BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1484

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

Sprint Communications Company L.P. Sprint, Sprint Spectrum, L.P. Nextel West Corp. and NPCR, Inc. ("Sprint") together with T-Mobile West Corporation ("T-Mobile"), referred to collectively as "Joint Wireless Carriers," submit their Initial Post-Hearing Brief requesting that the Oregon Public Utilities Commission ("Commission") approve the proposed merger of CenturyLink and Qwest Communications International, Inc.'s regulated incumbent local exchange subsidiaries in Oregon[1] (collectively "Joint Applicants" or "Merged Firm"), only if certain conditions necessary to prevent harm to competition are imposed. These conditions would be in addition to those contained in the Stipulation between Commission Staff, Citizens Utility Board of Oregon ("CUB") and Joint Applicants.

[1] Those operating subsidiaries include CenturyTel of Oregon, Inc., CenturyTel of Eastern Oregon, Inc. and Untied Telephone Company of the Northwest d/b/a CenturyLink (collectively "the Century Link Oregon ILECs") and Qwest Corporation ("Qwest Corp.").

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INTRODUCTION

The merger at issue here is huge. After the merger, the Merged Firm will serve a nationwide total of 17 million access lines, more than 5 million broadband customers, over 1.4 million video subscribers and 850,000 wireless customers, nearly doubling the size of Qwest nationally.[2] In Oregon, the Merged Firm will increase its market share of Oregon ILEC lines to 72 percent or 911,000 lines.[3]

The standard of review for this merger is "whether the transaction serves the public interest by causing 'no harm.'"[4] An important consideration – overlooked in this proceeding – is "the continued existence of a robust, competitive marketplace [which] is essential to satisfying the 'no harm' standard for this transaction.[5] Clearly, a merger of this magnitude raises a well-founded concern regarding the Merged Firm's enhanced market power and its anticompetitive behavior that would harm Oregon's competitive marketplace. Neither the Stipulation between the Staff/CUB and Joint Applicants nor the Integra/Joint Applicant Settlement Agreement[6] sets forth sufficient conditions to prevent harm to a robust, competitive marketplace in Oregon. In fact, without additional or modified conditions, the merger will cause real harm to the competitive marketplace. Therefore, as explained herein the Joint Wireless Carriers have proposed additional

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[2] Sprint/1, Frentrup/4.
[3] Sprint/1, Frentrup/5
[4] *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, Oregon Public Utility Commission, UM 1431 (2/24/10)(Verizon/Frontier Order") p.6.
[5] Verizon/Frontier Order p.6.
[6] On December 2, 2010, the Stipulation between CenturyLink, Inc., Qwest Communications International, Inc., the Staff of the Public Utility Commission of Oregon and the Citizens' Utility Board of Oregon ("Staff/CUB/Joint Applicants' Stipulation") was filed with the Commission. On November 9, 2010, the Settlement Agreement between CenturyLink, Inc., Qwest Communications International, Inc. and Integra Telecom, Inc. ("Integra Settlement") was filed with the Commission.

conditions that will prevent such competitive harm,[7] which should be adopted if the merger is approved.

The Joint Wireless Carriers request the Commission impose the following four conditions in order to be able to find that the merger will cause "no harm":

- No later than 30 days after the closing date of the Merger, all legacy CenturyLink ILECs (CenturyTel and Embarq) in Oregon must reduce their intrastate switched access rates to mirror the intrastate switched access rates and rate structure of the legacy Qwest ILEC in Oregon. No later than 120 days after the closing date of the Merger, all post-merger CenturyLink ILECs in Oregon must reduce their ***intrastate*** switched access rates to mirror the ***interstate*** switched access rates and rate structure of the legacy Qwest ILEC in Oregon.

- All interconnection agreements with the post-merger CenturyLink ILECs in Oregon should be extended forty-eight (48) months.

- All Oregon wholesale customers must be allowed to consolidate and port their interconnection agreements within the service territories of the post-merger CenturyLink ILECs in Oregon (including both Legacy CenturyLink and Qwest ILECs)

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

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[7] The FCC has explicitly recognized the competitive harm risk and imposed conditions on a number of other ILEC mergers that are similar in size to this one in order to reduce the delay and transaction costs ILECs can impose during the interconnection agreement process. *BellSouth Corporation and AT&T, Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc.*, 22 FCC Rcd 5662, Appendix F at 5809-5810 (2007) ("AT&T/BellSouth Merger Order"); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶¶ 373-376, 389 (1999).

I. SPECIFIC MERGER-RELATED HARM WILL OCCUR BECAUSE THE MERGED FIRM WILL BE ABLE TO USE ITS OWNER'S ECONOMICS TO UNFAIRLY WIELD MARKET POWER.

