

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Joint Application of Qwest Communications
International, Inc. and CenturyTel, Inc. for
Approval of Indirect Transfer of Control of
Qwest Corporation, Qwest Communications
Company, LLC, and Qwest LD Corporation

DOCKET NO. 10-049-16

SURREBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

INTEGRA TELECOM

Exhibit Integra 1SR

October 14, 2010

1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Douglas Denney. I work at 1201 Lloyd Blvd, Suite 500 in Portland,
4 Oregon.

5 **Q. DID YOU FILE DIRECT TESTIMONY IN THIS PROCEEDING ON**
6 **AUGUST 30, 2010?**

7 A. Yes.

8 **Q. PLEASE DESCRIBE HOW YOUR TESTIMONY IS ORGANIZED.**

9 A. The first section, this section, of my testimony introduces the testimony. The
10 second section of my testimony responds to critiques of the Joint CLEC
11 Additional Performance Assurance Plan (“APAP”) proposal (Joint CLEC
12 Proposed Condition 4.a) and demonstrates that the APAP can be an effective tool
13 to protect CLECs against post merger wholesale performance degradation. The
14 third section of my testimony supports Joint CLEC recommended condition
15 number 8 and clarifies that interconnection agreements (“ICA”) can be updated
16 for circumstances beyond a change in law. The final section of my testimony
17 corrects Ms. Stewart’s incorrect characterization of my testimony with respect to
18 the Minnesota *UNE Provisioning and Marketing Practices Docket*¹ as it relates to

¹ *In the Matter of a Commission Investigation into Qwest Corporation’s Provision of Network Elements to CLECs and into Related Marketing Practices Targeting CLEC Customers (“UNE Provisioning and Marketing Practices Docket”), MPUC Docket No. P-421/CI-09-1066.*

1 the importance of a number of CLEC proposed conditions, including condition 27
2 regarding conditioned copper loops.

3 **Q. ARE THERE ANY EXHIBITS TO YOUR TESTIMONY?**

4 A. No.

5

6 **II. WHOLESALE SERVICE QUALITY (JOINT CLEC RECOMMENDED**
7 **CONDITION NUMBER 4)**

8 **Q. WHAT IS THE JOINT PETITIONERS' POSITION WITH RESPECT TO**
9 **WHOLESALE SERVICE QUALITY?**

10 A. The Joint Petitioners promise post merger wholesale service quality, but reject the
11 Joint CLEC proposed process for assuring wholesale service quality does not
12 degrade if the merger is approved.

13 For example, Mr. Hunsucker, on behalf of CenturyLink, states, "I believe CLECs
14 will benefit from the merger..."² Mr. Hunsucker explains, "CenturyLink is
15 committed to maximizing its internal efficiencies associated with providing
16 quality service to CLECs which also means that the CLECs benefit from this
17 efficiency."³ He continues, "CenturyLink has a long-standing history of and
18 commitment to providing quality wholesale services. The provision of quality
19 service to wholesale customers is a priority and will remain so after the merger

² Rebuttal Testimony of Michael R. Hunsucker, September 30, 2010 ("Hunsucker Rebuttal"), p. 4, line 7.

³ Hunsucker Rebuttal, p. 36, lines 8-10.

1 closing.”⁴ Both Mr. Hunsucker of CenturyLink and Mr. Williams of Qwest claim
2 that each witness’s respective company “recognizes the value of its wholesale
3 customers to its business operations,”⁵ and Mr. Williams calls for “a proactive
4 approach toward resolving problems, regardless of their cause.”⁶

5 While promising *benefits* to CLECs and *a proactive approach*, the Joint Petitioners
6 are proposing a *reactive* approach by suggesting using the Utah Performance
7 Assurance Plan (“Utah PAP”)⁷ in an undefined manner to “focus on performance
8 trends, not just on a single-point comparison.”⁸ Though they propose to rely upon
9 the Utah PAP to determine trends, the Joint Petitioners argue that the performance
10 indicators (“PIDs”) used in the Utah PAP can’t properly identify performance
11 degradation.⁹ They further attempt to excuse deteriorating performance by arguing
12 that the Commission should only consider “nondiscrimination, not simply
13 performance degradation.”¹⁰ Finally, the Joint Petitioners also argue that CLECs

4 Hunsucker Rebuttal, p. 6, lines 5-7; p. 50, line 23-51, line 2.

5 Hunsucker Rebuttal, p. 14, lines 1-3; Rebuttal Testimony of Michael G. Williams, September 13, 2010 (“Williams Rebuttal”), p. 16, lines 9-10.

