

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1484

In the Matter of CENTURYLINK, INC.
Application for an Order to Approve the
Indirect Transfer of Control of QWEST
CORPORATION.

COMMISSION STAFF REPLY BRIEF

I. Introduction.

Staff of the Public Utility Commission of Oregon (“Staff”), the Citizens’ Utility Board (“CUB”), CenturyLink, Inc. (“CenturyLink”), and Qwest Communications International, Inc. (“Qwest”), entered into a stipulation (“Stipulation”) under which CenturyLink and Qwest agree to accept 53 conditions in exchange for Staff’s and CUB’s support for CenturyLink’s application for approval to merge with Qwest (“the Transaction”). A group of competitive local exchange providers (“Joint CLECs”), Sprint Communications Company and other wireless carriers (“Sprint”), the Telecommunications Ratepayers Association for Cost-based and Equitable Rates (“TRACER”), and Lincoln and Tillamook Counties, Lincoln City, and Parker Telecommunications (“Coastal Intervenor”), oppose the Transaction unless the Commission imposes additional conditions to protect their respective interests.

Staff previously addressed these proposed conditions and explained why the Commission should not adopt them. Staff will not revisit those arguments in this reply brief. Staff does, however, address arguments by CenturyLink and Qwest regarding two conditions to which the stipulating parties did not agree, the Coastal Intervenor’s arguments that no evidence supports stipulated condition 26, TRACER’s arguments that two conditions should be clarified, Sprint’s request that the Commission adopt a condition specifying the jurisdiction for disputes regarding enforcement of the merger order and authorizing attorney fees to the prevailing party in such disputes, and the Joint CLECs and Sprints complaints about how the Stipulation resembles an agreement CenturyLink reached with Integra and others.

1 **II. Discussion.**

2 **a. The Commission should adopt the Staff and CUB recommended broadband**
3 **reporting requirement and the most-favored-state condition.**

4 As discussed in Staff's supplemental testimony filed on December 8, 2010, and in Staff's
5 opening brief, CUB, Qwest, CenturyLink and Staff agreed to 53 conditions and agreed to
6 disagree about two conditions. One condition would require the merged company to report on
7 subscriptions to its broadband service in Oregon and any trouble reports regarding this service.
8 The other would allow the OPUC to impose a condition imposed on the merged company by
9 another jurisdiction after the OPUC has approved the Transaction in two circumstances: if the
10 condition addresses a harm that was not identified by the Commission or Staff in this proceeding
11 or if the condition addresses a harm more effectively than a comparable stipulated Oregon
12 condition. Staff proposed the conditions as follows:

13 Given that the Commission is approving the transaction based in part on the
14 increased availability of broadband, CenturyLink is directed to provide the
 following reporting requirements:

- 15 a. Not less than 90 days following the first anniversary of the close of the
16 transaction, and for the four subsequent annual periods, CenturyLink shall
17 provide the following reports on the preceding twelve-month period,
 regarding the provision of DSL service in Oregon:
- 18 b. By month, the numbers of initial and verified trouble report complaint
 (TRC) data.
- 19 c. The types and duration of TRCs.
- 20 d. A brief caption as to the cause of each TRC. (TRCs may be grouped into
21 categories for administrative reporting simplicity.)

22 The filing must thoroughly document what information CenturyLink collects in
23 the form of customer complaints about DSL service on the number, types, and
 causes of trouble that impinge on CenturyLink's provision of DSL service in
 Oregon.

24 CenturyLink must also file a report with the Commission not less than 90 days
25 following the first anniversary of the close of the transaction, and for the four
 subsequent annual periods, the following:

- 26 a. By customer class, wire center, by month, the number of DSL subscriptions.

1 b. By customer class, wire center, by month, the number of requested DSL
2 subscriptions.