Sprint witnesses Frentrup and Appleby have identified tangible competitive harm that will result from the merger. Namely, the Merged Firm will be able to use "owner's economics" to avoid costs that the Merged Firm can impose on its competitors, which will distort the competitive market.

"Owner's economics" is a commonly used term that describes the economic benefits that stem from owning all of the network functions and facilities needed to transmit telecommunications. The owner – the Merged Firm – incurs only the actual network cost of the functions the network provides.[8] It is able to avoid paying wholesale rates that it otherwise would have had to pay to unaffiliated companies for either transport or termination functions by keeping its traffic "on-net."[9] The combined companies' networks will allow them to enjoy significant expense savings by self-provisioning more network services and eliminating the need to purchase these services from a third party carrier. For instance, by adding Qwest's comprehensive national long distance network to CenturyLink's existing local exchange facilities, all of the Merged Firm's ILECs will now enjoy significant expense savings on the long distance service they provide. Likewise, by adding local exchange facilities, the Merged Firm long distance providers will save money on the cost of delivering long distance calls to local exchange customers. All other companies unaffiliated with the Merged Firm, who have no choice but to use its network as it will cover 37 states, must continue to pay whatever wholesale rates the Merged Firm chooses to charge.

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[8] Sprint/4, Appleby/7 lines 1-4.
[9] Jones Tr. 84, 98, 99.

The Joint Applicants identified "owner's economics" benefits throughout its internal merger analysis.[10] For instance, one CenturyLink document noted **[Begin Highly Confidential Data] [End Highly Confidential Data]**[11] **[Begin Highly Confidential Data] [End Highly Confidential Data]**[12]

The most blatant illustration of the benefits the Merged Firm will receive due to "owner's economics" will be its ability to avoid paying its existing bloated switched and special access charges.[13] The Joint Wireless Carriers recognize that previous rulings of the ALJ in this docket have stated that access charges are not an issue in this proceeding.[14] They dispute those rulings and request the Commission to disregard them because they are based upon the misperception that the Joint Wireless Carriers advocate wholesale access charge reform in this docket. That is not the case. The Joint Wireless Carriers request the Commission to impose a condition that is necessary to prevent tangible competitive harm, by at least equalizing, as a first step, the disproportionate intrastate access rates of the CenturyLink ILECs with those of the Qwest ILEC, and then transitioning those rates to interstate levels. The request of the Joint Wireless Carriers for a merger-related condition is no different than the request of the Commission Staff, CUB and the Joint Applicants for the conditions in their Stipulation regarding rates. If a condition is requested to mitigate a merger-related harm it should be considered by the

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[10] The Joint Applicants use this term several times in this analysis. Sprint/11; Sprint/13.
[11] Sprint/7.
[12] Sprint/9.
[13] The Merged Firm will also realize owner's economics on the incremental amount of long distance traffic that it can move from third-party long distance transport providers currently handling it to the Qwest long distance transport network. These long distance transport savings are calculated by comparing the price the Merged Firm's entities pay other carriers for long distance transport versus Qwest's cost to carry the incremental traffic on its long distance transport network. When a company self-provisions, the economic cost is the actual cost the company incurs to provide the service to itself. On the other hand, when a company must purchase the function from another carrier, the actual cost is the price the company must pay the other carrier. Sprint/4, Appleby/5.
[14] See ALJ Rulings dated September 7, 2010; November 3, 2010; November 23, 2010.

Commission, which has full authority to make a rate adjustment that is necessary to avoid competitive harm to wholesale customers due to the merger. The Commission's responsibilities to prevent merger-related harm extend to both wholesale and retail customers.

The specific harm the Joint Wireless Carriers seek to avoid is graphically set forth in Sprint/2, Frentrup Ex. 1, which shows the huge discrepancy between the intrastate access termination rates of CenturyTel ILECs and Qwest, as well as the avoided costs they will receive due to owner's economics.

