.

<sup>57</sup> Initial Post-Hearing Brief of Commission Staff at ¶ 6.

<sup>58</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶ 44.

additional terms relating to testing of a replacement interface<sup>59</sup> and wholesale service quality.<sup>60</sup> These terms are expressly applicable throughout the 14-state Qwest incumbent territory, including Washington, and the Joint CLECs seek their enforcement in this proceeding.

**V. CenturyLink’s Technical Defense To The Joint CLECs’ Discrimination Claim is Improper and Mischaracterizes The Issue**

21 CenturyLink argues that “Mediated access is not discriminatory” and further asserts that the differences between how CLECs access the Qwest repair systems and how CenturyLink accesses repair systems for its retail customers are “structural” and, therefore, there is no discrimination.<sup>61</sup> This argument relies on a hyper technical and unreasonably narrow reading of CenturyLink’s nondiscrimination obligation.

22 Both federal and Washington state law prohibit an incumbent local exchange carrier, such as CenturyLink, from discriminating against CLECs.<sup>62</sup> Pursuant to this nondiscrimination obligation, CenturyLink must provide interconnection that is “at least equal in quality to that provided by the local exchange carrier *to itself*”<sup>63</sup> on “rates , terms, and conditions that are just, reasonable, and nondiscriminatory.”<sup>64</sup> Additionally, CenturyLink is required to provide “non-discriminatory access to network elements.”<sup>65</sup> The nondiscrimination requirement under 251(c) is a more “stringent” nondiscrimination standard.<sup>66</sup> Under that standard, an ILEC must be nondiscriminatory both in the way it treats a CLEC in comparison to another CLEC and in the

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<sup>59</sup> See Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.A; Joint CLECs’ Opening Brief at ¶ 45.

<sup>60</sup> See Hearing Ex. BJJ-5 (Direct Testimony of Bonnie Johnson, BJJ-4) at Section 1.A and 1.C; Joint CLECs’ Opening Brief at ¶¶46-48.

<sup>61</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶34.

<sup>62</sup> 47 U.S.C. §251(c)(2)(C) and (D); RCW 80.36.170.

<sup>63</sup> 47 U.S.C. §251(c)(2)(C) (emphasis added) .

<sup>64</sup> 47 U.S.C. §251(c)(2)(D).

<sup>65</sup> 47 U.S.C. §251(c)(3).

<sup>66</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; First Report and Order, CC Docket No. 96-98, FCC 96-325, Released August 8, 1996 (“*Local Competition Order*”) at ¶ 217.



way it treats a CLEC in comparison to itself.<sup>67</sup> The FCC has determined OSS to be a “network element.”<sup>68</sup> Consequently, a CLEC must be permitted nondiscriminatory access to an ILEC’s OSS functions in order to provide pre-order information to potential customers, sign up customers, place orders for services or facilities, track the progress of its orders to completion, obtain relevant billing information from the ILEC, and, most significantly for purposes of this case, obtain prompt repair and maintenance services for its customers. Further, the OSS systems offered to CLECs is required to provide CLECs the same measure of backup and reliability as does the system that CenturyLink uses to serve its own retail customers.

23 The Joint CLECs are not claiming that mediated access is discriminatory nor are they claiming that they should be permitted direct access to the Qwest back end systems.<sup>69</sup> The Joint CLECs’ claim of discrimination is based on the fact that the OSS that CenturyLink uses to provide repair services to its retail customers has automatic failover and MEDIACC does not.<sup>70</sup> Thus, in the event of a failure of the systems that CenturyLink relies on to provide repair service to its retail customers, CenturyLink and its customers will not experience any delay because those systems automatically fail over to redundant systems.<sup>71</sup> In contrast, CLECs and CLEC customers, in the event of a failure of MEDIACC, will experience delays while CenturyLink

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<sup>67</sup> *Local Competition Order* at ¶218 (“We believe that the term ‘nondiscriminatory,’ as used throughout section 251, applies to the terms and conditions an [ILEC] imposes on third parties as well as on itself.”)

<sup>68</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; First Report and Order, CC Docket No. 96-98, FCC 96-325, Released August 8, 1996 at ¶ 516.

<sup>69</sup> Cf. Qwest Corporation and CenturyLink’s Opening Brief at ¶ 8.

<sup>70</sup> Joint CLECs’ Opening Brief at ¶¶ 53-57; see also Qwest Corporation and CenturyLink’s Opening Brief at ¶38 (“MTG has automatic failover capability; MEDIACC has failover capability but that capability is manual.”); Hearing Ex. DD-7 (Responsive Testimony of Douglas Denney, DD-5), p. 6 (“[The MEDIACC failover plan sets forth] “the steps that CenturyLink QC will follow to restore the server. These steps do not guarantee that the server can be restarted.”)

<sup>71</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.”).

performs manual activities, which may or may not be successful, to bring the system back up.<sup>72</sup> CenturyLink is arguing that as long as OSS “differences are structural,”<sup>73</sup> it is impossible for CenturyLink to discriminate. Since CLECs do not have direct access to CenturyLink OSS systems, by CenturyLink’s logic, there can be no discrimination. CenturyLink is thereby attempting to excuse itself from its non-discrimination obligations. The point of the obligation to provide interconnection that is *at least equal in quality to that provided by the local exchange carrier to itself*, is about end user customer experience. A customer whose phone is out of service likely will not care about the structural distinction that CenturyLink is attempting to draw, but rather, will only be interested in when its service will be restored. If CLECs are unable to provide this information because they cannot access CenturyLink’s repair systems, while CenturyLink can access these systems for its retail customers, the CLECs will not have received interconnection *at least equal in quality* to what CenturyLink provides itself. The structural differences that CenturyLink discusses are irrelevant to the fact that, with respect to failover capabilities, the system that CLECs rely on is inferior to the system that CenturyLink uses itself to provide service to its retail customers.