3 CenturyLink agrees that the Conditions may be expanded or modified as a result
4 of regulatory decisions in other states and the FCC, including decisions based
5 upon settlements, that impose conditions or commitments related to this merger
6 proposal. CenturyLink agrees that the Commission may adopt any commitments
7 or conditions from other states and the FCC that are adopted after the final order
8 in UM 1484 is issued that are related to addressing harms of the transaction if:

9 The commitment or condition does not result in the combined company being
10 required to provide a “net benefit” and either:

- 11 i. The Commission or Staff had not previously identified the harm to
12 Oregon ratepayers and such harm is applicable to Oregon; or
- 13 ii. The commitments or conditions in a final order of another state
14 and the FCC are more effective at preventing a harm previously
15 identified by the Commission or Staff.

16 Should new commitments or conditions meeting the requirements of subsection i.
17 or ii. of this paragraph occur, CenturyLink will commit to the following process
18 to facilitate a prompt decision from the Commission under this section:

- 19 a. Within fifteen (15) calendar days after a final order
20 adopting a new condition or stipulation with new or
21 amended commitments by a commission in another state
22 jurisdiction and the FCC, CenturyLink will send a copy of
23 the stipulation and commitment to Oregon Commission
24 Staff and to all parties in UM 1484.
- 25 b. CenturyLink will notify the Commission that they have
26 received the last such final order from other states and the
FCC adopting new conditions, stipulations, or
commitments (the “Final Filing”) within fifteen (15)
calendar days of receipt and sent it to Staff and all UM
1484 parties.
- c. Within 15 calendar days after the last such filing from the
other states and the FCC (“Final Filing”), any party to this
proceeding may file with the Commission its response,
including its position as to whether any of the covenants,
commitments and conditions from the other jurisdictions
(without modification of the language thereof except such
non-substantive changes as are necessary to make the two
commitments or condition applicable to Oregon), meets the
two requirements set forth above, and should be adopted in
Oregon. Any party filing such a response should serve it
upon the UM 1484 parties.¹

¹ Staff/700, Dougherty/2-3.

1 Staff and CUB believe that these two conditions are necessary to ensure that the
2 Transaction satisfies statutory criteria for approval of a merger. Qwest and Century Link do not.
3 The stipulating parties decided to not allow this disagreement over two conditions preclude the
4 finalization of their agreement on the remaining 53 conditions, and accordingly, agreed to allow
5 the Commission to resolve their dispute.

6 CenturyLink and Qwest misunderstand Staff's position on these two conditions. These
7 parties assert that by agreeing to allow the Commission to resolve this dispute, Staff and CUB
8 acknowledge the conditions are not necessary to ensure the Transaction satisfies the statutory
9 criteria for a merger. For example, CenturyLink and Qwest assert "Staff and CUB admit that
10 [the proposed condition regarding Broadband reporting] is not required or necessary to ensure
11 that the Transaction is in the public interest and does no harm."² This is incorrect.

12 It is Staff's position that the Transaction as proposed and stipulated to in the Stipulation
13 meets the statutory standard for approval upon the Commission's resolution on the two
14 additional conditions proposed by Staff and CUB. The joint testimony submitted by the
15 stipulating parties is consistent with Staff's understanding of their agreement with Qwest and
16 CenturyLink. The testimony includes the following, "all parties to the Staff/CUB Stipulation
17 agree that the Stipulation, and therefore the Transaction, is in the public interest upon resolution
18 of the two disputed conditions."³

19 In other words, whether the two conditions must be imposed to ensure that the
20 Transaction satisfies Oregon's statutory standard is a matter wholly within the discretion of the
21 Commission. For the reasons discussed in the testimony in this case and in the opening briefs
22 filed by CUB and Staff, Staff recommends that the Commission conclude that the broadband
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² CenturyLink/Qwest Opening Brief 47. *See also* n 45 (Qwest and CenturyLink asserting that their argument regarding Staff's and CUB's position that broadband reporting condition is not necessary to assure transaction satisfies statutory standard is true for MFS condition as well).

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³ Joint Testimony of Staff, CUB, CenturyLink and Qwest /2-3.

1 reporting and MFS condition are necessary for the Transaction to satisfy the statutory standard in
2 Oregon.