The Joint Applicants claim they will not be avoiding those costs because they will maintain separate legal entities that will continue to "pay" access charges and to "receive" access charge revenues. This is not true because accounting rules require such intracompany transactions to offset each other.[15] All of the revenues and expenses would be reported up to the ultimate parent company, CenturyLink, Inc.[16] The only real cost the Merger Firm will experience for the network access is the much lower actual cost of the network functionality not the inflated access charges between affiliated companies.[17]

In sum, the Merged Firm will enjoy owner's economics with respect to the cost of local traffic termination, namely switched access and special access services. To illustrate this benefit assume that a hypothetical medium sized business located within a CenturyLink local service territory in Oregon, ABC Company ("ABC"), has voice and data service needs. With three T-1 special access circuits, a long distance ("LD") carrier like Qwest LD or Sprint LD can connect ABC to the carrier's network for the provision of voice and data services. In addition to other self-provisioned network components, the

[15] Sprint/4, Appleby/10.
[16] CTL/101, Jones, p. 3 of 3; Tr. Jones, p. 95.
[17] Sprint/4, Appleby/7.

carrier also would have to terminate ABC's voice traffic to other LECs, including CenturyLink ILECs in Oregon and across the nation. To serve ABC prior to the merger, Qwest LD or Sprint LD would need to purchase the three T-1s from the CenturyLink ILEC and incur terminating access charges, both intrastate and interstate, to complete ABC's voice calls. Each of these access services are priced far above the actual cost,[18] with the high switched and special access rates of the CenturyLink ILEC impacting Qwest LD and Sprint LD equally. To collect a profit on the service provided to ABC and maximize shareholder return, both Qwest LD and Sprint LD would each be forced to price its retail service offering to ABC to recover the access costs imposed by the CenturyLink ILEC.[19]

Once the merger is complete, Qwest LD and the CenturyLink ILECs will be part of the same Merged Firm. The merger has not changed the circumstances for Sprint LD, or any other LD carrier unaffiliated with the Merged Firm, to serve ABC. To serve ABC's telecommunications needs, Sprint and all unaffiliated carriers will still need to pay the same excessively high switched and special access charges to the CenturyLink ILEC. Qwest LD will have to "pay" them, but only as a bookkeeping exercise. Qwest's ability to serve ABC will change because Qwest LD will view ABC's business as an opportunity to generate profits for the entire Merged Firm, which will only truly bear the actual cost – not the tarriffed rates – of access.[20] The Merged Firm will be able to price its services so as to undercut its competitors, as discussed more fully below which means that its competitors cannot compete on a level playing field. As long as the price of

[18] Sprint/2, Frentrup Ex. 1. CenturyLink's special access rates are also above actual cost. Sprint did not demonstrate that in this proceeding, however, because no merger condition on special access services in Oregon was requested.
[19] Sprint/4, Appleby/7-8.
[20] Sprint/1, Frentrup/20.

Qwest LD's retail offering to ABC wins the bid and the price is above the actual cost of the services provided to ABC by all the entities inside the Merged Firm, the Merged Firm will generate a profit on ABC's services. Unlike Sprint LD, Qwest LD no longer needs to account for the access costs it incurs internally within the Merged Firm because those costs to Qwest LD are revenues to a Qwest LD affiliate within the Merged Firm. Qwest LD's pricing decision can therefore be based on the much lower actual cost of the access functions. The merger thus clearly will provide Qwest LD with a competitive advantage over Sprint LD and all other non-affiliated LD Carriers attempting to bid and win ABC's telecommunications business. Specifically, Qwest LD will be able to price its services low enough to undercut its competitors that must account for the excessive access charges in their pricing decisions.

Further, in addition to the T-1 costs, as discussed above, any unaffiliated LD carrier serving ABC will incur switched access costs to complete ABC's voice calls. The competitive advantage the Merged Firm's carrier will receive is further enhanced because of the disparity in the intrastate access rates of the CenturyLink Oregon ILECs and Qwest Corp. While the Merged Firm's switched access rates overall will be excessively higher than cost, the CenturyLink Oregon ILECs' rates are up to seven times higher than Qwest's. The Qwest ILEC's current intrastate access rate is \$.0110 per minute, but the same rate for the CenturyLink Oregon ILECs is from \$.0305 to \$.0727. The cost of intrastate access service is no higher than \$.0007 per minute.[21] This intrastate switched access service margin provides the Merged Firm the same type of unfair advantage in competing for the retail services of ABC as the T-1 wholesale services did. Accordingly, the competitive retail providers must pay the inflated access charges of the Merged

[21] Sprint/2, Frentrup/1.

Firm's ILECs, and because of this will be unfairly disadvantaged in price comparisons with the Merged Firm's voice service offerings in the market.

The Joint Applicants acknowledge that the access prices that the Qwest IXC will be charged by its affiliated ILECs will not impact them financially. **[Begin Highly Confidential Data]**[22] **[End Highly Confidential Data]** This opportunity arises only because the Merged Firm's accounting will completely offset the excessive access rates with the revenues recorded on an intra-company basis. The bottom line is that competitors in Oregon will be harmed if the merged Firm is allowed to maintain the artificially high costs it can impose upon competitors to interconnect to the Merged Firm's expanded network, which the Merged Firm can avoid. Telecommunications service choices and prices for Oregon consumers will be adversely impacted.[23] Adopting the conditions proposed by the Joint Wireless Carriers will prevent the competitive harm discussed above.

