EXHIBIT___JCF-1T

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| In the matter of,<br><br>Joint Application of Qwest Communications International Inc. and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp. | Docket No. UT-100820 |

**RESPONSIVE TESTIMONY**

**OF**

**JAMES C. FALVEY**

**VICE PRESIDENT, REGULATORY AFFAIRS**

**& SENIOR COUNSEL**

**ON BEHALF OF**

**PAC-WEST TELECOMM, INC.**

**September 27, 2010**

**Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS?**

A. My name is James C. Falvey. I am the Vice President, Regulatory Affairs & Senior Counsel for Pac-West Telecomm, Inc. My business address is 420 Chinquapin Round Rd. Ste. 1, Annapolis, MD 21401.

**Q. ON WHOSE BEHALF ARE YOU TESTIFYING THIS PROCEEDING?**

A. I am testifying on behalf of Pac-West Telecomm, Inc. ("Pac-West").

**Q. PLEASE PROVIDE A BRIEF SUMMARY OF YOUR TESTIMONY AND PAC-WEST'S POSITION ON THE PROPOSED MERGER OF QWEST WITH CENTURYLINK?**

A. In my testimony I set forth Pac-West's concerns that the proposed merger will accelerate anti-competitive conduct by Qwest and, consequently, harm emerging competition. If competitors cannot compete due to discriminatory treatment, cumbersome interconnection negotiation requirements, lost wholesale inputs, longstanding, unresolved disputes and unpaid invoices due from Qwest; end-user consumers will see higher prices, reduced service quality, and fewer product options. Pac-West believes that the Commission can reduce the likelihood of competitive harm by adopting specific and straight-forward conditions in conjunction with merger approval. This testimony describes each of the conditions proposed by Pac-West.

**Q. PLEASE DESCRIBE YOUR POSITION AND DUTIES AT PAC-WEST.**

A. As the Vice President of Regulatory Affairs, I am responsible for Pac-West all state and federal regulatory matters, including state and federal regulatory proceedings, resolving carrier disputes, compliance issues, policy development, industry and FCC relations, and state and federal legislative activity. My responsibilities include negotiating and securing approval of interconnection agreements between Pac-West and incumbent carriers in Pac-West service territories. Similarly, if a dispute arises under one of the Pac-West interconnection agreements or tariffs, I am responsible for resolving the dispute through negotiation or litigation.

**Q. PLEASE DESCRIBE YOUR PROFESSIONAL BACKGROUND.**

**A.** From 1996 to present, I have represented competitive telecommunication providers on regulatory matters at the federal, state and local level. These carriers included CoreTel, espire Communications, Inc., Xspedius Communications, and Pac-West Telecomm, Inc. Prior to that, from 1994 to 1996, I represented a variety of competitive carriers in pre-Telecom Act state competition proceedings as an associate attorney with Swidler & Berlin. From 1990 to 1994, I practiced general commercial and antitrust litigation with the Washington, D.C. office of Johnson & Gibbs. Before law school, I was a legislative assistant to Senator Harry Reid from 1985 to 1987. I hold a law degree from the University Of Virginia School Of Law and a Bachelor's of Arts from Cornell University. Over the last sixteen years, I have handled regulatory proceedings, interconnection agreement negotiations, intercarrier compensation disputes, and complaints at the state and federal level for competitive carriers. I have testified on behalf of competitive carriers on interconnection, unbundling, resale, and intercarrier compensation issues before fifteen public service commissions.

**Q. PLEASE DESCRIBE YOUR BACKGROUND WITH INTERCONNECTION NEGOTIATIONS AND ARBITRATIONS.**

A. I have participated in state and federal interconnection proceedings since 1995, including pre-Act proceedings in Pennsylvania and Florida. Over the last fifteen years, I have negotiated interconnection agreements with BellSouth, GTE, Verizon, Southwestern Bell, Valor, and Qwest. I have also testified as a witness in Section 251/252 arbitrations in over ten states. In addition, I have attempted to port interconnection agreements from one AT&T state to another under the AT&T Merger requirements.

