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February 1, 2011

Annette Taylor
Oregon Public Utility Commission
550 Capitol St., NE
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Salem, OR 97301

Re: UM-1484

Dear Ms. Taylor:

Enclosed for filing in the above entitled matter please find an original and five (5) copies of CenturyLink's and Qwest's Post-Hearing Reply Brief, along with a certificate of service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Carla

Carla M. Butler

Enclosures
cc: Certificate of Service

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	**CENTURYLINK'S AND QWEST'S POST-HEARING REPLY BRIEF**

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Pursuant to Administrative Law Judge Allan Arlow's December 17, 2010 Ruling, as modified on January 7, 2011 and January 14, 2011, applicant CenturyLink, Inc. ("CenturyLink") and intervenor Qwest Communications International, Inc. ("QCII," or, where appropriate, "Qwest") (collectively, "the Merging Companies" or "Companies," and post-merger, the "Merged Company") hereby file their post-hearing reply brief.

INTRODUCTION

The Merging Companies in this Reply Brief respond to the opening briefs of the Joint (Non-Settling) CLECs, the Coastal Intervenors, TRACER, the Joint Wireless Carriers, and, with respect to two additional conditions, Staff and CUB. Importantly, the Merging Companies have reached settlements in this proceeding with Integra Telecom, Inc. ("Integra") ("Integra Settlement"), 360networks (USA), Inc. ("360networks"), and, more recently, Commission Staff ("Staff") and the Citizens' Utilities Board ("CUB") (collectively "Settlements" and "Settling Parties"). In addition, they have reached agreements with numerous other parties in other state merger proceedings, including the Communications Workers of America, Cox Cable, and various state commission staffs, agencies, and consumer advocates. The record in this matter shows that the terms and conditions in the Settlements go well beyond what is required to meet the Commission's "no harm" standard of review. Therefore, no additional conditions to the Transaction are necessary, and by approving the merger with the conditions provided in the Settlement Agreements, the Commission can be assured that the Transaction will do no harm and thus is in the public interest.

ARGUMENT

I. THE RECORD DOES NOT SUPPORT THEORIES UPON WHICH THE CLECS' ADDITIONAL CONDITIONS ARE BASED

The Non-Settling CLECs contend that their proposed additional conditions are necessary due to five underlying theories about this merger and mergers in general. However, because the record does not support these underlying theories, the additional conditions must be rejected.

Their first theory involves the erroneous comparisons of this Transaction to prior mergers to suggest that this one could *potentially* fail, stating:

> 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. Joint CLECs' Brief, p. 4.

This is nothing more than gross speculation. Rather than analyzing and comparing the organizational composition, the financial structure, managerial experience, and other attributes of the Hawaii Telecom and FairPoint transactions with the CenturyLink/Qwest transaction, the Joint CLECs simply rely on the superficial claim that, because each are telecommunications transactions, the same result will occur. In contrast, CenturyLink and Qwest have proven facts demonstrating the stark differences between those transactions and showing the extent to which the Joint CLECs exaggerate their claims of risk. CTL/500, Jones/13-21.

As noted in the Merger Companies' Opening Brief, this Transaction is different from the transactions that the Non-Settling CLECs cite, in part because those transactions primarily involved the acquisitions of portions of companies. This Transaction is about strengthening the combined company and not merely the sale of access lines. CenturyLink and Qwest face substantial competition from wireless and cable telephony providers and, in many cases, customers are substituting their traditional wireline for those wireless and cable services. See e.g., Qwest/1, Peppler/13-22. Thus, CenturyLink and Qwest structured their merger to be a combination of complete companies, and all of the assets, systems, and expertise of the operating entities will continue to exist under the newly merged company. No transfer or development of new systems will occur at merger close, and there will be no deadlines, or flash-cutovers, if and when CenturyLink deploys any new or different systems. This merger will also not result in the issuance of new debt, and the positive cash flows and very conservative synergy targets demonstrate the financial strength of the merged company. Another very stark difference from those other transactions is the managerial experience of CenturyLink – not only are its executives very experienced in operating telecommunications companies, but CenturyLink also has successfully managed the acquisition and integration of several companies, including the very substantial Embarq transaction. This merger, rather than weakening the two companies, in fact strengthens them from a financial and operational perspective, and thereby ensures that CLECs will continue to have a viable business partnership with the Merging Companies. See e.g. CTL/300, Bailey/5-7, 11-16, 18-21, 23-29; see also Merging Companies' Brief, pp. 7-8; see also CTL/800, Hunsucker/25.

As their second theory purportedly justifying their request for additional conditions, the Non-Settling CLECs state:

> 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. Joint CLECs' Brief, p. 4.

The record in this case contradicts this conclusion, however. CenturyLink has substantial operations in urban areas and in fact has impressively robust wholesale operations. See e.g., CTL/200, Schafer/13-14; CTL/800, Hunsucker/6-14. Moreover, CenturyLink has already named the leadership for the Merged Company's wholesale organization, and it is well staffed with Qwest employees. See, Tr., 12/17/10, pp. 36-37 (Mr. Hunsucker testifying that 12 of 21 "Tier 3" wholesale department employees of the Merged Company are Qwest employees); see also Tr., 12/16/11, vol. 1, p. 41. Thus, the Merging Companies will retain their knowledge of and experience with wholesale systems. In addition, the Merging Companies have stated that they understand and fully intend to ensure that Qwest's BOC obligations are fulfilled. CTL/500, Jones/36-38; see also CTL/800, Hunsucker/20, 28.

The Non-Settling CLECs' third, and equally baseless, conclusion is that the nearly two-year-old merger of CenturyTel and Embarq is somehow affecting CenturyLink's ability to provide wholesale service:

> 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. Joint CLECs' Brief, p. 4.

Once again, the record does not bear out the Non-Settling CLECs' claims. CenturyLink did explain the isolated problem, which occurred in North Carolina early in the merger integration process, and how it was handled. CTL/1000, Schafer/1-6; see also Tr., 12/16/10, vol. 1, pp. 119-126. That problem was identified, addressed, and notably did not recur in any other state because the integration process that CenturyLink employs takes the time necessary to continuously improve the integration results. *Id*. Furthermore, the record shows that CenturyTel-Embarq merger, rather than taxing CenturyLink, actually puts the company in a better position to merge with Qwest because CenturyLink has learned from the recent experience of integrating Embarq. *Id*.

Another unsupported claim, which is not an appropriate subject of this case in the first place, is that CenturyLink has a history of "anticompetitive policies and practices":

> 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. Joint CLECs' Brief, p. 4.

The CLECs proffer no evidence that demonstrates that any CenturyLink practices are anti-competitive. Mere unsupported allegations are not sufficient to establish such claims, and they certainly are not credible or persuasive enough for the Commission to consider it in this case. If the Non-Settling CLECs believe that CenturyLink is engaged in anticompetitive practices, they must seek to establish such a fact by complaint or other means that grants the respondent full due process under the Commission's statutes and rules. This is not the appropriate proceeding to do so, but, even it were, the Non-Settling CLECs certainly have not made even close to the showing that would be necessary for the Commission to make a finding on the issue.

Finally, the CLECs appear to allege that merger integration costs will negatively impact the anticipated synergy savings, which will lead to a degradation of wholesale service quality:

> 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. Joint CLECs' Brief, p. 4.

The record does not support this claim and, in fact, requires that the Commission reach the opposite conclusion.

First, the synergy targets are far from "enormous;" in fact, they are very conservative. The synergy targets are only 8% of Qwest's 2009 cash operating cost, as compared to other merger-related ILEC-transaction synergies that generally have been 20%+ of the target company's cash operating expenses. CTL/300, Bailey/6-7, 13-15. Further, the Joint CLECs' contention fails to acknowledge that, even without the synergies, the Merged Company is expected to realize $1.7 billion in remaining cash flow that could be used to cover integration costs. The Joint CLECs are unable to produce any evidence that CenturyLink is not meeting its synergy goals.

The Non-Settling CLECs nevertheless persist in arguing that the Merged Company will reduce service quality to its customers in order to achieve synergies. There are several other reasons why the Non-Settling CLECs' supposition about synergies is wrong. For CenturyLink to achieve synergies through a degradation of customer service would be equivalent to CenturyLink cutting off its nose to spite its face. Wholesale service is a source of revenue to the Merging Companies, like any other service, and wholesale customers are business partners that are also facing pressure from intermodal competition. CTL/800, Hunsucker/25. In addition, Mr. Hunsucker, recently named a Vice President of the Merged Company's wholesale division, summed it up when he testified at the hearing that "we have every incentive to provide quality service to any carrier and that's exactly why we created a wholesale organization. That's the focus of what we do every day." Tr., 12/17/10, p. 43, ll. 20-23.

And even if there were some basis for the Non-Settling CLECs' flawed conclusion on synergies, the settlement conditions to which the Merging Companies have agreed would more than address any concerns that the Non-Settling CLECs raise. Likewise, their attempt to link the extension of wholesale service arrangements to the estimated timeframe for synergy savings is flawed and illogical. Synergy savings are not expected to be realized through some alleged impact on wholesale service arrangements, and thus there is no basis to tie the extension of wholesale and commercial agreements and tariffs to the timeframe for achieving synergies.[1]

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[1] TRACER, which did not file testimony, also makes similar arguments about synergies, but further claims it is "likely CenturyLink will look to its local *retail and wholesale* operations, including those in Oregon, to meet urgent requirements to increase revenues." TRACER Brief, p. 5. (Emphasis added.) However, TRACER's claims about likely retail increases as a result of synergy savings are without merit for similar reasons that the Merging Companies discuss regarding synergies impacting wholesale operations. In addition, there are significant competitive pressures in the highly-competitive retail large business marketplace that undermine TRACER's arguments. See e.g., Qwest/1, Peppler/13-14, 22.

