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 UM 1484 JOINT CLEC OPENING BRIEF

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I. INTRODUCTION

Pursuant to the revised briefing schedule set forth in Administrative Law Judge Ruling dated January 14, 2011, the Joint CLECs[1] hereby file this Opening Brief in the above entitled matter concerning the proposed acquisition of the Qwest Operating Companies ("Qwest")[2] by CenturyTel, Inc. and its affiliates ("CenturyLink").[3]

The Joint CLECs are a group of individual competitive local exchange carriers ("CLECs") providing local telecommunications and/or competitive voice services in competition with Qwest, an incumbent local exchange carrier ("ILEC") and Oregon's Bell Operating Company ("BOC"). However, each of the Joint CLECs also relies on Qwest as its wholesale supplier of essential wholesale services[4] or interconnection used as essential inputs to provide competitive local services. Charter also provides service in competition with CenturyLink's

[1] The "Joint CLECs" consist of the following competitive local exchange carriers: XO Communications Services, Inc., tw telecom of oregon, llc, Covad Communications Company, PriorityOne Telecom, Inc., and Charter Fiberlink OR-CCVII, LLC.
[2] The Qwest Operating Companies include Qwest Communications International, Inc., Qwest Corporation, Qwest LD Corp., and Qwest Communications Company LLC.
[3] CenturyLink, as referred to herein, includes CenturyTel, Inc., CenturyTel of Oregon, Inc., CenturyTel of Eastern Oregon, Inc., and United Telephone Company of the Northwest (dba Embarq).
[4] Throughout the brief, "wholesale services" generally refers to any combination of interconnection, unbundled network elements, resale or collocation purchased pursuant to 47 U.S.C. § 251(c), and similar services purchased out of non-§ 251(c) commercial or wholesale agreements and/or Qwest ILEC tariffs.

affiliate, Embarq, which operates as an ILEC but not as a BOC. Because CLECs have few, if any, alternatives for these essential wholesale inputs, they are largely captive wholesale customers of Qwest and CenturyLink (sometimes referred to herein as the "Merging Companies").[5] Therefore, robust retail competition in Oregon depends on the ability of CLECs to purchase Qwest's and CenturyLink's wholesale facilities and interconnection on fair, reasonable and non-discriminatory terms.

The Merging Companies' dual role with respect to CLECs as both their primary competitor and sole supplier of certain essential wholesale facilities creates an inherent conflict of interest and threatens to undermine competitive choices available to Oregon consumers.[6] Because they compete with CLECs, the Merging Companies have a strong incentive to undermine their wholesale CLEC customers by increasing wholesale rates, diminishing wholesale service quality, reducing resources devoted to wholesale customers or eliminating wholesale offerings on which CLECs depend.[7] Further, as monopoly or near monopoly suppliers of essential facilities, Qwest and CenturyLink are in a position to impose unreasonable terms on the provision of the wholesale services on which CLECs rely.

Although Oregon CLECs remain vulnerable to anticompetitive conduct by Qwest, they are now able to compete effectively as a result of a number of contested and often arduous proceedings, negotiations and regulatory mandates over the past 14 years that have produced a delicate competitive balance in Oregon. Those proceedings, negotiations and regulatory mandates have resulted in the development of specific Qwest wholesale systems, policies and product offerings that have allowed local competition to develop in Oregon, albeit imperfectly and more slowly than many would have preferred. As a result, there are multiple CLECs

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[5] Joint CLECs/1, Ankum/13, lns. 12-14.
[6] *Id.* at lns. 14-17.
[7] *Id.*

providing different product offerings to different market segments in competition with Qwest and CenturyLink and to the benefit of Oregon consumers.

CenturyLink's acquisition of Qwest (the "Proposed Merger") threatens to disrupt the competitive balance that has been carefully developed over the past 14 years for a number of reasons:

1. The Proposed Merger shares in common with all mergers (particularly recent telecommunications mergers between ILECs) a high risk of failure, and that risk of failure threatens to harm Qwest's customers, particularly its captive wholesale customers.

2. The Proposed Merger involves a smaller, primarily rural non-BOC's proposed acquisition of a much larger more urban-oriented BOC that has unique BOC statutory obligations, substantially greater wholesale order volumes with CLECs, and a much longer, more extensive history developing wholesale systems, policies and service offerings related to CLECs that have allowed competition to develop.

3. The Proposed Merger comes on the heels of CenturyLink's acquisition of Embarq – an acquisition that also had the effect of more than doubling CenturyLink's size. That transaction closed just over 16 months ago and CenturyLink's efforts to integrate Embarq are not yet complete. The evidence in this case shows those integration efforts have substantially taxed CenturyLink's capabilities.

4. The acquiring company, CenturyLink, has a history of anticompetitive policies and practices not present in the Qwest region, giving rise to the risk that those policies and the corporate culture that produced them will be imported into the Qwest region to the detriment of wholesale customers and competition.

5. CenturyLink and Qwest expect to realize over $600 million in synergy savings in the 3 to 5 years immediately following closure of the merger, even though the service areas of the two merging ILECs do not significantly overlap. The Merged Company's pursuit of these enormous synergies, while simultaneously incurring substantial integration costs, poses a tremendous risk of harm to the captive wholesale customers as likely targets of the Merged Company's efforts to achieve those synergies.

Accordingly, the Proposed Merger should not be approved without substantial enforceable commitments that adequately address all of these risks to wholesale customers and local competition. To be adequate, those commitments must ensure that the wholesale products, service quality and systems currently provided by Qwest continue at current levels and prices for at least the full 3 to 5 year period during which CenturyLink and Qwest expect to achieve their projected synergies. Although the Staff Settlement includes several important commitments, the Joint CLECs believe the Commission must adopt additional conditions discussed below. These additional conditions are identified in Attachment A, wherein the Joint CLECs highlight those conditions in the context of the list of conditions originally proposed by the Joint CLECs. Anything less leaves wholesale customers and competition in Oregon unduly and unnecessarily exposed to the serious risks posed by the Proposed Merger.

II. THE PROPOSED MERGER CANNOT BE APPROVED UNLESS THE COMMISSION FINDS THAT IT WILL NOT HARM THE PUBLIC INTEREST IN MAINTAINING A COMPETITIVE MARKETPLACE.

The Proposed Merger requires Commission approval under ORS 759.375 and ORS 759.380. In considering whether to approve this transaction, the Commission applies the "in the public interest, no harm" standard.[8] The Commission recently observed in reviewing the transaction between Frontier Communications and Verizon Northwest that "[t]he continued existence of a robust, competitive marketplace is essential to satisfying the 'no harm' standard for the transaction."[9] In that proceeding, the Commission found that the "no harm" standard was satisfied with respect to the competitive marketplace based on a list of conditions that "address the issues of (1) ensuring costs related to the transaction were not borne by FNW's [Frontier's] competitive carrier wholesale customers; (2) assuring that existing wholesale service rates, terms, and conditions with VNW [Verizon] were maintained; (3) assuring a seamless transfer of wholesale OSS/BSS systems; and (4) assuring that wholesale service quality overall was not diminished."[10]

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[8] Staff/100, Dougherty/4, lns. 13-15.
[9] *In the Matter of Verizon Communications Inc. and Frontier Communications Corporation Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc*, Order No. 10-067 at 20, docket UM 1431 (entered February 24, 2010).
[10] *Id.*

The Proposed Merger presents serious risks to CLECs as captive wholesale customers that rely on Qwest and CenturyLink for the interconnection and wholesale services necessary to offer competitive choice to Oregon consumers. The Commission's focus on competition is particularly important in this case because the Proposed Merger's impact on *wholesale* customers and local competition will invariably affect the public interest in reasonable rates and service quality for *retail* services, especially since the Proposed Merger involves one ILEC proposing to acquire another (which also happens to be Oregon's largest telephone service provider and Regional BOC).

As demonstrated below, the Proposed Merger poses substantial risks of harm to CLECs and the competitive marketplace in a variety of ways, and the Merging Companies have failed to adequately address those risks through any existing assurances or settlement conditions. Accordingly, the Merging Companies have failed to meet their burden to demonstrate that this Proposed Merger is in the "public interest," i.e., that it will not cause harm to competitors or to competition in the State.

III. THE PROPOSED MERGER POSES SUBSTANTIAL RISKS OF HARM TO WHOLESALE CUSTOMERS AND LOCAL COMPETITION IN OREGON.

While all mergers carry with them the risk of failure and harm to shareholders and customers, the risks associated with the Proposed Merger are, as discussed below, substantially greater than most. Indeed, CenturyLink's own regulatory filings acknowledge the enormous risks associated with this transaction.[11] These risks fall primarily on CLECs, which will depend on the Merged Company for essential wholesale facilities and interconnection they need to provide competitive local service.

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[11] *See, e.g.,* Joint CLECs/1, Ankum/54 (referencing CenturyLink, Inc. Form S-4 Registration Statement, Registration No. 222 (June 4, 2010)).

The documented failures of recent similar mergers between ILECs highlight the inherent problems with transactions of this nature. The following transactions are of particular relevance to the Proposed Merger: (1) Hawaiian Telcom's acquisition of Hawaii's BOC, Verizon Hawaii; (2) FairPoint's acquisition of Verizon operations in northern New England; and (3) Frontier's acquisition of 4.8 million Verizon lines in 14 states. As discussed at length in the direct testimony of Dr. Ankum, each of these three mergers resulted in an array of serious problems, including severe service quality declines and Operational Support System ("OSS") failures.[12] These examples illustrate the enormous risks and uncertainties associated with ILEC mergers. They also demonstrate that claims of synergy savings are frequently unreliable and are often overtaken by operational problems and unexpectedly high integration costs. Indeed, post-merger problems and failures drove two of the three merged ILECs (Hawaiian Telcom and FairPoint) to file Chapter 11 bankruptcy petitions.[13]

Like the Hawaiian Telecom and FairPoint mergers, the Proposed Merger in this case involves a smaller ILEC purchasing a much larger one based on lofty but vague claims of expected synergies, efficiencies and other benefits. The documented failures and experiences of those two recent ILEC mergers serve as a warning with respect to the public interest implications of the Proposed Merger. Those two mergers illustrate plainly that the risks of the Proposed Merger are not theoretical and pose a serious threat to Oregon consumers and local competition.

In addition, CenturyLink's recent acquisition of Embarq further illustrates and increases the significant risks associated with its acquisition of Qwest. CenturyLink has already demonstrated a record of post-merger problems in the short time following its acquisition of

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[12] Joint CLECs/1, Ankum/25-36.
[13] *Id.* at p. 26, lns. 1-6.

Embarq, including deficiencies in CenturyLink's OSS and systems integration.[14] The challenges associated with CenturyLink's acquisition of Embarq pale in comparison to the challenges associated with its proposed acquisition of Qwest, which is much larger than Embarq and which is subject to unique additional BOC regulatory responsibilities that CenturyLink and Embarq have never had.[15] As Dr. Ankum observed:

> To be sure, the challenge of integrating and running Qwest, with its unique BOC obligations, comparatively enormous customer base, substantial wholesale responsibilities, and complex set of operational support systems, is particularly daunting and far beyond anything CenturyLink has faced to date.[16]

As such, CenturyLink's problems integrating Embarq foreshadow more extensive problems integrating the significantly different and much larger Qwest.

Even more troubling is the fact that CenturyLink's proposed acquisition of Qwest comes immediately after the Embarq transaction and before the Embarq integration has been completed. If the Proposed Merger is approved, CenturyLink will have grown by nine times its size over the span of two years.[17] Due to the rapidity and overlapping nature of CenturyLink's exponential growth, Dr. Ankum testified that the circumstances of the Proposed Merger present "disturbing similarities to the experience of WorldCom and other failed acquisitions."[18]

The Proposed Merger's risks are further accentuated by CenturyLink's lack of wholesale experience at volumes comparable to Qwest's and by the absence of any experience with Qwest's unique BOC responsibilities. CenturyLink's traditional focus of operations in less densely populated areas means that it has not faced the level of competition and wholesale service demand that ILECs such as Qwest have experienced in larger metropolitan areas. For

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[14] Joint CLECs/19, Gates/25 to Gates/26; Tr. Vol. 1 (12-16-2010), p. 119, ln. 19 to p.122, ln. 1, p.132, lns.17-25 (Schafer); *see also* Hearing Exhibit Joint CLECs/23 (CenturyLink Supplemental Response).
[15] Joint CLECs/1, Ankum/10-12.
[16] *Id.* at p. 12, lns. 6-10.
[17] Joint CLECs/8, Gates/80, lns. 18-19.
[18] Joint CLECs/1, Ankum/10-11.

instance, Qwest processes, on average, *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** xxx **END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** *** times more port orders than does CenturyLink in Oregon, and CLECs purchase *****BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** xxx **END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** *** times more unbundled network element ("UNE") loops (and *****BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** xxx **END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** *** times more enhanced extended links) from Qwest in Oregon than from CenturyLink.[19] This lack of experience with high-commercial ordering volumes raises profound doubts about CenturyLink's ability to meet the demands of wholesale customers operating in more densely populated urban and suburban areas served by Qwest. CenturyLink will also be required to satisfy the BOC responsibilities and obligations, with which it has no prior experience.

Finally, as the acquiring carrier, CenturyLink is likely to import its policies and practices into the Qwest region, which includes the vast majority of Oregon's population and the overwhelming majority of competitive carriers. Rather than retain practices and offerings that Qwest has developed after years of litigation, arbitrations and negotiation, it is likely that CenturyLink will gravitate towards its own familiar practices, particularly as it seeks savings to achieve expected synergies and to pay substantial integration costs.

The record reflects that CenturyLink has deployed a series of wholesale practices that would impede local competition in Oregon as compared to Qwest's practices. For example, CenturyLink assesses charges on various stages of the customer acquisition and migration

[19] Joint CLECs/8, Gates/27-28. *See also*, Hearing Exhibit Joint CLECs/23 (CenturyLink Supplemental Response).

process, including when a number port is requested, when a competitor connects to the customer's premises at the customer side of a CenturyLink Network Interface Device ("NID") enclosure, and when competitors seek to include their customers in CenturyLink directories.[20] In contrast, Qwest does not engage in these practices.

CenturyLink's post-merger drive to achieve enormous projected synergies, even as it faces substantial integration costs, will put the Merged Company under intense pressure to cut costs, raise prices and undermine competitors.[21] These pressures will reinforce the likelihood that CenturyLink will implement its own familiar policies and practices into the Qwest region (which encompasses nearly 88% of all of the combined companies' access lines in the state).[22]

IV. THE PROPOSED MERGER'S RISKS FALL PRIMARILY ON THE WHOLESALE CUSTOMERS OF THE MERGING COMPANIES TO THE DETRIMENT OF LOCAL COMPETITION.

Any merger such as the one in this case has, as its ultimate objective, the goal of increasing shareholder value. The Merging Companies' private shareholder interests, however, are likely at odds with the public interest that the Commission is obligated to protect in its review of this transaction. As Dr. Ankum has explained, the risks attendant to mergers between ILECs fall disproportionately on the wholesale market and its captive customers, such as CLECs, that have no alternatives for essential facilities they need in order to compete.[23]

In this case, the Merged Company's pursuit of over $600 million in synergies, at the same time it faces substantial post-merger integration costs and inevitable merger-related operational problems, creates a substantial risk to the public interest, particularly to wholesale

[20] Charter/1, Pruitt/10, lns. 1-8.
[21] Joint CLECs/1,Ankum/44, lns. 6-10.
[22] According to Ms. Peppler's Direct Testimony (Qwest/1, Peppler/10, lns. 12-16), as of year end 2009, Qwest served 802,000 access lines in Oregon and CenturyLink served another 109,000. Thus, on an access line basis, Qwest accounts for 88% of the combined companies' operations in the state (that is, 802,000 ÷ (802,000 + 109,000) = 88%).
[23] Joint CLECs/1, Ankum/21, lns. 1-9.

customers and local competition. The Merged Company's pursuit of enormous synergies, in the face of substantial integration costs and under the pressure of its enormous debt load, will likely create financial strains that will lead to a substantial degradation of services to wholesale customers and harm to competition.[24]

As an ILEC and Oregon's BOC, Qwest owns and controls the vast majority of the State's core telecommunications infrastructure, which is ubiquitously deployed and ultimately connected to every residence and business throughout Qwest's broad service area. That infrastructure not only provides the platform for Qwest's service to its own retail customers, but also serves as the network platform on which competitive providers (*i.e.,* CLECs) depend for access to their end-user retail customers.

The continued viability of retail competition turns on the continued availability of the wholesale facilities and interconnection from Qwest that CLECs currently rely on. The Merged Company's incentive to cut costs, augment its market share and increase its revenues to achieve its anticipated synergies threatens the continued availability of these essential wholesale inputs. CenturyLink's strong financial incentive to eliminate or reduce the quality of these wholesale offerings (or increase their price) should be matched by equally strong conditions or commitments to prevent or discourage these actions and protect the public interest. Those conditions or commitments should persist for at least the 3 to 5 year period during which the Merged Company expects to obtain merger synergies.