**Q. PLEASE DESCRIBE THE TYPE OF SERVICES PROVIDED BY PAC-WEST.**

**A.** Pac-West is a competitive local exchange carrier ("CLEC") focused for the last thirty years on providing wholesale communications infrastructure services for other CLECs, wireless providers, interexchange carriers, VoIP providers, and Internet Service and other information service providers. Pac-West offers voice and data access, transport, and managed services with unparalleled reliability, security, and value. Pac-West's network is engineered for easy integration and connectivity of multiple communications services. Pac-West recently introduced its Telastic service, a hosted operating environment for telecom services that allows carriers and service providers to evolve their less efficient legacy telecom infrastructure into a scalable and cost-effective system. Telastic includes on-demand carrier-grade network infrastructure, streamlined operations management capabilities, and turnkey communications service applications with instant capacity.

**Q. WHERE DOES PAC-WEST OPERATE?**

**A.** Pac-West has facilities in Qwest territory in Arizona, Colorado, Idaho, Oregon, Utah, and Washington. Pac-West also competes with CenturyLink in Nevada, and has operations in California and Texas. Pac-West also partners with other companies to provide services in over 30 states across the country.

**Q. DOES PAC-WEST INTERCONNECT WITH QWEST AND CENTURYLINK?**

**A.** Yes, like most CLECs, Pac-West has to interconnect with Qwest to exchange traffic and must purchase services from Qwest as the dominant incumbent local exchange carrier in Washington and five additional states where Pac-West competes with Qwest. As such, Pac-West interconnects, purchases special and switched access services from, and exchanges traffic with Qwest. In addition, Pac-West is interconnected with and competes with CenturyLink in Nevada. Thus, Pac-West has had experience with both companies. Because Pac-West is a wholesale customer and a competitor of both Qwest and CenturyLink, we are acutely concerned that the company resulting from the merger of CenturyTel, Inc. and Qwest Communications International, Inc. ("Merged Entity") will use its increased market power to discriminate against smaller CLECs like Pac-West. We are particularly concerned where there are currently instances where Qwest and CenturyLink have not been willing to abide by state and federal orders and statutes.

**Q. WHAT IS PAC-WEST'S POSITION ON THE PROPOSED MERGER OF QWEST WITH CENTURYLINK?**

A. As stated in the summary above, Pac-West is concerned that the proposed merger will accelerate anti-competitive conduct by Qwest and, consequently, harm emerging competition. If competitors cannot compete due to discriminatory treatment, cumbersome interconnection negotiation requirements, lost wholesale inputs, longstanding, unresolved disputes and unpaid invoices due from Qwest, end-user consumers will see higher prices, reduced service quality, and fewer product options. Pac-West believes that the Commission can reduce the likelihood of competitive harm by adopting the specific and straight-forward conditions as described further below. In addition, Pac-West supports the adoption of the conditions proposed by the Joint CLECs in conjunction with merger approval.

## I. <u>INTERCONNECTION</u>

**Q. DOES PAC-WEST ANTICIPATE INTERCONNECTION AGREEMENT PROBLEMS WITH THE MERGED ENTITY?**

**A.** Yes. Pac-West has had significant problems with ICA negotiations with Qwest, including delays in negotiating ICA amendments, negotiating new amendments, and even the filing of agreements with the state commissions. For example, Pac-West has been trying to negotiate an amendment with Qwest in six states to allow Pac-West to terminate VoIP traffic to Qwest's network. So far, Pac-West has only been able to complete one amendment in Arizona, and the Washington amendment has been the subject of numerous delays. Because I discuss this issue in detail later in my testimony, I will not go into further detail at this time.