Likewise, TRACER's arguments about the risks discussed in CenturyLink's Form S-4 filing with the SEC are not well taken. As Mr. Bailey of CenturyLink testified, it is important to understand the purpose of the "Risk Factors" section in SEC filings by publicly-traded companies. These items are mentioned as a matter of full disclosure of any and all risks to shareholders, as would be included in any public company's SEC Form S-4 or annual

These five justifications pervade the Non-Settling CLECs' opening brief, and are the foundation for their assertion that additional conditions, above and beyond the commitments that the Merging Companies have already made, are needed. The Merging Companies submit that none of the five justifications are supported by the record and that each of them is fatally flawed. The Commission need only reject these justifications in order to find that all of the Non-Settling CLECs' conditions are unnecessary. However, even if the Commission were to find otherwise, the stipulations and settlements between the Merged Companies and Staff, CUB, Integra, and 360networks are more than sufficient to address any CLEC concerns.

Finally, telling examples showing that the Non-Settling CLECs' continued push for more conditions is not reasonable and evidences nothing more than an attempt to extract unreasonable additional benefits that have no place in this merger docket can be found in what the Colorado and Utah Commissions stated about such proposals. For example, the Colorado Commission stated:

> We find that the Integra settlement agreement is in the public interest and we will approve it in this docket. We find that the agreement provides a reasonable level of protections to the CLECs beyond what was initially offered by the Joint Applicants. We decline to adopt the additional recommendations offered by the non-settling CLECs. Colorado Order, p. 27, ¶ 74; see also pp. 26-27, ¶¶ 75-76.

Likewise, the Utah Commission stated:

> Based on the evidence submitted to the Commission, and based on the proposed settlements - especially the Division and Integra settlements, the Commission finds the merger is in the public interest. . . . . *The Commission's duty is to protect all the public interest, and "the ultimate criterion against which all relevant factors are to be evaluated is the 'public good and convenience' not the existing carriers' convenience and necessity."* [Citations omitted.] The Commission finds the settlement agreements strike an appropriate

Form 10-K. As described, these "risk factors" represent general recitals of risks of which companies and the public are generally well aware. The disclosures of risk factors provide legal protection to the publicly-traded company and its investors, but they are not intended to suggest that such risks are likely outcomes. CTL/600, Bailey/30. Moreover, the Merging Companies showed that CenturyLink has a long history of successfully executing ILEC transactions, and thus is capable of managing operating risks. *Id*. As Mr. Bailey further testified, there is no evidence that failures or problems such as those recited in the S-4's "risk factors" have occurred in past CenturyLink transactions, or that they are likely to occur in this Transaction. Indeed, if undue emphasis were placed upon risk factors in an S-4 filing, mergers and financings for new investment likely would never occur. CTL/600, Bailey/30-31.

> balance between the interests of the Joint Applicants, the interests of their wholesale customers (CLECs), and the interests of retail customers in Utah. Therefore, no other conditions other than those contained in the individual settlements will be imposed. Utah Order, pp. 3-4. (Emphasis added.)
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> The settlements submitted to the Commission give sufficient certainty to the CLECs during the merger, but also allow the Joint Applicants to adjust to the ever-changing competitive landscape in the telecommunication industry. Utah Order, p. 9.

See also Minnesota ALJ Recommendation, ¶¶ 173, 195, 206, 230, 245, 251, 257, 263, 272, 278, 282, 284, 287, 290, 293, 302, 305, 309, 313, 316 (rejecting all of the Non-Settling CLECs' numerous additional proposed conditions). The Commission should say that enough is enough, as other commissions have done.

A. <u>The Commitments for Non-Section 251 Agreements and Tariffs are Sufficient</u>

The Merging Companies made substantial compromises during the negotiations, but the CLECs have, as is apparent from their advocacy, refused to settle for anything but the exact terms that they originally proposed. This is evidenced by the fact that they fail to acknowledge the benefits associated with many of the conditions that the Merged Companies have committed to that, in part or in whole, address their concerns (i.e., the 36-month extension of all Qwest interconnection agreements). But regardless of the course of the negotiations, there is applicable legal precedent that requires the Commission to reject the Non-Settling CLECs' proposals.

The first legal obstacle that the Commission would face in imposing generally-applicable interconnection conditions (those that apply to all carriers) is the Ninth Circuit's decision in *Pacific Bell v. Pacwest Telecom, Inc*. 325 F.3d 1114 (2003), which is addressed fully in the Merging Companies Opening Brief, and the Companies will not restate that discussion here. See Merging Companies' Brief, p. 37. Another important legal obstacle to the adopting the CLECs' proposal is the settled precedent that state commissions do not have jurisdiction to regulate services that ILECs provide either pursuant to Section 271 or voluntarily on a commercial basis.

For example, the Eighth Circuit has held that state commissions do not have authority to set rates for Section 271 elements. *Southwestern Bell Tel. v. Missouri PSC*, No. 06-3701, Slip. Op., at 10-11 (8th Cir. June 20, 2008).[2]

Furthermore, the Non-Settling CLECs mischaracterize the FCC's *Phoenix Forbearance Order* in an attempt to rationalize their 36-month commercial agreement extension. Joint CLECs' Brief, pp. 16-17. The CLECs' loose and imprecise arguments that the *Phoenix Order* somehow addressed the competitive landscape (in the Phoenix, Arizona metropolitan area) for the entire range of wholesale services requested by CLECs, such as "QLSP, dark fiber, special access, etc..." (Joint CLECs/23, Gates/21-22, 25-26, 34) are simply wrong. Although the *Phoenix Order* made passing references to other carriers' reliance on Qwest's wholesale services (¶¶ 68, 87), these references are legally *dicta* and are irrelevant for the purposes of this proceeding. This is especially so because the FCC's analysis and findings are limited to whether there is sufficient actual or potential competition in the Phoenix area to grant Qwest forbearance from *Section 251(c)(3) loop and transport unbundling obligations*.[3] The *Phoenix Order*, however, contains no analysis of *the degree* to which CLECs rely on *non-Section 251 wholesale services*, nor any

[2] Although there are not yet any Ninth Circuit decisions on this issue, there are at least ten other decisions reaching the same conclusion. *See*, *Verizon New England, 2007 WL 2509863, at *5; Michigan Bell Tel. Co. v. Lark, No. 06-11982, 2007 WL 2868633 (E.D. Mich. Sept. 26, 2007), appeals pending, Nos. 07-2469, 07-2473 (6th Cir.); BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n, No. 06-65-KKC (E.D. Ky. Sept. 18, 2007). Illinois Bell Tel. Co. v. Hurley, No. 05 C 1149, 2008 WL 239149 (N.D. Ill. Jan. 28, 2008); BellSouth Telecommunications, Inc. v. Georgia Pub. Service Comm'n, No. 1:06-CV-00162-CC, slip op. (N.D. Ga. Jan. 3, 2008); Illinois Bell Tel. Co. v. O'Connell-Diaz, No. 05-C-1149, 2006 WL 2796488, at *13-*14 (N.D. Ill. Sept. 28, 2006); Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n, 447 F. Supp. 2d 1281, 1285-86 (N.D. Fla. 2006); Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n, 461 F. Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), appeals pending, Nos. 06-3701, 06-3726, 06-3727 (8th Cir.); Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n, No. 05-cv-94, 2006 WL 2433249, at *8 (D.N.H. Aug. 22, 2006), aff'd, Verizon New England, 2007 WL 2509863; BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n, 368 F. Supp. 2d 557, 565-66 (S.D. Miss. 2005). Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission, 2003 WL 1903363 at *13 (S.D. Ind. 2003), aff'd, 359 F.3d 493 (7th Cir. 2004).*

[3] Mr. Gates selectively quotes from paragraph 96 of the *Phoenix Order*, where the FCC stated "there is no record evidence of significant competition for the wholesale products used to serve either mass market or enterprise customers." Joint CLECs/23, Gates/21-23, 25-26. However, the rest of paragraph 96 makes it clear that the FCC is only addressing Section 251(c)(3) loop and transport unbundling requirements, and not wholesale products and services generally.

analysis of the potential affect on competition if access to *non-Section 251 wholesale services* were limited, reduced or eliminated. Most importantly, the Phoenix Order does not alter the FCC's rulings in the *TRRO* docket that the CLECs have reasonable service alternatives available when they request non-Section 251 services, including self-provisioning. Thus, the *Phoenix Order* does not, as the CLECs hope, support the argument for 36-month extension of all non-Section 251 wholesale service arrangements. *See also*, Tr., 12/16/10, Vol. 1, pp. 139-146.