**VI. The Joint CLECs Request That The Commission Order A Remedy That Will Adequately Address The Risks That CenturyLink Has Claimed Exist<sup>74</sup>**

24 Commission Staff has correctly recognized that an unrecoverable failure of MEDIACC would be “catastrophic.”<sup>75</sup> Notwithstanding CenturyLink’s assertions regarding the risk of failure, CenturyLink states that it “intends” to keep MEDIACC running<sup>76</sup> and urges the

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<sup>72</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>73</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶ 34.

<sup>74</sup> The remedy sought by the Joint CLECs is discussed in the Joint CLECs’ Opening Brief at ¶¶ 59-71.

<sup>75</sup> Hearing Tr., Vol. III, p. 341, lines 2-6 (testimony of Robert Williamson).

<sup>76</sup> Hearing Ex. MH-1T (Direct Testimony of Michael Hunsucker), p. 7, lines 21-22.

Commission to do nothing until catastrophe occurs.<sup>77</sup> Such a “wait and see” approach will not adequately protect the public interest and should be rejected. Likewise the Commission should reject CenturyLink’s unilateral, so-called “proactive”<sup>78</sup> solution of developing, integrating and implementing a replacement OSS that is a potential solution only for carriers that wish to waive the rights CLECs obtained in the merger settlement commitments.

25           The CLECs did not enter into merger agreements in order to assure that they would have access to OSS that is at risk of catastrophic failure and needs to be replaced. The Commission need not and should not wait until MEDIACC has failed before it can find that CenturyLink has violated its merger commitments. Additionally, in order to address the concerns about MEDIACC’s reliability, the Joint CLECs request that the Commission order CenturyLink to take steps necessary: 1) to update MEDIACC, to reduce the likelihood of failure; 2) to make sure MEDIACC has the same failover capabilities as the OSS used by CenturyLink to serve retail customers; and 3) to mitigate harm to CLECs that might result from a MEDIACC failure.<sup>79</sup> The Joint CLECs also ask that, if CenturyLink is permitted to continue to use MTG, that it be required to develop and/or modify MTG in a manner that makes it a true back-up for CLECs that are electronically bonded with the Qwest OSS, either by developing a CMIP interface for MTG<sup>80</sup> or by paying CLECs’ costs of transitioning to MTG before the end of the thirty month moratorium.<sup>81</sup>

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<sup>77</sup> See, e.g., Qwest Corporation and CenturyLink’s Opening Brief at ¶35.

<sup>78</sup> Qwest Corporation and CenturyLink’s Opening Brief at ¶¶ 20, 21, 31, 33 & 47.

<sup>79</sup> Joint CLEC’s Opening Brief at ¶¶ 60-63.

<sup>80</sup> Joint CLEC’s Opening Brief at ¶¶ 64-70.

<sup>81</sup> Joint CLEC’s Opening Brief at ¶ 71.

26 CenturyLink notes that the relief discussed in Mr. Denney's testimony is different from the relief sought in the Joint CLECs' complaint.<sup>82</sup> What CenturyLink fails to recognize, however, is that circumstances have changed substantially since the Joint CLECs filed their complaint. First, unlike the Minnesota Commission, which acted to bar implementation of MTG, this Commission determined that it lacked authority to enjoin implementation of MTG on an interim basis. Accordingly, CenturyLink proceeded with the implementation of MTG in every state other than Minnesota, effective February 13, 2012.<sup>83</sup> In light of CenturyLink's decision to proceed notwithstanding the Joint CLECs' claims in this case, the Joint CLECs have focused their proposed remedies on steps to be taken to assure that MTG is implemented in a manner that, although requiring some modification of CenturyLink's merger commitments, is most consistent with those merger commitments.

27 Second, the issue of discrimination with regard to the failover capabilities of CenturyLink's wholesale and retail repair OSS did not come to light until after the complaint was filed. The Joint CLECs became aware of the inferiority of MEDIACC's failover capabilities, as compared with the failover capabilities of CenturyLink's retail systems, through discovery propounded by the Colorado Staff in the parallel proceeding pending before the Colorado Public Utilities Commission. The Joint CLECs could not have sought relief in their complaint for a problem that they did not know existed.

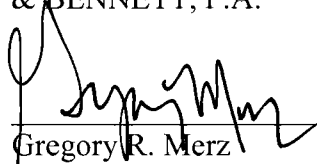
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<sup>82</sup> Qwest Corporation and CenturyLink's Opening Brief at ¶36. The Joint CLECs' request for relief is discussed in Mr. Denney's responsive testimony. See Hearing Ex. DD-2CT (Responsive Testimony of Douglas Denney), p. 32, line 12-p. 79, line 9.

<sup>83</sup> Hearing Ex. RA-19.

Dated: April 4, 2012

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

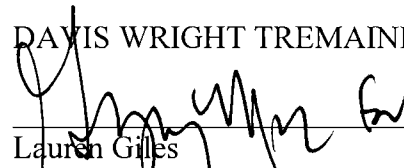


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Gregory R. Merz  
MN Reg. No. 185942  
500 IDS Center  
80 South Eight Street  
Minneapolis, MN 55402  
Telephone: 612-632-3257  
Facsimile: 612-632-4257  
[gregory.merz@gpmlaw.com](mailto:gregory.merz@gpmlaw.com)

Attorney for Integra and PAETEC

DAVIS WRIGHT TREMAINE



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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 of washington, llc**

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