**Q. HAS PAC-WEST EXPERIENCED OTHER DELAYS NEGOTIATING INTERCONNECTION AGREEMENTS WITH QWEST?**

A. Yes. To provide another example, Pac-West has had great difficulty reaching agreement with Qwest on its most recent Interconnection Agreement ("ICA") in Arizona. On August 15, 2008, Pac-West asked to opt into the XO Communications Services, Inc. ICA. Implementing this opt-in should have been a simple, straight-forward process. Instead, securing a new ICA has taken nearly two years of discussions, with Pac-West executing the new ICA on May 20, 2010, and Qwest filing the ICA on June 23, 2010. During the past two years, with no ICA in place and specifically because of these delays, Pac-West has received no reciprocal compensation for terminating calls on its network from Qwest customers in Arizona. Unlike some delays, which merely create uncertainty, this one had the added harm of depriving Pac-West of compensation for terminating Qwest customer traffic.

**Q. HOW CAN THE INTERCONNECTION NEGOTIATION PROCESS BE REFORMED TO PUT COMPETITORS ON EQUAL FOOTING WITH QWEST?**

A. First, a CLEC should be able to opt into an ICA in use by Qwest or CenturyLink with another CLEC in this state or elsewhere. The selected ICA would be effective upon filing (by the CLEC or Qwest/CenturyLink) with any necessary revisions to follow ***after*** the

ICA effective date. In other words, the Merged Entity should be required to allow any requesting carrier to "port" an existing ICA, without revision. The Merged Entity would be authorized to request an order modifying the agreement ***after it is effective,*** to the extent it is not technically feasible for the Merged Entity to comply with one or more provision of the agreement. This procedure would eliminate the sort of delay experienced by Pac-West in Arizona over the past two years. Pac-West recommends that this portable opt-in condition continue for a period of five years following the closing date of this Merger ("Closing Date").

**Q. WHAT WILL HAPPEN IF QWEST IS PERMITTED TO MAKE CHANGES TO THE AGREEMENT PRIOR TO HAVING THE PORTED ICA GO INTO EFFECT?**

**A.** Based on Pac-West's experience with Qwest, this would create such significant delays in the ICA porting process that it would defeat the purpose of such a streamlined ICA porting condition. If Qwest is given the opportunity to redline any ported agreement, to introduce issues, for example, of technical feasibility, the result will be an extensive ICA porting proceeding to determine which of the redlines are justified and which are not. If porting an ICA requires a year-long proceeding to contest a series of 10 or 20 issues, CLECs such as Pac-West will be faced with the same extended time frames and excessive costs associated with negotiating a new agreement. If the Merged Entity has issues with a ported ICA once it is filed, those issues can be addressed on after the ICA is filed and effective. In that manner, the vast majority of the agreement will become effective, while any contested issues are worked out by the Commission, rather than holding the entire ICA hostage to disputes over a limited number of issues.

**Q. DOES PAC-WEST HAVE ANY OTHER INTERCONNECTION CONCERNS?**

A. Yes. Pac-West is concerned that the Merged Entity could decide to unilaterally terminate ICAs and force CLECs into costly negotiations or arbitrations after the Closing Date. To protect against this possibility, Pac-West proposes that the Merged Entity be required to allow a competitive provider to choose to extend an existing ICA for a period of three years from the Closing Date. This condition would apply to ICAs with unexpired terms and ICAs in "evergreen" status. There are often times when an ICA is working well for a CLEC, but the CLEC is nonetheless forced to expend time and resources to renegotiate the ICA. Permitting the extension of ICAs will provide CLECs with a period of stability and prevent the Merged Entity from taking advantage of its increased market power by immediately seeking to renegotiate the rates, terms and conditions of those agreements.

**Q. HAS THIS TYPE OF EXTENSION REQUIREMENT BEEN IMPOSED BEFORE?**

A. Yes. This Commission recently adopted a similar set of conditions with respect to the Frontier-Verizon transaction.[1] Across its six Qwest states, Pac-West has agreements that are at or near their expiration dates and this condition would make it much easier for Pac-

[1] *In the matter of the Joint Application of Verizon Communications, Inc. and Frontier Communications Corporation For an Order Declining to Assert Jurisdiction, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc.,* Docket No. UT-090842, Order No. 6, pp. 32-32, and Appendix B at 5, issued April 16, 2010.