In addition to the jurisdictional limitations, the Non-Settling CLECs' proposed 36-month extension fails to acknowledge the differing regulatory treatment of non-Section 251 services, and the CLECs' ability to choose their provider and negotiate rates, terms and conditions with that provider. A network element can be price-regulated after the FCC finds, pursuant to Section 251(d)(2), that CLECs will be "impaired" without access to it. *TRO*, ¶ 651.[4] In contrast, Qwest offers services under commercial agreements that were either never subject to Section 251 or that were removed from the Section 251 list because CLECs are able to either self-provision the service or obtain it from another carrier. These services are subject to market pricing; however, the Merging Companies can voluntarily agree to pricing conditions in a settlement agreement, which as voluntary settlement commitments the Commission would be authorized to approve. *Id.*

The Non-Settling CLECs cite to Regional Commitment Plans ("RCPs") as an example of the need for additional time and argue that the 12-month extension that applies to them is not enough. Joint CLECs' Brief, pp. 20-21.[5] However, the discussion omits the fact that, absent the

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[4] See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 at 664 (FCC rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part, remanded in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

[5] The CLECs also allege that Qwest, in reducing RCP discounts shortly after the merger was announced, was "taking steps…to enhance revenues at the expense of wholesale customers," apparently suggesting some kind of collusive behavior. Joint CLECs' Brief, pp. 20-21. The suggestion is completely unsubstantiated in the record and

merger and the Staff/CUB Stipulation and the Integra Settlement, Qwest has had the regulatory flexibility to set new prices for services under the RCPs and other commercial agreements at the time when they expire, like the RCP set to expire in 2011 that CLECs cite in their brief. Joint CLECs' Brief, p. 20. These settlements would extend those arrangements for 12 months following the close of the merger for those carriers that choose to opt into it. Staff/CUB Stipulation, Condition 28d; Integra Settlement, Condition 3.d. In the Minnesota merger proceeding, the ALJ summarized well the reasoning for rejecting the CLECs' proposed 36-month extension for commercial agreements when she said:

> …the Joint CLECs have not demonstrated that this proposed condition is reasonable or necessary for the transaction to be deemed to be in the public interest. *As the Joint Petitioners emphasize, commercial agreements arise under 47 U.S.C. § 271 or because Qwest has made a voluntary decision to offer such agreements*. Most of these agreements relate to services that formerly were within the scope of unbundled network elements under Section 251(c), but subsequently have been found by the FCC to not meet the impairment standard. Because a BOC is free to offer such elements at rates that are market-based, the Joint CLECs' attempt to compare the prices that they used to receive under Section 251 with rates they currently receive under commercial agreements or federal tariffs is not appropriate and has been rejected in prior Commission proceedings. *Accordingly, providing different treatment for ICAs and commercial agreements comports with the differing regulatory standards governing such agreements and the fact that CLECs have a choice as to whether to purchase from Qwest, purchase from another carrier, or self-provision.* Minnesota ALJ Recommendation, ¶ 195. (Emphasis added.)[6]

just plain wrong. Qwest is required by law to conduct business as usual prior to merger-close, which is has done and continues to do.

In addition, CLECs again seem to confuse the standard of review in this case, stating that "18-month extension of commercial agreements provides little if any benefit," and that "extending wholesale agreement for three years at current rates would not cause competitive harm to CenturyLink." Joint CLECs' Brief, p. 22. The standard here is whether the transaction does not harm the public interest. The Commission is under no obligation to require benefits to particular parties, and in fact the Commission would act inconsistent within its duties if it were to do so.

[6] Staff also agrees with the Merging Companies. Because commercial agreements arise under Section 271 or because a BOC voluntarily offers such agreements, Staff agrees that "[a] BOC is free to offer such elements at rates that are market-based, and accordingly, it is not necessarily appropriate to apply to these agreements the same conditions applied to ICAs." Staff Brief, p. 18.

Likewise, Staff agrees with the Merging Companies regarding the agreed-upon extensions of wholesale and commercial agreements and tariffs. Staff notes, for example, that these extensions benefit competitors because "[a]s a general matter, prices for commercial/wholesale agreements can be altered and services can be terminated at any time, consistent with their terms." Staff Brief, p. 18. Thus, Staff finds that these commitments provide CLECs "a benefit to which they are not entitled absent the merger." *Id.*

Thus, because these commercial services are by their very nature competitive, there can be *no harm* to CLECs as a result of this Transaction, even if the Non-Settling CLECs' alleged parade of horribles were to come to fruition. In fact, the extensions of interconnection agreements ("ICAs") and commercial agreements under the Integra and Staff/CUB agreements only benefit CLECs. Staff agrees, stating that "CenturyLink's commitment to extend the terms of the existing commercial/wholesale agreements and tariff conditions by a certain period provide the competitors a benefit to which they are not entitled absent the merger." Staff Brief, p. 18. The commitments that the Merging Companies make in the various settlements are reasonable and thus result in a transaction that exceeds the Commission's no harm standard. As such it is completely irrelevant whether some CLECs "rely" or "depend" more on commercial agreements than on ICAs, or whether some CLECs rely or depend on these agreements more than others. See e.g., Joint CLECs' Brief, pp. 16-19.[7]

B. <u>The OSS Commitments are Sufficient to Ensure No Harm</u>

The Non-Settling CLECs allege, but fail to show, that there is a "high risk" of post-merger "degradation" of Qwest service, even absent the Merging Companies' settlement commitments. See Joint CLECs' Brief, pp. 24-27. The Non-Settling CLECs do not account for the fact that the Merging Companies are under no pressure to modify or replace any the systems. The record

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Staff also found the CLECs' request to require CenturyLink to extend Qwest intrastate tariff terms and conditions to not be appropriate, especially because these services will still be regulated under the Qwest price plan after the merger. That plan caps switched access rates until at least September 2013, and future changes are an issue in an on-going Commission docket. Staff Brief, p. 18. Staff further noted that the Qwest price plan allows Qwest to increase DS1 special access rates, and that DS3 rates have been found to be competitive and are deregulated. *Id.*, pp. 18-19.

[7] The Merging Companies also note that the Minnesota ALJ agreed with the Merging Companies that "regardless of the proposed merger or the terms of the Integra Settlement Agreement, *prices for commercial/wholesale agreements could be altered and services could be terminated at any time, as long as consistent with the terms of the agreement.*" Minnesota ALJ Recommendation, ¶ 196. (Emphasis added.) Thus, the ALJ found that the additional price stability assurances in the Integra Settlement "provide a *benefit to CLECs to which they would not otherwise be entitled*," and "a level of certainty and stability for wholesale customers following the proposed merger that would not otherwise exist," and therefore, that these commitments "lessen the impact of any future changes in such product offers." *Id.* (Emphasis added.)

contains numerous affirmations that CenturyLink, before it modifies any systems, will ensure that personnel are in place who use and understand those systems. And in fact that process has already begun. *See* e.g., CTL/800, Hunsucker/5, 10, 16, 24, 51; CTL/200, Schafer/7-12; see also Merging Companies' Brief, pp. 9-10. This will ensure that the Merged Company makes the best decisions for itself and its customers, which are of course the key to its success.

Similarly, the Non-Settling CLECs do not acknowledge the thorough process and review, under the Staff/CUB and Integra settlements, that must occur before any replacement of Qwest's OSS.[8] The settlements require that the Merging Companies (a) provide detailed notification 270 days in advance of replacing or integrating any OSS systems;[9] (b) provide notification, joint testing, and training; and (c) ensure that any changes to billing systems comply with ICAs (along with other ICA protections) and are compliant with Ordering and Billing Forum requirements.

Moreover, the Oregon Change Management Process ("CMP"), which is referenced in the settlements, is still in place to regulate changes to OSS. *See* Staff/CUB Stipulation, Condition 27; Integra Settlement, Condition 12. Under the current CMP, Qwest can (and does) modify or discontinue OSS on a nine-month calendar. Mr. Gates appears to misapprehend the CMP, stating that "[o]ut of the many way 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 CMP, one of the most difficult to detect and remedy." Joint CLECs' Brief, p. 23; see Joint CLECs/8, Gates/37-38. However, Mr. Gates fails to acknowledge that any conversion *must* be done through the CMP.

[8] It has already been determined in other state proceedings that the provisions of the Integra Settlement are sufficient to address any future possible OSS changes. *See* e.g., Minnesota ALJ Recommendation, ¶¶ 230, 231.

[9] The Non-Settling CLECs ask the Commission to require that the 270-day notice not be given until the three-year period for maintaining the Qwest OSS has expired. There are sufficient protections in place, and extending the process an additional 270 days would be unreasonable and would impair the ability of the Merged Company to operate efficiently.

In addition, as Staff noted, Condition 27 of the Staff/CUB Stipulation requires acceptance by wholesale customers of any replacement OSS, and thus offers greater protection than what the Joint CLECs originally proposed, or what the Non-Settling CLECs now propose. *See* Staff Brief, pp. 12-13. Therefore, the CLECs actually receive greater protections against service degradation with approval of the Transaction, subject to the commitments in the Staff/CUB and Integra settlements, than absent the Transaction, thereby ensuring it will not harm the public interest.

The Non-Settling CLECs also fail to demonstrate that the Merging Companies' 24-month OSS commitment is not in the public interest, and that the Commission should instead order a 36-month moratorium on changes. See e.g., Joint CLECs' Brief, pp. 27-28. Again, ignoring that the Merged Company will be under no pressure to make immediate, or imprudent, changes to systems, they wrongly allege that CenturyLink's OSS (EASE) is not robust. *Id.*, pp. 25-26. They also erroneously cite Oregon-specific statistics regarding wholesale orders in an attempt to prove this claim. *Id.*, p. 26. But EASE is used across all CenturyLink states, and thus the statistics they cite for Oregon are not in any way relevant to, or indicative of, the capabilities of EASE.[10] Contrary to those claims, EASE is a proven system that CenturyLink used in 2010 to process approximately one million LSRs and ASRs, compared to Qwest's 1.8 million. Tr., 12/16/10, vol. 3, p. 260; Tr., 12/17/10, p. 88; CTL/800, Hunsucker/7-8. The truth of the matter is that CenturyLink has significant experience successfully providing services to wholesale customers at commercial volumes. *Id.*[11] In addition, pushing the moratorium to 36 months unfairly requires

[10] The Non-Settling CLECs appear to use this argument about size and scope of CenturyLink's operations only when it is convenient, admitting later in their opening brief that "the Merged Company will be significantly larger than either of the two pre-merger companies." Joint CLECs' Brief, p. 33.

