

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of

CENTURYLINK, INC.,

Application for Approval of Merger between
CenturyTel, Inc. and Qwest Communications
International, Inc.

Docket No. UM 1484

**CHARTER, LEVEL 3, COVAD AND tw
telecom RESPONSE IN OPPOSITION
TO QWEST'S AND CENTURYLINK'S
MOTION TO STRIKE CERTAIN
PORTIONS OF SUPPLEMENTAL
TESTIMONY OF TIMOTHY J. GATES
AS IMPROPER SURREBUTTAL
TESTIMONY**

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QWEST'S AND CENTURYLINK'S MOTION TO STRIKE CERTAIN PORTIONS OF
SUPPLEMENTAL TESTIMONY OF TIMOTHY J. GATES AS IMPROPER
SURREBUTTAL TESTIMONY**

Charter Fiberlink OR-CCVII, LLC, Level 3 Communications, LLC, Covad
Communications Company and tw telecom of oregon, llc (collectively "Respondents") oppose
the Joint Movants¹ motion to strike certain portions of supplemental testimony of Timothy J.
Gates and urge the Administrative Law Judge (ALJ²) to reject the Joint Movants' attempts to
strike relevant pre-filed testimony. Because the Joint Movants requested expedited consideration
of this matter, the Respondents submit this opposition earlier than the seven days required by the
Commission's rules.² However, the Respondents do not believe that there are sufficient grounds
for such expedited treatment.³ Indeed, the Joint Movants will not be harmed if they are required
to respond to Mr. Gates' supplemental testimony in their responsive filing on Friday, November
19, 2009. If the ALJ determines that any of Mr. Gates' pre-filed testimony should be stricken,

¹ CenturyTel, Inc. and Qwest Communications International, Inc.

² OAR 860-001-420(5).

³ Moreover, there are additional deficiencies in the Joint Movants filing as they failed to comply with Rule 860-001-0420(3) and (7). Specifically, the Joint Movants did not make a good faith effort to confer with the Respondents prior to filing the motion to strike as required by 860-001-0420(3), nor did they attempt to contact the Joint CLECs to discuss this motion to determine whether the Joint CLECs would support expedited treatment of this motion as required by 860-001-0420(7).

the Joint Movants can simply move to withdraw their responsive testimony that addresses the testimony that is stricken. Such a result would not prejudice the Joint Movants in any meaningful way. Moreover, none of this testimony has been formally entered into the record yet so there is no need for the ALJ to respond by 12:00pm on Friday, November 19, 2010. In fact, a determination need not be made until some time before the closing of the record in this docket.

INTRODUCTION AND SUMMARY

On November 4, 2010, the Commission clarified the scope of the supplemental testimony to be filed on November 12, 2010. Specifically, the Commission ruled that Commission Staff and Intervenor Supplemental Testimony “shall be limited to any and all Hart-Scott-Rodino documents produced by CenturyLink, Inc. and Qwest Communications ...” In that ruling, the Commission acknowledged that the parties had agreed that any such testimony must be “*related to any and all HSR documents*” produced by CenturyLink and Qwest. (emphasis added). Based on that ruling, Mr. Gates submitted supplemental testimony “related to” the HSR documents.

Nevertheless, the Joint Movants claim that certain portions of the Supplemental Testimony of Mr. Gates should be stricken because they are improper and go outside of the scope of what was permitted by this Commission. They offer two recurring arguments to support their request to strike portions of Mr. Gates’ supplemental testimony. First, they argue that certain portions of Mr. Gates’ testimony do not have any “real” connections to so called “HSR Issues.” And second, they claim that much of Mr. Gates’ supplemental testimony is nothing more than “surrebuttal” testimony because it resembles surrebuttal testimony filed in the Utah proceeding.

Both of these arguments fail. First, the Joint Movants attempt to further narrow the scope of the supplemental testimony by insisting that Mr. Gates’ supplemental testimony was required

to address “HSR Issues.” To the contrary, as the parties agreed, and this Commission confirmed, the scope of the testimony was only limited to testimony that “related to” the HSR documents. Mr. Gates’ testimony need not address or be tied to “HSR issues.” As such, Mr. Gates properly prepared and submitted supplemental testimony “related to” the HSR documents.

Second, the Joint Movants improperly attempt to place form over function by claiming that Mr. Gates’ supplemental testimony is really “surrebuttal” testimony since it was filed under that caption in Utah. The fact that Mr. Gates’ testimony is captioned as “supplemental testimony” in one state proceeding and “surrebuttal testimony” in another is beside the point. The more appropriate metric is simply whether or not Mr. Gates’ testimony conveys the type of information that is permitted by this Commission pursuant to its ruling on the scope of supplemental testimony. In this instance, Mr. Gates’ supplemental testimony, in its entirety, meets that basic threshold and therefore no portions of his supplemental testimony should be stricken. Furthermore, Joint Movants have an opportunity to file responsive testimony. Thus, the implication that somehow Mr. Gates’ testimony is an inappropriate “last bite at the apple” is simply misplaced. Joint Movants will still have the “last word”.