3 **b. The Commission need not clarify conditions 9 and 10 as requested by**
4 **TRACER.**

5 TRACER asks the Commission to clarify the stipulated conditions that address potential
6 risk to retail ratepayers. TRACER asserts that it is not clear the reference in condition 10 to
7 “Merged Company” is meant to encompass the operating companies of CenturyLink and Qwest,
8 whether the transaction-related costs in condition 10 include “overall management costs that
9 result from the transaction,” and whether a request for rate increases under the Qwest Pricing
10 Plan approved in Docket No. UM 1354 would be a “regulated rate proceeding” under condition
11 9.⁴

12 Staff does not agree that it is necessary to clarify the conditions; they adequately protect
13 retail ratepayers from rate increases caused by the proposed merger.⁵ Further, a common-sense
14 reading of the conditions shows that TRACER’s concerns are not well founded.

15 First, it is not ambiguous that a request for change under the Qwest Pricing Plan would be
16 a regulated rate proceeding. Nor, is it unclear whether reference to Merged Company in the
17 following statement in condition 10 is intended to encompass the operating companies, “Merged
18 Company will not recover, or seek to recover through wholesale or retail service rates or other
19 fees paid by wholesale or retail customers any increases in overall management costs that result
20 from the transaction, including those incurred by the operating companies.” Finally, it is not
21 unclear that overall management costs that result from the transaction include “transaction-
22 related costs” related to transition, conversion or migration.

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26 ⁴ Opening Brief of TRACER 8-9.

⁵ See Staff/100, Dougherty/29.

1 **c. The Commission should adopt stipulated condition 26 and reject the Coastal**
2 **Intervenors' proposed conditions.**

3 Lincoln City, Lincoln and Tillamook counties, and Parker Communications (“Coastal
4 Intervenors”) take issue with condition 26, which is intended to address certain service issues in
5 Lincoln and Tillamook Counties and take issue with the absence of their proposed conditions.
6 Condition 26 provides,

7 CenturyLink will construct a physical communication link between the Cities of Lincoln
8 City and Newport, Oregon within 24 months following the close of the transaction.
9 CenturyLink will meet Staff and other interested parties during the engineering phase to
10 make certain that Staff is satisfied that the facility is sized adequately to handle the
11 expected demand.⁶

12 Prior to the time Staff entered into the Stipulation with Qwest, CenturyLink, and CUB,
13 Staff witness Michael Dougherty, the lead Staff witness for the docket, submitted written
14 testimony in support of this condition:

15 Staff recommended ordering condition 28 requires CenturyLink to construct a
16 physical communication link between the cities of Lincoln City and Newport,
17 Oregon, which would allow network redundancy. Commission Safety Staff
18 believes that this link is necessary as a result of system outages, community
19 isolation, and lack of network redundancy. Additionally, Staff has received a
20 letter in support of such condition from the Oregon Military Department, Oregon
21 Emergency Management (OEM).⁷

22 In their post-hearing brief, the Coastal Intervenors assert that that Mr. Dougherty’s
23 testimony regarding Condition 26 is based on “heresy” and that therefore the Commission
24 should disregard it.⁸ The Coastal Intervenors are incorrect.

25 First, Mr. Dougherty’s pre-filed testimony was admitted into the record without
26 objection. Second, “hearsay” evidence is admissible in administrative proceedings.⁹ Whether

23 ⁶ UM 1484 Stipulation – Attachment 1 at 4.

24 ⁷ Staff/100, Dougherty/31. (Note: what is now condition 26 was Staff’s proposed condition 28
25 in Staff’s reply testimony.)

26 ⁸ Coastal Intervenors’ Closing Brief 3.

⁹ See e.g., *Pierce v. Motor Vehicles Div.* 125 Or App 79, 84, 864 P2d 1355 (1993) (“There is no
question that hearsay testimony is admissible in an administrative proceeding.”).

1 such evidence is admissible in an administrative proceeding turns on the same test applied to any
2 evidence – whether it is of a type commonly relied upon by reasonably prudent persons in the
3 conduct of their serious affairs.¹⁰ Mr. Dougherty is the Program Manager for the Corporate
4 Analysis and Water Regulation Section of the OPUC. Mr. Dougherty’s testimony that he based
5 his conclusion about the appropriateness of condition 26 on what Commission Safety Staff told
6 him satisfies the statutory criteria for admission into the administrative record.

