

BEFORE THE PUBLIC UTILITY COMMISSION OF

OREGON

UM 1484

In the Matter of )  
CENTURYTEL, INC. ) QWEST'S AND CENTURYLINK'S  
Application for an Order to Approve the ) RESPONSE TO THE JOINT CLECS'  
Indirect Transfer of Control of QWEST ) MOTION TO AMEND SCHEDULE  
CORPORATION ) AND EXPEDITED ORAL  
 ) ARGUMENT REQUESTED  
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Applicant CenturyLink, Inc. ("CenturyLink") and intervenor Qwest Communications International, Inc. ("Qwest") (collectively "the Joint Respondents") hereby respond to the motion to amend the schedule ("Motion") and request for expedited oral argument that the "Joint CLECs" filed on Monday, October 11, 2010.<sup>1</sup> The Motion is not necessary, and any delay in the hearing schedule that was set four months ago would unduly prejudice the Joint Applicants and would inconvenience the Commission, all of the numerous witnesses, counsel and support personnel. Finally, any delay is the result of the Joint CLECs' own delay and lack of diligence in the discovery process.

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<sup>1</sup> The Joint CLECs are the following intervenors: The Joint CLECs are the following intervenors: XO Communications Services, Inc., tw telecom of oregon, llc, Integra Telecom of Oregon, Inc., Integra Telecom of Oregon, Inc., Advanced TelCom, Inc., Electric Lightwave, LLC, Eschelon Telecom of Oregon, Inc., Oregon Telecom Inc., and United Telecommunications Inc. d/b/a Unicom, Covad Communications Company, PriorityOne Telecom, Inc., and Charter Fiberlink OR-CCVII, LLC.

## ARGUMENT

CenturyLink filed its application for expedited approval of the proposed merger on May 24, 2010, along with a request for entry of the standard protective order, which the Commission issued on May 26, 2010. Due to numerous data requests that Commission Staff had issued that required production of highly-confidential information, on June 21, 2010, CenturyLink then filed a motion for a protective order addressing highly-confidential information with a proposed protective order. The Joint CLECs opposed the motion on June 23, 2010, and CenturyLink replied to the opposition on July 7, 2010. Thereafter, Administrative Law Judge Allan Arlow issued the highly-confidential protective order that CenturyLink had requested on July 30, 2010.

In the meantime, although CenturyLink had filed its application on May 24, 2010, it was not until June 29, 2010, more than a month later, that the Joint CLECs submitted their first set of substantive data requests, consisting of 156 data requests, plus subparts.<sup>2</sup> The Respondents promptly and timely responded to the data requests on July 14, 2010, at which time they objected to the production of any HSR documents in their responses to Joint CLEC data request No 147.

Specifically, CenturyLink objected as follows:

CenturyLink objects to this request insofar as it is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The filings prepared by CenturyLink as required by the HSR Act are specifically designed to provide to the Department of Justice and the

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<sup>2</sup> The Joint Respondents received four previous data requests that merely asked them to provide copies of their responses to data requests that Commission Staff had issued.

Federal Trade Commission the information that it requires to analyze the merger on a national level addressing specific federal antitrust issues. This is not the proper jurisdiction for such an analysis. In addition, the information requested is highly confidential, commercially sensitive information the release of which, particularly to CenturyLink's competitors such as Joint CLECs, would cause irreparable competitive harm to CenturyLink, the impact of which would not be mitigated by the terms of the Protective Order.

Qwest objected to this data request as follows:

Qwest objects to this request insofar as it is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The filings prepared by Qwest as required by the HSR Act are specifically designed to provide to the Department of Justice and the Federal Trade Commission the information that it requires to analyze the merger on a national level addressing specific federal antitrust issues under the Clayton Act. This is not the proper jurisdiction for such an analysis. In addition, the information requested is highly confidential, commercially sensitive information the release of which, particularly to Qwest's competitors such as Integra, would cause irreparable competitive harm to Qwest, the impact of which would not be mitigated by the terms of the Protective Order.

Despite that the Joint Respondents objected to the Joint CLECs' request for HSR documents in Oregon on July 14, 2010, it was not until about September 15, 2010, *more than two months later*, that the Joint CLECs indicated, *for the first time*, that they intended to file a motion to compel in Oregon if the Joint Respondents did not produce any withheld HSR documents.

On August 24, the Joint CLECs filed more than 400 pages of testimony, and hundreds of pages of exhibits (totaling more than six inches in height). They did so without having moved to compel the HSR documents that are at issue in this motion.