6 Williams Rebuttal, p. 27, lines 7-8.

7 Williams Rebuttal, p. 26, lines 10-11.

8 Williams Rebuttal, p. 26, lines 15-17.

9 Williams Rebuttal, p. 26, lines 5-7.

10 Williams Rebuttal, p. 18, lines 12-13.

1 should “have the burden to bring forth the confirming evidence” to demonstrate
2 merger-related harm.¹¹

3 This Joint Petitioner testimony is far from reassuring. In fact, it strongly suggests
4 that the Joint Petitioners are prepared for a deterioration in service quality if the
5 merger is approved. This is precisely why the Joint CLECs proposed a specific
6 plan, the APAP, for comparing pre merger and post merger wholesale service
7 quality.

8 **Q. WHAT ARGUMENTS DO THE JOINT PETITIONERS MAKE AGAINST**
9 **A PROCESS FOR COMPARING WHOLESALE SERVICE QUALITY**
10 **PRE AND POST MERGER?**

11 A. The Joint Petitioners make five basic arguments against a pre-defined
12 methodology for comparing wholesale service quality pre and post merger. They
13 argue: (1) a deterioration in wholesale service quality post merger is not proof of
14 merger related harm to CLECs;¹² (2) the Joint CLEC definition of performance
15 degradation is improper;¹³ (3) Qwest is already providing superior service;¹⁴ (4)

¹¹ Williams Rebuttal, p. 21, lines 14-16.

¹² Williams Rebuttal, pp. 20-22.

¹³ Williams Rebuttal, pp. 22-23.

¹⁴ Williams Rebuttal, pp. 23-24.

1 the PIDs are not designed to capture performance degradation;¹⁵ and (5) the
2 current Utah PAP is sufficient.¹⁶ All of the above arguments are flawed.

3

4 **A. A REDUCTION IN WHOLESALE SERVICE PERFORMANCE**
5 **IMPACTS CLECS AND THEIR END USER CUSTOMERS**

6 **Q. WILL A POST MERGER REDUCTION IN WHOLESALE SERVICE**
7 **QUALITY IMPACT CLECS AND THEIR UTAH END USER**
8 **CUSTOMERS?**

9 A. Of course. Mr. Williams claims that the “mere degradation of performance from
10 already-superb levels does not automatically translate into harm.”¹⁷ He also
11 argues that the “mere existence of lower performance levels... cannot be
12 characterized automatically as performance degradation.”¹⁸ This is wrong, as
13 performance degradation is simply another label for a decline in performance
14 levels, and lower performance levels directly impact CLECs and their end user
15 customers. Further, it is unclear which specific performance measures Mr.
16 Williams believes can degrade without impacting CLECs.

¹⁵ Williams Rebuttal, pp. 24-25.

¹⁶ Williams Rebuttal, pp. 25-26.

¹⁷ Williams Rebuttal, p. 21, lines 16-18.

¹⁸ Williams Rebuttal, p. 21, line 15 – p. 23, line 2.

1 Integra, like other CLECs, attempts to distinguish itself in the marketplace
2 through its customer relationships and its ability to offer customers reliable and
3 diverse voice and data network. Because Integra and other CLECs rely, in part,
4 upon network facilities leased from Qwest, the quality of service received from
5 Qwest is a vital component of their ability to serve customers well. There are no
6 generally available, last mile wholesale substitutes available to Integra and other
7 CLECs to serve end user customers across Qwest's region.¹⁹ That there are no
8 last mile substitutes for products subject to the PIDs in the Utah PAP is
9 undisputed: Qwest applies the PIDs and the Utah PAP only to products the FCC
10 has found *must* be provided to CLECs by ILECs in order to prevent CLEC
11 impairment. As a result, Qwest's behavior can have a significant impact on
12 Integra's customer relationships. Since Qwest is Integra's predominant supplier
13 of connections to end user customers²⁰ and Qwest is also Integra's largest
14 competitor, Qwest has the incentives and the ability to limit Integra's success in
15 the market through poor wholesale service. Qwest's gain from poor or diminished
16 wholesale service performance translates directly to harm to CLECs and harm to

¹⁹ The Minnesota Commission has reached this same conclusion noting, "Evidence suggests there are no significant alternatives to Qwest's wholesale facilities." Ex Parte, Comments of the Minnesota Public Utilities Commission, In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis/St. Paul Metropolitan Statistical Area, WC Docket No. 07-97, February 8, 2008, p. 6.