7 Mr. Dougherty also testified, briefly, about condition 26 on cross-examination. He
8 testified that the Commission Safety Staff told him that they were satisfied with condition 26.
9 Although counsel for Lincoln City cut short Mr. Dougherty’s testimony on the topic, the
10 testimony that Mr. Dougherty did provide was not ruled inadmissible by the administrative law
11 judge and was not stricken.

12 [Counsel for Lincoln City:] Is part of your understanding that historically there
13 have been system outages when the connection between the coast and Sheridan
14 has been severed?

15 [Mr. Dougherty:] I was only informed about when this condition came up, so I
16 don’t have any historical perspective on the outages and how the outages occur
17 and at what frequency and to what type of conditions. So, no, I don’t.

18 [Counsel for Lincoln City:] Okay. So you don’t know whether or not this
19 condition actually addresses the problem?

20 [Mr. Dougherty:] From what I was informed by safety staff, who were -- who
21 were satisfied with the condition, that this would relieve --

22 [Counsel for Lincoln City:] Well, object to hearsay.

23 [Mr. Dougherty:] Okay.

24 [Counsel for Lincoln City:] I didn't want you to tell me what they told you.

25 ALJ ARLOW: You asked.

26 [Counsel for Lincoln City:] Well, not directly.

¹⁰ See ORS 183.450.

1 By [Counsel for Lincoln City] (Continuing): So you are not familiar with the
2 specifics of the problem with the network outages in the north Lincoln County or
Tillamook?

3 [Mr. Dougherty:] No.

4 [Counsel for Lincoln City:] Okay.

5 [Mr. Dougherty:] Not any more than what my testimony points out.¹¹

6
7 As discussed in Staff's opening brief, the conditions that the Coastal Intervenors propose
8 do not address potential merger-related harms. At Staff's request, CenturyLink and Qwest
9 agreed to construct a facility to address certain service-related issues in Lincoln and Tillamook
10 Counties. CenturyLink and Qwest's commitment to construct a facility goes beyond what is
11 required to satisfy the statutory requirement of "no harm." Staff recommends that the
12 Commission reject the Coastal Intervenors' request for additional conditions.

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14 **d. The Commission should reject Sprint's proposed condition regarding**
15 **jurisdiction over disputes regarding the Commission's order and imposing**
attorney fees.

16 Sprint recommends that the Commission impose the following condition:

17 The Commission, the courts, and the FCC shall each have jurisdiction to enforce these
18 merger conditions, and the Merged Firm shall be (i) liable for the attorney fees of parties
19 who are successful in an action to enforce the conditions, and (ii) subject to having the
condition(s) at issue extended an additional 48 months at the enforcing party's option.¹²

20 The Commission should reject this proposed condition. First, it does not do what Sprint
21 suggests it should do, "specify how merger conditions are to be enforced."¹³ Instead, it simply
22 asserts what is already true by operation of different statutes; jurisdiction to enforce the
23 conditions will lie with the courts, the OPUC, or the FCC.

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25 ¹¹ 12.16.2010 Tr 226-27.

26 ¹² Joint Wireless Carriers' Initial Post-Hearing Brief 2.

¹³ Joint Wireless Carriers' Initial Post-Hearing Brief 20.

1 The real effect of the proposed condition is to create an attorney fees provision and to
2 provide a mechanism to extend merger conditions by an additional 48 months. Imposing a
3 requirement to pay attorney fees to a prevailing party is likely beyond the Commission's
4 authority. "With few exceptions, a party in whose favor final judgment is entered may recovery
5 attorney fees only when they are authorized by statute or a specific contractual provision."¹⁴
6 Because CenturyLink and Qwest did not stipulate to the imposition of attorney fees in actions
7 brought to enforce the merger conditions, any attorney fee provision would not be a contractual
8 provision, but would be part of the Commission's order.