West to carry on its business with the merged entity post-merger.

**Q. WHAT OBLIGATIONS WILL THE MERGED ENTITY HAVE WITH REGARD TO INTERCONNECTION?**

**A.** The Merged Entity, after the Closing Date will remain the largest incumbent local exchange carrier in Washington. Pac-West is concerned that the Merged Entity may disclaim its obligations under sections 251/252 and 271 of the Telecommunication Act because CenturyLink is not an incumbent local exchange carrier. Pac-West recommends that, as a merger condition, the Commission prohibit the Merged Entity from arguing in Washington that it is a "rural" incumbent local exchange carrier ("ILEC") exempt from certain obligations that "non-rural" ILECs have under sections 251/252 of the Telecommunications Act, or that it is not a Regional Bell Operating Company ("RBOC") subject to all of the obligations imposed on and RBOC pursuant to section 271 of the Telecommunications Act.

**Q. WHAT IS THE VALUE TO PAC-WEST OF SECTION 271 AND WHY ARE YOU CONCERNED THAT THE MERGED ENTITY MIGHT TRY TO AVOID THOSE OBLIGATIONS?**

**A.** The critical role of sections 251 and 252 are well known. But Section 271 also plays an integral role in ensuring that an RBOC like Qwest continues to comply with the core unbundling, interconnection, and compensation provisions, among others, of the Telecom Act. Section 271 gives CLECs an opportunity to bring anticompetitive practices to the attention of the FCC and to ensure enforcement of the key provisions of the Act, and Qwest must continue to remain subject to Section 271.

**Q. HOW ELSE MIGHT THE ICA NEGOTIATION PROCESS BE SIMPLIFIED?**

A. Much of the ICA turmoil experienced by Pac-West in Arizona over the past three years resulted directly from searching for an available "opt-in" ICA so as to avoid Qwest's form contract which was heavily biased against CLEC interests. Pac-West's preferred course would have been to use the Pac-West contract as the starting point for negotiating a new agreement. Qwest, however, has consistently been unwilling to use anything other than its standard form interconnection agreement. Pac-West requests that as of the Closing Date, the Merged Entity be required to permit carriers to use existing interconnection agreements as the basis for negotiating new or successor interconnection agreements. Allowing a CLEC to use its existing interconnection agreement as a starting point for negotiation would be another way to reduce the transaction costs associated with entering into a new interconnection agreement. CLECs are familiar with their own interconnection agreements and are not likely to face unexpected interpretations or consequences if the starting point is their own agreement.

## II. <u>INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC</u>

**Q. WHAT SHOULD THE COMMISSION DO WITH RESPECT TO ISP-BOUND TRAFFIC COMPENSATION?**

A. As a condition of this merger, the Commission should require that Qwest abide by all state commission and FCC orders, including the reciprocal compensation requirements of Section 251(b)(5) and the FCC's November 2008 *Order on* Mandamus. Section 251(b)(5) of the Telecommunications Act imposes a duty on all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[2] Since the FCC's *Order on Mandamus* in November 2008, the term "telecommunications" under the Act is not "limited geographically ('local,' 'intrastate,' or 'interstate') or to particular services…."[3] In that Order, the FCC made it clear that ISP-bound traffic was subject to Section 251(b)(5), and "that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic."[4] The D.C. Circuit, the court with jurisdiction to review FCC decisions and the most experience handling these types of FCC decisions, fully affirmed the FCC's decision.[5] Pac-West's initial complaint on the VNXX issue was filed with the Commission in June 2005, and Pac-West has now litigated this issue with Qwest in Washington for over five years. Yet despite the clear federal holding that a carrier such as Pac-West serving an ISP is entitled to be compensated for terminating another carrier's traffic, Qwest persists in refusing to pay Pac-West, arguing that section 251(b)(5) is somehow ***still*** limited to local traffic. This argument flatly contradicts the FCC's and the D.C. Circuit's orders that there are no such local limits to section 251(b)(5) traffic and to the obligation to compensate Pac-West for ISP-bound traffic. There seems to be no end to Qwest's strategy of continuous litigation which has gone on for over five years. Qwest

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[2] 47 U.S. C. §251(b)(5).
[3] FCC *Order on Mandamus*, ¶ 8.
[4] *ISP Mandamus Order* ¶ 8, ¶¶17-22.
[5] *Core Comm'ns, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010).

simply refuses to take the FCC's "no" for an answer.