V. WITHOUT CRITICAL ADDITIONAL COMMITMENTS TO PROTECT WHOLESALE CUSTOMERS AND LOCAL COMPETITION, THE PROPOSED MERGER CANNOT BE APPROVED CONSISTENT WITH THE PUBLIC INTEREST BASED SOLELY ON THE CONDITIONS IN THE INTEGRA AND STAFF SETTLEMENTS.

On November 6, 2010, the Merging Companies entered into a settlement with Integra

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[24] *Id.* at p. 44, lns. 6-10.

Telecom (the "Integra Settlement") in this matter. None of the other Joint CLECs were parties to that settlement or participants in its negotiation.[25] Although all the Joint CLECs participated in the settlement conferences convened by Staff prior to announcement of the Integra Settlement, the Merging Companies chose to negotiate a single separate settlement solely with Integra. Thereafter, the Staff and the Merging Companies reached a settlement that incorporates all the substantive conditions in the Integra Settlement and is, with one exception,[26] identical with respect to wholesale issues. Accordingly, references herein to the "Staff Settlement" refer also to the Integra Settlement.

While the Staff Settlement addresses a number of the risks and potential harms of the Proposed Merger, it does so from Integra's perspective and fails to adequately address issues critical to other CLECs and competition generally.[27] To that end, the Staff Settlement clearly reflects compromises that Integra believed were in its own business interests. Other CLECs, however, differ from Integra in a number of ways, including their internal systems, the types of customers they target, the geographical areas they serve, and the mix of wholesale products they require from the ILEC.

For example, CLECs have different OSS capabilities and use different Qwest OSS interfaces, depending on the development of their own systems and network.[28] Some CLECs, like Integra, currently use Qwest's Graphical User Interface ("GUI") OSS to submit orders; other CLECs, like tw telecom, use Qwest's application-to-application (XML) OSS; and other CLECs,

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[25] Joint CLECs/23, Gates/7, lns. 7-8.

[26] The Staff Settlement makes certain modifications to the OSS provision in the Integra Settlement. In particular, the Staff Settlement requires that the Merged Company provide wholesale service quality that is "not less than" that provided by Qwest prior to the closing date, while the Integra Settlement only requires wholesale service quality that is "not materially less" than that provided by Qwest prior to the closing date. Additionally, the Staff Settlement (unlike the Integra Settlement) provides that the Merged Company will provide support, data, functionality, performance, electronic flow through, and electronic bonding that is "functionally equivalent" to that provided prior to the merger.

[27] Joint CLECs/23, Gates/7, lns. 1-7.

[28] *Id.* at p. 8, lns. 6-7.

like Charter, use both XML and GUI OSS depending on the function required.[29] CLECs that have developed more internal OSS interfaces, systems and software will naturally need more time to adjust to post-merger changes to Qwest's existing OSS.[30] While it may have been acceptable for Integra to agree to a two-year extension of Qwest's OSS as a compromise for the line conditioning commitment, for example, this two-year period does not adequately protect other CLECs that have built more extensive internal systems and software based on Qwest's existing OSS – internal systems that would need to be modified or replaced when Qwest's OSS changes.[31]

In addition, the line-conditioning commitment, while important to Integra, provides little or no benefit to other CLECs due to differing business plans.[32] Charter and tw telecom, for example, do not offer xDSL service to Oregon customers and have no plans to do so.[33] Thus, the concerns that motivated Integra to pursue line conditioning concessions and make compromises to get this commitment are not shared by the remaining CLECs.[34]

CLECs also use different UNE services and different non-UNE commercial and wholesale agreements and tariffs in order to provide divergent services to their end user customers in Oregon, all in competition with the ILEC.[35] Integra may have been willing to compromise on the length of extensions for commercial and/or wholesale agreements, including tariffed offerings, in order to obtain other concessions important to Integra's interests.[36] Moreover, not all CLECs' commercial and/or wholesale agreements have the same expiration date and, again, the deal struck by Integra was calculated only to address Integra's specific

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[29] *Id.* at p. 9, ln. 20 to p. 10, ln. 3.
[30] *Id.* at p. 10, lns. 3-6.
[31] *Id.* at p. 11, lns. 2-7.
[32] *Id.* at p. 8, lns. 18-20.
[33] *Id.* at p. 9, lns. 2-4.
[34] *Id.* at lns. 4-6.
[35] *Id.* at p. 8, lns. 7-10.
[36] *Id.* at lns. 6-16.

interests.[37] For example, the Staff Settlement does not adequately protect the interests of a CLEC (like tw telecom) that purchases special access services from a tariff not subject to extension under the Staff Settlement, or that has a non-UNE wholesale agreement that might expire before the merger closing (because any wholesale agreement that expires prior to the merger closing date is not eligible for extension under the Staff Settlement).[38] In these and other ways, the compromises made by Integra (and subsequently incorporated into the Staff Settlement) do not provide sufficient basic protections for the Joint CLECs.

Conditions that reflect the compromises of one CLEC cannot be relied upon to adequately protect the interests of Oregon consumers since the competitive market is comprised of multiple competitors serving different customers in a variety of ways. To fully protect the broad public interest in competition, conditions for merger approval must fully address this broader array of competitive interests represented by the many CLECs in this proceeding. The remaining Joint CLECs represent a cross-section of the carriers that provide competitive local service to Oregon consumers. Addressing their concerns through adequate commitments as set forth below is essential to ensure that the broader public interest in "a continued robust, competitive marketplace" remains sufficiently protected.

As an absolute minimum, to ensure that the Proposed Merger does not harm the public interest in local competition, its approval must be conditioned on commitments that, for at least the 3 to 5 year synergy period: (a) ensure the continued availability of existing wholesale services at current prices; (b) retain Qwest's current OSS and preclude any decline in functionality upon transition to a successor OSS; (c) ensure open and reasonable access to and interconnection with the Merged Company's combined network through a single point of

[37] *Id.*
[38] *Id.* at p. 9, lns. 10-15.

interconnection; (d) preclude unnecessary increases in CLEC transaction costs; (e) ensure reasonable directory listing and directory assistance practices; (f) preclude CenturyLink's continued use of the rural exemption; (g) ensure stable ongoing access to UNEs through a moratorium on further non-impairment and forbearance filings; and (h) provide an enforceable mechanism to prevent or discourage any decline in wholesale service quality. It is essential that these commitments extend for at least three years, which is the lower end of the 3 to 5 year period during which the Merged Company expects to enjoy over $600 million in synergy savings (and during which wholesale customers and competition will be most vulnerable to harm).

Although the Staff Settlement addresses a number of these issues, it falls short in a number of critical areas. Those critical areas and the conditions necessary to address the issues arising from such issues are discussed below. As noted above, these additional conditions are identified in Attachment A.[39] Therefore, approval of the Proposed Merger should not be granted without the imposition of the important additional commitments discussed below.

A. The Merging Companies Have Not Made Adequate Commitments Regarding the Continuing Provision Of Non-UNE Wholesale Services.

The Merging Companies have committed in the Staff Settlement to extend interconnection agreements ("ICAs") for 3 years from the closing date of the merger. This provides a minimally adequate period of stability for ICAs during which no CLEC will face changes in UNE terms or prices. In contrast, the Merging Companies have committed to a far more limited extension of wholesale or commercial agreements (hereafter referred to collectively as "wholesale agreements") under which CLECs purchase the same (or similar) wholesale facilities as UNEs, but under a wholesale agreement rather than an ICA. Specifically, the Merging Companies have committed to extend wholesale agreements with a price cap for only

[39] Attachment A is a copy of Hearing Exhibit Joint CLECs/16 wherein the Joint CLECs highlight those conditions in the context of the list of conditions originally proposed by the Joint CLECs

18 months from closing, with an additional 18 months beyond that solely for embedded base customers with no limit on price increases. With respect to wholesale Regional Commitment Plan ("RCP") agreements, the Staff Settlement would provide an extension of 12 months from merger closing or, at a CLEC's option, 12 months after the termination date in the agreement.

These limited extensions for wholesale agreements are unreasonable and fail to adequately protect local competition from the risks associated with the Proposed Merger. Although these limited extensions may be adequate for Integra, they are not sufficient for the majority of CLECs, which rely more than Integra on these wholesale offerings. Accordingly, the Proposed Merger should be further conditioned on a commitment to extend current wholesale agreements, at current prices in effect as of the merger filing date, by three years following the merger's closing date, consistent with the extension of ICAs in the Staff Settlement.

1. **CLECs rely extensively on Qwest's non-UNE wholesale services.**

In its order denying Qwest's petition for forbearance in the Phoenix Arizona MSA, the FCC found: "the record reveals that no carrier besides Qwest provides meaningful wholesale services throughout the Phoenix marketplace, and that competitors offering business services largely must rely on inputs purchased from Qwest itself to provide service."[40] The FCC also stated: "there is no record evidence of significant competition for the wholesale products used to serve either mass market or enterprise customers."[41] The "wholesale services" and "wholesale products" referred to by the FCC include both UNE and non-UNE wholesale services and products.[42] While these conclusions were made about Qwest's wholesale services in the Phoenix MSA, there is no reason to believe that the conclusions regarding Qwest's wholesale services in

[40] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113, released June 22, 2010, at ¶ 2.
[41] *Id.* at ¶ 96.
[42] *See, e.g., id.*, at ¶ 68.

MSAs in Oregon would be any different.[43] In fact, this Commission's most recent published Report on Competition in the State confirms that these conclusions are applicable to Oregon as well.[44]

Most CLECs rely extensively on UNEs, but many also rely substantially on non-UNEs purchased from Qwest under wholesale agreements. These UNEs and non-UNEs are typically the same facilities, distinguished only by the fact that Qwest charges substantially more for its non-UNE facilities under wholesale agreements than the cost-based rates set by the Commission for UNEs provided under ICAs. This reliance on wholesale agreements extends to a broad range of wholesale inputs, including dark fiber, broadband services, special access services and the combined loop/transport/switching platform referred to as QLSP. For example, CLECs such as Charter and tw telecom rely on Qwest special access services for transport or to gain access to customers.[45]

There is no question that continued access to these wholesale facilities is critical to the ability of a number of Oregon CLECs to serve their customers and compete in Oregon's local exchange markets.[46] The record clearly establishes that CLECs in Oregon depend extensively on facilities purchased from Qwest under wholesale agreements and that the continued availability of those facilities is essential to protecting the public's interest in local competition.

2. **A number of CLEC intervenors depend more than Integra on Qwest's non-UNE wholesale agreements.**

Integra's decision to accept less than a three year extension of wholesale agreements reflects Integra's own business interests, distinct from a number of other CLECs providing

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[43] Joint CLECs/23, Gates/26, lns. 1-4. *See also* Tr. Vol. 1 (12-17-10), pp. 123-125 (Gates).
[44] Hearing Exhibit Joint CLECs/24 (Local Telecommunications Competition Survey (2009)); *see also* Tr. Vol. 1(12-16-2010), p.152, ln.20 to p.153, ln.16 (Brigham).
[45] Joint CLECs/23, Gates/22, lns. 7-8.
[46] *Id.* at p. 22, lns. 1-4.

competitive local service. Indeed, a number of CLECs in this case rely substantially more than Integra on these non-UNE wholesale offerings.[47]

As Dr. Ankum observed, the many CLECs that rely on wholesale facilities under these wholesale agreements have:

> built their business plans significantly around the availability of the products provided under those commercial agreements and the specific terms set forth in those agreements. Retail customers in turn receive competitive services based on CLEC access to these wholesale services from Qwest under these commercial agreements. Importantly, these CLECs generally have no alternative to Qwest for the products or services . . . provided under these commercial agreements.[48]

As such, while the limited extensions in the Staff Settlement may be adequate for Integra, they fail to meet the needs of those CLECs who rely on Qwest's wholesale agreements. The compromises reflected in the Staff Settlement are not sufficient to protect the interests of CLECs generally or the public's interest in promoting local competition, which require additional commitments to ensure stable service offerings and prices for all wholesale services (both UNE and non-UNE) following the Proposed Merger. At a minimum, these additional commitments must include a three-year extension of current wholesale agreements, co-extensive with the three-year extension of ICAs.

3. To Adequately Protect Local Competition, Prices For Facilities Purchased Under Wholesale Agreements Must Be Capped At Current Levels For At Least Three Years, Consistent With the Minimum Synergy Period and the ICA Extension in the Staff Settlement.

To ensure adequate stability for the CLECs that rely significantly on wholesale inputs provided under wholesale agreements, the merger must be conditioned on an extension of those agreements, at current prices, for at least three years following the closing of the Proposed Merger to match the minimum three-year synergy period and the three-year extension of ICAs.

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[47] *Id.* at pp. 8-9; *see also* Tr. Vol. 1 (12-17-2010), p.72, ln. 23 to p.73, ln. 5 (testimony of Integra witness Mr. Denney that "most of our wholesale purchases from Qwest are out of the * * * interconnection agreements").
[48] Joint CLECs/1, Ankum/69, lns. 12-16.

As Dr. Ankum testified, "the availability of wholesale services should be stable over the foreseeable future to offset the substantial uncertainty and risks of degraded wholesale services associated with the proposed merger, including the risks that stem from the Merged Company's efforts to achieve synergy savings post-merger."[49]

There can be little doubt that wholesale services currently purchased from Qwest will be a natural target in the Merged Company's efforts to achieve its ambitious synergy savings.[50] As captive wholesale customers, CLECs have no other suppliers to turn to for these wholesale services, which makes them uniquely vulnerable to price increases that increase their costs and potentially impede their ability to compete. That the Merged Company is likely to eliminate or raise prices on Qwest's non-UNE wholesale services is readily apparent from the fact that the acquiring company, CenturyLink, does not offer these services and apparently has little intent to provide them post-merger unless required.[51] This likelihood is further confirmed by the refusal of the Merging Companies to extend existing non-UNE wholesale agreements by at least the same length as their agreed-upon extension of ICAs. The Merging Companies' unwillingness to agree to an equal extension of Qwest's already higher priced non-UNE wholesale services indicates an unmistakable intent to increase those prices even higher as soon as possible during the 3 to 5 year synergy period.

The Staff Settlement's failure to cap non-UNE wholesale rates for the minimal three-year synergy period is compounded by the fact that the limited 18-month cap does not apply to current rates in effect on the date of the merger filing. Instead, that cap will only apply to rates in effect on the transaction's closing date, even if those rates were raised during the pendency of the Proposed Merger. This is particularly troubling given that the Merging Companies are already

[49] *Id.* at p. 64, ln. 39 to 65, ln. 3.
[50] *Id.* at pp. 40-41.
[51] *Id.* at p. 70, lns. 4-15.

"taking steps after the Merger Announcement Date . . . to enhance ... revenues at the expense of wholesale customers."[52] For example, shortly after the merger filing, on May 31, 2010, Qwest reduced the discounts available under its wholesale RCP agreement. Therefore, even the limited 18-month price cap is largely illusory in relation to wholesale price increases implemented between the Proposed Merger's filing and closing dates.

The Merging Companies' failure to commit to a uniform three-year extension of RCP agreements is also highly problematic. The new RCP agreement implemented after the Proposed Merger was announced, increases costs and substantially reduces the discounts previously available for the special access facilities.[53] For example, tw telecom currently purchases special access facilities from Qwest under an RCP agreement set to expire in June 2011, and has estimated that its special access costs will increase 22% absent the extension of non-UNE wholesale agreements it is requesting as part of the Joint CLEC merger conditions.[54]

Under the Staff Settlement, CenturyLink and Qwest have agreed to extend "term and volume discount plans" (which include RCP agreements) in effect on the merger closing date by only 12 months beyond the expiration of the then-existing term. The 12-month extension may provide sufficient price stability for Integra and any other CLECs with RCP agreements set to expire in 2013 or later.[55] However, CLECs such as tw telecom with RCP agreements that expire sooner, will be materially disadvantaged since they will be forced onto the higher effective RCP rates well before other CLECs. Moreover, if a CLEC's existing RCP agreement expires before the closing of the Proposed Merger, the CLEC would be unable to extend its existing agreement and be forced onto the new RCP that increases the CLEC's costs and negatively impacts its

[52] *Id.* at p. 86, lns. 2-4.
[53] Joint CLECs/23, Gates/30, lns. 6-9.
[54] *Id.* at lns. 9-13.
[55] *Id.* at lns. 17-19.

ability to compete.[56] Because tw telecom's RCP agreement with Qwest expires in June 2011, it would not be eligible for extension if the transaction closes after that date.[57]

Such disparate treatment of CLECs will harm the efficient operation of the market by artificially creating winners and losers based on an expiration date in an agreement instead of on a company's ability to efficiently compete in the market. Under the Staff Settlement, some CLECs would receive no protection (or less protection than other CLECs) from merger-related harm just because the arbitrary expiration date in the CLEC's agreement with Qwest is before the arbitrary (and unknown) merger closing date. This is patently unfair, produces unreasonable results, significantly reduces the effectiveness of the commitments in the proposed settlement and provides competitive advantages to some CLECs over others.[58] All CLECs should be entitled to the protections of merger commitments regardless of when they executed their wholesale services agreement with Qwest and regardless of the date on which the merger may close. Qwest should not be allowed to eliminate and raise prices for wholesales services while the proposed transaction is being reviewed, and then tie critical merger commitments to the merger closing date in order to lock in the higher prices and fewer services going-forward. Such an outcome undermines the effectiveness of the merger commitments as well as the public interest in fostering competition for the benefit of consumers.[59]

To avoid this unreasonable and discriminatory effect, the Commission should require an additional alternative condition under which CenturyLink and Qwest commit to extending all RCP agreements in effect as of the merger filing date by three years from the date the transaction closes. CLECs could still extend their existing RCP agreements by one year as provided in the

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[56] *Id.* at p. 32, lns. 3-5.
[57] *Id.* at lns. 6-7.
[58] *Id.* at lns. 11-13.
[59] *Id.* at lns. 19-20. *See* also Tr. Vol. 1 (12-17-10), pp. 22-28.