²⁰ In some markets, Integra has its own facilities to serve the last mile to a number of customers. However, overall, Integra relies upon Qwest's last mile facilities to access nearly all of its customers in every market across Qwest's region. This does not mean that Integra is not a facilities-based provider for these customers. For example, Integra often serves the customer using its own switch and collocation facilities, while leasing the loop from Qwest for the last mile piece.

1 competition. The gains to Qwest are wins in the marketplace and a potentially
2 tarnished CLEC reputation. The end user customer demands reliable service and
3 values met commitments. When the ability of a carrier to provide reliable service
4 and meet its commitments diminishes, the end user customer reacts. The end user
5 customer rarely has the patience to take sides when its service no longer works or
6 when its order is not filled on time. The end user customer's experience is with its
7 retail service provider, regardless of who is providing the various underlying
8 network components. Faced with unsatisfactory service, the retail customer is
9 naturally predisposed to migrate back to the historical, still dominant, incumbent
10 provider. Thus, poor or diminished wholesale performance by Qwest necessarily
11 negatively impacts the CLEC utilizing these facilities.

12 **Q. SHOULD CLECS BEAR THE BURDEN IN EACH INSTANCE TO**
13 **DEMONSTRATE THAT PERFORMANCE DEGRADATION IS MERGER**
14 **RELATED AND RESULTS IN HARM TO CLECS?**

15 A. No. Mr. Williams argues, “if CLECs believe they are harmed by issues outside of
16 the Utah PAP, such as alleged merger-related harm, it is proper that they have the
17 burden to bring forth the confirming evidence.”²¹ This argument attempts to shift
18 the burden of proof regarding the effect of the merger on the public interest from
19 the Joint Petitioners to the CLECs. Such a shift would effectively eviscerate the
20 Joint CLECs’ ability to enforce current wholesale service quality levels. The

²¹ Williams Rebuttal, p. 21, lines 16-18.

1 expense of filing a Commission complaint for each individual marker of a
2 reduction in service quality would greatly exceed the cost of the particular
3 individual problem, while the cumulative significant adverse affect of poor
4 service quality harm CLECs and their end user customers. That is precisely why
5 PAPs became a central part of Federal Communications Commission (“FCC”)
6 approval of RBOC entry into interLATA long distance markets under Section 271
7 of the Telecom Act. The key feature of a PAP, including the Utah PAP, is a
8 system of self-executing remedies that is triggered automatically upon the
9 RBOC’s failure to meet particular quality standards.

10 Further, the Joint Petitioners, *not CLECs*, have requested this Commission
11 approve their merger. As described in the Direct Testimony of Dr. Ankum, the
12 Commission must determine whether the proposed merger is in the public
13 interest; one criterion applied to determine whether the public interest is met is *the*
14 *absence of harm*.²² The Joint Petitioners bear the burden of demonstrating that
15 the merger is in the public interest, prior to the merger being approved. In
16 addition, the APAP, as proposed, contains provisions by which Qwest can seek to
17 be excused from payments that under particular circumstances would be
18 improper.²³ This will be discussed in more detail below. Mr. Williams’s
19 proposal is to shift the burden to CLECs to prove harm from merger-related

²² Direct Testimony of August H. Ankum, Ph.D., August 30, 2010, (“Ankum Direct”), pp. 14-19.

²³ See Exhibit Integra 1.1, APAP §§ 13.3 (circumstances where payments are not obligated) and 16.1.1 (removal of PID from APAP).

1 service quality degradation, absent any established method or measurement, post
2 merger. In other words, Mr. Williams is proposing that the Commission ignore
3 the public interest standard when deciding whether wholesale service quality
4 should be maintained, as promised by the Joint Petitioners.