**Q. WHAT HAS QWEST DEMANDED WITH RESPECT TO ISP-BOUND TRAFFIC**

A. Qwest has, for years, refused to pay Pac-West anything for what it has categorized as "VNXX" ISP-bound traffic. Even worse, CenturyLink, has demanded in its service territory that Pac-West pay originating access charges on such traffic. Both carriers' positions violate both the FCC *Core ISP Order*[6] and FCC regulations.[7] FCC orders and implementing regulations simply do not permit a "local" traffic pre-condition for ISP-bound traffic compensation.

**Q. WHAT ARE THE DETAILS OF THE VNXX ISP-BOUND TRAFFIC DISPUTE?**

A. Pac-West provides service to a large number of ISPs and offers virtual NXX (VNXX) arrangements, which are locally dialed ISP-bound calls originated by a caller physically located outside the local calling area. These arrangements allow Pac-West's ISP customers to offer their competitive services over a broader service territory and help bring new competitive ISP alternatives to Washington. In Washington, Qwest has refused to compensate Pac-West for terminating Qwest customer traffic when Pac-West utilizes a VNXX arrangement for the terminating customer. Pac-West has sought termination at the level set by the FCC in the *ISP Remand Order* for ISP-bound traffic -- $0.0007 cents per minute -- which is a much lower rate than the rate ILECs bill for the

[6] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 01-92, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (rel. Nov. 5, 2008) ("*Core ISP Order*").
[7] 47 C.F.R. § 51.703(b).

termination of local traffic. It is also the lowest FCC-mandated rate for any type of traffic exchange. Yet, Qwest continues to refuse to pay at that rate and to litigate.

In June of 2005, when this litigation was initiated in Washington by Pac-West, parties could have reasonably differed on what federal law required. However, since 2006 – when the Commission ordered Qwest to pay Pac-West for all ISP-Bound traffic – the FCC in the November 2008 ISP *Order on Mandamus* and the D.C. Circuit have issued orders that support the Washington Commission's conclusion that this traffic was compensable and rejecting the contrary conclusion that VNXX ISP-bound traffic is limited to traffic originating and terminating within the local calling area and not eligible for reciprocal compensation.[8]

**Q. WHAT HAS BEEN THE COURSE OF THE QWEST'S LITIGATION TO DATE?**

**A.** Qwest has been very successful in extending the life of its challenge to the FCC's VNXX orders, and is continuing to find ways to extend the life of the dispute. Although it is not necessary to get into the details of all the steps in the process, it is worth noting that the case was initially filed in 2005, decided on by the Commission in 2008, appealed by Qwest to federal district court, and the Commission was reversed by the district court in 2007. But despite the fact that the FCC clarified the VNXX issue in November 2008, and was affirmed by the D.C. Circuit earlier this year, Qwest continues to litigate this issue in

[8] *See, Pac-West telecom, inc. v. Qwest Corporation,* Docket No. UT-053036, Order No. 05, issued February 10, 2006, reconsideration denied in Order No. 06, issued June 9, 2006.Pac-West v. Qwest, Decision No. 68820; Docket No. T-01051B-05-0495 and T-03693A-05-0495 (complaint filed on July 13, 2005).

Washington.