II. THE MERGED FIRM'S ENHANCED MARKET POWER NEEDS TO BE CONSTRAINED TO PREVENT HARM TO OREGON RETAIL AND WHOLESALE CUSTOMERS

The synergies and economics of scale and scope created by this merger increase the Merged Firm's ability as the sole manager of the dominant ILECs in a much, much larger service territory to engage in anti-competitive behavior more than legacy Qwest or legacy CenturyLink could do absent the merger.[24] As discussed above, "owner's

[22] Sprint/4, Appleby/10; Sprint/15.
[23] Sprint/1, Frentrup/12.
[24] Sprint/1, Frentrup/12. The FCC acknowledged the increased incentive and ability for competitive harm in the case of a merger of two ILECs in the Embarq/CenturyTel Approval Order. The FCC stated: "A merger between two incumbent LECs may increase the merged entity's incentive to engage in anticompetitive behavior by allowing it to capture or internalize a higher proportion of the benefits of such anticompetitive strategies against regional or national competitors...The larger the resulting incumbent LEC is, the greater is its ability to internalize these spillover effects." Staff/506; *In the Matter of*

economics" enable the Merged Firm to tilt the competitive landscape in its favor, if left unchecked.

The Joint Applicants would fend off the access reduction conditions proposed by the Joint Wireless Carriers, claiming that they are steadily losing local access lines – that is, traditional wireline voice service customers. This is a red herring argument because the true economic value of the Merged Firm is not measured by the number of local wireline voice service customers, but by the underlying combined networks of Qwest and CenturyLink that will enable the provision of numerous other services such as broadband Internet service and Internet protocol television ("IPTV"), either as standalone services or bundled with traditional local and long distance voice services. The ability to offer these other services presents a significant revenue opportunity that more than offsets any losses attributable to a decline in traditional local voice service.

The Merged Firm's network will provide not only the local and long-distance voice service as it did in the past, but will also provide services to transmit data necessary to provide Internet, video, and entertainment services. The financial viability of the ILEC holding companies cannot be determined by examining the trend in local access lines in isolation. The Commission must consider all of the services currently provided, as well as the future revenue opportunities associated with services that will be provided, on the network in evaluating the merger. Further, such consideration will show that the Merged Firm does not require high switched access rates to cover the network costs of providing voice services when it will be offering other telecommunications and data services that

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Applications Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc. Memorandum Opinion and Order, WC Docket N. 08-238, FCC 09-54 (released June 25, 2009), ¶ 33, f.n. 106.

more than cover its network costs. In short, imposing the proposed condition of the Joint Wireless Carriers can be absorbed financially by the Merged Firm.

The Merged Firm will continue to be the dominant provider of landline service within its service area.[25] The offering of additional non-voice services will help the Merged Firm to compete in the market. The Merged Firm believes **[Begin Highly Confidential Data]**[26]**[End Highly Confidential Data]** The Joint Petitioners' ILECs have transitioned their networks from providing only voice service to also providing broadband and entertainment services. As Sprint witness James Appleby explained in filed testimony:

> The ILEC copper network that was built to provide quality voice service was augmented with DSL technology over the past ten years to provide broadband services. This involved installing electronic components to the network to connect customers' local loops to transport facilities that connect to the internet. The distance between the electronic device and the customer's location determines the bandwidth or speed of the customer's internet connection. As customers demanded faster internet connections and the ILECs identified other services such as video entertainment that can be provisioned over those broadband networks, the ILECs have extended fiber facilities closer to the customers (fiber to the node) and then installed electronics closer to the customers to connect that fiber to the copper loops.[27]

The Merged Firm has acknowledged the existing network in place will facilitate the latest transition to provide IPTV. The Network President of CenturyLink states **[Begin Highly Confidential Data]**[28]**[End Highly Confidential Data]** Clearly, retail customers do not view Qwest solely as a provider of local voice service. In fact, the customers view Qwest as a broadband provider as much as they view it as a voice service

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[25] Sprint/4, Appleby/13.
[26] Sprint/19.
[27] Sprint/4, Appleby/14.
[28] Sprint/22.

provider based on their purchase decisions.[29] As a result of these additional non-voice services, the Merged Firm has a significant opportunity to increase the average revenue per user (ARPU). For Qwest, the mass market ARPU has increased from $45.83 in the first quarter of 2005 to $61.64 in the first quarter of 2010, a 34.5% increase.[30] In a similar period, legacy Embarq reported consumer ARPU increasing from $49.60 in the first quarter of 2005 to $56.71 in the first quarter of 2009, a 14.3% increase.[31] Clearly, the Merged Firm has opportunities to increase ARPU given Qwest's acknowledgment that **[Begin Highly Confidential Data]**[32] **[End Highly Confidential Data]**