Staff filed its testimony on September 3, 2010, and CenturyLink and Qwest then filed their rebuttal testimony on September 21, 2010.

On Friday, September 17, 2010, almost a month after they filed their testimony, and one business day before they filed their HSR motion to compel, Integra served a second voluminous set of data requests (Nos. 157 to 189). These data requests included the data requests at issue (nos. 157-162) in their just-filed October 11, 2010 motion to compel that forms the second bases for their concurrent motion to delay the procedural schedule. These data requests were served only five weeks before the October 20-21, 2010 hearing, and thus the responses were provided on October 1, 2010, three weeks before the hearing.

Thereafter, on Monday, September 20, 2010, one month before the October 20-21 hearing, and more than two months after CenturyLink and Qwest objected to the production of HSR documents, on July 14, 2010, the Joint CLECs filed their HSR motion to compel. CenturyLink and Qwest responded to the motion on October 5, 2010. However, because the Administrative Law Judge in Minnesota had ruled a few days before that the HSR documents had to be produced in that proceeding, and because CenturyLink and Qwest did in fact produce them on or around October 1, 2010, CenturyLink and Qwest agreed on October 7, 2010 to produce the HSR documents in Oregon, while maintaining their objections, thereby making the Joint CLECs' September 20th HSR motion to compel moot. Qwest then produced its remaining HSR documents

on October 8, 2010,<sup>3</sup> and CenturyLink produced its remaining HSR documents on October 12, 2010.<sup>4</sup>

The procedural history is important here to show several key facts. First, despite claiming that they somehow “need” these HSR documents to make their case, the Joint CLECs were able to file more than *400 pages* of testimony, and hundreds of pages of discovery (after propounding hundreds of data requests, with multiple subparts), almost *one month before* they filed their motion to compel. Second, despite that they knew on July 14, 2010 that CenturyLink and Qwest objected to the production of these documents, they did nothing about those documents until demanding, *for the first time* and *more than two months later* (on September 15, 2010), that they intended to file a motion to compel in Oregon if the Respondents did not produce the withheld HSR documents.

CenturyLink and Qwest can only surmise that either Joint CLECs intentionally waited to file the Motion or were so consumed disputing the very same discovery in other states that they simply neglected to do so in Oregon. Whatever the case, if not having this information were so important to Joint CLECs’ case, they would not have

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<sup>3</sup> On October 1, 2010, Qwest provided to Integra numerous highly-confidential HSR documents that it had previously provided to Commission Staff in response to Staff data requests No. 66.

<sup>4</sup> In their motion, the Joint CLECs argue about motions for *in camera* review and the concept of “Staff’s Eyes Only” (“SEO”) designations. (Motion, pp. 2-3.) However, none of that is relevant to the issues in Oregon, where the Joint Respondents did not seek any “Staff’s Eyes Only” status or a request for any *in camera* review. The Joint CLECs simply did not approach the Joint Respondents about the HSR documents in Oregon until very recently, and only did so immediately before filing their September 20, 2010 motion to compel HSR documents..

waited until just weeks before the hearing (months after receiving the data) to challenge CenturyLink's and Qwest's stated objections to providing the HSR information.

In this context, it is clear that this Motion to Amend the schedule, the late-filed motion to compel production of the HSR documents, and the recently-filed and unsupported motion to compel<sup>5</sup> are not intended to aid the Joint CLECs' case. The motions filed by Joint CLECs will only serve to cause delay in the Commission's review of the Merger, and will not result in the inclusion of relevant, additional information to the record. Further, amending the schedule would result in delay that would unduly prejudice CenturyLink and Qwest, and would inconvenience the Commission, all of the numerous witnesses, counsel and support personnel.

The Commission scheduled these hearing dates four months ago. To change them now, for what appears to be a procedural gambit by the Joint CLECs to introduce new, largely irrelevant evidence and apply pressure on the Joint Respondents, would not set the appropriate example for future cases before this Commission.

Further still, the practical effect of granting the Joint CLECs' motion would be a great inconvenience to all of the parties and witnesses here. The Joint Respondents note that by their count, there were at least 28 witnesses who filed testimony, and most of them live and work outside of Oregon and thus have made the appropriate travel and work arrangements. All of these witnesses did so with the understanding that the

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<sup>5</sup> Please refer to Joint Respondent's simultaneously filed Response to the Joint CLECs' Motion to Compel, explaining why that Motion is moot and should be denied.

hearing would take place on October 20 and 21, 2010, after the parties all agreed to those dates back in June. To change the date at the eleventh hour, especially based on the Joint CLECs sitting on their hands and waiting until the last minute to compel or seek certain irrelevant discovery, would be an enormous inconvenience to all those involved, and would be a disservice to the parties in this important proceeding. Moreover, even though the Joint CLECs have agreed to a delay, the practical effect is that the particular dates that the Joint CLECs suggest will not be available to at least some of the participants, especially given everyone's busy schedules, including their participation in other merger dockets across the country.<sup>6</sup> Thus, for the Commission to simply vacate these dates based on this last-minute request would be an undue hardship and prejudice to the Commission and the parties.