**Q. WHAT IS THE IMPACT OF QWEST'S ONGOING INTRANSIGENCE ON THIS ISSUE?**

A. Qwest's continued litigation over reciprocal compensation has had the dual effect of forcing Pac-West to provide services without compensation, while saddling Pac-West with the exposure associated with significant (albeit meritless) compensation claims. When Qwest initially lost this issue to Pac-West back in 2006[9], Qwest was required to make payment on past due reciprocal compensation payments for ISP-bound traffic. However, in connection with its ongoing litigation, Qwest asserted a clawback claim, that if Qwest were to prevail ultimately in its ongoing litigation, Pac-West would be required to pay back approximately $2 million in payments made by Qwest, for traffic exchanged prior to 2006. Qwest insisted that it obtain a written commitment to this clawback claim when Pac-West was exiting from bankruptcy, a special claim that few other participants in the proceeding required. Four years later, Qwest continues to assert this claim and Pac-West continues to carry this exposure on its books, despite the fact that the law has clearly precluded Qwest's clawback claim since 2008. If not required to follow FCC rules and orders, Qwest could force Pac-West to carry this burden for another four years, simply by continuing to litigate.

[9] *Id.*

**Q. IS THIS THE ONLY CLAWBACK CLAIM ASSERTED BY QWEST AND CENTURYLINK AGAINST PAC-WEST?**

A. No. In fact, there is an additional clawback claim of approximately $1 million on the same issue in Arizona, for a total of $3 million in claims by Qwest. In addition, CenturyLink has asserted a separate dispute on the same issue in Nevada, although CenturyLink takes the more aggressive position that originating access applies to VNXX traffic. Not only does CenturyLink not remit reciprocal compensation to Pac-West, but actually claims that Pac-West owes CenturyLink originating access charges for ISP-bound traffic. The CenturyLink claim is for over $4 million, bringing the total VNXX claims by the two companies to over $7 million. Pac-West has on all claims pointed out that the law has changed as of November 2008, and that there is no legal gravamen for the disputes. But neither Qwest nor CenturyLink has been willing to recognize the FCC's *ISP Mandamus Order*, nor the D.C. Circuit decision affirming it. The strategy of each company has been to impose unwarranted exposure on Pac-West, and extend the life of those claims through litigation.

**Q. HAS THIS ISSUE BEEN RESOLVED BY OTHER INCUMBENT LOCAL EXCHANGE CARRIERS OUTSIDE THE QWEST REGION?**

A. Yes. Unlike Qwest, which continues to dig its heels in on this issue, the issue of VNXX traffic has long since been resolved in other parts of the country. For years, BellSouth has made a 9-state agreement available throughout the BellSouth region that allows for LATA-wide VFX at the $0.0007 rate. Similarly, the issue has been resolved in

California for several years, again, with payment for all ISP-bound, including VNXX traffic at $0.0007. AT&T has also offered a 13-state amendment in states ranging from Arkansas to Connecticut to Texas to Wisconsin that provides for VNXX in the same compensation range across a broad footprint. These agreements often require interconnection at each tandem, which itself is an onerous requirement. But these carriers have long since put this issue behind them, unlike Qwest, which is clinging to claims on traffic exchanged over five years ago, and will not come to terms on reasonable VNXX arrangements anywhere in its territory.

**Q. WHY ADDRESS THIS ISSUE IN THE MERGER PROCEEDING?**

A. It was June of 2005 when Pac-West filed a complaint with this Commission to recover reciprocal compensation payments owed by Qwest for ISP-Bound traffic. The Commission ruled in Pac-West's favor on February of 2006.[10] Qwest has not ceased litigating that dispute despite rulings by the FCC and the D.C. Circuit Court of Appeals clarifying that ISP-Bound traffic need not be local to be compensated. The Merged Entity may continue refusing to pay carriers the reciprocal compensation owed under federal law because to delay is to win if your adversary has fewer resources. Of particular concern to Pac-West is the fact that CenturyLink has taken an even more extreme position than Qwest, arguing in Nevada that originating access charges apply to VNXX traffic, despite the fact that the federal rules clearly preclude applying access charges to the origination of 251(b)(5) traffic. The Commission should be concerned

[10] *Id.*.

that the Merged Entity could go from bad to worse on this issue and take an even more aggressive position against CLECs such as Pac-West. The Merged Entity will have even greater pressure and leverage to drag out disputes where payment is otherwise required to preserve Merged Entity revenues and reduce competitor revenues. Pac-West asks that the Commission resolve this issue before the merger is approved by instructing Qwest to abide by the FCC's rules and orders, and to make payment for all ISP-bound traffic at the reciprocal compensation rate, including VNXX traffic, without regard to the geographic reach of the call.