The Joint Petitioners' higher revenues from additional non-voice services contribute to higher profit margins in the mass markets – Qwest's profit margin on mass market revenues increased from **[Begin Highly Confidential Data] [End Highly Confidential Data]**[33] from 2007 to 2009. In addition, the cost of Qwest's high-speed Internet service in 2009 was **[Begin Highly Confidential Data] [End Highly Confidential Data]**.[34] This type of cost efficiency will clearly drive margin improvements, especially if the Merged Firm is able to penetrate the broadband market more deeply, as it forecasts it will.

Wireless backhaul is essential to today's wireless services industry and to the continued development of wireless data services. As Sprint witness James Appleby noted in filed testimony:

> Wireless services are only truly wireless for a very small portion of the end-to-end communications path, from the customer's handset to the

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[29] Sprint/4, Appleby/15.
[30] Qwest quarterly public financial statements.
[31] Embarq quarterly public financial statements.
[32] Sprint/28.
[33] Sprint/29.
[34] *Id.*

wireless cell tower. After that point they usually traverse landline facilities. In addition, wireless customers are demanding more and more bandwidth for the services that today's smart phones can provide - email, texting, and streaming mobile video - and to meet this demand wireless carriers are augmenting the bandwidth between their cell sites and the mobile carriers' first switching location. Wireless carriers rely on special access for these connections.[35]

The Merged Firm's investment in FTTC means more opportunity for it to raise revenues from the captive wireless carriers in this market. Once again, the Merged Firm has market power as a result of the substantial service opportunities its ubiquitous network creates, and this provides yet another opportunity for the Merged Firm to undercut its competitors.[36] The Merged Firm has significantly increased the potential revenue it can generate from offering its many retail services to a vastly expanded customer base. The Merged Firm also has significant opportunities to leverage its position as a near-monopoly of certain wholesale services into the future, such as FTTC.

The ability to undercut competitors' prices is anti-competitive and discriminatory; it ensures competitors cannot compete on a level playing field. Ultimately, Oregon consumers pay the price in the form of reduced competitive service options and thus higher than necessary rates. The Joint Wireless Carriers' proposed conditions are necessary to ensure the Merged Firm is not enabled to wield its market power to the detriment of its competitors and Oregon consumers. In particular, Condition One relating to switched access charges is necessary to prevent the Merged Firm from continuing to

[35] Sprint/4, Appleby/20.

[36] Qwest only agrees to build FTTC **[Begin Highly Confidential Data] [End Highly Confidential Data]. Sprint/34.** Of the estimated **[Begin Highly Confidential Data] [End Highly Confidential Data]** that will have bandwidth requirements that justify FTTC deployment by **[Begin Highly Confidential Data] [End Highly Confidential Data]**, Qwest already has contracts for **[Begin Highly Confidential Data** Sprint/34 **[End Highly Confidential Data]**. With paybacks guaranteed as a result of **[Begin Highly Confidential Data] [End Highly Confidential Data]** and **[Begin Highly Confidential Data] [End Highly Confidential Data] Sprint/36** of the market addressed to date in Qwest's service area, the Merged Firm can use its near-monopoly market share of local access facilities to continue to dominate the wireless backhaul market into the future. *See* Sprint/34; Sprint/36.

burden its competitors with exorbitant switched access rates, a burden the Merged Firm itself will not have to bear due to owner's economics. As a first step, the Commission should require all the legacy CenturyLink ILECs (CenturyTel and Embarq) to reduce their intrastate switched access rates to the intrastate rates of the legacy Qwest ILEC in Oregon. Then, to bring the rates of all the Merged Firm ILECs closer to the actual cost of providing switched access service, the Commission should require that the ***intrastate*** switched access rates of all the post-merger CenturyLink ILECs (CenturyTel, Embarq, and Qwest) be reduced to the ***interstate*** switched access rates of the legacy Qwest ILEC.

The revenue impact of the proposed access charges reductions in total, as calculated by the Joint Wireless Carriers of **[Begin Highly Confidential Data] [End Highly Confidential Data]**[37] is far less than the estimated $30.8 million Oregon-specific operating expenses synergies of the Merger.[38] Given the Merged Firm's substantial revenue growth opportunities, as discussed above, due to the merger, the access charge reductions, needed to facilitate a truly competitive marketplace in Oregon are fully warranted.