[11] The Merging Companies also note that the Minnesota ALJ concluded that these detailed provisions fully address any concerns that the Joint CLECs might have regarding potential changes or ultimate replacement of the Qwest OSS. Minnesota ALJ Recommendation, ¶¶ 230, 231.

the new company to carry two systems and restricts it from converting or consolidating systems that will create efficiencies for all.

Finally, there is no need or precedent for third-party testing of any future OSS that the merged company might implement. See e.g., Joint CLECs' Brief, pp. 28-29. The FCC has held that while third-party testing was an acceptable alternative when commercial volumes did not exist (as was the case in the original Section 271 petitions), the most probative evidence that an OSS is operationally ready is "actual commercial usage."[12] The FCC stated:

> Absent sufficient and reliable data on commercial usage, the Commission will consider the results of *carrier-to-carrier testing, independent third party testing, and internal testing*, in assessing the commercial readiness of a BOC's OSS. . . . *[T]he Commission does not require OSS testing* . . . .[13]

In this case, the Merging Companies have agreed to carrier-to-carrier testing with CLECs, pursuant to jointly-adopted criteria, to ensure that any new OSS would be acceptable. See e.g., Integra Settlement, Condition 12.c.i. Moreover, the FCC and state commissions retain jurisdiction to act as arbiter of any disputes, and must be provided prior notice of any intention to replace an OSS. *Id*., Condition 12.a. and c.

Both CenturyLink and Qwest have many years of combined experience successfully implementing OSS to fulfill service orders at commercial volumes. And the Merged Company has demonstrated in this case that it is committed to maintaining key personnel from both companies to ensure that this record of success is not harmed. CTL/500, Jones/36-38; see also CTL/800, Hunsucker/20, 28. But even if Qwest were to decide to entirely replace its OSS today, absent the merger, third-party testing would not be required. Furthermore, while the original Qwest OSS interface was third-party tested when Qwest obtained in-region interLATA service

[12] Staff agrees with the Merged Companies on this point. Staff Brief, pp. 13-14.

[13] FCC 02-332, Memorandum Opinion and Order, WC Docket No. 02-314, Adopted: December 20, 2002, Appendix K at p. 16. (Emphasis added.)

authority under Section 271, Qwest later replaced it with a new OSS interface *without* third-party testing. Qwest/4, Viveros/15-18. Thus there is no reason, precedent or public interest justification for requiring third-party testing of any new post-merger OSS should the Merged Company decide to implement one for Qwest.[14] The notification, carrier-to-carrier testing, and other procedures in the Staff/CUB and Integra settlements are more than sufficient to exceed the no harm/public interest standard.

C. <u>The Single Point of Interconnection Requirement that Non-Settling CLECs Propose is not Appropriate or Needed</u>

The Non-Settling CLECs' request for a single point of interconnection ("SPOI") commitment from the Merged Company (Joint CLECs' Brief, pp. 29-32) is not an appropriate part of a Commission merger proceeding. This appears to be a carrier-specific issue raised only by Charter. See Charter/1, Pruitt/35-40; Charter/14, Pruitt/12-14. If any CLEC is so concerned about an interconnection practice which it claims is unlawful, the appropriate means to address those issues include negotiation and arbitration under Sections 251 and 252 of the Telecommunications Act ("the Act"). This proceeding is not the forum in which to address complex interconnection issues, especially where it has nothing to do with the Transaction, or whether the Transaction does no harm and thus is in the public interest. Other state commissions concur,[15] as well as Staff, which states in its brief that this proposed condition does not address a potential harm of the merger. Staff Brief, p. 17.

[14] Staff agrees with the Merging Companies on this point. Staff notes that the FCC does not assert that it considers third-party testing superior to carrier-to-carrier testing, as the Joint CLECs claim, but only that persuasive testing will provide objective means to evaluate readiness, and that the persuasiveness of third-party testing depends on the qualification of the party. Staff Brief, pp. 13-14.

[15] See e.g., Minnesota ALJ Recommendation, ¶ 251; see also Colorado Order, ¶¶ 74-76 (declining to adopt any of the remaining CLECs' proposed conditions, especially in light of the protections in the Integra Settlement); Utah Order, pp. 3-4, 9-10 (same).

D. <u>No Interconnection-Related Costs or ICA "Porting" Conditions are Needed or Appropriate</u>

The CLECs' proposed conditions regarding "interconnection-related costs" and "porting" of ICAs exemplifies their misapplication of the Commission's no harm standard. See Joint CLECs' Brief, pp. 32-37. In admitting that the size of the Merged Company will be enhanced with certain operating economies and efficiencies, the Non-Settling CLECs state that "to the extent such economies are achieved, they should also *accrue to the benefit* of captive wholesale customers and consumers." Joint CLECs' Brief, p. 33. (Emphasis added.).[16] Any condition based on this reasoning would result in "net benefits" impact, but the standard in Oregon is whether the Transaction will result in "no harm" to the public interest

In addition, the Non-Settling CLECs' request for porting is based on an argument that a failure to do so will result in interconnection-related transaction costs. Joint CLECs' Brief, pp. 32-27. However, negotiation and maintaining state-specific ICAs are mandated by federal law, regardless of the Transaction. *See*, 47 U.S.C. §§ 251 and 252. Such a condition also would likely result in agreements in Oregon that do not reflect Oregon interconnection policy and rules. Similarly, porting would undermine parties' expectations that the original state's rules and network configurations would apply, which would effectively rewrite the agreement in a way that was not contemplated in the negotiations or by the Commission that originally approved it. And the imposition of these conditions in this case is beyond the scope of the Commission's authority to approve and arbitrate ICAs.[17]

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[16] The Non-Settling CLECs repeatedly assert that they are "captive" customers. See e.g., Joint CLECs' Brief, pp. 3, 4, 6, 19, 19. Despite this repeated mantra, nothing could be further from the truth, and the Merging Companies have long dispelled that myth. See e.g., Qwest/3, Brigham/27-29, 33-34.

[17] The Joint CLECs also misapprehend the genesis of the porting requirement in the AT&T/Bellsouth merger that they cite, and that the Joint Wireless Carriers mention. Joint CLECs' Brief, pp. 36-37, and fn. 114; see also Joint Wireless Brief, pp. 19-20. The FCC did *not* impose this condition on AT&T and BellSouth. Rather, it was simply among a number of *voluntary commitments* that the BOCs agreed to and that the FCC adopted. *In the Matter of*

Moreover, the Joint Wireless Carriers' desire for a *single* ICA for all Qwest/CenturyLink entities in all states (Joint Wireless Brief, pp. 17-18) is directly contradicted by the Joint CLECs' position that CLECs' "differing business plans" mandate differing contract and settlement terms. Joint CLECs' Brief, pp. 12-14; Joint CLECs/23, Gates/7-11. While the Joint Wireless Carriers seek a unified ICA, the Joint CLECs fear that very thing. *Id*.

Further, Staff agrees with the Merging Companies that a porting condition is not necessary to address any harm that any competitor has attempted to identify. This is especially so because the Merging Companies have agreed to extend Qwest agreements for at least three years, and thus CLECs and wireless carriers will not need to negotiate new contract terms with Qwest for a reasonable period of time. Staff Brief, p. 16. Staff also agrees that the Joint Wireless Carriers' porting request is unrelated to any harm the merger may pose, but rather, the proposal is simply an attempt to spread benefits to individual customers. *Id*. Finally, Staff recognizes this proposed condition could burden the Merged Company, especially based on the unique operations of each operating company. As Staff notes, "[f]orcing the operating companies of these entities [Merging Companies] to implement the terms of the other's ICAs without allowing the Merged Company the opportunity to first determine to which extent it will combine the operations of the CenturyLink and Qwest operating companies is not warranted." *Id*., pp. 16-17; see also CTL/800, Hunsucker/36-37 (explaining numerous reasons why porting of ICAs, either across companies or across states, is unreasonable and unnecessary).

Finally, even assuming that there were legal, logistical or practical bases for the porting of ICAs, which no competitor has shown, there would still be the inherent unfairness in simply imposing such a broad condition under the facts here and under the statutory standard of review

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AT&T, Inc. and BellSouth Corporation, Application for Transfer, 22 FCC Rcd 5662 (rel. March 26, 2007). This condition also raises a jurisdictional issue in that this Commission does not generally have the *inter*state jurisdiction to order porting of ICAs across state lines.

applicable to this case. See e.g., CTL/800, Hunsucker/36. The Minnesota ALJ's reasoning on this issue is compelling on this point:

> There are a number of practical, operational, and legal issues that would arise if this condition were imposed. Because CenturyLink and Qwest ICAs have been negotiated with the particular network and facilities in mind, it would be contrary to the expectations of the parties that an ICA could be imposed upon another entity's network and facilities. As a technical or logical matter, not all negotiated terms can be applied to all companies or in all jurisdictions. For example, Minnesota has a list of required unique terms that must be included in ICAs in order to obtain state approval. Many of those terms are not required in contracts from other states, and commissions in those states may have made differing substantive rulings. Following such an approach would also be contrary to the review and approval process conducted by the Commission. Moreover, importing terms from another state could allow CLECs to effectively ignore or inappropriately modify Minnesota rulings on particular issues. Minnesota ALJ Recommendation, ¶ 206; see also ¶¶ 207, 305.

E. A Directory Listings/Directory Assistance Condition is Not Needed and is Beyond the Scope of this Proceeding

The Joint CLECs also request that the Commission impose a condition requiring the Merged Company to comply with the law relating to directory listings. See Joint CLECs' Brief, pp. 37-44. This condition seems intended to reflect a portion of Joint CLECs' proposed Condition No. 23, from Exhibit Joint CLECs/8.