Staff Settlement, but CLECs would also have the option of extending their current RCP agreements by three years from the transaction's closing date. This condition should apply to the non-UNE wholesale agreements/tariffs in place as of the merger filing (or at least the agreements in effect at the end of the current year) to provide the price stability that CLECs need.

4. The Additional 18-Month Extension of Commercial Agreements Provides Little If Any Benefit to CLECs or Local Competition.

The Merging Companies' commitment to extend wholesale commercial agreements an additional 18 months without a price cap for embedded base customers is inadequate for several reasons. First, without a price cap, this extension provides no stability on the most important material term in the purchase of these facilities. Second, the absence of a price cap would allow the Merged Company to price these wholesale products beyond the reach of CLECs, which would effectively eliminate the product's availability. Third, limiting the availability of wholesale inputs purchased under these agreements to a CLEC's embedded base effectively prevents CLECs from using those inputs to grow their customer base. To the extent a CLEC relies on particular wholesale inputs to serve retail customers, the embedded base limitation in the Staff Settlement would prevent that CLEC from adding any new customers. In that sense this particular aspect of the Merging Companies' commitment is highly anti-competitive.

5. Extending Wholesale Agreements for Three Years at Current Rates Would Not Cause Competitive Harm to CenturyLink.

Extending wholesale agreements for a full three years at current rates would not result in any competitive harm to the Merged Company.[60] The rates under those agreements are already substantially higher than the UNE rates set by the Commission for those same wholesale facilities.[61] For instance, for dark fiber in Oregon, the commercial rate (per mile) is 5 to 8 times

[60] Joint CLECs/23, Gates/35, ln. 1.
[61] *Id.* at lns. 2-4.

higher than the UNE dark fiber rate.[62] In addition, the commercial wholesale rates were set by Qwest unilaterally without any negotiation or input from CLECs.[63] The Merging Companies have provided no reason why the rates for non-UNE wholesale services should be allowed to increase, particularly at the same time the Merged Company will be pursuing merger-related synergy savings.

The need for post-merger stability and certainty applies to all wholesale facilities, not just those provided as UNEs under ICAs. Indeed, providing more stability for UNEs than non-UNEs does not serve the public interest. To the contrary, it unduly slants the competitive playing field in favor of certain CLECs over others, depending on the mix of wholesale products they need. As a result, it is critical that Qwest's commercial and wholesale agreements be extended for at least three years at current rates, coextensive with the three-year extension of ICAs, to match the minimum three-year synergy period.

B. The Merging Companies Have Not Committed to Sufficient Protections Regarding OSS.

Although the Staff Settlement addresses the Merged Company's continued use of Qwest's OSS, it does not adequately address the OSS risks associated with the Proposed Merger in several important respects. Therefore, to ensure that the post-merger OSS and performance levels do not deteriorate, approval of the Proposed Merger should be conditioned on the following additional commitments:

(1) an extension of Qwest's OSS for ***at least three years*** to match the Merged Company's 3-5 year synergy period; and

(2) a commitment by the Merged Company that any successor OSS will perform at the same level as Qwest's current OSS as confirmed by third-party testing at commercial volumes.

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[62] *Id.* at lns. 4-6.

[63] *Id.* at lns. 6-7.

1. High quality OSS is critical to the ability of CLECs to provide competitive local services.

The FCC defines OSS to include five functions: (1) pre-ordering, (2) ordering, (3) provisioning, (4) maintenance and repair, and (5) billing.[64] OSS includes all of the computer systems, databases and personnel that an ILEC uses to perform internal functions necessary for these five functions.[65] The FCC has determined OSS to be a "network element."[66] 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 obtain prompt repair and maintenance services for its customers.[67] The FCC has found that CLECs would be "severely disadvantaged, if not precluded altogether, from fairly competing," if they did not have nondiscriminatory access to OSS.[68]

These systems must also be efficient, reliable and accurate. Inefficient systems that require extensive manual intervention, for instance, needlessly increase CLECs' costs, make it more difficult to do business with the ILEC, and increase potential errors because of the manual nature of the work.[69]

2. The record indicates that there is a high risk of OSS degradation following the Proposed Merger.

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[64] *See, e.g., 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 (the "*Local Competition Order*") at ¶¶ 516-528.
[65] *See* 47 C.F.R. §51.313(c) and §51.319(g).
[66] *Local Competition Order* at ¶ 516.
[67] Joint CLECs/8, Gates/36, lns. 10-15.
[68] *Local Competition Order* at ¶ 518.
[69] Joint CLECs/8, Gates/35, lns. 7-10.

The Merging Companies have not provided sufficient detail regarding their plans with respect to the integration of the CenturyLink and Qwest systems. The evidence that has been provided on this issue, however, gives the Commission ample reason for concern that the Proposed Merger will have an adverse impact on the OSS functionalities and capabilities available to CLECs who currently use Qwest's systems. CenturyLink has estimated that *****BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER xxxxxxxxxxxxxxxxxx END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER ***** of the total estimated $575 million in operational synergy savings will come from *****BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER xxxxxxxxxxxxxxxxxxxxxx END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER *****.[70] Given the magnitude of the estimated savings from this item relative to the overall synergy savings estimate, it is likely that integration efforts will involve OSS (including the modification or replacement of Qwest's OSS systems and/or databases with inferior systems to achieve cost savings).[71] As Mr. Gates has testified, "[o]ut of the many ways that the Merged Company could integrate the two companies to the detriment of competition, degrading the quality or access to OSS would be the most effective, and could be, if not done through a transparent Change Management Process ("CMP"), one of the most difficult to detect and remedy."[72]

CenturyLink's plans to modify or replace Qwest's OSS in pursuit of merger-related synergy savings would cause substantial harm to CLECs' ability to effectively compete. Qwest's OSS is the only OSS that has a track record of handling the substantial commercial

[70] *Id.* at p. 42, lns. 17-20 (citing CenturyLink Response to Joint CLECs Oregon Data Request #56(a), Highly Confidential Attachment 56a).
[71] *Id.* at p. 43, lns. 1-3.
[72] *Id.* at p. 37, ln. 17 to p. 38, ln. 2.

volumes in Qwest's legacy BOC territory. Qwest, unlike CenturyLink, went through the Section 271 approval process and, as part of that process, Qwest's OSS, CMP and supporting processes were extensively tested, including testing by an independent third-party, to ensure that they provided nondiscriminatory access.[73] In addition to extensive third-party testing, Qwest's OSS is also handling actual commercial volumes in Qwest's BOC territory today (and has for numerous years). By contrast, CenturyLink's OSS has not been through independent third-party testing and has not been tested for commercial volumes or shown to be operationally ready for Qwest's territory. And, given its relatively recent deployment, CenturyLink's OSS is much less familiar to CLECs.[74] There is a grave concern – grounded in CenturyLink's lack of experience, the lack of information from CenturyLink and Qwest, and recent system integration failures – that allowing CenturyLink to modify or replace Qwest's OSS will expose the CLECs to severe risk that their access to OSS will deteriorate post-merger.[75]

Mr. Gates has provided extensive testimony regarding the differences between the Qwest and CenturyLink OSS systems and the superior functionality of Qwest's OSS.[76] For all these reasons, modifying or replacing Qwest OSS with CenturyLink OSS will degrade CLEC access to OSS in Qwest's legacy region – which is over 88% of the merged company's access lines in Oregon[77] – and result in harm to competition as well as the public's interest in a competitive local services market.

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[73] *Id.* at pp. 43-44.
[74] *Id.* at p. 63, lns. 8-9.
[75] *Id.* at lns. 9-14.
[76] *See, e.g., id.* at pp. 48-50 and 58-60 (discussing, for instance, that Qwest (but not CenturyLink) allows electronic bonding capability for maintenance and repair that permits a direct connection between the CLEC and the Qwest repair technicians, and that Qwest's web-based maintenance and repair GUI has superior functionality that allows CLECs to submit trouble tickets for special access circuits through Qwest's GUI system, which is not permitted through CenturyLink's web-based system).
[77] *See, supra,* note 22.

Furthermore, modifying or replacing Qwest's OSS would result in significant disruption and cost related to the CLECs' own internal systems.[78] CLECs have built their own systems and interfaces to electronically bond directly with Qwest's OSS, and CLECs have also integrated their electronic interfaces into their own back end systems.[79] CLECs' interfaces and back end systems would be subject to change if the Merged Company modified or replaced Qwest's OSS post-merger, which could potentially require CLECs to revert to significantly less efficient manual processes. This would also require significant effort and cost to CLECs that have already developed internal systems to electronically bond with Qwest's OSS.

The Staff Settlement does not adequately address the OSS risks associated with the Proposed Merger, particularly with respect to CLECs that have more automated internal systems interfaced with Qwest's OSS. To ensure that the post-merger OSS and performance levels do not deteriorate and to prevent serious harm to the CLECs (and local competition), approval of the Proposed Merger should be subject to the following two additional conditions referenced above and further discussed below: (a) Qwest OSS should be offered for at least three years; and (b) third-party testing should be required before the transition to any non-Qwest OSS.

3. The Commission Should Adopt A Requirement That the Merged Company Use and Offer Qwest OSS for at Least Three Years.

The Joint CLECs urge the Commission to require the Merged Company to add at least a year to the time period in the Staff Settlement during which the Merged Company will continue to use and offer the Qwest OSS, for a total extension of at least three years after the merger. Further, the Commission should clarify that the Merged Company may not provide the specific 270-day prior notice of future OSS changes until the three-year period has expired. Mr. Gates has explained that because CenturyLink has estimated synergy savings to be achieved over a

[78] *Id.* at pp. 52-57.
[79] *Id.*

three-to-five year period, evidence in the record shows that the greatest risk to CLECs of CenturyLink degrading access to OSS is during that three-to-five year window.[80]

As the record demonstrates, if CLEC access to OSS is degraded due to integration failures or attempts to find synergy savings, competitors will be disadvantaged in attempting to compete with CenturyLink. A commitment to continue operating the Qwest OSS for a period of time *less than* three years – less than the minimum time period during which CenturyLink will be aggressively pursuing synergy cost savings – significantly increases the potential that the Merged Company will eliminate or degrade the OSS systems, processes, and support relied upon by CLECs. For this reason the Commission should require that, in the legacy Qwest ILEC service territory, the Merged Company will use and offer to wholesale customers the legacy Qwest OSS for at least three years after closing.

4. The Commission Should Require Third-Party Testing At Commercial Volumes To Ensure That the Any Successor OSS Is Equivalent To The Current Qwest OSS After The Three Year Period.

A degradation of the levels of service provided today under the Qwest OSS would represent a significant step backwards – i.e., backsliding on Qwest's statutory 47 U.S.C § 271 obligations. Qwest's OSS was subjected to an extensive third-party test conducted over a three-year period for the express purpose of determining whether it satisfied the nondiscriminatory access requirement under Section 271.[81] That third party testing revealed hundreds of problems that were addressed, and later resolved, through OSS improvements and re-testing. Millions of dollars of investment and countless person hours went into this process.[82] Ultimately, because of those investments and the continued review and oversight of state commissions like this one, Qwest ultimately received 271 authority to provide in-region interLATA services. Replacing

[80] *Id.* at p. 123, lns. 18.
[81] *Id.* at p. 38, lns. 4-7.
[82] *Id.* at p. 63, lns. 1-6.

Qwest's legacy OSS with CenturyLink's legacy (or new) OSS would lead to backsliding on Qwest's 271 obligations because Qwest would no longer be providing the nondiscriminatory access to OSS that was a *quid pro quo* for 271 approval. Also, as discussed above, the evidence shows that, when compared to Qwest's existing OSS, CenturyLink's OSS has inferior functionality, does not support as many services, has not been third-party tested, and has never processed the significantly higher commercial volumes experienced in Qwest's legacy territory.

The risks associated with replacing Qwest's OSS following the merger are quite significant and must be met with equally compelling safeguards beyond those in the Staff Settlement. Therefore, at a minimum, it is essential that any changes in OSS following the three-year period requested by the Joint CLECs should be subject to the same third-party testing at commercial volumes that was used to ensure the adequacy of the current Qwest OSS.

C. The Merging Companies Have Not Committed to Sufficient Conditions Surrounding Competitors' Rights to Utilize A Single Point of Interconnection (POI) per LATA.

The Staff Settlement fails to include any commitments that would address CenturyLink's practice of requiring CLECs to bear the costs of establishing burdensome and inefficient multiple points of interconnection per LATA. While the Joint CLECs proposed CLEC Condition 28 to specifically alleviate this very concern, this proposed condition was not included in the Integra Settlement (or, later, the Staff Settlement). Indeed, as Charter's witness Mr. Bill Pruitt explained, "Integra does not provide competitive residential wireline voice services in small Oregon communities so it lacks any real incentive to seek conditions to address concerns that are not relevant to its business."[83] The lack of commitment from the Merged Company to give CLECs the right to use the more efficient and cost-effective approach for interconnecting at a single point of interconnection per LATA does nothing more than needlessly increase CLEC costs of

[83] Charter Fiberlink/14, Pruitt/12, ln. 27 to 13, ln. 2.

interconnection to the ILEC. Without the inclusion of this commitment from the Merged Company, the Staff Settlement falls short of addressing another needless anticompetitive burden that CLEC Condition 28 was intended to prevent.

In several other states CenturyLink has established multiple separate legal operating entities (i.e., affiliates).[84] This approach provides a basis for CenturyLink to avoid the obligation to permit competitors to interconnect at a single POI in a LATA. It does so by requiring competitors to establish POIs in each of its separate affiliate's service territories.[85] Specifically, CenturyLink takes the unreasonable position that each separate legal entity may demand that competitors obtain a separate ICA with such entity, and must establish separate connections (*i.e.*, multiple POIs) with the network associated with each entity, even where the networks may be contiguous to and interconnected with one another.[86] This practice is harmful to competition because it unreasonably increases competitors' interconnection costs, and provides the Merged Company a competitive advantage over CLECs that are forced to expend resources to build out to multiple points on the ILEC's network. Accordingly, the Commission should adopt CLEC Condition 28 to provide the remaining CLECs with an option to interconnect with the Merged Company at a single POI per LATA, to the extent that their networks are or become interconnected.

The FCC has repeatedly affirmed that competitors do not have to build networks that mirror the ILEC's network,[87] and that Section 251 permits competitors to interconnect via a single POI in a LATA.[88] Indeed, CenturyLink witness Mr. Hunsucker acknowledged that he has

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[84] CenturyLink maintains seventeen (17) independent legal entities in Wisconsin, nine (9) in Louisiana, seven (7) in Arkansas, five (5) in Missouri and four (4) in Minnesota. *See* Charter Fiberlink/1, Pruitt/35 lines 9-11.
[85] *Id.* at p. 36, lns. 20-22.
[86] *Id.*
[87] *Local Competition Order*, ¶ 209.
[88] *See, e.g., Local Competition Order* at ¶ 209.

previously testified in other proceedings that federal law does require incumbent LECs to provide a single POI to competitive LECs.[89] Although federal law is unambiguous on this point, CenturyLink continues to require CLECs like Charter to establish multiple (and in some cases, up to 13[90]) separate POIs with each of the CenturyLink separate operating companies with which it exchanges traffic in a given state.

Moreover, although CenturyLink has refused to provide any meaningful details with respect to the facilities that connect its affiliates in Oregon,[91] the record in this proceeding confirms that "the Merged Company will not only have a larger footprint, but also will have many legacy CenturyLink exchanges that are adjacent or in close proximity to legacy Qwest exchanges."[92] Qwest's witness Ms. Peppler explained that "[i]n many cases the [Qwest and CenturyLink] networks are adjacent or within close proximity to one another, and this will make it easier to implement operating efficiencies and infrastructure improvements."[93] In addition, during the hearing CenturyLink witness Mr. Schafer acknowledged that because the two companies' networks in Oregon are "complementary"[94] and "contiguous"[95] the merged company would obtain value by "put[ting] pieces of the network together" to create value.[96]

To the extent that the Merged Company provisions facilities to connect the legacy networks of CenturyLink and Qwest to realize the benefits of a larger interconnected footprint –

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[89] Tr. Vol. 1 (12-17-10) at p. 32, line 22 to p. 34, line 18.
[90] For example, as a result of CenturyLink's expansive and disparate service territories in Wisconsin, Charter may be forced to bear the costly, and inefficient, burden of separately interconnecting with 13 out of the 17 separate legal entities. Charter Fiberlink/1, Pruitt/36, lns. 3-8.
[91] *See* Charter Fiberlink/1, Pruitt/11 (Exhibit providing copy of CenturyLink Discovery Response No. 45). CenturyLink refused to provide Charter with any detailed information when asked whether it connects its affiliates in Oregon.
[92] Joint CLECs/8, Gates/190, lns. 7-9. A map of Qwest and CenturyLink exchanges in Oregon is included in the record as an exhibit. *See* Joint CLECs/19 (Map of Qwest and CenturyLink exchanges in Oregon); Charter Fiberlink/10, Pruitt/2.
[93] Qwest/1, Peppler/12, lns. 7-9; *See* Tr. Vol. 1 (12-16-10), p.114, ln. 18 to p.115, ln. 21 (Schafer).
[94] Tr. Vol. 1 at p. 114, line 22 to p. 115 line 1.
[95] *Id.*
[96] *Id.* at p. 116, lines 10-14.

which, based upon Ms. Peppler's and Mr. Schafer's testimony, they undoubtedly will – these same benefits should also flow through to competitors interconnecting with the Merged Company in accord with FCC policy pronouncements from the inception of the Act.[97] As Dr. Ankum explains, allowing CLECs to share in the operational benefits enjoyed by the Merged Company would "lower barriers to entry for competitors who would be permitted to capitalize on the increased scale and efficiencies of the Merged Company."[98] In the absence of this condition, the Proposed Merger would harm competition by allowing the Merged Company to gain the advantage of efficiencies of scope and scale while denying the benefits of these same efficiencies to competitors.