III. CONSOLIDATION, PORTING, AND EXTENSION OF EXISTING ICAS MINIMIZES RISK OF ANTICOMPETITIVE BEHAVIOR WHILE MAXIMIZING SYNERGY SAVINGS

The record in this case shows that competing carriers, including the Joint Wireless Carriers, have a number of interconnection agreements ("ICAs") in place with the CenturyTel Oregon ILECs and Qwest, many of which have varying rates, terms and conditions. Managing multiple ICAs – both across different states and within the same state – is costly and burdensome, and increases the risk of anticompetitive behavior. In

[37] Sprint/1, Frentrup/22; Sprint/3, Frentrup Ex. 2.
[38] Sprint/1, Frentrup/22.

Oregon alone, CenturyLink has 37 ICAs with CLECs and 19 with wireless companies.[39] While Qwest, a significantly larger company, has reported 127 Oregon ICAs with CLECs,[40] 19 with wireless companies in Oregon. The sheer volume of ICAs that the Merged Firm will have in Oregon creates a heightened risk that the Merged Firm will use its enhanced market power to raise costs for competing carriers to access its greatly expanded network by requiring re-negotiation of critical function and pricing terms in its ICAs. This would impose substantial transaction costs associated with the negotiation and arbitration of ICAs under sections 251 and 252 on competing carriers.

Paragraph 28 of the Staff/CUB/Joint Applicant Stipulation ostensibly provides some protection from the competitive harm of having to re-negotiate countless ICA's with the Merged Firm. That paragraph extends existing ICA's between competing carriers and Qwest for thirty-six months from the merger closing date. Paragraphs 28 through 41 of the Stipulation track with the provisions of the Stipulation between Integra and the Joint Applicants which allegedly gave staff confidence "that the concerns of competitive carriers were adequately addressed.[41] In fact, the wholesale provisions in the Staff/CUB/Joint Applicants Stipulation, as well as the Integra Stipulation do <u>not</u> address the concerns of competitive carriers – but only one such carrier, Integra. Staff Witness Dougherty contacted no <u>other</u> competitive carriers before opining on the adequacy of the wholesale provisions.[42] He also did not know that Integra offers services only in Qwest ILEC serving areas[43] in Oregon, which is why the Stipulations' wholesale terms apply,

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[39] Sprint/1, Frentrup/24.
[40] *Id.* (citing Ex. 63(Qwest Response to Integra IR No. 76)).
[41] Dougherty p. 24, 12/10/10.
[42] TR. 171, December 17, 2010.
[43] *Id., see also* TR 74, December 7, 2010.

for the most part, only to the legacy Qwest ILEC and not to the CenturyLink Oregon ILECs.

The Joint Wireless Carriers have filed formal Objections to the Staff/CUB/Joint Applicants' Stipulation, which fails to put in place conditions that are necessary to ensure the existence of a robust, competitive marketplace.

A. Any Term Extension Should Cover the CenturyLink ICAs.

For no well-founded reason, the Merged Firm has refused to apply the 36-month ICA extension to the Century/Link Oregon ILECs. The Joint Wireless Carriers have ICA's with those ILECs. Just as it is important for CLECs and CMRS carriers to have certainty regarding the status of their Qwest ICAs, it is equally important to allow CLECs and CMRS carriers to extend their ICAs with CenturyLink at their option. A condition that extends only to the Qwest ICAs raises the costs for interconnecting carriers as they could be forced to renegotiate and arbitrate their CenturyLink ICAs well before the Qwest extensions expire. Rather than expending resources in negotiating and arbitrating ICAs, interconnecting carriers would rather focus on providing competitive services. This same concern applies for both the Qwest and CenturyLink ICAs. Therefore, extensions of ICAs should not be limited to Qwest ICAs.

As a condition for FCC approval in the CenturyTel/Embarq Merger,[44] both of the ILECs (the CenturyTel ILECs and Embarq ILECs) agreed to extend their ICAs.[45] When questioned at the December 17, 2010 hearing, CenturyLink wholesale witness Michael Hunsucker admitted that it was possible to extend the CenturyTel and Embarq ICAs to be

[44]Staff/50; Marinos/29-30.
[45] TR Dec. 17, 2010, p. 48 (Hunsucker).

coterminous with the extensions of the Qwest ICAs.[46] He simply said "we don't believe it's appropriate to do that." Additionally, Mr, Hunsucker could not provide any estimates of costs to extending the interconnection agreement extension provision to the CenturyLink ICAs.[47] Thus, there are no technical or cost reasons that prevent extension of this condition to the CenturyLink ICAs.