The Joint CLECs indicate that they are merely seeking a commitment that the Merged Company comply with existing law relating directory listing requirements. See Joint CLECs' Brief, p. 39. If this were in fact the case, these concerns also are addressed in the Staff/CUB Stipulation (Condition 31) and the Integra Settlement (Condition 6). These conditions contain the Merging Companies' commitment to comply with sections 251 and 252 of the Act, which would necessarily include the laws identified in the Joint CLECs' brief related to directory listings.

To the extent that the Joint CLECs and Charter are seeking more (i.e., are attempting to impose a disputed interpretation of those laws on the Merged Company through this proceeding), the Commission should reject that attempt. As with the numerous other conditions that the Non-

Settling CLECs continue to pursue, any CLEC concerns with CenturyLink's provisioning of directory listings exist independent of and are unrelated to the Transaction. Thus, it is not necessary or appropriate for the Commission to consider or address these issues as part of its no harm/public interest analysis. If a dispute exists as to whether CenturyLink is currently complying with the law relating to directory listings, that issue can be properly addressed through a complaint proceeding with the Commission where the relevant facts and applicable law can be fully presented and considered.[18]

F. The "Rural Exemption" Waiver Condition is Without Merit and is Beyond the Scope of this proceeding

The CLECs propose that the Commission force CenturyLink to relinquish the rural exemptions held by its Oregon CenturyTel ILECs, based on their claim that the exemption is anti-competitive. Joint CLECs' Brief, pp. 44-48. However, any such requirement would be contrary to federal law. Whether a company qualifies for such an exemption is governed by section 251(f) of the Act. Thus, by operation of law, the Oregon CenturyTel ILEC entities maintain that exemption today, and nothing about the Transaction changes that status. *Id.* As Mr. Hunsucker explained, the applicable provisions of the Act lay out a comprehensive procedure for state commissions to follow in determining whether or not the rural exemption should be lifted. CTL/800, Hunsucker/39. This is the same procedure that the Minnesota Commission followed in the AT&T/GTE arbitration which the Joint CLECs cite. Joint CLECs' Brief, p. 46. It is unnecessary to summarily require the Merged Company to waive the exemption in the context of this merger proceeding, where the full ramifications of such a waiver on CenturyLink and its customers, as well as the correct application of the federal law, cannot be fully presented and considered.

[18] The Merging Companies note that these are the precise reasons why the Minnesota ALJ recommends that this proposed condition not be adopted in that state. Minnesota ALJ Recommendation, ¶ 257. Likewise, Staff finds that this proposed condition is not necessary and is redundant of Staff/CUB Stipulation Condition 31. Staff Brief, p. 17.

The Non-Settling CLECs make several arguments why they believe the rural exemption should no longer apply after CenturyLink merges with Qwest.[19] If their concern is that the rural exemption would extend to Qwest territories after the merger, that concern has been fully addressed in both the Staff/CUB Stipulation (Condition 31) and the Integra Settlement (Condition 6).

Moreover, the FCC order in the Frontier/Verizon transaction does not support the Non-Settling CLECs' proposal for two reasons. First, Frontier *volunteered* to waive the rural exemption for the Verizon service territory.[20] Frontier was not ordered to do so, in contrast to what the Joint CLECs suggest should happen here. Second, the waiver in the Frontier case applied only to the acquired service territories, and not to Frontier's pre-transaction service territories. The Staff/CUB Stipulation (Condition 31) and the Integra Settlement (Condition 6) already contain the FCC's Frontier commitment (i.e., the rural exemption cannot be claimed in the acquired service territories). Any attempt to terminate the rural exemption beyond a voluntary commitment would be unprecedented and outside the Commission's authority in this non-Section 251 proceeding.

Finally, the ALJ in Minnesota agrees with the Merging Companies on this issue. In her ruling on this issue, the ALJ found:

> . . . The proposed transaction is structured as parent-level transfer of control that will not result in any change in the corporate structure of the CenturyLink and Qwest operating entities as a result of the transaction. *Because nothing about the merger changes the operations of those entities, there is no proper basis to require as a condition of the merger that CenturyLink affiliates relinquish their current rights to the rural exemption.* The Merged Company's voluntary commitment in the Integra Settlement Agreement that it will not seek to change the status quo by asserting that Qwest is entitled to the rural exemption applies in the legacy Qwest ILEC service territory is an adequate safeguard that is logically related to the merger. In fact, this commitment accomplishes the same purpose as the condition approved by the FCC in the Frontier/Verizon merger proceeding. In any event,

[19] To support their position, the Joint CLECs discuss at length the rural status of legacy CenturyTel ILECs in other states. Joint CLECs' Brief, p. 45. The circumstances in these states have no bearing or relevance to the Commission's decision whether the merger does no harm and thus is in the public interest in Oregon.

[20] This and other commitments that Verizon made are clearly recognized by the FCC as being "voluntary." See *In the Matter of Applications Filed by Frontier Communications Corporation and Verizon Communications, Inc., for Assignment or Transfer of Control,* WC Docket No. 09-95, Memorandum Opinion and Order, ¶ 3.

> the Joint CLECs did not demonstrate in this record that the rural exemption does not apply to the CenturyLink affiliates that currently claim it. *Moreover, because the Act provides a process to challenge the exemption, other remedies are available to CLECs that believe the exemption has been inappropriately claimed.* Minnesota ALJ Recommendation, ¶ 245. (Emphasis added.)[21]

G. <u>The Moratorium on Non-Impairment or Forbearance Filings is Sufficient</u>

The CLECs also seek to extend the time period under the settlements in which the Merged Company would be prohibited from seeking future reclassifications of Qwest wire centers pursuant to the FCC's *Triennial Review Remand Order* ("*TRRO*") for an additional two years. Joint CLECs' Brief, pp. 48-49.[22] This proposed condition is inconsistent with FCC decisions that set the standard for such reclassifications. It is also inconsistent with this Commission's order in Docket UM 1251, which adopted a stipulation between many of the same CLECs involved in this proceeding and Qwest regarding the procedure and standard for reviewing such applications. See Order No. 07-328 in Docket UM 1251. Further, the Commission has reviewed Qwest wire center reclassification petitions since 2007 pursuant to this stipulation and the process has worked well – resulting in efficient processes that have allowed the parties and Staff to review reclassification petitions and generally reach agreement regarding the appropriate result to the proceeding prior to Commission review. The CLECs' proposed condition would freeze this process and would ignore the significant FCC and Oregon history behind the process that is being used for these cases.

[21] Likewise, Staff agrees this proposed condition is not necessary. Staff indicates that Stipulated Condition 31 specifies that CenturyLink and all of its affiliates will comply with Sections 251 and 252 of the Act and that CenturyLink will "not seek to avoid any of its obligations on the grounds that Qwest Corporation is exempt from any of the obligations pursuant to sections 251(f)(1) and 251(f)(2)." Staff Brief, p. 14.

Staff also notes the Transaction does not facilitate CenturyLink's use of the rural exemption, and thus it is not appropriate to use the Transaction to insulate CLECs from CenturyLink's use of the exemption. Staff also notes that whether CenturyLink's operating companies will be eligible for the rural exemption turns on the criteria of the Act. Staff Brief, p. 14-15.

[22] See *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order on Remand (FCC rel. February 4, 2005).

Moreover, the Staff/CUB Stipulation (Condition 39) and the Integra Settlement (Condition 8) already prohibit the Merged Company from seeking to reclassify as "non-impaired" any Qwest Oregon wire center for purposes of Section 251, and from filing any petition seeking forbearance from Section 251 obligations under Section 160(c) of the Act or dominant carrier regulation, in any Qwest Oregon wire center before June 1, 2012. The Joint CLECs argue that this moratorium should be in place for 36 months from the date of the merger close. Joint CLECs' Brief, pp. 48-49. Again, the only rationale the CLECs provide for their proposed term of the moratorium is that it should coincide with the period that CenturyLink has stated it expects to realize its estimated synergy savings. *Id*.

Finally, it is not sound public policy and not in the public interest to tie the hands of the Merged Company and limit its ability to seek regulatory treatment that the FCC authorizes if the Merged Company can demonstrate that competitive conditions merit relief from certain Section 251 or Section 271 obligations pursuant to federal law. Also, the Joint CLECs provide no logical connection between synergies and continuing a moratorium upon implementation of the FCC's *TRRO*. The Joint CLECs' arguments pre-judge the issue. If the *TRRO* criteria is met, then by definition the elements are not bottleneck inputs. And a continued moratorium would frustrate FCC policy. A moratorium until June 1, 2012 provides a period of certainty on this issue for CLECs, and is sufficient as a compromise that is in the public interest. See e.g., Minnesota ALJ Recommendation, ¶ 263.[23] Staff also agrees that this condition is not at all necessary and that existing law and the Staff/CUB Stipulation is sufficient. Staff Brief, p. 22.

[23] As the Minnesota ALJ found:

Specific procedures were developed with the input of CLECs to govern the process for determining impairment of a wire center, and it is *not appropriate to circumvent those procedures by imposing the condition urged by the Joint CLECs in this proceeding.* Moreover, the moratorium until June 1, 2012, to which the Joint Petitioners agreed in the Integra Settlement, provides a reasonable period of certainty to the CLECs while the merger is in its early stages. Minnesota ALJ Recommendation, ¶ 263. (Emphasis added).