These problems can be addressed by adopting CLEC Condition 28, which gives CLECs the option to interconnect with the Merged Company at a single POI per LATA. Further, the Joint CLECs have revised this condition to apply *only* where the Merged Company's affiliates' networks are interconnected. Notably, Qwest does not force CLECs to interconnect at multiple POIs per LATA. As such, Qwest's practice should be viewed as the preferred practice. Thus, in light of the shortcomings of the Integra Settlement which is completely silent on this matter, the Commission should adopt CLEC Condition 28, as amended.

D. CenturyLink and Qwest Have Not Committed to Sufficient Conditions to Ensure That Competitors' Interconnection-Related Transaction Costs Will Not Rise As a Result of the Merger.

The Staff Settlement includes several important conditions related to ICAs. However, these conditions will not eliminate the potential for the Merged Company to increase competitors' transaction costs associated with negotiating or arbitrating ICAs. In particular, the lack of any ICA "porting" (also known as cross-state adoption) provision constitutes the

[97] Joint CLECs/8, Gates/191, ln. 21 to 192, ln. 4; Joint CLECs/1, Ankum/82, lns. 2-5. *See also*, *Local Competition Order* at ¶ 209.
[98] Joint CLECs/1, Ankum/82, lines 7-9.

omission of a significant condition necessary to ensure that competitors' transaction costs do not increase as a result of this merger.

If this transaction is approved, the Merged Company will be significantly larger than either of the two pre-merger companies. Indeed, the Merging Companies' witnesses have testified that the Merged Company will control 17 million access lines, with operations spanning 37 states,[99] and a combined pro forma revenue of $19.8 billion (as of year end 2009).[100] Collectively, this increased size and scope will make CenturyLink the third largest ILEC/BOC in the nation.[101] This increase in size and resources will benefit the Merged Company by allowing it to obtain certain operating economies and efficiencies. However, to the extent such economies are achieved, they should also accrue in part to the benefit of captive wholesale customers and consumers.

At the same time, the size and operating power accruing from the merger will also give the Merged Company a strong incentive to use its enhanced market power as leverage during negotiations and dealings with competitors. The FCC has explained that, under the "Big Footprint" theory, "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."[102] The Merged Company's relative size is a concern because: "[t]he larger the resulting incumbent LEC is, the greater is its ability to internalize these spillover effects."[103] The "spillover effects" referred to here have been described by the FCC as "discriminatory conduct

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[99] CTL/100, Jones/11, lines 8-10.
[100] Qwest/1, Peppler/10. lines 9-10
[101] Joint CLECs1/ Anukum/89, lns. 25-28.
[102] *In the Matter of Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, n. 106 (2009).
[103] *Id.*

by an incumbent LEC in its region [that] affects competitors in areas both inside and outside the incumbent's region."[104] The resulting effects on competitors of such spillover effects can "directly or indirectly *harm customers*, whose business the incumbent LEC is seeking to gain."[105] In other words, as ILECs increase in size and scope, their ability to leverage such size and scope to the disadvantage of competitors also increases. That, in turn, can lead to a degradation of service to end-user customers in Oregon.

Further, evidence in this case, and in the industry generally, demonstrates that the operational uncertainty arising from the Merged Company's plans to consolidate ICA terms is significant. Indeed, documents produced by CenturyLink indicate that the company intends to *****BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.[106] **END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER***** Such an agreement would likely import many of the wholesale "worst" practices identified in the testimony of Charter witness Mr. Pruitt and Joint CLEC witness Mr. Gates. This substantially increases the uncertainty and risks that stem from the Merged Company's efforts to achieve synergy savings post-merger through degraded wholesale services and interconnection terms.[107]

Given these anticipated post-closing actions, the Joint CLECs are concerned that ICA terms may not be stable over the foreseeable future because the Merged Company will use its

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[104] *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer of Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 at ¶ 177 (2000).
[105] *Id.* (emphasis added).
[106] Joint CLECs/31, Qwest Communications International, Inc., HSR Filing Attachment 4C-29 (Hearing Exhibit titled "Wholesale Diligence Update," prepared on April 19, 2010 by Bill Cheek, President, Wholesale Operations CenturyLink).
[107] *Id.*

size and market power to force competitors into negotiations of a new agreement. This is particularly true for competitors that operate in multiple CenturyLink and Qwest service areas, and which therefore have many different agreements (on a state-by-state basis) with the Merging Companies.[108] The potential that such agreements may be undermined or degraded by the Merged Company's potential use of its increased size and leverage to gain a competitive advantage is not an idle concern. As Joint CLEC witness Dr. Ankum explained:

> wholesale customers need certainty with regard to the elements and services they purchase from Qwest (or the Merged Company) for business planning purposes, and based on the transaction as filed, there is no such certainty. CLECs cannot simply go elsewhere for the wholesale services they need from Qwest and CenturyLink both now and post-merger, so certainty in this area is absolutely essential.[109]

This is why competitors are concerned that the Merged Company may direct its integration efforts to the detriment of wholesale customers either by withdrawing 251 services, or significantly changing the offerings Qwest currently makes available under its ICA.[110] The effect of these issues is a potential for a significant increase in the transaction costs of competitors – in both substantial time and resources to negotiate and/or arbitrate replacement agreements. Requiring wholesale customers to receive, review, negotiate and execute ICAs for this purpose could result in disruption or delay during the transfer of control. And that disruption and delay would be exacerbated if wholesale customers disagree with the terms included in the ICAs with the Merged Company, resulting in parties seeking resolution of those disputes before this Commission.[111] Negotiations with the Merged Company over the terms of new agreements will inevitably lead to longer and more contentious negotiations, and potentially arbitrations,

[108] *See, e.g.*, Charter Fiberlink/14, Pruitt/10, lns. 22-25.
[109] Joint CLECs/1, Ankum/66, lns. 3-8.
[110] *Id.* at p. 65, lns. 9-13.
[111] *Id.* at Joint CLECs/1, Ankum/68, ln. 22 to 69, ln. 2.

which can be lengthy and require the expenditure of significant resources by competitors and by the Commission.[112]

At least one competitor, Charter, is very familiar with the inherent pitfalls of this process through its experience negotiating and arbitrating ICAs with both CenturyLink and Qwest in multiple states. Because Integra generally does not compete with CenturyLink in Oregon (and other states), it would not have the experience of negotiating or arbitrating an ICA with CenturyLink in Oregon (or elsewhere).[113] Thus, it is not surprising that the Integra Settlement does nothing to address concerns that are unique to competitors that must negotiate and in some cases arbitrate ICAs with both CenturyLink and Qwest in multiple states. This is likely the reason that the Integra Settlement omits any discussion of cross-state adoptions, or so-called ICA "porting."

To address these concerns the Commission must adopt an additional ICA condition that permits competitors to opt-in to Qwest's ICAs in Oregon and then "port" such agreements to another state. That same condition should also recognize the inverse, *i.e.* it should require the Merged Company to permit competitors to opt-in to Qwest ICAs in another state and then "port" such agreements to Oregon, provided Commission-required terms and pricing are added to the agreements ported into Oregon.

Proposed Joint CLEC Condition 10 provides language that would accomplish these objectives. That condition permits a competitor to adopt, or opt-into, any ICA to which Qwest is a party, in the same state, or in any state to which Qwest is an ILEC. Such a condition is not new to merger proceedings, as the FCC has previously adopted similar conditions in conjunction with its approval of the AT&T/BellSouth merger, and the Bell Atlantic/GTE merger. In the most

[112] *Id.*
[113] Charter Fiberlink/14, Pruitt/10, ln. 15 to 11, ln. 15.

recent case, the agency required AT&T/BellSouth to make available to any CLEC any ICA (negotiated or arbitrated) to which an AT&T/BellSouth ILEC is a party in any state within the AT&T 22-state footprint, subject to state-specific pricing and technical feasibility.[114] Notably, the Joint CLECs' proposed condition permits the state commission to modify the ICA before opt in if the Merged Company demonstrates technical infeasibility, or if the TELRIC-based prices in the ICA are inconsistent with the TELRIC-based prices in the state in question.[115]

Adoption of this additional interconnection condition will result in several demonstrable benefits for competitors, and ultimately end user customers in Oregon. These conditions will ensure that competitors transaction costs are not arbitrarily raised, or adversely affected, which will allow competitors to continue offering competitively priced services to Oregon. Furthermore, these conditions will ensure that the Merged Company does not attempt to obtain synergy "savings" through the imposition of new or increased rates and surcharges, or other improper or anticompetitive terms in any new consolidated template ICA the Merged Company may introduce in the future.

E. The Merging Companies Have Not Committed to Sufficient Conditions Regarding Directory Listing and Assistance Practices.

The Staff Settlement fails to address any of the Joint CLECs' concerns with respect to CenturyLink's failure to provide wholesale access to directory listing and directory assistance functions in a nondiscriminatory manner. In fact, there is not a single provision in the Staff Settlement that secures a commitment that the Merged Company will comply with existing federal law with respect to its responsibilities to provide nondiscriminatory access to directory

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[114] *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, ¶ 19 (2007).
[115] Joint CLEC/1, Ankum/76, lns. 9-12.

listing and directory assistance, or that the Merged Company will not attempt to shift its directory listing and directory assistance responsibilities to a third party vendor.

The record demonstrates that with respect to certain directory listing and directory assistance functions, CenturyLink refuses to implement wholesale practices required under Section 251(b)(3). More specifically, CenturyLink shifts its obligations under Section 251(b)(3) of the Act to a third-party vendor by refusing to contract with competitors (in an ICA) for certain basic directory listing and directory assistance functions.[116] As a result of this practice, there is a greater likelihood that directory services provided by competitors will be degraded if CenturyLink, or its third-party vendor, fails to properly maintain directory assistance and directory listings databases in the same manner that Qwest does throughout its ILEC serving territory.[117]

Mr. Gates testified that CenturyLink's use of a third-party vendor to provide directory assistance services created significant problems for Charter's subscribers.[118] For example, within the last several years CenturyLink subscribers were not able to obtain Charter subscribers' listing information from CenturyLink's directory assistance service. Specifically, every time that a CenturyLink subscriber called directory assistance by dialing "4-1-1" and requested listing information about a Charter subscriber, the listing information was not provided by CenturyLink's vendor and the subscriber was told that such information was not available.[119] As a result, CenturyLink subscribers trying to reach Charter subscribers by requesting information

[116] Joint CLECs/8, Gates/167-168.
[117] *Id.* at p. 167, lns. 7-10.
[118] *Id.* at p. 168, lns. 1-14.
[119] *Id.* at p. 168, lns. 1-4. After some investigation, Charter determined that the problem arose because CenturyLink had contracted with a third-party vendor to operate its directory assistance database. *Id.* at p. 168, lns. 7-12. That third-party vendor did not have Charter's listings in its local database and was not querying the correct national database, thereby excluding Charter subscriber listing information from 411 search results for thousands of Charter subscribers. *Id.* at p. 168, lns. 7-12.

from 411 services were unable to do so.[120] When presented with this information, CenturyLink disclaimed any obligation to remedy the situation, claiming instead that the practices of its directory assistance database vendor were not subject to scrutiny from competitors like Charter. To address the potential impact that this type of practice will have on competitors, the Commission should adopt CLEC Condition 23 as an additional condition that the Merged Company must operate under. The adoption of this Condition (in addition to the terms of the Staff Settlement) will ensure that competitors in Oregon are provided the nondiscriminatory access to directory listing and directory assistance functions that is required by law.

Notably, Condition 23 simply requires that the Merged Company provide wholesale directory services in compliance with existing law. It does not impose any additional operational burdens that the Merging Companies should not already be operating under. Further, a condition that simply requires the Merged Company to comply with the law does not impose any additional operational burdens. The Condition, however, would ensure that the Merged Company could not undermine competitors by offering wholesale directory listing and assistance services in a manner that is inconsistent with federal law. The fact that the Condition requires CenturyLink to continue to comply with existing federal law in the Qwest ILEC territory should not be grounds for dismissing this Condition as "mere surplusage." If the Condition is not imposed on this merger, there will be nothing except a future arbitration or interconnection agreement enforcement complaint case before this Commission that will stop this worst practice in the Qwest ILEC territory in Oregon. Competitors should not have to enforce their existing rights under federal law through arbitration when Qwest does not engage in such practices today. Doing so, would violate the "no harm" standard of the public interest standard.

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[120] *Id.* at p.168, lns. 2-6.

Section 251(b)(3) states that all local exchange carriers have the duty to permit all competing providers with "nondiscriminatory access to telephone numbers, . . . directory assistance, and directory listing."[121] Of particular relevance to this proceeding, is the statute's mandate that ILECs provide to CLECs "nondiscriminatory access to the . . . directory assistance, and directory listing"[122] that they maintain for their own customer's benefit. A directory listing consists of the customer's name, phone number, and address that are published in a directory, such as a telephone book, or included in a directory database, such as that used when a caller dials "411."[123] Thus, competitors have the right to have their customers' listing information "placed" into the local directory assistance databases that other LECs (mainly incumbents) maintain, *or cause to be maintained*, on "nondiscriminatory rates, terms and conditions."[124]

This action of "placing a customer's listing information in a directory assistance database" is the very functionality that CenturyLink refuses to incorporate into its ICAs. CenturyLink refuses to include such language, but provides that very same basic functionality to its own customers. Because Section 251(b)(3)'s nondiscrimination standard operates to require the ILEC to provide to the CLEC that which it provides its end users, CenturyLink has the obligation to undertake the same activities for competitor's subscribers as it does for its own subscribers.

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[121] 47 U.S.C. § 251(b)(3). In construing the obligations arising under this section of the statute, the FCC has clearly proscribed the specific actions that ILECs (indeed, all LECs) must undertake to comply with their duty under Section 251(b)(3) to provide non-discriminatory access to directory listing. To that end, the FCC has explained: "the section 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by the suggestion . . . that directory listing be defined as a verb that refers to *the act of placing a customer's listing information in a directory assistance database* or in a directory compilation for external use (such as white pages)." *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information under the Telecommunications Act of 1934 [sic], As Amended*, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd. 15550 ¶ 160 (1999) ("*SLI/DA Order*").
[122] *Id.*
[123] Joint CLECs/8, Gates/168, ln.18 to 169, ln. 1.
[124] 47 C.F.R. § 51.217(a)(2)(i) (FCC rule defining "nondiscriminatory access" requirement of Section 251(b)(3) (emphasis added).

Although it is not uncommon for ILECs to use third-party vendors for directory assistance activities, the problem arises when an ILEC, with specific requirements under Section 251(b)(3), attempts to shift its responsibilities to a third-party. While the FCC has certainly recognized that carriers may enter into agreements to have subscriber listing databases administered by a third party,[125] such agreements must still be included in ICAs since use of a side agreement for access to subscriber listing databases would be directly at odds with the statutory requirements that LECs (i) provide directory listings on a nondiscriminatory basis; and (ii) make these directory assistance and directory listing terms available to other carriers in ICAs for adoption through the mechanism of 47 U.S.C. § 252.[126]

Clearly, carriers cannot avoid their obligations under Section 251(b)(3) simply by contracting with a third-party vendor for those functions that are required by that section. In this case, that means that CenturyLink, even though it may use a third-party vendor to support its directory assistance service, is still the federally-regulated entity that is obligated to provide nondiscriminatory access to directory assistance under Section 251(b)(3). Second, when problems occur with the directory listing information, CenturyLink must accept responsibility (and ultimately liability) for addressing and resolving the problems. CenturyLink cannot be allowed to disclaim responsibility for the discriminatory handling of subscriber listing information simply through its decision to use a third-party vendor. Therefore, CenturyLink's general policy of refusing to include its 251(b)(3) obligations within ICAs – including the obligation to publish competitor's listings in the same directories in which it publishes its own

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[125] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, FCC 96-333, 11 FCC Rcd 19392 at ¶ 144 (1996), vacated in part, *People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997), rev. on other grounds, *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721 (Jan. 25, 1999).
[126] *SLI/DA Order* at ¶ 36.

customers listings, and the obligation to ensure that competitor's listings are available to its own customers who request directory assistance – contravenes its obligations under Section 251.