Finally, even in the event the Commission were to be sympathetic to the CLECs' dubious request, in no case should the hearings next week be canceled, and there is no need for such drastic action. As mentioned, the parties have invested substantial resources in preparations and travel arrangements for those hearings, and it is simply too late in the process to cancel them without substantial prejudice. At the most, the Commission could consider (although the Joint Respondents do not believe it is

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<sup>6</sup> As the Joint CLECs themselves note (see Motion, p. 4, fn. 7), proposed hearing dates in the future are not very feasible given the hearing schedules in merger approval proceedings in other states, and the fact that many of the counsel and witnesses involved in those hearings are also counsel in witnesses in this proceeding. As the Joint CLECs further note (Motion, p. 5, fn. 9), there are hearings scheduled in seven other states just in the month of November alone. The CLECs do not mention, however, that there is also another hearing the week after the one here (October 26-27 in Utah), and that they have filed an almost identical motion to delay that hearing as well (also with proposed December dates). In short, the likelihood of all counsel, witnesses and Commission personnel to be available on the two suggested days is practically nil.

necessary for the reasons stated above) providing for a brief additional round of pre-filed testimony and a half-day hearing for the very limited purpose of addressing any relevant issues the Joint CLECs identify based on their review of the HSR documents.

**CONCLUSION**

For all of these reasons, the Joint Respondents respectfully submit that the Commission should deny the Joint CLECs' Motion in its entirety.

DATED: October 14, 2010

Respectfully submitted,

CENTURYLINK

QWEST



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William Hendricks, III  
CenturyLink  
805 Broadway Street  
Vancouver, WA 98660  
(360) 905-5949 (office)  
(541) 387-9439 (secondary office)  
[Tre.Hendricks@CenturyLink.com](mailto:Tre.Hendricks@CenturyLink.com)

---

Alex M. Duarte  
Qwest Law Department  
310 SW Park Avenue, 11th Floor  
Portland, OR 97205  
503-242-5623  
503-242-8589 (fax)  
[Alex.Duarte@qwest.com](mailto:Alex.Duarte@qwest.com)

Attorney for CenturyLink, Inc.

Attorney for Qwest Communications  
International, Inc.



**CERTIFICATE OF SERVICE**  
**UM-1484**

I certify that on October 14, 2010, a true and correct copy of CenturyLink and Qwest's Response to Joint CLECs Motion to Amend the Schedule in Docket UM-1484 was served on the following parties via electronic mail and where paper service is not waived, by U.S. mail:

W	Charles L Best Attorney At Law 1631 NE Broadway #538 Portland, OR 97232-1425 <a href="mailto:chuck@charleslbest.com">chuck@charleslbest.com</a>	W	Michel Singer Nelson 360networks (USA) Inc. 370 Interlocken Blvd Ste 600 Broomfield, CO 80021-8015 <a href="mailto:mnelson@360.net">mnelson@360.net</a>
W	Penny Stanley 360networks (USA) inc. 370 Interlocken Blvd Ste 600 Broomfield, CO 80021-8015 <a href="mailto:penny.stanley@360.net">penny.stanley@360.net</a>	W	Arthur A Butler Ater Wynne LLP 601 Union Street, Ste 1501 Seattle, WA 98101-3981 <a href="mailto:aab@aterwynne.com">aab@aterwynne.com</a>
W	Joel Paisner Ater Wynne LLP 601 Union St Ste 1501 Seattle, WA 98101-2327 <a href="mailto:jrp@aterwynne.com">jrp@aterwynne.com</a>	W	Richard Stevens Central Telephone Inc. PO Box 25 Goldendale, WA 98620 <a href="mailto:rstevens@gorge.net">rstevens@gorge.net</a>
W	John Felz CenturyLink 5454 W 110 <sup>th</sup> St KSOPKJ0502 Overland Park, KS 66211 <a href="mailto:john.felz@centurylink.com">john.felz@centurylink.com</a>	W	Michael R. Moore Charter Fiberlink OR – CCVII, LLC 12405 Powerscourt Dr. St. Louis, MO 63131 <a href="mailto:michael.moore@chartercom.com">michael.moore@chartercom.com</a>
W	Gordon Feighner Citizens Utility Board of Oregon 610 SW Broadway, Ste 400 Portland, OR 97205 <a href="mailto:gordon@oregoncub.org">gordon@oregoncub.org</a>	W	Robert Jenks Citizens Utility Board of Oregon 610 SW Broadway, Ste 400 Portland, OR 97205 <a href="mailto:bob@oregoncub.org">bob@oregoncub.org</a>
W	G. Catriona McCracken Citizens Utility Board of Oregon 610 SW Broadway, Ste 400 Portland, OR 97205 <a href="mailto:catriona@oregoncub.org">catriona@oregoncub.org</a>	W	Raymond Myers Citizens Utility Board of Oregon 610 SW Broadway, Ste 400 Portland, OR 97205 <a href="mailto:ray@oregoncub.org">ray@oregoncub.org</a>