H. The APAP and any Additional Service Quality Conditions are Inappropriate to Consider in this Proceeding and are Unnecessary

Both the Joint CLECs and TRACER continue to advocate for the Commission's adoption of the Additional Performance Assurance Plan ("APAP") as a purported means of ensuring wholesale service quality. See Joint CLECs' Brief, pp. 49-57; TRACER Brief, pp. 9-14. This is another condition that is far too complex to address in a merger proceeding. It is also telling that the APAP's author and original proponent no longer supports it, and that the company he represents advocates for merger approval under the terms of the Integra Settlement. Aside from these facts, the record does not support imposition of the APAP.

First, the APAP has not been subjected to the same level of scrutiny under the appropriate legal standards as has the Oregon QPAP. The Oregon QPAP is based on business rules that Qwest voluntarily agreed to, after extensive negotiations, testing, and audits, in connection with obtaining Section 271 relief. Qwest/5, Williams/8. This process involved the establishment of numerous performance indicator definitions ("PIDs"), which are measurements specific areas of Qwest's wholesale performance. Qwest/5, Williams/3. For example, PIDs cover pre-order/order, billing, provisioning, maintenance and repair, network performances, and etc. *Id*. The point is that these numerous and complex measures were developed over the course of long and arduous, collaborative processes, and under the governing federal non-discrimination standard. The APAP was not developed using this process or according to an applicable standard under the Act. Moreover, forcing an additional penalty plan upon the Merged Companies against their will raises the question of whether such action exceeds the Commission's lawful authority. The ALJ in Minnesota recognized this issue, saying:

> [I]f the Commission were to condition its approval of the merger upon the adoption of the proposed APAP, its action arguably would amount to requiring the Joint Petitioners to make self executing payments to their competitors and thus exceed the Commission's

> authority (*citing In Re Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, Minn. 2005). Minnesota ALJ Recommendation, ¶ 271.

And further, the QPAP was again subjected to more scrutiny and modification in connection with Qwest's Section 271 proceedings. Now, in the context of this merger case, the CLECs demand the imposition of a new, untested wholesale standard to measure "performance degradation and deterioration," with minimal review and no input from the Commission or the impacted parties.

In addition, the APAP design is flawed because it does not tie payments to merger-related conduct, and would result in excessive windfall payments to the CLECs. The APAP would compare every post-closing measurement, every month, to the average performance for an entire year preceding merger closing. One problem is that this scheme would not measure (a) whether post-close wholesale performance might degrade ***to the detriment of CLECs*** or (b) whether any such degradation would be ***due to effects of the merger***. And it is flawed logic to assume that every monthly variation in the performance levels harms CLECs or is merger-related. Qwest/5, Williams/16-21; see also Utah Tr., pp. 576-581, 582-583, pp. 184-189. Another problem is that performance levels based on the flawed annual average set forth in the APAP will not necessarily square with performance levels based more accurately on a granular month-by-month comparison. Qwest/5, Williams/19-23. It is likewise fallacious to assume that any monthly PID result that is lower than the annual baseline average proves that the CLECs have been harmed, because there could be months, or even 11 out of 12 months, where Qwest could meet standards and the APAP would still show a poor performance on a year average basis. *Id*.

The result is that the APAP could create huge windfalls of penalty revenue for CLECs. Mr. Williams' testimony, which was not contested by any party, shows a real-world example of how the APAP could result in the assessment of extraordinarily high penalties ***even if the very same level of service was provided during the comparison periods***. Using actual 12-month performance data (which resulted in an actual penalty of about $70,000 under the Oregon QPAP), Mr. Williams showed that if the same performance were repeated post-closing, under the APAP, Qwest would be penalized about **$1.4 million**, or roughly **20 times** the QPAP amount, even though the pre- and post-merger service performance would be exactly the same. Williams Affidavit, ¶¶ 4-8; see also Utah Tr., pp. 576-581, 582-583 (a seven-fold increase in Utah); Utah Tr., pp. 184-189 (same). The Minnesota ALJ agreed:

> The Joint Petitioners provided convincing evidence that the APAP has serious flaws and should not be adopted. Most significantly, they demonstrated that substantial payments would be due under the proposed APAP even if service levels remained exactly the same, resulting in a windfall to CLECs. Minnesota ALJ Recommendation, ¶ 271.

Furthermore, the existing QPAP and Integra Settlement provide sufficient post-merger performance monitoring. The QPAP detects trends in performance by the production of monthly "indications" of performance levels such that any party can use QPAP data to identify trends in wholesale service quality performance. Qwest/5, Williams/22-23. The Staff/CUB Stipulation and the Integra Settlement provide for the continuation of post-merger service quality, by specifying the process for identifying deficiencies and by authorizing Commission resolution if deficiencies are not resolved. Staff/CUB Stipulation, Condition 34; Integra Settlement, Condition 2(a) and (b).[24] These are substantive, important protections that provide further reasons to reject the APAP proposal, just as the Minnesota ALJ did:

> The Administrative Law Judge also finds that the Integra Settlement Agreement provides an adequate mechanism to discourage any decline in wholesale service quality and is consistent with the public interest. The Integra Settlement provides for a comparison of service quality before and after the Transaction; requires the Merged Company to meet or exceed the average wholesale performance provided by Qwest to the CLEC for at least three years after the transaction closing date; and requires the Merged Company to conduct a root cause analysis if service deteriorates and develop proposals to remedy deficiencies

[24] It is also noteworthy that, as the Utah transcript clearly shows, the APAP proponent and author, Mr. Denney, struggled to defend and justify the APAP. The Merging Companies will not reiterate all of Mr. Denney's concessions and admissions, but simply note that they provided a dozen key examples in their 12 bullet-point summaries at pages 33 and 34 of their opening brief. See also Utah Tr., pp. 379-427.

> within thirty days. A CLEC may also invoke the root cause procedure if the CLEC determines that the performance it received for a PID, product, or disaggregation is materially different post-merger. Minnesota ALJ Recommendation, ¶ 272.

Further still, overlaying another plan on top of the QPAP could be considered an amendment to that plan which this Commission approved. Any such amendment would be subject to notice and an opportunity to be heard under ORS 756.568. The Commission adopted the QPAP in Docket UM 823, its Section 271 proceeding, almost nine years ago.[25] Notably, the Commission-approved QPAP (in Section 16) provides for a periodic review mechanism that any CLEC could use to request changes, if desired. See Final Recommendation, Docket UM 823, pp. 14-15.

Staff agrees that the APAP is a bad idea. Staff noted that the Joint CLECs have failed to establish that the stipulated conditions (Conditions 34-38) are not sufficient protections against degradation of wholesale service quality. Staff Brief, p. 21. Just as importantly, Staff notes that the CLECs' (Integra's) APAP proposal has not been sufficiently vetted in this proceeding. *Id*. This lack of due process is yet another concern that the Merging Companies have raised. See Merging Companies' Brief, p. 32, fn. 40, and Qwest/5, Williams/9-23. These due process concerns are exacerbated by the fact that the Oregon APAP testimony and plan themselves are not in the record, and that no competent witness was offered to testify about it.[26] Staff finds

[25] See e.g., *Final Recommendation Report of the Commission*, Docket UM 823 (August 19, 2002), pp. 14-15; *Workshop 4, Part 2 Findings and Recommendation Report of the Commission and Procedural Ruling*, Docket UM 823 (June 3, 2002), pp. 78-80.

[26] Yet another significant due process concern is that even though TRACER acknowledges there are "a number of questions about how the Joint CLECs' proposed APAP would work," it nevertheless proposes that the Commission "require that an appropriate self-executing wholesale performance assurance plan be implemented as a condition for approving the merger." TRACER Brief, p. 13. According to TRACER, the Commission should then "open an expedited docket to more fully evaluate the issues that have been raised about the Joint CLECs' APAP and make corrections, if needed" and "[a]lternative plans could also be considered." *Id*., pp. 13-14. Thus, TRACER essentially proposes that the Commission adopt the flawed APAP (the only "self-executing" wholesale PAP being advocated), despite the numerous concerns, and then fix the problems later in a subsequent docket. In the meantime, of course, the Merged Company would be subject to significant unfair penalties, even without evidence of any post-merger service degradation, until the Commission corrected the plan later. This is akin to a sheriff shooting first and asking questions later, and in all events, such action clearly would not meet due process requirements. This is yet another reason why the Commission should reject the APAP proposal outright.

persuasive Qwest's evidence showing the probability of substantial penalties even if performance does not vary between test periods, and urges the Commission not to subject the Merged Company to performance "incentives" that may have unintended consequences. *Id.*

I. <u>The Wireless Carriers' Conditions Should be Rejected</u>

Like the Joint CLECs, the Joint Wireless Carriers (Sprint and T-Mobile) propose additional conditions. These proposed conditions include: a "flash cut" to interstate access charges for both CenturyLink and Qwest, extension of Qwest's ICAs for 48 months (12 months more than the Integra Settlement), extension of CenturyLink's ICAs for the same 48 months period post-merger, and the porting of Qwest or CenturyLink ICAs between states and operating entities.

1. <u>The access rate arguments are not relevant to the merger</u>

Once again, despite Judge Arlow's rulings that access charge issues and rates are not relevant to the issues in the merger,[27] the Joint Wireless Carriers continue to raise them. They devote the vast majority of their brief (approximately 15 pages) on these issues. Joint Wireless Brief, pp. 2-17. But even absent the rulings against the Joint Wireless Carriers (Sprint) on the access rate issues, their arguments are without merit. The Joint Wireless Carriers' erroneous position is based on a flawed understanding the concept of market power, as Qwest's witness, Robert Brigham, demonstrated in his supplemental testimony. Qwest/6, Brigham/4-5.[28]

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[27] See, for example, *Ruling, Motion Dismissed as Moot in Part and Denied in Part*, September 7, 2010, p. 4; *Ruling, Motion to Certify Questions Denied*, November 3, 2010, p. 3; *Conference Report and Ruling*, November 23, 2010, pp. 2-3. See also Tr., 12/16/10, Vol. 1, pp. 94-95.