To address these concerns, the Merged Company should be required to adopt Qwest's best practices of including terms in its ICAs that address its 251(b)(3) obligations to ensure that its end users have access to competitors' customer listings when they call CenturyLink's directory listing vendor. Although these principles are absent from the Staff Settlement, they are reflected in CLEC Condition 23, which ensures that CenturyLink will comply with federal and state law with respect to its directory assistance and directory listings responsibilities. CenturyLink's refusal to do so contravenes statutory obligations and creates operational and competitive problems for competitors whose service may be perceived as substandard by the competitor's end users. Accordingly, the Commission should condition approval of this transaction upon a commitment from the Merged Company to adopt Qwest's best practices, and reject CenturyLink's worst practices, in regard to directory listings and directory assistance.

Furthermore, the Staff Settlement does not go far enough to keep the Merging Companies from improperly introducing new wholesale surcharges prior to the merger closing date. This fact is illustrated by Qwest's recent decision to impose new directory-related charges upon facilities-based competitors. Specifically, on November 30, 2010, Qwest issued a notice of its intent to begin assessing a new monthly recurring and nonrecurring directory listing charge on facilities-based competitors as of January 1, 2011.[127]

[127] Joint CLECs/24 (Product Notice); see also Joint CLECs/23, Gates/37, lns. 1-9. The notice references a version of the Qwest Product Catalog (Version 53) that doesn't currently exist. However, existing Version 52 of the Product Catalog states in the "Pricing" section, under the "FBDL" (facilities-based directory listing) product: " Monthly recurring charges are the retail tariffed rate minus the wholesale discount specified in your Interconnection Agreement or amended rate sheet. ***Nonrecurring charges do not apply to FBDL.***" This proposed charge would likely apply to all facilities-based competitors who request that customers' listing information be included in the white and yellow page directories in which Qwest publishes its own customers' listings. Hearing Exhibit Joint CLECs/38 (White Page Directory); *see also* Tr. Vol.1 (12-17-2010), p.99, lns. 5-19 (Viveros).

These actions support the Joint CLECs' testimony that CenturyLink is likely to begin assessing anticompetitive customer acquisition charges in Qwest ILEC territory which is over 88% of the combined companies' access lines in Oregon.[128] As stated in Mr. Pruitt's direct testimony and confirmed by Mr. Viveros at the hearing, Qwest does not currently assess directory listing charges,[129] nor do other RBOCs operating in other parts of the nation. Further, Mr. Pruitt has already explained that the assessment of these types of surcharges on competitors during the customer acquisition and migration process is an anticompetitive practice which burdens competitors with unnecessary costs.

As Mr. Gates explained, Qwest's plan to introduce a new directory listing charge on facilities-based competitors is contrary to the spirit of the commitment made by the Merging Companies (in both the Integra and Staff Settlements) to stop assessing wholesale surcharges on competitors.[130] This action undermines assurances made in the settlements that the Merged Company would not assess "'storage' or other related fees, rents or service order charges upon a CLECs' subscriber directory listings information submitted to the Merged Company."[131] More troubling is the fact that Qwest may be trying to avail itself of a loophole in this provision of the Staff Settlement by introducing these charges prior to the merger closing date (at which point any prior-approved rates would be grandfathered in). Indeed, as Mr. Gates explained, if Qwest is permitted to impose such charges there is nothing to stop the company from issuing additional notices prior to closing to increase rates that could undermine competitors' costs.[132] If this is, in fact, Qwest's intentions, then the Commission must take affirmative action to expand the

[128] *See* Qwest/1, Peppler/10, lns. 12-16.
[129] Charter Fiberlink/1, Pruitt/31, ln. 21 to 32, ln. 4; Tr. Vol. 1 (12-17-2010), p.99, ln.7-9 (Viveros).
[130] Tr. Vol. 1 (12-17-10) at p. 132, ln. 6 to p. 133, ln. 8.
[131] Integra Settlement Agreement at ¶ 4(b).
[132] Tr. Vol. 1 (12-17-10) at p. 133, lns. 2-8.

prohibition on wholesale surcharges to prohibit the introduction of last-minute charges sought by the Merging Companies.

F. CenturyLink Has Not Committed to Sufficient Protections To Ensure That it Does Not Continue Using the Rural Exemption to Avoid Obligations Under Section 251(c).

The Staff Settlement does not adequately address the Joint CLECs' proposed concerns with CenturyLink's current practice of using the rural exemption in an anticompetitive manner. For example, although the Staff Settlement addresses this rural exemption issue, the condition is limited to only the "Qwest ILEC service territory."[133] Because this condition only applies to Qwest and not CenturyLink, it is of limited utility to competitors like Charter who provide service in Oregon's smaller, less densely populated communities in competition with CenturyLink.[134] Indeed, while Qwest has stated that it does not operate under a rural exemption in Oregon, CenturyLink has admitted that two of its three affiliates in Oregon operate under a rural exemption.[135] Thus, the Staff Settlement on this issue offers no relief to those competitors directly affected by CenturyLink's anticompetitive use of the rural exemption.

More specifically, the absence of adequate rural exemption commitments in the Staff Settlement is problematic because upon closing of the Proposed Merger, there is a material risk that the Merged Company will seek to avoid its obligations as an ILEC under Section 251(c) by using the rural exemption as a shield against network interconnection obligations which promote competition. In fact, CenturyLink's current reliance on its "rural" company status for many of its separate operating companies has the effect of increasing competitors' operating costs because competitors cannot rely upon access to interconnection, UNEs, and collocation rights provided under Section 251(c), at TELRIC rates, to support their service arrangements. This

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[133] Integra Settlement Agreement at § 6.
[134] Charter Fiberlink/14, Pruitt/14, lns. 14-18.
[135] *Id.* at p.14, lns. 13-15.

harmful practice is yet another example of the type of "worst" practices that CenturyLink engages in at the expense of competition and the public interest at large.

Under the Act, rural companies receive a number of competitive advantages. For example, rural companies receive federal USF high-cost support based on embedded rather than forward looking costs,[136] and they may take advantage of procedures to preclude competitive entry, such as the rural exemption contained in section 251(f).[137]

Despite controlling over 7 million access lines following its merger with Embarq, CenturyLink continues to assert the protections of being a "rural telephone company" in many areas. It does so by organizing itself into dozens of small operating companies undoubtedly so that those entities can qualify under the statutory definition of a "rural telephone company."[138] Specifically, CenturyLink lists 17 operating entities in Wisconsin, 9 in Louisiana, 7 in Arkansas and 5 in Missouri, and 3 in Oregon. However, as Dr. Ankum testified, "the rural exemption is intended for small rural carriers whose economic viability may be threatened if they were obligated to incur costs to implement all the unbundling and resale provisions of the Telecommunications Act of 1996, such as the costs associated with the development of sophisticated OSS."[139]

There is undisputed evidence that CenturyLink's operating companies have "close operational ties" with the parent company.[140] In fact, CenturyLink's witnesses have made it quite clear that most of CenturyLink's operations occur at the parent company (*i.e.*, national)

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[136] *See Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, ¶¶ 4-8 (2001).
[137] 47 U.S.C. §251(f) (listing exemptions for certain rural telephone companies and suspensions and modifications for rural carriers relating to interconnection and the development of competitive markets).
[138] 47 U.S.C. § 251(f)(2).
[139] Joint CLECs/1, Ankum/89, lns. 22-25.
[140] *See, e.g.*, CTL/203, Shafer (diagram of CenturyLink Operating Model).

level, not at the operating company (*i.e.*, local) level. CenturyLink's witness Mr. Jones acknowledged that the CenturyLink operating companies in Oregon do not have a specific President nor do they have their own customer service center, IT, human resources, billing relations, finance, wholesale groups, OSS, signaling networks, legal or human resources department.[141] Instead, all of the key operations occur at the corporate headquarters in Monroe, Louisiana (*i.e.*, at the national parent company level) and the state "operating" companies are little more than shell companies.

Thus, the record shows that very few, if any, functions actually occur at the local entity level. Indeed, CenturyLink's use of dozens of separate operating companies appears to be nothing more than a legal fiction as the parent company (*i.e.*, corporate headquarters) manages the operations for all of the separate operating companies.[142] Such a result could not have been what Congress intended when it crafted the framework for the rural exemption.[143]

If CenturyLink's proposed merger with Qwest is finalized, CenturyLink will be the third largest ILEC/BOC in the country with, as noted above, more than 17 million access lines.[144] Its operating territory will span 37 states and it will be a BOC in 14 of those states.[145] Although the

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[141] Tr. Vol. 1, p.54, ln. 15 to p.57, ln. 7 (Jones).

[142] Under similar circumstances, the Minnesota PUC denied another ILEC's attempt to invoke the rural exemption because it determined that there were "close operational ties" between the ILEC's local operating company and its national parent company. *In the Matter of AT&T Communications of the Midwest, Inc.'s petition for Arbitration with GTE Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Denying Claim to Rural Exemption at 8, Docket P-442, 407/M-96-939 (Minn. PUC 1996). The Minnesota PUC explained that although the local operating company, viewed in isolation, might qualify as a rural carrier (*i.e.*, since less than 15% of its access lines were in cities or towns with populations exceeding 50,000), the national entity did not qualify for such treatment. *Id.* at 4. The Minnesota PUC reasoned that ***because there were "close operational ties" between the local operating company and its national parent company, it must therefore consider the parent company for purposes of evaluating the ILEC's claims for a rural exemption***. *Id.* at 5. (emphasis added). Further, the Minnesota PUC concluded that Congress had no intention of extending the rural exemption to an ILEC (GTE) which was then one of the nation's largest local telephone service providers in the United States. *Id.* In this instance, there is undisputed evidence that CenturyLink's operating companies have "close operational ties" with the parent company

[143] Joint CLECs/1, Ankum/90, ln. 28 to 91, ln. 2.

[144] Joint CLECs/1, Ankum/90, lns. 25-28; Qwest/1, Peppler/10, lns. 10-12.

[145] Joint CLECs/1, Ankum/90, lns. 25-28.

Joint CLECs have competed successfully in the video, voice, and broadband marketplaces in numerous states around the country, all of its remaining members are serving far fewer than the 17 million access lines that the combined CenturyLink/Qwest will control. Given both its absolute and its relative size, it is well past time that CenturyLink cease wrapping itself in the protective cloak of the small rural carrier.[146]

Indeed, in the Verizon/Frontier proceeding, the FCC found that a similar condition was appropriate. Commenters in that proceeding had expressed serious concerns that, unlike Verizon, post-transaction Frontier would argue that it was eligible for the rural exemption which could have a chilling effect on competition.[147] The FCC determined that these concerns must be addressed and approved the transaction only after Frontier committed "not to assert that it is exempt from section 251(c) obligations pursuant to section 251(f)(1) in the areas transferred from Verizon that are rural telephone companies outside of West Virginia, or 'to move or reclassify any exchanges or wire centers currently located in Verizon West Virginia's legacy service areas so as to … take advantage of the rural exemption under Section 251(f)(1).'"[148]

In this instance, the Commission should secure similar commitments from the Merged Company. Although the Staff Settlement attempts to cover some of these commitments, it fails to adequately do so. For these reasons, the Commission should go beyond the limited terms of

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[146] It should qualify neither as a rural carrier under 251(f)(1) nor under 251(f)(2), which applies to carriers with less than 2% if the nation's subscriber lines in the aggregate. CenturyLink will have well in excess of 2% of the nation's access lines following the merger.
[147] *In the Matter of Applications Filed by Frontier Communications Corp. and Verizon Communications Inc. for Assignment of Transfer of Control*, Order, WC Docket No. 09-95; FCC 10-87, ¶ 39 (2010). .
[148] *Id.* at ¶ 40; *see, e.g., Frontier Comm. Corp., Verizon West Virginia Inc., et al.*, Order, Case No. 09-0871-T-PC, 2010 W. Va. PUC LEXIS 1158, * 130 (2010) (Frontier commits that it "will not seek to avoid any of its obligations under any assumed agreements on the grounds that Frontier WV is not an incumbent local exchange carrier under the Federal Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq*, (the 'Communications Act'), nor on the grounds that it is exempt from any of the obligations hereunder pursuant to Section 251(f)(1) or Section (f)(2) of the Communications Act."); *In the Matter of Verizon Communications Inc. and Frontier Communications Corp. Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc.*, Order No. 10-067, Doc. UM 1431, Appendix A, pp.9-10 (Feb. 24, 2010) (Frontier commits that it "will not seek to avoid any of its obligations on the grounds that it is exempt from any of the obligations pursuant to Section 251(f)(1) or Section 252(f)(2) of the Act.").

the Staff Settlement by adopting CLEC Condition 12 and footnote 5, which provide that CenturyLink may no longer assert the rural exemption under Section 251. In addition, under these Conditions both Qwest and CenturyLink affiliates must relinquish any current rights they may have under the rural exemption to avoid their obligations under Section 251(c) upon closing of the Proposed Merger, and neither company may seek suspensions or modifications for rural carriers under Section 251(f)(2) with regard to such obligations.[149]

G. The Merging Companies Have Failed To Commit to An Adequate Moratorium on Non-Impairment And Forbearance Filings.

CenturyLink and Qwest have committed in the Staff Settlement to not seek to reclassify as "non-impaired" any Qwest wire centers for the purposes of Section 251 of the Act and not to file new petitions for forbearance from any Section 251 or Section 271 obligation in any Qwest wire center before June 1, 2012. While the Joint CLECs agree with a moratorium on non-impairment filings and petitions for forbearance, the June 1, 2012 expiration date in the Staff Settlement is inadequate.

The Joint CLECs have proposed in Condition 14 that such a moratorium should remain in effect during the Defined Time Period (which corresponds to the Merged Company's synergy time period). If the proposed transaction is ultimately approved in the first quarter of 2011 (as the Merging Companies are hoping), the June 1, 2012 expiration date results in an effective moratorium of about 15 months. This falls far short of the three-to-five year time period during which the Merged Company will be engaged in integration and pursuing merger-related synergy savings. This also falls far short of the 42-month moratorium adopted by the FCC in relation to the AT&T/BellSouth merger. Accordingly, the time period of the moratorium should be the

[149] The Joint CLECs would be willing to stipulate that the Condition is only intended to ensure that CenturyLink entities abide by their ILEC obligations under 251(c) and not to prohibit them from obtaining continued USF reimbursements in accordance with existing law.

Defined Time Period as set forth in Joint CLEC Condition 14 (and in no circumstances less than the minimum three year period associated with the Merged Company's synergy estimate).

The moratorium proposed by the Joint CLECs would provide critical certainty for wholesale customers related to the bottleneck inputs they purchase from the Merged Company while it integrates the two separate companies and pursues significant synergy savings. To adequately protect the public's interest in competition, it is essential to provide CLECs with an adequate period of certainty during which the terms and conditions of access to the wholesale inputs they need to provide competitive local exchange services remain unchanged.

H. The Merging Companies Have Failed to Commit To A Mechanism To Prevent Or Discourage Any Decline In Wholesale Service Quality.

As discussed extensively above, the Merged Company must maintain service quality at current levels to ensure sufficient competition and that the merger is in the public interest. There must therefore be a disincentive for the Merged Company to achieve its promised synergies at the expense of the CLECs through a deterioration of its wholesale market operations. For that reason, it is essential that the Merging Companies commit to implementing the additional performance assurance plan ("APAP") proposed by the Joint CLECs. As discussed below, the APAP is necessary to (1) ensure that wholesale service quality does not decline post merger, and (2) provide a truly enforceable mechanism to protect impacted CLECs if wholesale quality does decline.

The APAP is a minimum five year performance assurance plan applicable to the legacy Qwest ILEC territory, which would compare the Merged Company's post merger monthly performance with the performance that existed in the twelve months prior to the merger filing date.[150] This comparison would be made using the current Oregon Performance Assurance Indicators ("PIDs"), products and disaggregation, as well as the same statistical methodology that exists in the current Qwest Oregon Performance Assurance ("QPAP") to determine whether a statistical significant deterioration in performance exists.[151]

The APAP is intended to provide the proper incentives to the Merged Company not to pursue synergy savings at the expense of its wholesale customers.[152] The APAP does not replace the QPAP; rather, it works in tandem with the QPAP, and uses the same methodology but is tailored to the purpose of measuring merger-related performance issues. So, whereas the current QPAP compares *wholesale* service quality to *retail* service quality to determine whether Qwest is providing nondiscriminatory access, the APAP compares *pre-merger* wholesale service quality to *post-merger* wholesale service quality to determine whether there has been a merger-related deterioration in wholesale service quality.[153]

1. The Merging Companies' rejection of the APAP signifies why the APAP is necessary.

The fact that CenturyLink and Qwest outright reject the APAP is, in itself, an indication that they foresee (or at least acknowledge the substantial risk of) a post-merger deterioration in wholesale service. While both of the Merging Companies have made repeated but unenforceable statements about their utmost commitment to providing quality service to CLECs, the fact that they do not support the use of the APAP to back up their promises strongly suggests that they (a) are prepared for a deterioration in service quality if the merger is approved, and (b) they do not want to be held accountable for it. These are precisely the reasons the APAP is necessary – to ensure that the Merging Companies' actions match their words.