## III. QWEST HAS REFUSED TO OFFER PAC-WEST A NONDISCRIMINATORY VOIP AMENDMENT.

**Q. HAS PAC-WEST SOUGHT A VOIP AMENDMENT FROM QWEST IN WASHINGTON?**

**A.** Yes. The amendment requested by Pac-West would permit Pac-West to terminate traffic originated as Voice over Internet Protocol ("VoIP") to Qwest in Washington. Pac-West requested the arrangement because we had identified VoIP termination amendments that Qwest had entered into with other CLECs across the Qwest footprint, including in Washington. Pac-West initially negotiated this arrangement in its interconnection agreement with Qwest in Arizona, which was in the process of being renegotiated. When Pac-West finalized its Arizona agreement with Qwest in May 2010, I requested that Qwest provide the same arrangement in the other six states in which Pac-West operates, including Washington.

**Q. DID QWEST OFFER YOU THE ARRANGEMENT IN WASHINGTON IN MAY?**

A. No, despite the fact that Pac-West raised the fact that other carriers had the arrangement in Washington and other states, Qwest said that it was not willing to negotiate amendments in those states until they saw how the arrangement worked in Arizona. Pac-West objected because Qwest has had VoIP termination agreements in place for some time in Arizona and elsewhere with other carriers, and we wanted to get the process started in the other states. In light of these delays, Pac-West raised this issue to Qwest as a matter of discriminatory treatment.

**Q. WHEN PAC-WEST RAISED THE ISSUE IN THE CONTEXT OF THE MERGER PROCEEDINGS, DID QWEST CHANGE ITS POSITION?**

A. Yes, on the same day FCC comments were due, Qwest first communicated to Pac-West that it has a generic VoIP amendment available to all CLECs, a significant change to its previous demurral. While previously Qwest was not willing to negotiate a Washington VoIP termination amendment, once its refusal to negotiate was brought to light, Qwest changed its position on offering a Washington amendment. The parties then began negotiating the terms of the amendment. After several weeks of negotiations, Qwest notified Pac-West on August 6 that there was a different amendment we should be using, although Qwest did incorporate the negotiated redlines into this new amendment.

**Q. AS OF SEPTEMBER 27, 2010, HAS QWEST AGREED TO TERMS ON THE VOIP AMENDMENT FOR WASHINGTON?**

**A.** No. The parties continue to negotiate more than four months after Pac-West initially requested the amendment back in May. The parties were close to reaching agreement when Qwest raised a new issue late in the negotiations, claiming that the amendment was only available to Pac-West if it were willing to only receive $0.0007 or less as a reciprocal compensation rate for Pac-West's termination of Qwest's section 251(b)(5) traffic. Qwest claimed that this was necessary due to limitations in their billing systems and because they had only offered the amendment to carriers that were either bill and keep or at $0.0007 for all traffic. In fact, Qwest entered into a VoIP termination agreement with Pac-West in Arizona, despite the fact that Pac-West does not accept the lower $0.0007 rate there. In addition, Pac-West has proposed a simple billing solution to Qwest's ostensible billing issues, but Qwest is still requiring the lower $0.0007 rate. It is Pac-West's view that Qwest is trying to force Pac-West to a lower rate and pay less reciprocal compensation as a price to pay for requesting a nondiscriminatory VoIP amendment. This Qwest billing issue was never raised by Qwest in Arizona, and only recently raised in Washington.