However, extension of Qwest ICAs but not the CenturyLink ICAs deprives interconnecting carriers like Sprint of the efficiencies from the Merger that the Merged Firm will achieve. Rather than allowing competitive carriers to at least work under all existing ICAs, exempting the CenturyLink ICAs from an extension requirement will force competitive carriers to juggle different ICAs of varying lengths. If a benefit of the merger is to obtain true synergies, then these should be achieved in all areas of the Merged Firm's operations. In the end, the Merged Firm's reluctance to extend the extension condition to the CenturyLink ICAs is yet another vehicle for it to impose costs upon its competitors.

B. The ICAs Should be Extended for Four Years.

The second reason Condition 28 of the Staff/CUB/Joint Applicants' Stipulation is insufficient is that the extension is only for three years rather than the four years that Sprint requested in its testimony.[48] A four-year extension is more appropriate as it will give interconnecting parties like Sprint additional time to work under the existing ICAs. If amendments are requested by CenturyLink due to changes in the law, the existing ICAs have provisions to address that situation. Four-year extensions rather than three-

[46] TR Dec. 17, 2010, p.50 (Hunsucker).
[47] TR Dec. 17, 2010, p. 48 (Hunsucker).
[48] Sprint/1; Frentrup/26.

year extensions will help minimize the costs that the Merged Firm can impose on its competitors.

IV. CONSOLIDATION OF THE MERGED FIRM'S ICAs INTO ONE STANDARD ICA REDUCES COSTS WHILE MINIMIZING THE RISK OF ANTICOMPETITIVE CONDUCT.

One of the key competitive roadblocks for carriers such as Sprint is the existence of many separate interconnection agreements with ILECs around the country. Negotiating, monitoring, renewing and complying with the agreements impose significant transaction costs upon competitive carriers. Minimizing these transaction costs would provide a public benefit because it would enable competitive carriers to pass cost savings through to customers in competitive rates. One obvious way to do this would be to consolidate interconnection agreements. In a merger situation like the present one, common sense and sound public policy points to requiring the same interconnection agreement(s) for the Merged Firm. After all, if CenturyLink and Qwest justify their merger by exhorting the financial synergies of running a consolidated company why shouldn't they be required to consolidate their many interconnection agreements? The Staff/CUB/Joint Applicants' Stipulation's interconnection provisions fail to move toward this goal in a meaningful way.

The Merged Firm asserts that the proposed merger is in the public interest because all the synergies CenturyLink and Qwest will realize are presumptively beneficial for the Merged Firm's customers. While the Joint Wireless Carriers do not object to the notion that the Merged Firm should be able to enjoy significant synergies by combining the two companies' networks, management, and other operations, we, as wholesale customers, also should be able to benefit. This can be done by allowing competing carriers to consolidate/port existing ICAs with the Merged Firm. Qwest and CenturyLink have identified no technical reason why an ICA from Qwest will not work in CenturyLink Territory, speculating only that such porting sounds difficult to do. Given that the burden is upon Qwest and CenturyLink to justify their merger the Commission would be acting in the public interest to insist upon more rigorous competitive conditions that are contained in the Stipulation.

Like contract extensions, porting a contract from one ILEC to another in the Merged Firm avoids the burdensome incremental cost of contract negotiations and potential arbitration to establish a new contract. With more than 100 ILECs in the Merged Firm[49] (and its stated plan to retain each legal entity), management of the interconnection arrangements will be unnecessarily burdensome. For instance, if Sprint needs to interconnect with multiple Merged Firm entities in multiple locations Sprint will need to negotiate with such entities on a myriad of issues over and over again. It makes much more sense for the industry as a whole to move towards minimizing the number of ICAs across the country. CenturyLink recognizes the benefit of a combined interconnection agreement as it admits that it is working to combine the interconnection agreements from its last merger between Embarq and CenturyTel for its own internal purposes "and also externally to our customers." [50] Porting existing agreements from one ILEC to another within the Merged Firm, even if the agreement originated in another state would promote this goal. The porting of existing agreements may also result in one nationwide interconnection agreement. In sum, porting of interconnection agreements

[49] Nationally, CenturyLink will have approximately 75 legacy CenturyTel ILEC legal entities, approximately 25 legacy Embarq ILEC legal entities and 13 legacy Qwest ILEC legal entities.
[50] TR Dec. 17, 2010, p. 53 (Hunsucker).

prevents the Merged Firm from imposing unnecessary negotiation and legal costs upon its competitors.

