BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1484

In the Matter of CENTURYLINK, INC. Application for Approval of Merger between CenturyTel, Inc. and Qwest Communications International, Inc.	)	Docket No. UM 1484 **JOINT WIRELESS CARRIERS' POST-HEARING REPLY BRIEF** **PUBLIC**

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INTRODUCTION

Sprint Communications Company, L.P. d/b/a Sprint, Sprint Spectrum, L.P. d/b/a Sprint PCS, Nextel West Corp. d/b/a Nextel, and NPCR, Inc. d/b/a Nextel Partners ("Sprint"), together with T-Mobile West Corporation ("T-Mobile"), referred to collectively as "Joint Wireless Carriers," submit this Post-Hearing Reply Brief in response to the initial post-hearing brief filed by Qwest Communications International, Inc. ("Qwest") and CenturyLink, Inc. ("CenturyLink") ("Q/CL Brief").[1]

The Q/CL Brief urges approval of the CenturyLink application to transfer indirect control of Qwest's operating subsidiaries in Oregon to CenturyLink. It erroneously claims that this proposed transfer of control, which will unite CenturyLink and Qwest in Oregon, will cause no harm and will benefit Oregon customers. This brief does not address the tangible harm to competition that this merger will cause in Oregon as demonstrated by the testimony of Sprint witnesses Frentrup and Appleby. The only benefits it discusses are illusory because Qwest and CenturyLink simply promise to keep the status quo,[2] which is no merger-related benefit and it is at best unclear whether the promised $45 million broadband commitment is incremental broadband investment or part of previous commitments ordered in the Embarq/CenturyTel merger approval at the FCC.[3] The Commission Staff did not know whether this broadband commitment was a new commitment,[4] before entering into its stipulation with Qwest and CenturyLink.[5]

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[1] Where indicated, this Reply will also respond to the Opening Brief of the Staff of the Public Utility Commission of Oregon ("Staff Brief").
[2] Q/CL Brief, p. 5.
[3] *See* Ex. 506, Embarq/CenturyTel Merger Approval Order, Appendix C, pp. 30-31.
[4] TR Dec. 17, 2010, pp. 179-180 (Dougherty).
[5] The Staff/Citizens Utility Board ("CUB")/Joint Applicants' Stipulation is described in fn. 6 of the Joint Wireless Carriers' Initial Post-Hearing Brief ("Initial Brief").

Therefore, Q/CL Brief's[6] claim that Commission Staff support proves "no harm" should be taken with a grain of salt. The same perspective should apply to Q/CL Brief's reliance on the Integra Settlement,[7] which addresses only the issues of one CLEC that operates only in Qwest territory as proof of no harm. Neither the Staff Stipulation nor the Integra Settlement "provides sufficient protection for wholesale customers."[8]

Therefore, as explained herein, under these circumstances, the Public Utility Commission of Oregon ("Commission") should provide stricter scrutiny of the transaction before it. Of course, the Commission has the authority to impose additional conditions than contained in the Staff/CUB/Joint Applicants' Stipulation and has exercised that authority in the recent past in reviewing another telecommunications merger and when presented a global settlement.[9] Here, the settlement is far from agreed upon by all parties and the Joint Wireless Carriers have presented specific additional conditions that should be imposed to address specific competitive harms posed by the merger.

If approved as requested by Qwest and CenturyLink and the Commission Staff competitive harm will occur in Oregon. The Commission should reject Joint Petitioners' claim that they cannot exert market power post-merger to the detriment of competing carriers in Oregon. The Merged Firm will dominate the wireline local exchange service market and associated public switched telephone network in Oregon to an even greater degree than Qwest and CenturyLink individually do now, which gives them significant

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[6] Q/CL Brief, p. 2.
[7] Described in fn.6 of the Initial Brief.
[8] Q/CL Brief, p. 2.
[9] TR Dec. 17, 2010, pp. 175-176 (Dougherty). (Staff witness Dougherty stated, "In UM 1431 (Verizon/Frontier Merger Order), in fact, there was a stipulation, and I think you are well aware that the Commission added at least one, if not two, conditions to what was stipulated between all of the parties and that was really a global settlement in 1431.")

market power. As a result, the Commission should require the Merged Firm to reduce intrastate access charge as a condition to finding the merger in the public interest. The Commission should also require as a condition for approving the merger that any existing interconnection agreement ("ICA") that competitive carriers in Oregon have with Qwest or CenturyLink within the footprint of the Merged Firm may be ported into or within Oregon and extended for 48 months.