W Kevin Elliott Parks  
Citizens Utility Board of Oregon  
610 SW Broadway, Ste 400  
Portland, OR 97205  
[kevin@oregoncub.org](mailto:kevin@oregoncub.org)

W David Hawker  
City of Lincoln City  
801 SW Highway 101  
Lincoln City, OR 97367  
[davidh@lincolncity.org](mailto:davidh@lincolncity.org)

W Douglas R. Holbrook  
Holbrook & Seifert, LLC  
PO Box 2087  
Newport, OR 97367  
[doug@lawbyhs.com](mailto:doug@lawbyhs.com)

W Charles Jones  
Communication Connection  
14250 NW Science Park Dr. – Ste B  
Portland, OR 97229  
[charlesjones@cms-nw.com](mailto:charlesjones@cms-nw.com)

W Marsha Spellman  
Converge Communications  
10425 SW Hawthorne Ln.  
Portland, OR 97225  
[marsha@convergecomm.com](mailto:marsha@convergecomm.com)

W Frank G Patrick  
Corporate Lawyers PC  
PO Box 231119  
Portland, OR 97281  
[fgplawpc@hotmail.com](mailto:fgplawpc@hotmail.com)

Katherine K. Mudge  
Covad Communications Co.  
7000 N Mopac Expwy 2<sup>nd</sup> Fl  
Austin, TX 78731  
[kmudge@covad.com](mailto:kmudge@covad.com)

W K C Halm  
Davis Wright Tremaine, LLP  
1919 Pennsylvania Ave NW 2<sup>nd</sup> Fl  
Washington DC 20006-3458  
[kchalm@dwt.com](mailto:kchalm@dwt.com)

W Gregory J. Kopta  
Davis Wright Tremaine, LLP  
1201 Third Ave – Ste 2200  
Seattle, WA 98101-1688  
[gregkopta@dwt.com](mailto:gregkopta@dwt.com)

W Mark P. Trincherro  
Davis Wright Tremaine, LLP  
1300 SW Fifth Ave Ste 2300  
Portland, OR 97201-5682  
[marktrincherro@dwt.com](mailto:marktrincherro@dwt.com)

Jason W. Jones  
Department of Justice  
Assistant Attorney General  
1162 Court St NE  
Salem, OR 97301-4096  
[jason.w.jones@state.or.us](mailto:jason.w.jones@state.or.us)

W Judith Endejan  
Graham & Dunn PC  
2801 Alaskan Way, Ste 300  
Seattle, WA 98121  
[jendejan@grahamdunn.com](mailto:jendejan@grahamdunn.com)

W Gregory Merz  
Gray Plant Mooty  
500 IDS Center  
80 S. Eighth St.  
Minneapolis, MN 55402  
[gregory.merz@gpmlaw.com](mailto:gregory.merz@gpmlaw.com)

W Karen L. Clauson  
Integra Telecom, Inc.  
6160 Golden Hills Dr.  
Golden Valley, MN 55416-1020  
[klclauson@integratelecom.com](mailto:klclauson@integratelecom.com)

W Greg L. Rogers  
Level 3 Communications LLC  
1025 Eldorado Blvd  
Broomfield, CO 80021  
[greg.rogers@level3.com](mailto:greg.rogers@level3.com)

W Wayne Belmont  
Lincoln County Legal Counsel  
225 W Olive St., Rm 110  
Newport, OR 97365  
[wbelmont@co.lincoln.or.us](mailto:wbelmont@co.lincoln.or.us)