ARGUMENT

I. PAGE 5, LINE 13 THROUGH PAGE 9, LINE 8 OF MR. GATES' SUPPLEMENTAL TESTIMONY IS "RELATED TO" THE HSR DOCUMENTS

Contrary to the Joint Movants' claims, page 5, line 13 through page 9, line 8 is related to the HSR documents and should not be stricken. Specifically, this portion of Mr. Gates' supplemental testimony addresses concerns about the potential impact of the proposed transaction on competitive carriers and competition in this State that are raised by the HSR Document entitled [***BEGIN HIGHLY CONFIDENTIAL

[REDACTED]

[REDACTED]

[REDACTED] ⁴ END HIGHLY CONFIDENTIAL***] The entire portion of Mr. Gates' supplemental testimony that Joint Movants seek to strike stems from that troubling statement, which strongly suggests that CenturyLink intends to integrate its legacy systems with Qwest. Because the potential integration of Qwest systems with CenturyLink's systems post-merger has been and continues to be a major concern for the Respondents, that statement, as provided in an HSR document, is significant in that it confirms the Respondents' concerns. As such, Mr. Gates' discussion on the harmful impact that such a system integration could have on the Joint CLECs' systems and operations post-merger is undoubtedly related to the statement in the HSR document.

Further, whether Mr. Gates filed similar testimony in the Utah proceeding captioned as "surrebuttal testimony" misses the point. Contrary to the Joint Movants claims, the testimony provided by Mr. Gates in this proceeding falls squarely within the scope of the Commission's requirements for this filing and that is the only logical threshold for determining whether certain

⁴ HSR Filing Attachment 4(c)-52, p.50.

testimony is proper. Thus, this portion of Mr. Gates' supplemental testimony was properly included as it is "related to" the HSR documents.

II. PAGE 9, LINE 9 THROUGH PAGE 13, LINE 2 OF MR. GATES' SUPPLEMENTAL TESTIMONY IS "RELATED TO" THE HSR DOCUMENTS

The second portion of Mr. Gates' supplemental testimony that the Joint Movants seek to strike is on page 9, line 9 through page 13, line 2. While the Joint Movants attempt to distinguish this so called "second" portion of the testimony from the first portion of testimony that it seeks to strike (discussed above), they fail to acknowledge that this portion of the testimony is simply a continuation of the discussion provided in the first portion of his testimony. In other words, in this second portion of Mr. Gates' supplemental testimony, he continues to discuss and provide examples of the detrimental impact that could result if there is an integration of Qwest's systems with CenturyLink's systems post-merger, as contemplated in and derived from an HSR document. For example, the first question in this portion of Mr. Gates' testimony states: "Are there other critical functions that are available from Qwest's OSS that are not available from CenturyLink's OSS?" This question and the full discussion that follows in this portion of Mr. Gates' supplemental testimony is "related to" the same HSR document that raised concerns for the Respondents because of the harms that could occur from CenturyLink's integration of its systems. Because the supplemental testimony was intended to include anything related the HSR documents, there is no basis to strike this portion of Mr. Gates' supplemental testimony from the record.

III. PAGE 24, LINE 15 THROUGH PAGE 31, LINE 16 OF MR. GATES' SUPPLEMENTAL TESTIMONY IS "RELATED TO" THE HSR DOCUMENTS

With respect to the final portion of Mr. Gates' supplemental testimony that the Joint Movants seek to strike (*i.e.*, page 24, line 15 through page 31, line 16), the entire discussion in

section of his testimony “relates to” what he discovered during his review of the HSR documents.

Moreover, the fact that similar testimony was entitled “surrebuttal” testimony in another state proceeding is not dispositive and does not mean that Mr. Gates’ testimony should not be properly considered supplemental testimony in this proceeding. In fact, any testimony that addresses issues upon which HSR documents have some bearing falls within the scope of the supplemental testimony that was permitted to be filed in this proceeding. As a result, it is perfectly appropriate to include this portion of Mr. Gates’ supplemental testimony because it “relates to” the HSR documents.

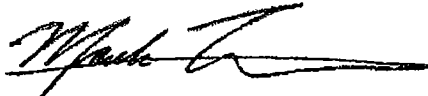
question “Do These Problems Raise Concerns About CenturyLink’s [*** **BEGIN HIGHLY CONFIDENTIAL**
[REDACTED] **END HIGHLY CONFIDENTIAL*****] For Other Reasons?”

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Commission deny the Joint Movants motion to strike certain portions of supplemental testimony of Timothy J. Gates.

Dated: November 18, 2010

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**CERTIFICATE OF SERVICE
UM 1484**

I hereby certify that **CHARTER, LEVEL 3, COVAD AND tw telecom RESPONSE IN OPPOSITION TO QWEST'S AND CENTURYLINK'S MOTION TO STRIKE CERTAIN PORTIONS OF SUPPLEMENTAL TESTIMONY OF TIMOTHY J. GATES AS IMPROPER SURREBUTTAL TESTIMONY** was served on the following persons on November 18, 2010, by email to all parties and by U.S. Mail to parties who have not waived paper service:

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Dated: November 18, 2010



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