I. MERGER APPROVAL SHOULD BE CONDITIONED ON A REDUCTION OF THE MERGED FIRM'S INTRASTATE ACCESS RATES

A. The Merged Firm Will Enjoy Significant Market Power

The Q/CL Brief does not dispute that Qwest and CenturyLink will enjoy significant market power post-merger. There is no significant competition in Oregon as Qwest and CenturyLink will have 72% of the incumbent wireline market in Oregon.[10] While they contend that national trends show access line loss and wireless and cable competition[11] their own analysis shows their loss of access lines **[Begin Highly Confidential Data] [End Highly Confidential Data]**.[12] This is because the greatly expanded broadband capacity of their combined networks will allow them to offer the same triple play of telephone, video (IPTV), and internet services that previously only cable has been able to offer.[13]

The Q/CL Brief does not dispute that competitive carriers like Sprint who must pay for access to the public switched telephone network in Oregon will be subject to the unparalleled market power of the Merged Firm. All Oregon CLECs must obtain some, if

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[10] Sprint/1; Frentrup/5. In addition, the local competition report in Oregon indicates a market share of only 2.4% for wireline CLECs. Ex. JC-24; TR Dec. 16, 2010, p. 154 (Brigham).
[11] Q/CL Brief, p. 5.
[12] Sprint/4; Appleby/13-18.
[13] Q/CL Brief, p.12 citing CTL/100, Jones/9-14; Qest/1, Peppler/10-11.

not all, of the network facilities they need to provide local service in the Merged Firm's footprint from the Merged Firm. They will be at the mercy of the Merged Firm's pricing of network elements and services. The Merged Firm, on the other hand, will benefit from decreased costs to provide service as a result of the "owner's economics" associated with combining two local exchange networks into the third largest local exchange network in the country, and combining that with the network of a national interexchange carrier.[14] Because none of its competitors enjoy the same advantages, the Merged Firm can afford to engage in price cutting in the short term to cripple competitors, and once having accomplished that goal, be at liberty to increase prices again for its customers.[15]

The Q/CL Brief fails to rebut the proof of the increased market power of post-merger Qwest and CenturyLink or the fact of the cost advantages they will have over their competitors. Yet, this is the crux of the competitive issue raised by the Joint Wireless Carriers. Rather, the Q/CL Brief mischaracterizes this very real issue as being about "access rates" that need not be considered in this proceeding.[16] The real issue is the competitive harm that will arise post-merger if an appropriate condition is not put in place to forestall this harm. The Joint Wireless Carriers' proposal to reduce access rates is thus entirely appropriate for resolution in this proceeding because it will mitigate specific merger harm without imposing costs upon the Merged Firm that cannot be absorbed. After all, the Q/CL Brief boasts of the financial strength of the Merged Firm

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[14] Initial Brief, pp. 3-8. The Joint Wireless Carriers will not repeat here the extensive record evidence showing the reduced input costs and increased economic efficiencies that will be realized upon creation of the Merged Firm, where any one of its affiliate's payments to another affiliate for facilities or services results in the cost recognized by the buying affiliate for that facility or service being more than offset by the revenues of the selling affiliate.

[15] Initial Brief, pp. 6-8.

[16] Q/CL Brief, p. 35.

and its estimated synergies of $575 million in annual operating expenses and $50 million in annual capital expenditures.[17]

The FCC has expressly recognized that merging ILECs have an incentive to wield market power to engage in anticompetitive behavior. With respect to the Qwest/CenturyLink merger, the FCC recently issued an extensive set of data requests which include numerous questions aimed at obtaining more detailed information on whether the merger of Qwest and CenturyLink is in the public interest. Under the heading "Public Interest Analysis," the FCC requested that Joint Petitioners provide a description and copies of all documents prepared (either internally or by outside advisors) that discuss any analyses of or assumptions and/or data supporting the following claims:

> "The transaction will give post-merger CenturyLink an enhanced position in the enterprise and government broadband markets" and "will enable post merger CenturyLink to leverage Qwest's strength in providing complex communications services to large businesses and government entities . . . to provide a broader array of services to enterprise customers in CenturyLink territories."[18]

The FCC also asked for:

> all documents created by or for either CenturyLink or Qwest (either internally or by outside advisors) for the purpose of analyzing the effects of this transaction with respect to: competition, diversity, consumer welfare, technology, efficiencies, synergies, and profitability.[19]

These questions directly address the market power the Merged Firm will have as a result of combining Qwest's comprehensive national long distance network to Qwest's and CenturyLink's existing local exchange networks. As noted above, this combination

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[17] Q/CL Brief, p. 8.