9 Further, even if CenturyLink and Qwest had stipulated to an attorney fees provision, the
10 only parties to the Stipulation are Commission Staff, CUB, CenturyLink and Qwest. Unless an
11 entity is a party to the Stipulation, they could not take advantage of any contractual attorney fee
12 provision¹⁵

13 To the extent Sprint believes that the Commission should explain in its order how it will
14 enforce the conditions, such an explanation is unnecessary and possibly confusing.
15 How the Commission will enforce the conditions turns on the specific condition at issue. For
16 example, to enforce the conditions prohibiting CenturyLink from including transaction-related
17 costs in retail ratepayers' rates, the Commission will set rates that exclude such costs. To
18 enforce the conditions setting forth reporting requirements, the Commission may rely on ORS
19 756.160, under which the Attorney General may pursue a circuit court order compelling
20 CenturyLink to provide the required reports. To the extent CenturyLink does not comply with
21 the requirement to construct a physical facility, the Commission could pursue injunctive relief in
22 circuit court under ORS 756.180. To the extent CenturyLink fails to comply with conditions

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¹⁴ *Loverin v. Paulus*, 160 Or App 605, 613, 982 P2d 20 (1999).

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¹⁵ *See Autolend, IAP, Inc. v. Auto Depot, Inc.*, 170 Or App 135, 11 P3d 693 (2000) (Upholding trial court order denying attorney fees where the trial court concluded that there was no contract between litigants, and thus, no contractual attorney fees provision on which to base an award..)

1 related to wholesale services or any condition, the Commission could seek injunctive relief or
2 imposition of monetary penalties in circuit court.¹⁶

3 In sum, it is not necessary to stipulate, or order, that the remedies for CenturyLink's non-
4 compliance are those remedies provided by law. And, given that the appropriate remedy will
5 turn on which condition is at issue and the circumstances underlying the alleged failure to
6 comply, it would be difficult to specify in any detail how each condition will be enforced.

7 For similar reasons, Sprint's recommendation that the Commission impose a condition
8 that could extend a condition for an additional four years if an entity is successful in enforcing
9 CenturyLink's obligation to comply with that condition in a proceeding before the OPUC, a
10 court, or the FCC, is not well taken. The appropriate remedy will turn on the nature of the harm
11 and is not necessarily going to be extending a particular condition by four years.

12 **e. The Commission should reject the Joint CLECs proposed conditions.**

13 Staff has addressed the Joint CLECs' request to impose additional conditions and to
14 modify some of the stipulated conditions. The conditions proposed by the Joint CLECs would
15 generally go beyond what is necessary to ensure the Transaction causes "no harm" to the Joint
16 CLECs and would actually result in the Transaction providing a benefit to them. In contrast, the
17 stipulated conditions (and the additional two conditions recommended by Staff) appropriately
18 balance the interests of the merging companies, its competitors, CenturyLink and Qwest
19 ratepayers, and customers of the Joint CLECs and wireless carriers.

20 To the extent the Joint CLECs rely on the fact the stipulated conditions are like the
21 conditions stipulated to by Integra Telecom as evidence that the stipulated conditions do not
22 adequately protect all Joint CLECs, their reliance is misplaced. Whether the conditions are
23 adequate turns on an examination of the harm they are intended to address and the protection that
24 they offer.

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¹⁶ ORS 756.990

1 Furthermore, the Joint CLECs' arguments based on comparisons of the Integra settlement
2 and the Stipulation are not well founded. As discussed in the Joint Testimony supporting the
3 Stipulation, parties to the underlying proceeding (including the Joint CLECs and Sprint), met on
4 August 3, August 30, September 8, September 27, October 12, October 21, and November 28,
5 2010 for settlement negotiations.¹⁷ Although the Integra Settlement did address some of Staff's
6 concerns regarding wholesale services, Staff continued to negotiate with CenturyLink and Qwest
7 after these parties reached that settlement regarding the conditions that would be imposed to
8 protect wholesale customers.

9 As Staff stated in the Joint Testimony, the conditions to which the stipulating parties
10 agreed to, 27-41 (the wholesale conditions), alleviated Staff's concerns regarding the potential
11 impacts on competitive carriers and CenturyLink's lack of experience as a Bell-operating
12 company ("BOC").¹⁸ In other words, Staff's decision to enter the Stipulation was based on its
13 own investigation and negotiations,¹⁹ not on an agreement reached by CenturyLink and other
14 entities.