[150] Joint CLECs/23, Gates/40, ln. 20 to 41, ln. 1.
[151] *Id.* at p. 41, lns. 1-5.
[152] *Id.* at lns. 9-11.
[153] *Id.* at lns. 5-9.

2. **The Merging Companies' arguments in opposition to the APAP are flawed.**

The Merging Companies "have no proposals to simply assure that wholesale service quality doesn't degrade if the merger is approved."[154] Instead, they raise a host of arguments in opposition to the APAP proposal. None of these arguments, however, are persuasive.

The Merging Companies erroneously contend that the "mere existence of lower performance levels … cannot be characterized automatically as performance degradation"[155] To the contrary, "performance degradation" is by definition a decline in performance levels. So, to the extent there is a decline in performance, there is performance degradation. CenturyLink and Qwest further claim that the "mere degradation of performance from already-superb levels would not automatically translate into harm."[156] This claim fails to recognize the impact that a degradation of performance would have on a vulnerable CLEC. Lower performance levels – no matter how large or small – directly impact CLECs and their end user customers. As an example, when performance levels decline and the ability of the respective carrier to provide reliable service and meet its commitments diminishes, no matter who is providing the various underlying network components, the end-user customer will inevitably blame its retail service provider (the CLEC). Furthermore, it is important to note that the decline in performance that is at issue, is a decline in performance that is sufficiently significant to trigger the protections and penalties of the APAP. So, assuming the diminution of performance levels are sufficient to trigger the penalties, it will undoubtedly impact the respective CLEC.[157]

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[154] Surrebuttal and Supplemental Rebuttal Testimony of Douglas Denney in the related Utah proceeding (Docket 10-049-16), p. 16, lns. 17-18. By prior stipulation, this Utah testimony has been entered into the record in this Oregon proceeding.
[155] Rebuttal Testimony of Michael Williams (Utah), p. 22, lns. 15-17.
[156] Williams Rebuttal (Utah), p. 21, lns. 16-18.
[157] *See* Denney Surrebuttal Testimony, October 14, 2010, p. 15, lns. 2-3 ("service would have to substantially degrade from current levels before a payment would be made under the APAP"); Transcript of Utah proceedings, testimony of Douglas Denney, October 27, 2010, Vol. II, p. 395, lns. 22-24 ("the test in the APAP is when there's a

CenturyLink and Qwest also argue that, "if CLECs believe they are harmed by issues beyond those that the QPAP addresses, such as alleged merger-related harm, it is proper that they have the burden to bring forth any conforming evidence."[158] This argument inappropriately flips the burden of proof regarding the impact of the merger on the public interest from CenturyLink and Qwest to the CLECs. As discussed above, the Merging Companies bear the burden to establish that the proposed merger is in the public interest and one of the factors that *they* must establish is the absence of harm. As Mr. Denney testified in the Utah proceedings, "the burden should be on the [applicant] regarding the wholesale service quality[;] the CLECs didn't ask for the merger, the [applicant] did."[159] The improper burden shift urged by the Merging Companies would effectively eviscerate the Joint CLECs' ability to enforce current wholesale levels, as the expense of filing a Commission complaint for each individual marker (i.e., PID) of reduction in service and quality would likely exceed the cost of the particular individual problem. If the Merging Companies had their way, not only would the CLECs have to deal with the issues surrounding a degradation of service, but the CLECs would also bear the burden and costs to rectify it. This issue in itself underscores the reason for a key feature of the APAP – self-executing remedies triggered upon the Merged Company's failure to meet particular quality standards.

CenturyLink and Qwest claim that the PIDs contained in the QPAP are not and cannot be designed to measure service degradation. Specifically, they argue, "the PIDs were defined to measure performance against parity or fixed benchmarks, not to properly identify performance

statistically-significant deterioration, then a remedy would kick in"); Denney Direct Testimony, Aug. 30, 2010, p. 13, lns. 3-5 ("a payment would be required under the APAP as a result in a significant deterioration of wholesale service quality post merger").

[158] Williams Rebuttal (Utah), p. 21, lns. 14-16.

[159] Transcript of Utah proceedings, testimony of Douglas Denney, October 27, 2010, Vol. II, p. 398, lns. 5-14.

degradation."[160] However, CenturyLink and Qwest do not provide any support for this contention.

A common theme in the Merging Companies' persistent opposition to the APAP is, stated in various ways, that the QPAP, by itself, is already "sufficient" to measure and ensure wholesale service quality.[161] However, as discussed above, the QPAP is *insufficient* to protect CLECs against a post-merger decline in wholesale service quality. While the QPAP serves a crucial function – ensuring that wholesale service levels are at least as good as retail levels – it provides no protection against post-merger degradation. Indeed, under the QPAP, wholesale service quality could deteriorate after the merger and never trigger a payment so long as retail service quality deteriorates at the same pace. On the other hand, the proposed APAP will help to assure that the Merged Company maintains wholesale service qualities at current levels and will create disincentives for the Merged Company to achieve synergies at the expense of its CLEC competitors through a deterioration of wholesale service operations.[162]

In an affidavit filed well after the hearing in this matter, Qwest's representative (Mr. Williams) contends that under the proposed APAP the Merged Company would face a penalty of $1.4 million (as compared to only $70,000 under the QPAP) if it merely equals its pre-merger performance levels.[163] Mr. Williams claims to have performed an "analysis" but does not share with the Commission and the other parties the underlying data and computations that led to this assertion, which was added to the record at such a late time that the Joint CLECs are unable to conduct discovery in order to meaningfully challenge Mr. Williams as to his "analysis." The APAP was first proposed in this proceeding in testimony and exhibits filed on August 24,

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[160] Williams Rebuttal (Utah), p. 25, lns. 5-6.
[161] *See, e.g., id.* at 28, ln. 7.
[162] Joint CLECs/23, Gates/41, lns. 14-20.
[163] Qwest/__ (sic), Williams Aff. Regarding APAP/2.

2010.[164] Mr. Williams filed rebuttal testimony on September 21, 2010.[165] His rebuttal testimony presented the proper opportunity for Mr. Williams to provide his "analysis," not after the hearing in this matter. Mr. Williams' last-minute affidavit does not assist the Commission in ascertaining the public interest and should be given no weight in its consideration thereof.

The Merging Companies also assert that the APAP is "inappropriate" because it does not necessarily focus on "merger-harm." Whatever minimal merit this argument might otherwise have, it has already been effectively addressed in the Utah proceeding (and the Joint CLECs hereby amend their proposed APAP condition accordingly). In his testimony on behalf of the CLECs in the Utah proceeding, Mr. Denney offered a solution to "make this issue go away," whereby no payments are owed under the APAP unless and until the post-merger service degradation exceeds the measureable pre-merger service fluctuations.[166] Specifically, the CLECs proposed the following formulation:

> APAP remedy payments to a CLEC for a specific PID in some measure will not occur until the remedy payments exceed the remedy credit. And for each CLEC and each PID, product, and disaggregation in the APAP, a remedy credit will be calculated as described in this paragraph. The remedy credit is calculated as follows for each PID, product, and disaggregation: For each month one year prior to the merger filing date monthly performance will be compared to the average wholesale performance provided by Qwest to each CLEC for one year prior to the merger filing date. If monthly performance, as described in the preceding sentence, would result in a remedy payment calculated using the methodology in the APAP to determined remedy payments, then the calculated amount will be a remedy credit for the PID, product, and disaggregation.[167]

Mr. Denney made this proposal to address Qwest's stated concerns and to "make sure that we're really capturing a deterioration in wholesale service quality * * * before there would be any

[164] Integra 1/ (direct testimony of Mr. Denney).
[165] Qwest/5 (rebuttal testimony of Mr. Williams).
[166] Denney testimony, October 27, 2010 (Utah), Tr. Vol. II, p. 372.
[167] *Id.* at p. 372, ln. 15 to p. 373, ln. 8.

remedy payments under the plan."[168] Again, Qwest's witness (Mr. Williams) provides no sound reason for the Commission to reject this compromise proposal by Mr. Denney. Mr. Williams merely states that this "modification would not prevent the APAP from penalizing the Merged Company even when service performance has not degraded."[169] Mr. Williams does not explain or give any basis for his statement that Mr. Denney's modification "would not prevent" certain penalties, and does not even attempt to quantify the (perhaps nominal) penalties that he believes are at least theoretically possible under the compromise proposed by the Joint CLECs.

3. The Terms of the Staff Settlement Are Insufficient to Prevent Merger Related Harm to the CLECs.

The Staff Settlement would prevent the Merged Company from eliminating or withdrawing the QPAP for at least three years after the merger closing date; however this is insufficient because, as discussed above, the QPAP would not identify or resolve merger-related harm to wholesale service quality. In addition, while the Staff Settlement requires the Merged Company to meet or exceed the average wholesale performance provided by Qwest to the CLEC for a certain time following the merger and to conduct a root-cause analysis if wholesale service quality deteriorates, these are not sufficient incentives for the Merged Company to maintain wholesale service quality levels post-merger.

The root cause provision (Staff Settlement Condition 34(b)) does not provide any self-effectuating incentives so that, if/when post-merger wholesale service quality deterioration occurs, the Merged Company is properly motivated to resolve these problems immediately and

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[168] *Id.* at p. 373, lns. 9-17.
[169] Qwest/__ (sic), Williams Aff. Regarding APAP/3.

without the need for additional litigation and disputes.[170] The root cause provision that requires the Merged Company to determine why service quality problems are occurring and to develop a plan to rectify them is of little benefit to CLECs and their end users who will be experiencing service-affecting problems and disruptions.[171] In fact, if a CLEC does not agree with the proposed plan to rectify the service quality problems, it will be forced to file a complaint with this Commission, further delaying remedies to end user service-affecting degradation in wholesale service quality.

It is not in the public interest to approve the merger based on a commitment from the Merged Company to simply look into merger-related wholesale service quality problems as they occur and propose a plan to fix them; instead, the Proposed Merger should not be approved unless there are sufficient assurances that wholesale service quality deterioration does not occur in the first place. The APAP is an essential self-effectuating mechanism to ensure that, during the synergy period, the Merged Company's performance in the legacy Qwest ILEC territory does not deteriorate as compared to pre-merger performance. If the Merged Company acts as CenturyLink and Qwest have represented – and there is no degradation in service – then the status quo remains intact and the Merged Company will not be subjected to any payments or penalties. Only if the Merged Company fails to live up to representations that CenturyLink and Quest have made to the Commission will the APAP provisions be triggered.

Based on the record in this proceeding, the Commission should adopt the Joint CLECs' proposed APAP condition and require that it remain in place for the five year synergy period, or at least the three year minimum synergy period. If the Commission does not adopt the proposed APAP, the Joint CLECs alternatively ask the Commission to immediately open an expedited

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[170] *Id.* at p. 44, lns. 1-22.
[171] *Id.*

docket to consider and adopt other appropriate self-effectuating penalty measures to provide proper incentives for the Merged Company to prevent service quality degradation.[172]

VI. THE COMMISSION SHOULD ADOPT A MOST FAVORED STATE CONDITION.

The Joint CLECs agree with Staff that the Commission should adopt a Most Favored State ("MFS") condition. While the Joint CLECs prefer the simpler MFS condition they proposed (Condition 29), the Commission should at a minimum adopt Staff's proposed MFS condition. Imposing a MFS condition would be consistent with the Commission's practice in prior telecommunications merger proceedings, including the recent Frontier-Verizon transaction and the Embarq-CenturyLink transaction.[173]

A MFS condition would ensure that the public interest benefits obtained as a result of conditions agreed to by the Merging Companies in other jurisdictions, or at the FCC, can also be applied in Oregon. The Merging Companies requested expedited review and approval of the proposed transaction, and the Commission and other parties have worked diligently to analyze the proposed transaction on expedited timeframes to oblige the request. However, if a condition is adopted in another jurisdiction to address a merger-related harm that would arise in Oregon but was not identified in this proceeding, consumers in Oregon should not be penalized by foregoing the public interest benefits of that condition just because the Merging Companies wanted to expedite these proceedings. A MFS condition provides a proper balance between the interest of the Merging Companies to secure regulatory approval of the merger on a shortened timeframe and the interest of the Commission to ensure that approval of the merger is in the public interest.

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[172] In the recent proceedings relating to the Verizon/Frontier merger, the Commission agreed to undertake a similar post-hearing, expedited process to fashion appropriate incentives for the merged company.

[173] *See* Order No. 10-067 in Docket UM 1431; *see also* Order No. 09-169 in Docket UM 1416.

CenturyLink opposes a MFS condition because, in its view, "a condition or commitment in one jurisdiction may not be a necessary or even appropriate condition for adoption in Oregon."[174] However, this concern has already been accounted for in the MFS conditions proposed by both Joint CLECs and Staff, which allow the Commission to decide whether to expand or modify conditions adopted in this proceeding based on conditions adopted in other jurisdictions after the order is issued in Oregon. Rather than *requiring* that all conditions adopted in other jurisdictions be imported to Oregon, the proposed MFS conditions would allow the Commission to consider whether conditions from other jurisdictions are necessary and/or appropriate for Oregon.

Alternatively, if the Commissions is not inclined to impose a MFS condition, the Commission could simply wait until all the remaining jurisdictions (including the Federal Communications Commission) have ruled on the Proposed Merger before rendering its decision. Absent a MFS condition, this is the only way for the Commission to ensure that Oregon consumers receive the benefits and protections afforded to consumers elsewhere.

VII. CONCLUSION AND RECOMMENDATION

Based on the forgoing, the Joint CLECs urge the Commission to adopt the proposed conditions discussed herein in addition to the conditions set forth in the Staff Settlement.

Dated: January 25, 2011

Respectfully submitted,

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ATTACHMENT A
JOINT CLEC PROPOSED MODIFICATIONS TO STAFF WHOLESALE SETTLEMENT CONDITIONS

UM 1484
SETTLEMENT CONDITIONS

RETAIL CONDITIONS

1. CenturyLink Inc. (CenturyLink) shall provide the Public Utility Commission of Oregon (Commission) access to all books of account, as well as, all documents, data, and records that pertain to the transaction.

2. The Commission reserves the right to review, for reasonableness, all financial aspects of this transaction in any rate proceeding or earnings review under an alternative form of regulation.

3. The Applicants shall immediately notify the Commission of any substantive material changes to the transaction terms and conditions from those set forth in their Application that: (1) occur while a Commission order approving the transaction is pending, or (2) occur before the transaction is closed, but after the Commission issues its order approving the transaction. The Applicants must also submit a supplemental application for an amended Commission order in this docket if the substantive transaction conditions and terms affecting Commission regulated services change as set forth in this condition.

4. Except as authorized by this Commission, CenturyLink (referring to the parent company at the conclusion of this transaction) will maintain an organizational structure that includes the four separate ILECs in Oregon (no change from current allocated areas) — CenturyTel of Oregon Inc., CenturyTel of Eastern Oregon, Inc., United Telephone Company of the Northwest, and Qwest Corporation (Qwest) (collectively, Operating Companies). CenturyLink (also referred to as "Company") agrees that an application must be filed with the Commission should it propose to merge or consolidate the operations of the Operating Companies, to the extent required by Oregon law.

5. Prior to the closing of the transaction, customer notification of the merger and change of parent company will be given to all local exchange and long distance customers and will comply with any Oregon and FCC rules and regulations. This notice will include notification to all existing and acquired OTAP/Lifeline customers that the acquisition will not affect their OTAP/Lifeline credits and that there is no action required on their part. Prior to the notification, CenturyLink will submit a draft of the OTAP/Lifeline portion to the OTAP Manager for review.

6. No Commission-regulated intrastate service currently offered by Qwest in Exchange and Network Services Tariff No. 33 and Private Line Transport Services Tariff No. 31 will be discontinued for a period of at least three years following the Closing Date, except as approved by the Commission.

7. CenturyLink shall follow the terms and conditions of Qwest's UM 1354 price plan (Order Nos. 08- 408, 08-544, and 10-215). Exceptions to this condition are noted in Conditions 11,

16 and 18 below. Any proposed changes to the approved price plan must receive Commission approval. Within 60 days following any branding or administrative changes to Qwest's Oregon rates, rules, and regulations, CenturyLink will file updated Qwest Oregon rates, rules, and regulations that show the branding change.

8. The Operating Companies will not advocate in any general rate case proceeding for a higher overall cost of capital as compared to what its cost of capital would have been absent the transaction, but the Operating Companies may seek a cost of capital under the then-existing capital market conditions.

9. Operating Companies will not seek recovery of one-time transition, branding or transaction costs in Oregon intrastate regulated rate proceedings. Operating Companies will not seek to recover through wholesale service rates one-time transaction, branding or transition costs.

10. The Merged Company will not recover, or seek to recover through wholesale or retail service rates or other fees paid by wholesale or retail customers any increases in overall management costs that result from the transaction, including those incurred by the operating companies. For purposes of this condition, "transaction-related costs" shall be construed to include all Merged Company costs related to or resulting from the transaction and any related transition, conversion, or migration costs and, for example, shall not be limited in time to costs incurred only through the Closing Date.