[18] *In re Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a CenturyLink, for Assignment or Transfer of Control*, WC Docket No. 10-110, FCC Information and Document Request at Section III.C.10.b.iv (Oct. 18, 2010) (emphasis added).

[19] *Id.* at Section III.C.12 (emphasis added).

allows the Merged Firm to enjoy significant expense savings by internalizing costs through self-provisioning more network services, such as long distance transport and access costs.[20]

The FCC has expressly recognized in other ILEC mergers the increased incentive for the merged entity to engage in anticompetitive behavior. In its order approving the CenturyTel/Embarq merger, the FCC stated

> We find that, as a theoretical matter, the merger may result in increased anticompetitive behavior on the part of the Applicants. Consistent with the "Big Footprint" theory that the Commission addressed in prior BOC mergers, we find that the increase in the size of CenturyTel's study area resulting from the merger may increase its incentive to engage in anticompetitive activity, although we think it is likely to have a lesser effect in the instant case than in the prior BOC mergers.[21]

The FCC further observed that:

> As the Commission explained in the SBC/Ameritech Order, a merger between two incumbent LECs may increase the merged entity's incentive to engage in anticompetitive behavior by allowing it to capture or internalize a higher proportion of the benefits of such anticompetitive strategies against regional or national competitors. The larger the resulting incumbent LEC is, the greater is its ability to internalize these spillover effects. Because CenturyTel after the merger will still be smaller than AT&T or Verizon was, it will be unable to internalize as large a proportion of the benefits of anticompetitive activity as those companies.[22]

The FCC thus expressly recognizes that the potential harm from anticompetitive behavior is more pronounced in BOC mergers due to the BOCs' larger size and their ability to internalize a relatively larger proportion of the benefits, which is to benefit from "owner's economics," as discussed by the Joint Wireless Carriers.[23]

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[20] Initial Brief, pp. 5-13.
[21] *In the Matter of Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order ("CenturyTel/Embarq Merger Order") at ¶ 33 (rel. June 25, 2009) (citations omitted).
[22] *Id.* at n.106 (citations omitted) (emphasis added).
[23] Initial Brief, pp. 3-6.

The FCC ultimately concluded with respect to the CenturyTel/Embarq merger that the voluntary commitments of the two companies were sufficient to alleviate the concerns it identified.[24] However, this case is not like the CenturyTel/Embarq merger because Qwest is a BOC and the resulting Merged Firm will be even bigger and more dominant than pre-merger Qwest. The market power concerns expressed by the FCC in the context of a BOC merger are plainly relevant and applicable here. Accordingly, the Joint Wireless Carriers' proposed access rate conditions are necessary to ensure the Merged Firm cannot wield its market power to engage in anticompetitive and discriminatory behavior against other carriers.

Contrary to the claims by CenturyLink and Qwest, the CLECs, including the Joint Wireless carriers, are not seeking to "have their cake and eat it too."[25] Rather, they are raising legitimate competitive issues that cannot be brushed aside simply because one CLEC had its self-interests addressed in the Integra Settlement. The first necessary competitive protection absent from the Staff/CUB/Joint Applicants' Stipulation and the Integra Settlement is the access charge reductions proposed by the Joint Wireless Carriers. The second involves treatment of interconnection agreements ("ICAs").

II. CONSOLIDATING/PORTING AND EXTENDING EXISTING ICAs MAXIMIZES THE SYNERGIES AND MINIMIZES THE ANTICOMPETITIVE RISKS OF THE PROPOSED MERGER

The Q/CL Brief claims that the Merged Firm's strong financials will allow it to robustly compete within the telecommunications marketplace.[26] It boasts that "the merged company is expected to have one of the strongest balance sheets in the U.S.

[24] *CenturyTel/Embarq Merger Order* at ¶ 33.
[25] Q/CL Brief, p. 3.
[26] Q/CL Brief, p. 7.

telecommunications industry."[27] The Q/CL Brief specifically identifies the synergies that will be realized through the merger as a key source of the financial strength it will have to prevail within the marketplace.[28] Despite these explicit claims that the Merged Firm will be a financial powerhouse, the Q/CL Brief disregards altogether the concerns the Joint Wireless Carriers have raised with respect to the Merged Firm's ability to abuse its financial strength through needless re-negotiations and arbitrations of existing ICAs.