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¹⁷ Joint Testimony of Staff, CUB, CenturyLink, and Qwest 4.

25 ¹⁸ Joint Testimony of Staff, CUB, CenturyLink, and Qwest 24.

26 ¹⁹ Prior to entering into the Stipulation, Staff filed testimony outlining its concerns with the
Transaction. Staff/100. Staff's testimony and exhibits totaled approximately 300 pages.

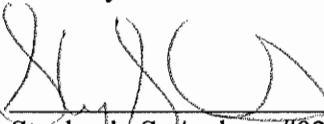
1 **III. Conclusion.**

2 The Commission should approve the Stipulation and its 53 conditions, and impose the
3 two conditions recommended by Staff and CUB.

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5 DATED this 1st day of February 2011.

6
7 Respectfully submitted,

8 JOHN R. KROGER
9 Attorney General

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11 _____
12 Stephanie S. Andrus, #92512
13 Senior Assistant Attorney General
14 Of Attorneys for Staff of the Public
15 Utility Commission of Oregon
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1 **CERTIFICATE OF SERVICE**

2 I certify that on February 1, 2011, I served the foregoing Reply Brief upon the parties in
3 this proceeding by electronic mail and by sending a true, exact and full copy by regular mail,
4 postage prepaid, or by hand-delivery/shuttle, to the parties accepting paper service.

5 **W**
6 **CHARLES L BEST (HC)**
7 ATTORNEY AT LAW
8 1631 NE BROADWAY #538
9 PORTLAND OR 97232-1425
10 chuck@charleslbest.com

11 **W**
12 **360NETWORKS(USA) INC**
13 MICHEL SINGER NELSON
14 370 INTERLOCKEN BLVD STE 600
15 BROOMFIELD CO 80021-8015

16 PENNY STANLEY
17 370 INTERLOCKEN BLVD STE 600
18 BROOMFIELD CO 80021-8015
19 penny.stanley@360.net

20 **W**
21 **ATER WYNNE LLP**
22 ARTHUR A BUTLER (C)(HC)
23 601 UNION STREET, STE 1501
24 SEATTLE WA 98101-3981
25 aab@aterwynne.com

26 JOEL PAISNER
ATTORNEY
601 UNION ST STE 1501
SEATTLE WA 98101-2327
jrp@aterwynne.com

W
CENTRAL TELEPHONE INC
RICHARD STEVENS
PO BOX 25
GOLDENDALE WA 98620
rstevens@gorge.net

W
CENTURY FARM COURT
JOHN FELZ
DIRECTOR REGULATORY OPERATIONS
5454 W 110TH ST KSOPKJ0502
OVERLAND PARK KS 66211
john.felz@centurylink.com

W
CENTURYLINK
RHONDA KENT
805 BROADWAY 8TH FL
VANCOUVER WA 98660
rhonda.kent@centurylink.com

W
CENTURYLINK, INC.
WILLIAM E HENDRICKS
ATTORNEY
805 BROADWAY ST
VANCOUVER WA 98660-3277
tre.hendricks@centurylink.com

W
CHARTER FIBERLINK OR - CCVII LLC
MICHAEL R MOORE
12405 POWERSCOURT DR
ST LOUIS MO 63131
michael.moore@chartercom.com

W
CITIZENS' UTILITY BOARD OF OREGON
GORDON FEIGNER (C)
ENERGY ANALYST
610 SW BROADWAY, SUITE 308
PORTLAND OR 97205
gordon@oregoncub.org

ROBERT JENKS (C)
EXECUTIVE DIRECTOR
610 SW BROADWAY STE 308
PORTLAND OR 97205
bob@oregoncub.org

G. CATRIONA MCCrackEN (C)
LEGAL COUNSEL/STAFF ATTY
610 SW BROADWAY - STE 308
PORTLAND OR 97205
catriona@oregoncub.org

RAYMOND MYERS (C)
ATTORNEY
610 SW BROADWAY - STE 308
PORTLAND OR 97205
ray@oregoncub.org