11. As a requirement for post merger financial reporting, each operating company will submit the Commission standard Annual Report Form 0 and Commission standard Oregon Separated Results of Operations Report Form I.

12. Within 60 days of the nearest calendar quarter following 12 months after close of the transaction, and for two subsequent 12-month periods, CenturyLink shall file with the Commission a report describing:

    a. Substantive activities undertaken relating to integrating Qwest operations with CenturyLink, as well as achieving synergies made available as a result of this transaction. CenturyLink synergies will be reported on a CenturyLink total company basis;

    b. Costs and projected savings of each such respective activity on a CenturyLink total company and Oregon-allocated basis;

    c. Organizational and staff force changes in Oregon operations; and,

    d. Impacts on Oregon operations and customers.

    The reporting requirement required by Condition 12 shall end with the submission of the third report unless otherwise directed by the Commission.

13. CenturyLink will commit to expend $45 million in broadband deployment in CenturyLink and Qwest areas in Oregon over a five (5) year period beginning January 1, 2011 and ending December 31, 2015. CenturyLink will commit to expend twenty-five (25%) of the $45 million broadband investment by December 31, 2012. The capital investment necessary to meet Condition 26 will count toward satisfying the $45 million commitment.

    Beginning on the date of the first anniversary of the close of the Transaction and continuing annually until the $45 million broadband commitment is completed, CenturyLink will submit to the Commission Staff: 1) a broadband deployment plan that details the planned investments for the year, including the geographic areas targeted for investment and the estimated number of customers that would benefit; and 2) a report that identifies the previous calendar year's progress in broadband deployment including: a) a list of all wire centers and broadband speeds currently available in each wire center by speed and number of lines capable showing wire centers where broadband investment was made, b) the additional number of households capable of receiving broadband; and c) the prior year's and cumulative amounts expended towards the $45 million broadband commitment.

CenturyLink will provide a semi-annual update to the broadband deployment plan outlining progress made and identifying any impediments that may prevent the completion of the planned projects.

14. After the closing date, the Merged Company will honor any and all promotional discount offers made by pre-merger Qwest to its residence and small business customers, including those for local, long distance, and interne access services. The discounted prices will continue on an individual customer basis until the term to which Qwest committed expires.

15. Within 30 days after the close of the transaction, CenturyLink will notify Commission staff:

    a. Post-merger CenturyLink's consolidated 2010 Net Debt/ trailing 12-month EBITDA.

    b. Post-merger rating agency reports of CenturyLink

    c. Pre-merger stand-alone CenturyLink's price per share as of the date of closing of the merger.

    d. Pre-merger stand-alone Qwest's price per share as of the date of closing of the merger.

16. CenturyLink will not encumber the assets of the Oregon Operating Companies that are necessary or useful in the performance of their duties to the public without seeking Commission approval pursuant to ORS 759.375.

17. CenturyLink agrees that it will not seek to recover in Oregon intrastate regulated retail or wholesale rates any acquisition premium paid by CenturyLink for Qwest. Any acquisition premium will be recorded in the books at the parent level.

18. After the close of the merger, both CenturyLink and Qwest agree to the removal of the Qwest price plan exemption from the requirements of ORS 759.380 and ORS 759.375. However, the parties agree that for property sales where the sales price is less than $10 million the Qwest Price Plan exemption from ORS 759.375(1)(a) applies, except that the sale of any Qwest exchange will be subject to Commission approval under ORS 759.375.

19. After the closing of the transaction and for a period of not less than three years, CenturyLink must file with the Commission quarterly reports with:

    a. CenturyLink's consolidated balance sheet.

    b. Intercompany receivables and payables showing the beginning balance, the change for the quarterly and the ending balance of those accounts will be submitted to the Commission. This report shall be filed annually on April 1 of each year.

c. Dividend payment declared by CenturyLink to its shareholders (in total and per share) for the same time period.

These quarterly reports should be filed no more than 90 days following the close of each quarter. CenturyLink could waive this condition if its post transaction issuer credit rating is affirmed as investment grade by two of the following credit rating agencies (or successors): Moody's, Fitch Ratings, Standard and Poor's Services.

20. Immediately after the close of this transaction, the Operating Companies will report retail service quality results in accordance with OAR 860-023-0055. CenturyTel is currently exempt from service quality reporting, having met the conditions of OAR 860-023-0055 (16)(d), but is required to submit to the Commission the monthly CenturyTel retail service quality reports for two years after the close of this transaction.

21. CenturyLink will maintain current Commission minimum retail service quality standards (OAR 860- 023-0055) as are currently being reported in the Qwest's monthly service quality reports to the Commission. If CenturyLink fails to maintain the current service quality levels for the Qwest Operating Company it will be subject to potential penalties as set forth in ORS 759.450.

22. CenturyLink will provide to the Commission the following:

    a. CenturyLink will provide to the Commission on the first anniversary of the transaction close, a status report on its switching infrastructure in the state and any switch replacements, upgrades or retirements made in the prior calendar year as well as any that are known for the upcoming calendar year.

    b. CenturyLink will provide the Commission on the first and second anniversary of the transaction close, a confidential report for the previous calendar year detailing Oregon regulated capital expenditures as a percentage of total system expenditures and a comparison of the amount of regulated capital expenditures per Oregon access line with the amount of regulated capital expenditures per CenturyLink system-wide access line.

23. CenturyLink will provide to Commission Staff, in electronic form, and subject to confidentiality, the detailed Form-477 data that the four Operating Companies are currently providing to the FCC for their service areas. This will be done annually for three years beginning with the year after the closing of the transaction, subject to the continuation of the requirement for filing with the FCC.

24. CenturyLink is committed to complying with all applicable federal and Oregon safety standards and requirements, and will commit to comply with the safety and reliability laws in Oregon per ORS 757.035, OAR 860 Division-024, and OAR 860 Division-028.

25. Within seven (7) days after close of the transaction, CenturyLink agrees to provide the Commission a listing of CenturyLink primary and secondary points of contact within its new organization for safety and pole attachment matters.

26. CenturyLink will construct a physical communication link between the Cities of Lincoln City and Newport, Oregon within 24 months following the close of the transaction.

CenturyLink will meet with Staff and other interested parties during the engineering phase to make certain that Staff is satisfied that the facility is sized adequately to handle the expected demand.

Definitions

"Closing Date" or "Merger Closing Date" refers to the closing date of the Transaction for which the Applicants have sought approval from the FCC and state commissions.[1]

"Merged Company" refers to the post-merger company (CenturyLink and its operating companies, collectively, after the Closing Date).

"Merger Filing Date" refers to May 10, 2010, which is the date on which Qwest and CenturyLink made their merger filing with the FCC.

"Operational Support Systems" or "OSS" are as defined by 47 CFR 51.319(g) and as interpreted in the rules and orders of the FCC.

"OSS Interfaces" are defined as existing or new gateways (including application-to-application interfaces and Graphical User Interfaces), connectivity and system functions that support or affect the pre-order, order, provisioning, maintenance and repair, and billing capabilities for local services (local exchange services) provided by CLECs to their end users.

"Qwest Corporation" and "Qwest" refer to Qwest Corporation and its successors and assigns.

27. Operations Support Systems

Retail

Prior to conversion of major Qwest/CenturyLink retail operations support systems that impact Oregon operations, CenturyLink will provide notice to the Commission 90 days in advance of the conversion. Notification will consist of a description of the systems involved, the action to be taken, the timelines associated with the system conversion and a description of customer impacts. Retail operations support systems are defined as ordering, provisioning, maintenance and repair, and billing systems.

Wholesale

In legacy Qwest ILEC service territory, after the Closing Date, the Merged Company will use and offer to wholesale customers the legacy Qwest Operational Support Systems (OSS) for at least ~~two~~ **three** years, or until July 1, 2013, whichever is later, and thereafter provide a level of wholesale service quality that is not less than that provided by Qwest prior to the Closing date with functionally equivalent support, data, functionality, performance, electronic flow through, and electronic bonding. After the period noted above, the Merged Company will not replace or

[1] *See Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a/ CenturyLink for Consent to Transfer of Control, Pleading Cycle Established,* Public Notice, DA 10-993, WC Dkt. No. 10-110 (rel. May 28, 2010) ("Public Notice") and related applications filed in state proceedings.

integrate Qwest systems without first establishing a detailed transition plan and complying with the following procedures:

a. *Detailed Plan*

The Merged Company will provide notice to the Commission and any affected parties at least 270 days before replacing or integrating Qwest OSS system(s). Upon request, the Merged Company will describe the system to be replaced or integrated, the surviving system, and steps to be taken to ensure data integrity is maintained. The Merged Company's plan will also identify planned contingency actions in the event that the Merged Company encounters any significant problems with the planned transition. The plan submitted by the Merged Company will be prepared by information technology professionals with substantial experience and knowledge regarding legacy CenturyLink and legacy Qwest systems processes and requirements. Carriers will have the opportunity to comment on the Merged Company's plan in a forum in which it is filed as well as in the Qwest Change Management Process.

b. *CMP*

The Merged Company will follow the procedures in the Qwest Change Management Process ("CMP") Document.

c. *Replacement or Retirement of a Qwest OSS Interface*

i. The replacement or retirement of a Qwest OSS Interface may not occur without sufficient acceptance of the replacement interface by CLEC and CMRS carriers to help assure that the replacement interface provides the level of wholesale service quality provided by Qwest prior to the Closing Date (as described above). Each party participating in testing will commit adequate resources to complete the acceptance testing within the applicable time period. The Parties will work together to develop acceptance criteria. Testing will continue until the acceptance criteria are met. Sufficient acceptance of a replacement for a Qwest OSS Interface will be determined by a majority vote, no vote to be unreasonably withheld, of the CMP participants (Qwest and CLEC and CMRS carriers) in testing, subject to any party invoking the CMP's Dispute Resolution process. The requirements of this paragraph will remain in place only until completion of merger-related OSS integration and migration activity. If a dispute arises as to whether such merger-related OSS integration and migration activity is complete, the Commission will determine the completion date.

ii. The Merged Company will allow coordinated testing with CLEC and CMRS carriers, including a stable testing environment that mirrors production, jointly established test cases, and, when applicable, controlled production testing, unless otherwise agreed to by the Company and CLEC and CMRS carriers. Testing described in this paragraph associated with merger-related system replacement or integration will be allowed for the time periods in the CMP Document, or for 120 days, whichever is longer, unless otherwise mutually agreed to by the Merged Company and CLEC and CMRS carriers engaged in the testing.

iii. For any Qwest system that was subject to third party testing (e.g., as part of a Section 271 process), robust, transparent third party testing will be conducted for the replacement system to ensure that it provides the needed functionality and can appropriately handle existing and continuing wholesale services in commercial volumes. The types and extent of testing conducted during the Qwest Section 271 proceeding will provide guidance as to the types and extent of testing needed for the replacement systems. The Merged Company will not limit CLEC use of, or retire, the existing system until after third party testing has been successfully completed for the replacement system.

~~iii~~iv. The Merged Company will provide the CLECs and CMRS carriers training and education on any wholesale OSS implemented by the Merged Company without charge to the CLEC and CMRS carrier.

d. *Billing Systems*

The Merged Company will not begin integration of Billing systems before the end of the minimum two year or July 1, 2013 period, whichever is longer, noted above, or without following the above procedures, unless the integration will not impact data, connectivity and system functions that support or affect CLEC and CMRS carriers and their customers. Any changes by the Merged Company to the legacy Qwest non-retail OSS will meet all applicable ICA provisions related to billing and, to the extent not included in an ICA, will be Ordering and Billing Forum (OBF) compliant.

28. Notwithstanding any provision allowing one or both parties to Qwest interconnection agreements ("ICAs"), Commercial Agreements, and other Wholesale Agreements between Qwest Corporation or its successors and assigns and CLEC and CMRS carriers ("Extended Agreements") to terminate the Extended Agreement upon or after expiration of the term of the agreement, the Merged Company shall not terminate or grandparent, change the terms or conditions, or increase the rates of any Extended Agreements during the unexpired term or for at least the Applicable Time Period identified below, whichever occurs later (the "Extended Time Period"), unless required by a change of law, or a CLEC or CMRS carrier requests or agrees in writing to a change and any applicable procedure to effectuate that change is followed. In the event that the Extended Agreement expressly allows termination of the agreement in other circumstances, such as default due to non-payment, this Condition does not preclude termination of an Extended Agreement in those circumstances provided that the Merged Company follows both (1) the Extended Agreement's express provisions, and (2) any applicable procedures pertaining to such termination. Upon approval of the Transaction, these terms will be part of the order of approval and thus not trigger or require the filing of an ICA amendment, unless directed otherwise by the Commission.

a. *Interconnection Agreements.* The Applicable Time Period for Qwest's interconnection agreements (ICAs) is at least thirty-six months after the Closing Date. The Extended Time Period applies whether or not the initial or current term has expired or is in evergreen status.

i. The Merged Company shall allow a CLEC or CMRS carrier to use its pre-existing interconnection agreement as the basis for negotiating an initial successor replacement interconnection agreement to the extended ICA. Where the parties agree it is reasonable to do so, the parties may incorporate the amendments to the existing agreement into the body of the agreement used as the basis for such negotiations of the initial successor replacement interconnection agreement.

ii. A CLEC or CMRS carrier may opt-in to an interconnection agreement in its initial term or the extended term.

iii. If Qwest and a CLEC or CMRS carrier are in negotiations for a replacement interconnection agreement before the Closing Date, the Merged Company will allow the CLEC or CMRS carrier to continue to use the negotiations draft upon which negotiations prior to the Closing Date have been conducted as the basis for negotiating a replacement interconnection agreement. In the latter situation (ongoing negotiations), after the Closing Date, the Merged Company will not substitute a negotiations template interconnection agreement proposal of any legacy CenturyLink operating company for the negotiations proposals made before the Closing Date by legacy Qwest.

b. *Commercial Agreements.* The Applicable Time Period for Commercial agreements is at least ~~eighteen~~ <u>**thirty-six (36)**</u> months after the Closing Date for Qwest's Commercial agreements (i.e., offerings made available after a UNE(s) becomes unavailable via ICA): Broadband for Resale, Commercial Broadband Services (QCBS), Commercial Dark Fiber, High Speed Commercial Internet Service (HSIS), Local Services Platform (QLSP), Internetwork Calling Name (ICNAM), and Commercial Line Sharing, as well as any other Commercial agreement to which Qwest and CLEC or CMRS carrier were parties as of the Closing Date. ~~Notwithstanding any provision to the contrary in this Agreement:~~

~~i. After the eighteen month period, Qwest reserves the right to modify rates.~~

~~ii. If a Commercial agreement later becomes unavailable on a going forward basis, the agreement will remain available to CLEC or CMRS carrier on a grandparented basis to serve CLEC or CMRS carrier's embedded base of customers already being served via services purchased under that Commercial agreement, subject to Qwest's right to modify rates, for at least eighteen months after Qwest has notified CLEC or CMRS carrier that the agreement is no longer available.~~

c. *Wholesale Agreements.* The Applicable Time Period for Wholesale agreements is at least ~~eighteen~~ <u>**thirty-six (36)**</u> months after the Closing Date for Qwest's Wholesale agreements (i.e., offerings made available after a tariffed offering becomes unavailable via tariff): Wholesale Data Services Agreement (ATM, Frame Relay, GeoMax, HDTV-Net, Metro Optical Ethernet, Self-Healing Network, Synchronous Service Transport), as well as any other Wholesale agreement to which Qwest and CLEC or CMRS carrier were parties as of the Closing Date. ~~Notwithstanding any provisions to the contrary in this Agreement:~~

~~i. After the eighteen month period, Qwest reserves the right to modify rates.~~

~~ii. If a Wholesale agreement later becomes unavailable on a going forward basis, the agreement will remain available to CLEC or CMRS carrier on a grandparented basis to serve CLEC or CMRS carrier's embedded base of customers already being served via~~

~~services purchased under that Wholesale agreement for at least eighteen months after Qwest has notified CLEC or CMRS carrier that the agreement is no longer available, subject to Qwest's right to modify rates.~~

d. *Intrastate Tariffs.* For at least ~~twelve~~ **thirty-six (36)** months after the Closing Date, the Merged Company will not seek to increase rates or modify terms and conditions for Qwest wholesale tariff offerings. Notwithstanding any provision to the contrary in this Agreement, Qwest may engage in Competitive Response pricing as set forth in its tariffs.

   i. Regarding term and volume discount plans, such plans offered by Qwest as of the Closing Date will be extended by ~~twelve~~ **thirty-six (36)** months beyond the expiration of the then existing term, unless the wholesale customer indicates it opts out of this one-year extension.

   ii. The Merged Company will honor any existing contracts for services on an individualized term pricing plan arrangement for the duration of the contracted term.