W Adam Lowney  
McDowell Rackner & Gibson PC  
419 SW 11<sup>th</sup> Ave, Ste 400  
Portland, OR 97205  
[adam@mcd-law.com](mailto:adam@mcd-law.com)

W Wendy McIndoo  
McDowell Rackner & Gibson PC  
419 SW 11<sup>th</sup> Ave., Ste 400  
Portland, OR 97205  
[wendy@mcd-law.com](mailto:wendy@mcd-law.com)

W Lisa F. Rackner  
McDowell Rackner & Gibson PC  
419 SW 11<sup>th</sup> Ave., Ste 400  
Portland, OR 97205  
[lisa@mcd-law.com](mailto:lisa@mcd-law.com)

W Greg Marshall  
Northwest Public Comm. Council  
2373 NW 185<sup>th</sup> Ave - #310  
Hillsboro, OR 97124  
[gmarshall@corbantechologies.com](mailto:gmarshall@corbantechologies.com)

W Randy Linderman  
Pacific Northwest Payphone  
1315 NW 185<sup>th</sup> Ave., Ste 215  
Beaverton, OR 97006-1947  
[rlinderman@gofirestream.com](mailto:rlinderman@gofirestream.com)

W Edwin B. Parker  
Parker Telecommunications  
PO Box 402  
Glenden Beach, OR 97388  
[edparker@teleport.com](mailto:edparker@teleport.com)

W Kelly Mutch  
PriorityOne Telecommunications Inc.  
PO Box 758  
La Grande, OR 97850-6462  
[managers@p1tel.com](mailto:managers@p1tel.com)

W Bryan Conway  
Public Utility Commission of Oregon  
PO Box 2148  
Salem, OR 97308-2148  
[bryan.conway@state.or.us](mailto:bryan.conway@state.or.us)

W Michael Dougherty  
Public Utility Commission of Oregon  
PO Box 2148  
Salem, OR 97308-2148  
[michael.dougherty@state.or.us](mailto:michael.dougherty@state.or.us)

Patrick L. Phipps  
QSI Consulting, Inc.  
3504 Sundance Dr.  
Springfield, IL 62711

Alex M. Duarte  
Qwest Corporation  
310 SW Park Ave. 11<sup>th</sup> Fl  
Portland, OR 97205-3715  
[alex.duarte@qwest.com](mailto:alex.duarte@qwest.com)

Mark Reynolds  
Qwest Corporation  
1600 7<sup>th</sup> Ave Rm 3206  
Seattle, WA 98191  
[mark.reynolds3@qwest.com](mailto:mark.reynolds3@qwest.com)

W Diane Browning  
Sprint Communications Co. LP  
6450 Sprint Pkwy  
Overland Park, KS 66251  
[diane.c.browning@sprint.com](mailto:diane.c.browning@sprint.com)

W Kenneth Schifman  
Sprint Communications Co. LP  
6450 Sprint Pkwy  
Overland Park, KS 66251  
[kenneth.schifman@sprint.com](mailto:kenneth.schifman@sprint.com)

W Kristin L. Jacobson  
Sprint Nextel  
201 Mission St. Ste 1500  
San Francisco, CA 94105  
[kristin.l.jacobson@sprint.com](mailto:kristin.l.jacobson@sprint.com)

Dave Conn  
T-Mobile USA, Inc.  
12920 SE 38<sup>th</sup> St.  
Bellevue, WA 98006  
[dave.conn@t-mobile.com](mailto:dave.conn@t-mobile.com)

W William Sargent  
Tillamook County Counsel  
1134 Main Ave.  
Tillamook, OR 97141  
[wsargent@oregoncoast.com](mailto:wsargent@oregoncoast.com)

Lyndall Nipps  
tw telecom of Oregon, LLC  
9665 Granite Ridge Dr. – Ste 500  
San Diego, CA 92123  
[lyndall.nipps@twtelecom.com](mailto:lyndall.nipps@twtelecom.com)

Barbara Young  
CenturyLink  
902 Wasco St ORHDRA0305  
Hood River, OR 97031  
[barbara.c.young@centurylink.com](mailto:barbara.c.young@centurylink.com)

W Adam Haas  
WSTC  
10425 SW Hawthorne Ln  
Portland, OR 97225  
[adamhaas@convergecomm.com](mailto:adamhaas@convergecomm.com)

Rex M. Knowles  
XO Communications Services, Inc.  
7050 Union Park Ave – Ste 400  
Midvale, UT 84047  
[rex.knowles@xo.com](mailto:rex.knowles@xo.com)

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Rhonda Kent

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