Sprint witness Frentrup clearly demonstrated how the Joint Petitioners could use ICAs as a vehicle to impose unnecessary costs on competing carriers.[29] To minimize such a risk, Mr. Frentrup urged the Commission to impose a condition permitting competitive carriers to port existing ICAs from one operating entity wholly owned by the Merged Firm to another wholly owned operating entity within the Merged Firm's footprint in Oregon, and to permit carriers to extend these ICAs for up to 48 months. This would allow carriers to port a current Qwest ICA to any CenturyLink operating entity in Oregon after the closing of the merger.[30]

Several contradictions reside in the claims of Qwest and CenturyLink regarding ICAs, which are not reconciled or even addressed in the Q/CL Brief. First, it does not address the inconsistency in Paragraph 28 of the Staff/CUB/Joint Applicants' Stipulation, which extends existing ICAs for 36 months only for Qwest ICAs, but not for CenturyLink ICAs. On cross-examination, CenturyLink witness Hunsucker admitted that the ICAs of both CenturyTel and Embarq had been extended in that merger[31] and that the ICAs of Qwest and CenturyLink both could be extended to be co-terminus in this

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[27] *Id.* at 7-8.
[28] *Id.*
[29] Sprint/1, Frentrup/23-28.
[30] Sprint/1, Frentrup/28.
[31] TR Dec. 17, 2010, p. 47 (Hunsucker).

merger.[32] CenturyLink could not claim that extending the condition to the CenturyLink ICAs is cost-prohibitive as it did no analysis of the costs posed by such an extension.[33]

The Q/CL Brief completely skirts the arbitrary, unreasonable position on ICA term extension for both CenturyLink and Qwest. These entities provided no factual or legal basis for this position except that "we don't believe it's appropriate."[34] Therefore, the Commission should modify Paragraph 28 of the Stipulation to provide for a uniform term extension for both CenturyLink and Qwest ILECs. The Joint Wireless Carriers further urge the Commission to make these extensions 48 months in length to provide more latitude to carriers to avoid the burdensome cost of contract negotiations and potential arbitration.[35]

The second inconsistency is CenturyLink's opposition to allowing the porting of ICAs between companies or states. Its purported justification in the Q/CL Brief[36] has no basis, is speculative and refuted by the testimony of Mr. Hunsucker. He agreed that Qwest and CenturyLink ICAs would have the same type of essential terms and conditions such as on network interconnection, intercarrier compensation and facilities sharing.[37] He acknowledged the Joint Wireless Carriers' proposal would not require CenturyLink to do something that was not technically feasible in a ported ICA.[38] He admitted that he had been working to combine the ICAs of CenturyTel and Embarq since their merger -- a move that could reduce administrative costs. Despite these admissions, the Q/CL Brief persists in its obstructionist position of opposing a proposal from the Joint Wireless

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[32] TR Dec. 17, 2010, p. 50 (Hunsucker).
[33] *Id.*
[34] *Id.*
[35] Sprint/1, Frentrup/26.
[36] Q/CL Brief, pp. 39-40.
[37] TR Dec. 17, 2010, p.46 (Hunsucker).
[38] TR Dec. 17, 2010, p.52 (Hunsucker).

Carriers that would promote administrative efficiencies in a state with a total of 164 CLEC ICAs and 38 wireless ICAs.[39] These numbers could be reduced sharply, as could transaction costs, by allowing porting at the very least between CenturyLink and Qwest entities operating in Oregon.

Qwest and CenturyLink assert that the proposed merger is in the public interest because all the synergies CenturyLink and Qwest will realize are presumptively beneficial for the Merged Firm's customers.[40] The Joint Wireless Carriers agree that the Merged Firm should be able to enjoy significant synergies by combining the two companies' networks, management, and other operations. However, such synergies should benefit customers, including wholesale customers, if the merger is deemed to be in the public interest. This can be done by allowing competing carriers to consolidate/port existing ICAs with the Merged Firm, and extend them for a period of at least 48 months. And any ICA extension condition must apply to both the CenturyLink ICAs and the Qwest ICAs.

III. CONCLUSION

For all the foregoing reasons, as well as those contained in Joint Wireless Carriers Initial Post-Hearing Brief, Sprint and T-Mobile request that the Commission impose their recommended conditions before finding that the proposed merger of Joint Petitioners Qwest and CenturyLink is in the public interest. Nothing in the Q/CL Brief rebuts the case made for these conditions.

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[39] Sprint/1; Frentrup/24.
[40] Q/CL Brief, p. 5.

RESPECTFULLY SUBMITTED this 1st day of February, 2011.

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