**Q. ARE PAC-WEST AND QWEST STILL NEGOTIATING THE AMENDMENT?**

**A.** Yes. Pac-West is willing to reach a reasonable settlement with Qwest and CenturyLink. Pac-West will continue negotiating and is hopeful that it will receive a nondiscriminatory amendment from Qwest in Washington before this proceeding concludes. However, in the event this has not been achieved by then, Pac-West recommends the Commission add this as a condition.

**Q. WHAT MERGER CONDITION DOES PAC-WEST RECOMMEND THE COMMISSION IMPOSE ON THE MERGED ENTITY WITH RESPECT TO VOIP AMENDMENTS?**

A. Pac-West's issue is a simple one of nondiscrimination. Qwest should offer the same amendment terms to all CLECs in Washington so as not to pick favorites among its competitors. Pac-West has been forced to resell services through other carriers that have this same VoIP amendment in their ICAs, despite the fact that Pac-West has an equal right to a direct relationship with Qwest. This type of discrimination is clearly not permitted in Washington.[11] The Commission should require the Merged Entity to offer nondiscriminatory VoIP amendments in Washington, without exacting concessions, such as lower reciprocal compensation rates.

**Q. WHY IS THIS AN ISSUE IN THIS MERGER PROCEEDING?**

A. The issue raised by Qwest's refusal to negotiate a nondiscriminatory VoIP amendment is essential to the development of competition in Washington. The issue of how VoIP traffic should be rated and routed has been very contentious. If the Merged Entity is able to pick and choose which carriers it will originate and terminate VoIP traffic with, it could potentially determine which CLECs will be able to continue to compete as more

[11] *See,* RCW 80.36.170 (unreasonable preference prohibited); RCW 80.36.180 (rate discrimination prohibited); RCW 80.36.186 (pricing of or access to noncompetitive services--unreasonable preference or advantage prohibited).

and more traffic becomes VoIP. By picking favorites, the Merged Entity could exert undue influence on CLECs, forcing them to take certain legal or regulatory positions, or establish unfavorable operational arrangements in order to obtain reasonable VoIP termination terms and conditions. It is, therefore, critical that the Commission require nondiscriminatory treatment of CLECs by the Merged Entity going forward, in order for competition to continue to develop in Washington.

## IV. PAC-WEST SUPPORTS THE CONDITIONS RAISED BY THE JOINT CLECS.

**Q. DOES PAC-WEST ALSO SUPPORT THE CONDITIONS PROPOSED BY THE JOINT CLECS?**

A. Yes. Telecommunications competition in Washington is good for consumers, good for the State's economy, and critical for business growth in general. Competitors have a proven track record of providing new and innovative services, improved customer service and lower prices for consumers. The acquisition of Qwest, by an independent local exchange carrier which serves mostly rural areas, threatens to undermine Washington's substantial progress in promoting competition. For this reason, Pac-West supports the conditions proposed by the Joint CLECs. These conditions are designed to continue the development of competition in Washington by preserving the systems and processes that already exist (e.g. OSS, QPAP, and arbitration process). In addition, many of the Joint CLEC conditions address concerns that are of critical importance to Pac-West, such as improved interconnection negotiation requirements. Without the Joint CLEC conditions, telecommunications competition will be vulnerable.

**Q. PLEASE SUMMARIZE YOUR TESTIMONY**

A. Neither Qwest nor CenturyLink have shared with competitors their post-merger plans for wholesale services. This is problematic. The Merged Entity could embrace its role as a wholesale provider, dismiss its appeals challenging carrier compensation awards, and maintain and improve its wholesale systems. Alternatively, the Merged Entity could continue litigating lost cases, persist in withholding intercarrier compensation, and cease supporting its wholesale systems and operations. To avert this second scenario, Pac-West requests that the Commission impose the conditions identified above, as well as the conditions proposed by the Joint CLECs. Only by imposing conditions will the Commission ensure that Washington remains a pro-competitive, innovative, and affordable state for competitive telecommunications.

**Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

A. Yes.