1 **W**
2 **CITIZENS' UTILITY BOARD OF OREGON**
3 KEVIN ELLIOTT PARKS (C)
4 STAFF ATTORNEY
5 610 SW BROADWAY STE 308
6 PORTLAND OR 97205
7 kevin@oregoncub.org

8 **W**
9 **CITY OF LINCOLN CITY**
10 DAVID HAWKER
11 CITY MANAGER
12 801 SW HIGHWAY 101
13 LINCOLN CITY OR 97367
14 davidh@lincolncity.org

15 **DOUGLAS R HOLBROOK**
16 ATTORNEY
17 PO BOX 2087
18 NEWPORT OR 97365
19 doug@lawbyhs.com

20 **W**
21 **COMMUNICATION CONNECTION**
22 CHARLES JONES
23 MANAGER
24 14250 NW SCIENCE PARK DR - STE B
25 PORTLAND OR 97229
26 charlesjones@cms-nw.com

1 **W**
2 **CONVERGE COMMUNICATIONS**
3 MARSHA SPELLMAN
4 10425 SW HAWTHORNE LN
5 PORTLAND OR 97225
6 marsha@convergecomm.com

7 **W**
8 **CORPORATE LAWYERS PC**
9 FRANK G PATRICK
10 PO BOX 231119
11 PORTLAND OR 97281
12 fgplawpc@hotmail.com

13 **W**
14 **COVAD COMMUNICATIONS CO**
15 KATHERINE K MUDGE
16 DIRECTOR, STATE AFFAIRS & ILEC RELATIONS
17 7000 N MOPAC EXPWY 2ND FL
18 AUSTIN TX 78731
19 kmudge@covad.com

20 **W**
21 **DAVIS WRIGHT TREMAINE LLP**
22 K C HALM (C) (HC)
23 1919 PENNSYLVANIA AVE NW 2ND FL
24 WASHINGTON DC 20006-3458
25 kchalm@dwt.com

1 **W**
2 **DAVIS WRIGHT TREMAINE LLP**
3 BRIAN NIXON (C)
4 1919 PENNSYLVANIA AVE STE 200
5 WASHINGTON DC 20006
6 briannixon@dwt.com

7 **MARK P TRINCHERO (C) (HC)**
8 1300 SW FIFTH AVE STE 2300
9 PORTLAND OR 97201-5682
10 marktrinchero@dwt.com

11 **W**
12 **GRAHAM & DUNN PC**
13 JUDITH ENDEJAN (C)
14 2801 ALASKIAN WAY
15 SUITE 300
16 SEATTLE WA 98121
17 jendejan@grahamdunn.com

18 **W**
19 **GRAY PLANT MOOTY**
20 GREGORY MERZ (C)(HC)
21 ATTORNEY
22 500 IDS CENTER
23 80 S EIGHTH ST
24 MINNEAPOLIS MN 55402
25 gregory.merz@gpmlaw.com

26 **W**
1 **INTEGRA TELCOM INC**
2 KAREN L CLAUSON (C)
3 VICE PRESIDENT, LAW & POLICY
4 6160 GOLDEN HILLS DR
5 GOLDEN VALLEY MN 55416-1020
6 klclauson@Integratelecom.com

7 **W**
8 **LEVEL 3 COMMUNICATIONS LLC**
9 GREG L ROGERS (C)
10 SR CORPORATE COUNSEL
11 1025 ELDORADO BLVD
12 BROOMFIELD CO 80021
13 greg.rogers@level3.com

14 **W**
15 **LINCOLN COUNTY COUNSEL**
16 WAYNE BELMONT
17 225 W OLIVE ST, RM 110
18 NEWPORT OR 97365
19 wbelmont@co.lincoln.or.us

20 **W**
21 **MCDOWELL RACKNER & GIBSON PC**
22 ADAM LOWNEY (C)
23 419 SW 11TH AVE, STE 400
24 PORTLAND OR 97205
25 adam@mcd-law.com

1 **W**
2 **MCDOWELL RACKNER & GIBSON PC**
3 WENDY MCINDOO (C)
4 OFFICE MANAGER
5 419 SW 11TH AVE., SUITE 400
6 PORTLAND OR 97205
7 wendy@mcd-law.com