29. The Merged Company agrees not to increase the rates in Qwest ICAs during the Extended Time Period defined in condition number 28 above. If, during the Extended Time Period, the Merged Company offers a Section 251 product or service that is not offered under an ICA (a "new" product or service), the Merged Company may establish a rate using normal procedures. A product, service, or functionality is not "new" for purposes of this paragraph if Qwest was already providing that product, service, or functionality at existing rates as of the Closing Date in the legacy Qwest ILEC serving territory.

   a. Regarding rates changed via a Commission cost docket, the Merged Company may initiate a cost docket (or seek rate increases in a cost docket initiated by another party) before the expiration of the thirty-six month Extended-Time Period for ICA terms only if (i) the rate elements, charges or functionalities are not already provided under rates as of the Closing Date as described in paragraph 4; or (ii) the cost docket is not initiated until at least eighteen months after the Closing Date and any rates approved in the cost docket will not become effective until after expiration of the thirty-six month Extended Time Period for extension of ICA terms.

   b. After the Closing Date, in the legacy Qwest ILEC serving territory, the Merged Company shall not assess any fees, charges, surcharges or other assessments upon CLEC or CMRS carriers for activities that arise during the subscriber acquisition and migration process other than any fees, charges, surcharges or other assessments that were approved by the Commission and charged by Qwest in the legacy Qwest ILEC service territory before the Closing Date, unless Qwest first receives Commission approval. This condition prohibits the Merged Company from charging such fees, charges, surcharges or other assessments, including:

      i. Service order charges assessed upon CLEC or CMRS carriers submitting local service requests ("LSRs") for number porting;

      ii. Access or "use" fees or charges assessed upon CLEC or CMRS carriers that connect a competitor's own self-provisioned loop, or last mile facility, to the customer side of the Merged Company's network interface device ("MD") enclosure or box; and

      iii. "Storage" or other related fees, rents or service order charges assessed upon a CLEC or CMRS carrier's subscriber directory listings information submitted to the Merged Company for publication in a directory listing or inclusion in a directory assistance database.

30. In the legacy Qwest ILEC service territory, the Merged Company will continue to provide intrastate transit service subject to the same rates, terms, and conditions that were provided as of the Closing

Date for at least three years following the Closing Date, unless directed otherwise by the Commission.

31. CenturyLink and all of its incumbent local exchange carrier ("ILEC") affiliates will comply with 47 U.S.C. Sections 251 and 252. In the legacy Qwest ILEC service territory, the Merged Company will not seek to avoid any of its obligations on the grounds that Qwest Corporation is exempt from any of the obligations pursuant to Section 251(0(1) or Section 251(0(2) of the Communications Act. The Merged Company will waive its right to seek the exemption for rural telephone companies under Section 251(f)(1) and its right to seek suspensions and modifications for rural carriers under Section 251(f)(2) of the Communications Act.

32. In the legacy Qwest ILEC service territory, after the Closing Date, Qwest Corporation shall be classified as a Bell Operating Company ("BOC"), pursuant to Section 3(4)(A)-(B) of the Communications Act and shall be subject to all requirements applicable to BOCs, including Sections 271 and 272.

33. In the legacy Qwest ILEC service territory, to the extent that an ICA is silent as to an interval for the provision of a product, service or functionality or refers to Qwest's website or Service Interval Guide (SIG), the applicable interval, after the Closing Date, shall be no longer than the interval in Qwest's SIG as of the Closing Date. Either party to the ICA may request an amendment to the ICA to lengthen an interval after the thirty-six month Extended Time Period for extension of ICA terms.

~~34. In the legacy Qwest ILEC service territory, the Merged Company shall comply with all wholesale performance requirements and associated remedy or penalty regimes for all wholesale services including those set forth in regulations, tariffs, Commercial Agreements defined above, and interconnection agreements applicable to legacy Qwest as of the Closing Date. In the legacy Qwest service territory, the Merged Company shall continue to provide to CLECs and CMRS carriers at least the reports of wholesale performance metrics that legacy Qwest made available, or was required to make available, to CLECs and CMRS carriers and the Commission as of the Closing Date, or as subsequently modified or eliminated as permitted under these conditions or pursuant to any changes in law. After the execution of this settlement and prior to the Closing Date, Qwest agrees not to initiate any changes to wholesale performance requirements and associated remedy or penalty regimes, however, nothing prevents Qwest from responding to and participating in any docket initiated by another party or as otherwise required by law.~~

~~a. The Merged Company will not seek to reduce or modify the Qwest Performance Indicator Definition (Pit)) or Qwest Performance Assurance Plan (QPAP) that are offered, or provided via contract or Commission approved plan, as of the Closing Date for at least eighteen months after the Closing Date. After the eighteen month period, the Merged Company may seek modifications under the terms and conditions outlined in the QPAP. The Merged Company will not seek to eliminate or withdraw the QPAP for at least three years after the Closing Date. The QPAP will be available to all requesting CLECs and CMRS carriers unless the Merged Company obtains approval from the Commission to~~

~~eliminate or withdraw it.~~

~~i. For at least three years after the Closing Date, and consistent with the FCC's required conditions of the Embarq-CenturyTel merger, in the legacy Qwest ILEC service territory, the Merged Company shall meet or exceed the average wholesale performance provided by Qwest to CLEC or CMRS carrier, measured as follows:~~

~~a. For the first three months after Closing Date, Qwest's performance will be compared to Qwest's performance for the twelve months prior to Closing Date.~~

~~b. Thereafter, each successive month of Qwest's performance will be added to the three month period in 34.a.i.a. in determining Qwest's performance until twelve months,after Closing Date.~~

~~c. Beginning one year after Closing Date, Qwest's performance will be measured by a rolling twelve month average performance.~~

~~b. If the Merged Company fails to provide wholesale performance levels as measured by the methodology described in this condition, the Merged Company must conduct a root cause analysis for the discrepancies and develop proposals to remedy each deficiency within thirty days and provide this to CLEC or CMRS carrier and Commission staff for review and comment.~~

~~i. A CLEC or CMRS carrier may invoke the root cause procedure for deterioration in wholesale performance for any PID, product, or disaggregation included within a PID measure if the CLEC or **CMRS** carrier determines that the performance it received for that PID, product, or disaggregation is materially different and provides the basis for CLEC or CMRS carrier's determination.~~

~~If performance deficiencies are not resolved, the CLEC or CMRS carrier may request a resolution or wholesale service quality proceeding before the Commission. The Merged Company does not waive its right to oppose such a request.~~

34. <u>In the legacy Qwest ILEC territory, the Merged Company shall comply with all wholesale performance requirements and associated remedy or penalty regimes for all wholesale services, including those set forth in regulations, tariffs, interconnection agreements, and Commercial agreements applicable to legacy Qwest as of the Merger Filing Date. The Merged Company shall continue to provide to CLECs at least the reports of wholesale performance metrics that legacy Qwest made available, or was required to make available, to CLECs as of the Merger Filing Date. The Merged Company shall also provide these reports to state commission staff or the FCC, when requested. The state commission and/or the FCC may determine that additional remedies are required, if the remedies described in this condition do not result in the required wholesale service quality performance or if the Merged Company violates the merger conditions.</u>

a. <u>No Qwest Performance Indicator Definition (PID) or Performance Assurance Plan (PAP) that is offered, or provided via contract or Commission approved plan, as of the Merger Filing Date ("Current PAP") will be reduced, eliminated, or withdrawn for at least five years after the Closing Date and will be available to all requesting</u>

CLECs until the Merged Company obtains approval from the applicable state commission, after the minimum 5-year period, to reduce, eliminate, or withdraw it. For at least the Defined Time Period, in the legacy Qwest ILEC territory, the Merged Company shall meet or exceed the average wholesale performance provided by Qwest to each CLEC for one year prior to the Merger Filing Date for each PID, product, and disaggregation. If the Merged Company fails to provide wholesale performance as described in the preceding sentence, the Merged Company will also make remedy payments to each affected CLEC in an amount as would be calculated using the methodology (*e.g.*, modified Z test, critical Z values, and escalation payments) in the Current PAP, for each missed occurrence when comparing performance post- and pre- Closing Date ("Additional PAP").

b. In the legacy Qwest ILEC territory, for at least the Defined Time Period, the Merged Company will meet or exceed the average monthly performance provided by Qwest to each CLEC for one year prior to the Merger Filing Date for each metric contained in the CLEC-specific monthly special access performance reports that Qwest provides, or was required to provide, to CLECs as of the Merger Filing Date. For each month that the Merged Company fails to meet Qwest's average monthly performance for any of these metrics, the Merged Company will make remedy payments (calculated on a basis to be determined by the state commission or FCC) on a per-month, per-metric basis to each affected CLEC.

35. For thirty-six months after the Closing Date, in the legacy Qwest ILEC service territory, the Merged Company will provide to Commission staff quarterly data for Oregon wholesale carriers that will enable monitoring of current performance compared to the performance for the 12 months prior to the Closing Date for the five metrics consistent with condition number 34 above in the manner described. For twelve months after the Closing Date, in the legacy Embarq ILEC service territory, the Merged Company will provide to the Commission staff quarterly data for Oregon wholesale carriers in the aggregate that enable monitoring of current performance compared to the performance for the 12 months prior to the Closing Date for the five metrics. Additionally, the Merged Company will grant Commission staff access to service quality data currently available to wholesale carriers on the companies' websites.

36. The Merged Company shall provide to wholesale carriers, and maintain and make available to wholesale carriers on a going-forward basis, up-to-date escalation information, contact lists, and account manager information and will provide this information, when possible, thirty days prior to the Closing Date. If not possible, the Merged Company will provide the information within five business days, absent exigent circumstances. For changes to support center location, the Merged Company will provide at least thirty days advance written notice to wholesale carriers and Commission staff. For other changes, the Merged Company will provide reasonable notice, as circumstances permit, of the changes and will keep pertinent information timely updated. The infatination and notice provided shall be consistent with the terms of applicable interconnection agreements.

37. The Merged Company will make available to each wholesale carrier in the legacy Qwest ILEC service territory the types and level of data, information, and assistance that Qwest made available as of the Closing Date concerning Qwest's wholesale Operational Support Systems functions and wholesale business practices and procedures, including information provided via

the wholesale web site (which Qwest sometimes refers to as its Product Catalog or "PCAT"), notices, industry letters, the change management process, and databases/tools (loop qualification tools, loop make-up tool, raw loop data tool, ICONN database, *etc.)*.

38. The Merged Company shall ensure that wholesale and CLEC operations are sufficiently staffed and supported, relative to wholesale order volumes, by personnel, including IT personnel, adequately trained on the Qwest and CenturyLink systems and processes. With respect to the wholesale and CLEC operations, such personnel shall be dedicated exclusively to wholesale operations so as to provide a level of service that is not less than and is functionally equivalent to that which was provided by Qwest prior to the Merger Closing Date and to ensure that customer protected information is not used by the Merged Company's retail operations for marketing purposes. The Merged Company will employ people who are dedicated to the task of meeting the needs of wholesale customers.

39. Qwest will not seek to reclassify as "non-impaired" any Qwest Oregon wire centers for purposes of Section 251 of the Communications Act, nor will the Merged Company file any new petition under Section 10 of the Communications Act seeking forbearance from any Section 251 or 271 obligation or dominant carrier regulation in any Qwest Oregon wire center before June 1, 20~~12~~**14**.

40. In the legacy Qwest ILEC service territory, if the Commission acknowledges or approves the Settlement Agreement filed by CenturyLink, Qwest and Integra in this docket, the line conditioning amendment including all rates, terms and conditions related to condition 14 of that Settlement Agreement will be made available to any requesting carrier no later than 30 days after the transaction Closing Date.

41. After the Closing Date, the Merged Company will engineer and maintain its network in compliance with federal and state law, as well as the terms of applicable ICAs.

    a. The Merged Company shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to the local loop, as provided by 47 C.F.R. § 51.319(a)(8).

    b. The Merged Company will retire copper in compliance with federal and state law, as well as the terms of applicable ICAs and as required by a change of law.

[*new*]

42. The Merged Company will provide nondiscriminatory access to directory listings and directory assistance in compliance with federal and state law. Specifically, the Merged Company will be responsible for ensuring that all directory listings submitted by CLECs for inclusion in directory assistance or listings databases are properly incorporated into such databases (whether such databases are maintained by the Merged Company or a third party vendor). Further the Merged Company will ensure that CLECs' subscriber listings are accessible to any requesting person on the same terms and conditions that the Merged Company's subscriber listings are available to any requesting person.

[*new*]

43. At CLEC's option, the Merged Company will interconnect with CLEC at a single point of interconnection per LATA, regardless of whether the Merged Company provides service in such LATA via multiple operating company affiliates or a single operating company, provided that

such affiliates' networks are interconnected.

[*new*]

44. The Merged Company shall make available to requesting carriers via the opt-in process pursuant to 47 U.S.C. § 252(i), and applicable state law and procedure, any entire Qwest ICA, whether negotiated, arbitrated, or extended pursuant to these Merger Conditions, that Qwest has entered into in any state in the Merged Company's territory, subject only to state commission-approved state specific pricing, performance plans and technical feasibility. Such cross-state adoption does not include the adoption of a legacy Qwest ICA for use in a CenturyLink territory. Adoption cannot be denied because the agreement has not been amended to reflect changes in law. In the event the Merged Company raises technical feasibility as a barrier to cross-state adoptions of an ICA, the burden will be on the Merged Company to prove technical infeasibility.

[*new*]

45. All Conditions herein may be expanded or modified as a result of regulatory decisions concerning the proposed transaction in other states, including decisions based upon settlements, that impose conditions or commitments related to the transaction. CenturyLink agrees that the state commission of any state may adopt any commitments or conditions from other states or the FCC that are adopted after the final order in that state.

4~~2~~6. If the Merged Company changes the carriers it uses to provide intrastate long distance service to customers in either the pre-merger CenturyLink or the pre-merger Qwest areas, the company will notify each of the affected Oregon intrastate long distance customers at least 30 days in advance of the change. For 90 days following the customer transfers, CenturyLink will waive any change charges, e.g., PICs, for customers choosing to change carriers.

4~~3~~7. CenturyLink will designate a representative to serve on the Commission's Oregon Telecommunications Industry Advisory Committee, which generally convenes on a quarterly basis, should the incumbents representing Qwest and CenturyLink, respectively, vacate their seats as a result of the merger.

4~~4~~8. Prior to any billing system consolidations or changes, CenturyLink will provide to the OTAP Manager and Administrative Specialist a description of how the OTAP credits are listed on customer bills. CenturyLink will also provide the OTAP Manager and Administrative Specialist a sample copy of a customer's bill that lists the OTAP/Lifeline credits. The OTAP Manager and Administrative Specialist will accept a redacted copy in which the customer's personal identifying information is protected.

4~~5~~9. CenturyLink will maintain sufficient staff levels to effectively address daily communications with Commission Staff regarding OTAP/Lifeline questions and concerns and OTAP/Lifeline reporting issues. Prior to any billing system consolidations or changes, CenturyLink will provide notice to the OTAP Manager of staffing changes that impact the established process for filing reports and addressing OTAP staff questions and concerns.

50~~**46**~~. If Legacy Embarq or CenturyTel personnel identify an approved OTAP/Lifeline customer for the other's territory on a Commission approval report due to Staff error, legacy personnel must either:

a. Notify the OTAP Manager and Administrative Specialist of the discrepancy on the No Match report, or

b. Contact personnel (and the OTAP Manager and Administrative Specialist) of the customer's respective territory to apply the OTAP/Lifeline credit to their account.

51~~47~~. Before the close of transaction, CenturyLink will designate at least one liaison for higher level discussions with the OTAP Manager should the incumbents representing Qwest and CenturyLink, respectively vacate their positions as a result of the merger.

52~~48~~. Post merger, CenturyLink will advise the OTAP Manager of any impending OTAP/Lifeline marketing and outreach efforts (e.g. radio public service announcements), in addition, CenturyLink will provide the OTAP Manager electronic copies of its OTAP/Lifeline advertising collateral.

53~~49~~. Prior to the merger, CenturyLink, including Embarq and Qwest, will have no outstanding debt to the Commission with respect to the RSPF surcharge collection, remittance, and reporting requirements.

54~~50~~. CenturyLink will provide notice to and input from the OTAP Manager prior to making material changes to the existing Qwest mechanized OTAP reporting system.

55~~51~~. CenturyLink agrees that the Operating Companies, including Qwest, will comply with all applicable Commission statutes and regulations regarding affiliated interest transactions, including timely filings of applications and reports, consistent with their respective forms of regulation, and terms of such regulation, as applicable to each respective Operating Company. To the extent affiliated interest changes do occur, the Company or its Operating Companies will make the appropriate affiliated interest filings pursuant to ORS 759.390 consistent with their respective forms of regulation.

56~~52~~. Within 12 months after the close of this transaction, CenturyLink will file with the Commission affiliated interest agreements, including an updated Cost Allocation Manual for services that reflect as charges and credits to operating accounts in Operating Companies' Form 0.

57~~53~~. The certificates of all CenturyLink and Qwest entities certified as Competitive Providers in Oregon will remain in effect and unchanged as of the date of close of the transaction. Thereafter, CenturyLink and Qwest will report any changes affecting those certificates in compliance with applicable Commission statutes and regulations.

CERTIFICATE OF SERVICE
UM 1484

I hereby certify that the **Joint CLEC Opening Brief** was served on the following persons on January 25, 2011, by email to all parties and by U.S. Mail to parties who have not waived paper service:

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Dated: January 25, 2011

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