[28] The Joint Wireless Carriers argue that the post-merger company will enjoy additional "owner's economics" that will lead to the exercise of "unwarranted" market power. However, the Joint Wireless Carriers incorrectly define "market power." The Horizontal Merger Guidelines ("HMG") released by the United States Department of Justice and Federal Trade Commission state: "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives." *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, issued August 19, 2010, p. 2. The Joint Wireless Carriers provide no evidence that alleged "owner's economics" resulting from the merger will provide the post-merger company with "the ability to "raise price, reduce output, diminish innovation, or otherwise harm customers" in Oregon. See e.g., Qwest/6, Brigham/4-5.

The Wireless Carriers also argue that the post-merger company may realize higher revenues, higher average revenue per unit ("ARPU") and greater profit margins. They conclude, therefore, that the Merged Company will be able to exercise "market power" in a manner that is harmful to the public interest. See e.g., Joint Wireless Carriers' Brief, pp. 8-13; Sprint/4, Appleby/15-21.[29] However, an improvement in these metrics does not provide any evidence of unwarranted market power. There is no basis to assume that a company can exert market power in a manner that is detrimental to customers or the public interest simply by improving its financials—especially when it operates in an intensely competitive industry such as telecommunications. In reality, if these goals are realized, the Merged Company will be financially healthier and will be better able to provide new and innovative services that customers demand. See e.g., Qwest/6, Brigham/9.

Likewise, there is no basis to require the company to reduce its access revenues to compensate for the future increases in revenues that the Merged Company hopes to attain. See e.g., Joint Wireless Carriers' Brief, pp. 9-11; Sprint/4, Appleby/11, 18. The Joint Wireless Carriers essentially argues for a "revenue requirement" by recommending that the Commission impose reductions in current revenues that would offset projected (but not guaranteed) future increased revenues. This is completely inappropriate, especially because the Qwest subsidiary is and will be regulated under its Price Plan. Even if the company were rate-of-return regulated, there would be no justification for reducing current revenues based on projected future earnings. Qwest/6, Brigham/10.

[29] The Joint Wireless Carriers claim in their brief that "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." Joint Wireless Carriers' Brief, p. 6. However, they fail to cite to any testimony or other evidence in the record to support this claim. There is no basis for the Commission to accept this bald conclusion and it should be rejected.

By arguing for a merger-related condition, the Joint Wireless Carriers evade the very detailed analysis that is inherent in the setting of switched access rates. That is, switched access rate dockets necessarily include an exhaustive investigation into costs and rate levels, particularly in rural areas, coupled by the consideration of important policy issues, such as the goal of universal service at affordable rates, levels of universal support, impacts of switched access rate changes to basic rates and surcharges, and competitive and regulatory parity among all local exchange carriers charging for switched access. Further, the CenturyLink ILECs' intrastate access charges are currently subject to tariffs and remain subject to those same tariffs after the merger, and the process for changing those tariffs will be the same after the merger as it is now. See e.g., CTL/500, Jones/441; CTL/800, Hunsucker/17-18.

Because this is an industry-affecting issue that involves complex financial, legal and policy issues, it is outside of the merger and is not related to the "no harm" public interest standard. Judge Arlow ruled the first time this issue was presented in this case as follows:

> Historically, this issue [access rates] has been addressed and was resolved many years ago by the requirement that ILECs place their competitive operations in fully separated subsidiaries with separate management, technical and financial staffs and operations, so that the access charges which they pay to their ILEC affiliate will have the same economic impact upon their operations as they would to an unaffiliated CLEC competitor. Evidence regarding the amount of these special and interstate access charges that the [Merging Companies'] ILECs charge each others' CLEC affiliates is therefore not "reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the pending proceeding. *Ruling, Motion Dismissed as Moot in Part and Denied in Part*, September 7, 2010, p. 4.

Finally, in a very-well reasoned analysis and recommendation, the Minnesota ALJ ruled, after reviewing similar evidence and argument in Minnesota from these same parties, as follows:

> The Administrative Law Judge concludes that the Joint Wireless Carriers have not adequately demonstrated the underlying factual basis for their proposal or that the public interest requires it to be imposed in this proceeding. The complex and industry-wide issues

involved are more appropriately considered in the other dockets that are pending involving this issue. Minnesota Order, ¶ 302.[30]

Like the many other issues that the Non-Settling CLECs (including the Joint Wireless Carriers) raise that do not arise as a result of the proposed merger, the Commission should reject these arguments and proposals as being inappropriate for resolution in this docket.

2. Additional ICA commitments, such as a four-year ICA extension, extending CenturyLink ICAs, "porting" ICAs, or a "standard" ICA, are not necessary for the merger to cause no harm

Unlike the other competitors participating in this case, the Wireless Carriers recommend that both Qwest and CenturyLink ICAs be extended for *48 months* post-merger. Joint Wireless Brief, pp. 15-17. They do not explain why this longer period is specifically necessary for the merger to do no harm, or why *CenturyLink* ICAs should be extended, especially given that CenturyLink is the acquiring company, and thus the merger does not affect its existing ICAs. See CTL/800, Hunsucker/35-37. The Joint Wireless Carriers also suggest that the Commission should require that CenturyLink "consolidate" ICAs into one "standard" agreement, and therefore that such ICAs could be "ported" between states and Merged Company subsidiaries. Joint Wireless Brief, pp. 17-20.

These proposed conditions would completely circumvent the procedures of Sections 251 and 252 of the Act and establish a process that benefits only their interests. There is nothing about the merger that requires or justifies porting or extending ICAs. The Act's negotiation and arbitration processes allow carriers to pursue any terms they consider appropriate. Tellingly, neither the Joint Wireless Carriers nor any other CLEC have cited to any legal authority for the Commission's jurisdiction to impose any such condition, and these conditions do not make sense

[30] Likewise, Staff agrees that access rate issues have no place in this docket. See Staff Brief, p. 20; see also Staff/300, Reynolds/12-13.

for the same reasons that Joint CLECs' proposed conditions regarding porting and ICA extensions do not make sense.

Staff agrees with the Merging Companies on these issues. For example, Staff notes that the Joint Wireless Carriers' argument for a four-year extension (because "four years is longer than three years") is "not a compelling reason to require a four-year extension." Staff Brief, p. 15. Indeed, as the ALJ in Minnesota found on this same issue:

> The Joint Wireless Carriers have not demonstrated that a 48-month extension of ICAs is necessary to ensure that the transaction is in the public interest. In addition, because Qwest is the company that will be acquired, it is reasonable for the Integra Settlement Agreement to focus on the extension of Qwest ICAs. The Administrative Law Judge thus recommends that the Commission not adopt this recommended condition. Minnesota ALJ Recommendation, ¶ 309.

Staff also agrees that the Commission should not require the companies to extend CenturyLink ICAs, as the Merging Companies have done for the Qwest ICAs. Staff Brief, p. 15. Staff notes that the interests the Joint Wireless Carriers seek to protect are not those that are appropriately protected in connection with the Transaction. Specifically, Staff notes that Oregon law requires the Commission to ensure that the merger does not cause harm to customers, but it does not require that the Commission ensure that benefits of the merger are passed through to customers. *Id*. Further, Staff notes that to the extent that competitors may need to negotiate new ICAs with CenturyLink's operating companies, such need does *not arise from the merger*. Instead, it is a consequence of existing ICAs expiring according to their terms. *Id*.

3. <u>A merger condition cannot expand the FCC's or courts' jurisdictions</u>

The final condition that the Joint Wireless Carriers propose relates to the Commission's enforcement of merger conditions. That proposed condition provides that "[t]he Commission, the courts, and the FCC shall each have jurisdiction to enforce these merger conditions…" Joint Wireless Carriers' Brief, p. 20. While it is axiomatic that the Commission will have the authority to enforce its order ruling on the Transaction, including any conditions the order may impose, the Commission has no authority to accord jurisdiction to the courts or the FCC. Further, asking the Commission to allow the parties to choose alternative forums for dispute resolution may reduce or change the Commission's authority over the parties and the Transaction.

As the ALJ in Minnesota found:

> The Joint Wireless Carriers have not demonstrated that this proposed condition is necessary to ensure that the proposed transaction is in the public interest, nor have they demonstrated that the Commission can confer jurisdiction on the courts or the FCC. Accordingly, the Administrative Law Judge recommends that this condition not be adopted in this proceeding. Minnesota ALJ Recommendation, ¶ 316.

This proposed enforcement condition is simply not allowable and should be rejected.

J. <u>Level 3 did not file a brief and thus its proposals should be rejected</u>

Finally, Level 3 filed testimony and recommended a number of proposed conditions, including regarding ISP-bound traffic (VNXX traffic), "8YY" homing, and billing disputes. Level 3/100; see Level 3/100, Thayer/2-4 (summary of Level 3's proposed conditions). The Merging Companies responded to that testimony, primarily in the Rebuttal Testimony of Michael Hunsucker (CTL/800, Hunsucker/39-40, 46, 60-62) and Christopher Viveros (Qwest/4, Viveros/24-32). The Merging Companies also briefed the many reasons why the Commission should not adopt any of these proposed conditions, which the Merging Companies incorporate here by reference. See Merging Companies' Brief, pp. 42-44. Level 3 has not filed any post-hearing brief, and the Commission should reject each of its proposed conditions.