8 LISA F RACKNER (C)
9 ATTORNEY
10 419 SW 11TH AVE., SUITE 400
11 PORTLAND OR 97205
12 lisa@mcd-law.com

13 **W**
14 **NORTHWEST PUBLIC COMMUNICATIONS**
15 **COUNCIL**
16 GREG MARSHALL
17 PRESIDENT
18 2373 NW 185TH AVE - # 310
19 HILLSBORO OR 97124
20 gmarshall@corbantechologies.com

21 **W**
22 **PACIFIC NORTHWEST PAYPHONE**
23 RANDY LINDERMAN
24 PMB 300
25 2373 NW 185TH AVE
26 HILLSBORO OR 97124-7076
rlinderman@gofirestream.com

1 **W**
2 **PARKER TELECOMMUNICATIONS**
3 EDWIN B PARKER
4 PO BOX 402
5 GLENEDEN BEACH OR 97388
6 edparker@teleport.com

7 **W**
8 **PRIORITYONE TELECOMMUNICATIONS INC**
9 KELLY MUTCH (C)
10 PO BOX 758
11 LA GRANDE OR 97850-6462
12 managers@p1tel.com

13 **PUBLIC UTILITY COMMISSION OF OREGON**
14 BRYAN CONWAY (C)
15 PO BOX 2148
16 SALEM OR 97308-2148
17 bryan.conway@state.or.us

18 MICHAEL DOUGHERTY (C)
19 PO BOX 2148
20 SALEM OR 97308-2148
21 michael.dougherty@state.or.us

22 **QSI CONSULTING, INC**
23 PATRICK L PHIPPS (C)
24 VICE PRESIDENT
25 3504 SUNDANCE DR
26 SPRINGFIELD IL 62711

QWEST CORPORATION
ALEX M DUARTE
CORPORATE COUNSEL
310 SW PARK AVE 11TH FL
PORTLAND OR 97205-3715
alex.duarte@qwest.com

QWEST CORPORATION
MARK REYNOLDS
1600 7TH AVE RM 3206
SEATTLE WA 98191
mark.reynolds3@qwest.com

W
SPRINT COMMUNICATIONS CO LP
DIANE BROWNING
6450 SPRINT PKWY
OVERLAND PARK KS 66251
diane.c.browning@sprint.com

KENNETH SCHIFMAN
6450 SPRINT PKWY
OVERLAND PARK KS 66251
kenneth.schifman@sprint.com

W
SPRINT NEXTEL
KRISTIN L JACOBSON (C)
201 MISSION ST STE 1500
SAN FRANCISCO CA 94105
kristin.l.jacobson@sprint.com

T-MOBILE USA INC
DAVE CONN
12920 SE 38TH ST
BELLEVUE WA 98006
dave.conn@t-mobile.com

W
TILLAMOOK COUNTY
WILLIAM SARGENT
TILLAMOOK COUNTY COUNSEL
1134 MAIN AVE
TILLAMOOK OR 97141
wsargent@oregoncoast.com

TW TELECOM OF OREGON LLC
LYNDALL NIPPS (C)
VICE PRESIDENT, REGULATORY AFFAIRS
9665 GRANITE RIDGE DR - STE 500
SAN DIEGO CA 92123
lyndall.nipps@twtelecom.com

UNITED TELEPHONE CO OF THE NORTHWEST
BARBARA YOUNG
902 WASCO ST ORHDRA0305
HOOD RIVER OR 97031
barbara.c.young@centurylink.com

1 **W**
2 **WSTC**
3 ADAM HAAS
4 10425 SW HAWTHORNE LN
5 PORTLAND OR 97225
6 adamhaas@convergecomm.com

XO COMMUNICATIONS SERVICES INC
REX M KNOWLES
REGIONAL VICE PRESIDENT - REGULATORY
7050 UNION PARK AVE - STE 400
MIDVALE UT 84047
rex.knowles@xo.com

7 

8 Neoma Lane
9 Legal Secretary
10 Department of Justice
11 Business Activities Section