The Merged Firm's refusal to even consider consolidation and porting of ICAs is evidence that there is a real risk it will exercise its newly enhanced market power as the third largest ILEC in the United States to impose less favorable terms on competing carriers. Once the Merged Firm is created, however, it will be the largest ILEC in Oregon with 911,000 access lines – significantly larger than the CenturyTel and Embarq companies that operated only a few years.[51] For the Joint Petitioners to insist that the terms and conditions of the existing CenturyLink ICAs must be maintained when the economics that justified those terms and conditions in the first place no longer exist, is a fair indication of the enhanced risk that the Merged Firm would exploit this opportunity to abuse its market power.

In addition to the porting of existing ICAs from one Merged Firm entity into another within Oregon, there are also significant efficiencies if a carrier is able to port the entirety of an existing ICA, except for State-specific rates, from another state in the Merged Firm's territory to Oregon. "State-specific rates" would not include billing arrangements such as bill-and-keep for the exchange of traffic, or contractual provisions to share the costs of interconnection facilities.[52]

State commissions and the FCC have imposed this condition for other mergers similar in size and scope to this one, giving competitive carriers the right to consolidate and port ICAs among the merged companies' operating entities. The FCC required porting of agreements between states and legal entities for the 22 AT&T Corporation

[51] Sprint/1; Frentrup/5.
[52] Sprint/1; Frenbrup/28.

ILECs, which of course involved different networks and operations similar to CenturyLink and Qwest.[53] At the state level, the Illinois Commission also required porting of interconnection agreements in both the SBC-Ameritech merger, and the Bell Atlantic-GTE merger.[54]

V. THE COMMISSION SHOULD SPECIFY HOW MERGER CONDITIONS ARE ENFORCED.

Based on Sprint's experience in attempting to implement intended competition-enhancing conditions imposed in other ILEC mergers, the Joint Wireless Carriers are concerned that the Merged Firm, whether intentionally or unintentionally, may not interpret a merger condition in the same manner that the beneficiaries of the merger condition do. In addition, Sprint has encountered objections from ILECs as to what the appropriate forum is for bringing a regulatory or legal action to enforce merger conditions; specifically, challenges to state commission jurisdiction relating to enforcement of FCC merger conditions.[55] To erase doubt about merger condition enforcement, and to encourage the Merged Firm to implement in good faith all of the merger conditions approved by the Commission, the Commission should specify how merger conditions are to be enforced.

VI. A MOST FAVORED NATIONS CLAUSE SHOULD BE ADDED

Even though Sprint does not support Staff/CUB/Joint Applicants' Stipulation, if the Commission does accept it then the Stipulation should include a Most Favored States condition. On this point, Sprint supports Mr. Dougherty's testimony in Staff Exhibit 700

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54 *Id.*

55 Sprint/1; Frentrup/32.

and Mr. Feighner's testimony in CUB Exhibit 200 requesting that the Commission impose conditions upon the Merged Firm that are imposed upon them by other states and the FCC.

VII. SPRINT SUPPORTS THE CONDITIONS PROPOSED BY THE JOINT CLECS

Sprint further objects to the Staff/CUB/Joint Applicants' Stipulation because it does not contain two specific conditions proposed by the Joint CLECs, which would promote wholesale customers and enhance competition. Specifically, Sprint supports the Joint CLECs' proposed condition that allows for interconnecting carriers to have a single point of interconnection with all of the Merged Firm's ILECs in a particular state. Once again, the Merged Firm wants to take advantage of the synergies of the merger but deprive its wholesale customers of the benefits of the synergies. A single point of interconnection reduces the trunking and facility costs for competitors. Just as the Merged Firm realizes network synergies, so, too wholesale competitors should be able to reduce their interconnection costs. The Stipulation should include a condition that allows competitive carriers to interconnect with the Merged Firm at a single point.

In addition, Sprint supports the condition proposed by the Joint CLECs that prohibits any of the CenturyLink ILECs from exercising the rural exemption. The Merged Firm is the third largest ILEC in the nation. It makes no sense for a company of this size and scale to be able to claim the rural exemption under § 251(f) to protect it from competition.

VIII. CONCLUSION

For all the foregoing reasons, the Joint Wireless Carriers request that the Commission impose the additional conditions detailed herein in approving the proposed merger of Qwest and CenturyLink or the "no harm" standard will not be met.

RESPECTFULLY SUBMITTED this 25th day of January, 2011.

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CERTIFICATE OF SERVICE
UM 1484

I hereby certify that the Redacted Initial Post-Hearing Brief of Sprint Communications Company L.P. Sprint, Sprint Spectrum, L.P. Nextel West Corp. and NPCR, Inc. and T-Mobile West Corporation was served on the following persons on January 25, 2011, by email to all parties and by U.S. Mail to the parties who have not waived paper service:

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