II. <u>THE COASTAL INTERVENORS CONDITIONS SHOULD BE REJECTED</u>

The Coastal Intervenors argue in their opening brief that Condition 26 in the Staff/CUB Stipulation is not sufficient to address their concerns about network reliability. See e.g., Coastal Intervenors' Brief, pp. 2-3. They further claim that their testimony regarding network reliability is unrebutted. They also argue that Staff's testimony on the issue is hearsay and should not be considered by the Commission.

None of these arguments overcomes the fact that litigation of their issues is beyond the scope of this proceeding. To allow the Coastal Intervenors to raise service- and area-specific issues would open the floodgates for every interested person to intervene in Commission merger proceedings in an attempt to extract concessions from the applicants that are not relevant to the Commission's standard of review. And that is precisely what has happened in this case. By intervening and using this merger proceeding to exert pressure on the Staff and the Merging Companies, the Coastal Intervenors were able to achieve a settlement condition (Condition 26), which they now claim is not adequate to address their concerns.

Commission review of mergers would become unmanageable if every municipality, carrier, customer, or other individual interest arrived with a personalized wish list at the Commission doorstep. There are appropriate processes for the Coastal Intervenors to utilize to address their concerns. For example, they could seek relief in a Commission complaint or request for investigation. But the Coastal Intervenors have instead done nothing since the CenturyTel-Embarq merger case, when they first raised these concerns. The Commission should not encourage such use of its resources by a party to settle issues that are not relevant to the main inquiry in a merger proceeding.

In addition, the Coastal Intervenors have not given due regard to Judge Arlow's rulings limiting their intervention, which quoted his prior order on the same issue in Docket UM 1416, finding that issues related to "particular services or to a particular area" are beyond the scope of a merger case. In litigating this case, the Merging Companies adhered to this ruling, but the Coastal Intervenors did not. Rather, they have continued to advance their service- and area-specific issues in their prefiled testimony and in motions (filed after Judge Arlow's intervention ruling), and they continue to do so now in their briefs.

And even if the Commission deemed it prudent to entertain service- or area-specific issues, the Coastal Intervenors have not established that the Transaction will harm their specific interests, much less that it would harm the public interest more generally. They make numerous allegations supported by their understanding of CenturyLink's network, which are questionable at best given the proprietary and secure nature of CenturyLink's network architecture. The Coastal Intervenors did not support their version of CenturyLink's network configuration with information provided directly by CenturyLink (i.e., in discovery responses). In fact, the Coastal Intervenors did not conduct discovery of any kind in this case. On the other hand, the Commission's Staff is privy to CenturyLink's network design and is well suited to evaluate the issues that the Costal Intervenors raise (as is CenturyLink itself).

III. THE TWO ADDITIONAL STAFF CONDITIONS SHOULD BE REJECTED

A. The Commission Should Not Adopt a Broadband Reporting Condition

Staff argues that the Commission's jurisdictional limitation over broadband can be overcome through the insertion of broadband reporting condition into the merger order. Staff Brief, p. 6. Then, the Staff argues that, if the Commission orders such a condition, "CenturyLink can choose whether it is willing to go forward with the merger…" Staff Brief, p. 7.

First, the Merging Companies do not believe that the Commission can avoid its jurisdictional limitations by adopting conditions in merger cases that are otherwise unlawful; otherwise, such jurisdictional limitations would be meaningless. It would appear that under this reasoning, the Commission could adopt *any* condition it wanted, whether or not related to telecommunications. This interpretation of the Commission's statutes and federal law is inconsistent with well-established principles of statutory construction and should be rejected because it would lead to absurd results.[31]

Likewise, CUB's statement that the broadband deployment reports in the Staff/CUB Stipulation "will not tell Commission Staff anything about *quality of service*" is telling. CUB Brief, p. 8. The broadband investment provisions of the Stipulation are intended to ensure a minimum level of investment, not a minimum level of service quality, and the reporting included in the condition is more than sufficient to allow the Commission to monitor the Merged Company's progress in fulfilling it. As noted in the Merging Company's Opening Brief, the highly-competitive nature of the broadband market ensures service quality. Merging Companies' Brief, pp. 48-49. Moreover, broadband competitors are not subject to similar reporting conditions, and thus such a condition would put the Merged Company at a competitive disadvantage. *Id*.

Further, the fact that CenturyLink cited broadband benefits in the Application does not cure the jurisdictional defect in Staff's proposed broadband reporting condition. See Staff Brief, p. 6-8. CenturyLink cannot expand the Commission's jurisdictional reach; only the legislature or Congress can do that. And as noted in the Merging Companies' Opening Brief, the reporting in the Staff/CUB Stipulation is more than sufficient to allow the Commission to monitor the broadband investment commitments in the Stipulation. Merging Companies' Brief, pp. 48-49.

Finally, the Commission need not adopt either condition for it to find that the Staff/CUB Stipulation is in the public interest. CUB's Opening Brief is inconsistent on this point. CUB in its Opening Brief asks the Commission to adopt "the Trouble Report Complaint Reporting and Most-Favored State conditions because *then, and only then*, will the merger fully meet the standard of 'in the public interest, no harm'." See CUB Brief, p. 14. (Emphasis added.) That statement is at

[31] *See, 1000 Friends of Oregon v. Wasco County Court*, 68 Or.App. 765, 772, 686 P.2d 375 (1984) (stating laws should not be construed in a manner that achieves illogical or absurd results), *citing Hollinger v. Blair/Dickson*, 270 Or. 46, 53-54, 526 P.2d 1015 (1974); *see also, James v. Carnation Co*., 278 Or. 65, 72 (1977).

odds with the joint testimony (of CenturyLink, Qwest, Staff and CUB) that, "[w]hen viewed in light of the comprehensive nature of all of the commitments subject to the Stipulation, *upon resolution* of the two outstanding disputed issues there will be adequate assurance that the Transaction meets the public interest, no harm standard." See [Errata] Testimony in Support of Stipulation, p. 11, ll. 11-13; See also p. 5, ll. 4-5; and p. 21, l. 1; see also Merging Companies' Brief, p. 47, and fn. 45. Therefore, the parties to the Staff/CUB Stipulation agree that the Commission may indeed adopt those terms as meeting the no harm/public interest standard, without also adopting the two additional proposed Staff conditions.

B. <u>The Commission Should Not Impose an MFS Condition</u>

The Merging Companies will not restate all of the arguments from their Opening Brief, which largely addresses the arguments that Staff and CUB make in their opening briefs and in their testimonies. However, there are several points to which the Merger Companies will reply.

Staff states that "a condition from other states or the FCC will be imported only if it addresses a harm that was not identified in the Oregon proceeding or if it more effectively addresses a harm that was identified." Staff Brief, p. 9. The Commission looks at the Transaction as a whole, under the no harm standard, and determines whether it will harm the public interest (and customers in particular). While the Commission may look at particular harms when weighing the impact of the transaction, it must determine whether, on balance, the Transaction does no harm.[32] If the Commission concludes that the Transaction does no harm to the public interest, it does so based the record before it, including the Merged Companies' voluntary commitments. Thus, approving any non-Oregon condition that purportedly addressed a single harm "more effectively" would *exceed*

[32] See e.g. Order No. 95-526 in docket UP 96, Order No. 08-617 in docket UP-249, Order No. 02-466 in docket UP 195, Order No. 09-169 in docket UM 1416, and Order No. 10-067 in docket UM 1431.

the scope of the Commission's authority by essentially creating a "net benefits" standard, which is not applicable to telecommunications transactions in Oregon.

In addition, notice and an opportunity for hearing would be required to determine whether any new condition would in fact tip the balance of harm such that the Transaction no longer resulted in no harm. Therefore, the Merging Companies assert that the procedure set forth in Staff's proposed MFS condition does not afford the Merging Companies due process of law. For example, the MFS provision appears to be inconsistent with the statutory process for amending orders set forth by the legislature in ORS 756.568. Before an amended order can be issued, the statute requires that the Commission provide the respondent with notice and an "opportunity to be heard as provided in ORS 756.500 and 756.610."[33]

Finally, any order that included an MFS provision would also appear to conflict with the statutory definition of "final order" in an administrative proceeding. ORS 183.310(6)(b) provides:

> (b) "Final order" means final agency action expressed in writing. "Final order" does not include any tentative or preliminary agency declaration or statement that:
> (A) Precedes final agency action; or
> (B) Does not preclude further agency consideration of the subject matter of the statement or declaration.

If the Commission were notified of an order from another state Commission and then amended its order in this case to adopt portions of that order, this Commission's original order would not have been "final" because it contemplated being amended or superseded. The Commission should therefore reject this additional condition.

[33] The Merging Companies also note that the Colorado Commission denied an MFS condition because the Merged Company may be subject to a variety of requirements in other jurisdictions and the circumstances in other jurisdiction may be different. The Colorado Commission found that its review of particular requirements and condition is necessary before it can impose them on the Company in that state. Colorado Order, ¶ 69.

CONCLUSION

The record clearly demonstrates that the Commission's approval of the Transaction, conditioned on the commitments contained in the Settlements in this matter, will do no harm and is thus in the public interest. Therefore, CenturyLink and Qwest respectfully request that the Commission expeditiously issue an order approving the Transaction as described in CenturyLink's Application and the record in this case.

DATED: February 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

UM 1484

I hereby certify that on the 1st day of February, 2011, I served the foregoing CENTURYLINK'S AND QWEST'S POST-HEARING REPLY BRIEF, in the above entitled docket on the following persons via e-mail, and via U.S. Mail by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. Post Office at Portland, Oregon.

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(w) denotes waiver of paper service
* denotes signed Protective Order No. 10-192
** denotes signed Protective Order Nos. 10-192 and 10-291