5 **Q. DOES THE MINNESOTA SUPREME COURT DECISION IN THE**
6 **WHOLESALE SERVICE QUALITY CASE LIMIT COMMISSION**
7 **AUTHORITY WITH RESPECT TO ITS ABILITY TO REVIEW AND**
8 **APPROVE MERGERS IN UTAH?**

9 A. Of course not. Mr. Williams suggests that the Commission does not have
10 authority to require performance related merger conditions with payments for
11 diminished performance because, “[i]n 2005, the State of Minnesota Supreme
12 Court concluded that the Minnesota Commission could not levy self-executing
13 consequences.”²⁴ Besides the basic fact that the Minnesota Supreme Court
14 decision has no bearing on Utah, the referenced case had nothing to do with the
15 Minnesota Commission’s authority to review and approve or deny a merger of
16 companies it regulates. As discussed previously, the Commission must determine
17 whether the merger is in the public interest. The Joint Petitioners have not argued
18 that the Commission has no authority over the merger; rather, they have
19 acknowledged the Commission’s authority.²⁵ Certainly, if the Commission

²⁴ Williams Rebuttal, p. 19, lines 9-11.

²⁵ See Joint Petition for Expedited Approval of Indirect Transfer of Control, May 19, 2010, p. 2.

1 determines that the merger is not in the public interest, it can deny the merger.

2 The Commission's uncontested authority to *deny* the merger certainly includes the
3 authority to *grant approval* subject to conditions that are intended to ensure the
4 merger is consistent with the public interest as required by law.

5 The Joint CLECs have proposed the APAP as a merger condition to ensure that
6 the merger does not result in a decline in wholesale service quality. Given the
7 critical importance of quality wholesale service to competition, this merger would
8 not be in the public interest without the APAP condition. Conditioning approval
9 of the merger on the inclusion of the APAP allows the Joint Petitioners to accept
10 the APAP²⁶ if they desire to go ahead with the merger. The logic contained in the
11 Minnesota Supreme Court decision does nothing to suggest a limit to the
12 Minnesota Commission's (or any Commission's) authority to deny a merger, or to
13 condition approval of a merger based on the implementation of additional
14 performance assurances.

15 Mr. Williams's own testimony supports a distinction between the Minnesota
16 Supreme Court's rejection of the Minnesota Commission's wholesale service
17 quality self-executing performance payments and the proposed APAP condition.

18 As Mr. William interprets the implementation of the Utah PAP, it was the result

²⁶ See Williams Rebuttal, p. 21, lines 7-9. Here he argues that Qwest volunteered to the Utah PAP in order to obtain 271 approval. Likewise, if the Commission determines the APAP will assist the Joint Petitioners in meeting the public interest standard, it can require the Joint Petitioners to volunteer to the APAP in order to obtain merger approval.

1 of a “Qwest voluntary agree[ment] in connection with obtaining Section 271
2 relief.”²⁷ The Minnesota Supreme Court noted in the 2005 wholesale service
3 quality case cited by Qwest,

4 In evaluating petitions to enter the long-distance market, the FCC relied on
5 so-called Post-Entry Performance Assurance Plans, which were developed
6 collaboratively by the regional Bell operating companies, including
7 Qwest, competitive carriers, and state regulatory bodies, like the MPUC,
8 to ensure the nondiscriminatory provision of wholesale local exchange
9 services.²⁸

10 However, in this docket, Mr. Williams is suggesting that the APAP would not be
11 supportable if appealed.²⁹ Mr. Williams’s testimony on the Utah PAP and the
12 APAP proposal actually bolsters rather than undercuts approval of the APAP
13 condition. Just as Qwest in 2001 filed a petition to the various states and to the
14 FCC for long distance authority, the Joint Petitioners in this proceeding have
15 brought an application to the Commission for its approval of a proposed merger.
16 The merger is voluntarily undertaken and a public interest determination is
17 required for Commission approval. Under Qwest’s reasoning, the Commission
18 has every right to consider the proposed performance measure condition, with
19 self-executing remedies, as part of its merger consideration to ensure that the
20 merger is in the public interest.

²⁷ Williams Rebuttal, p. 9, lines 15-17.

²⁸ *In the Matter of Qwest’s Wholesale Service Quality Standards*, 702 N.W. 2d 246, 249 (August 18, 2005).

²⁹ Williams Rebuttal at p. 19, lines 9-20.

1 Even if one does not fully ascribe to Qwest's analysis of the Utah PAP and
2 wholesale service quality dockets, Qwest's witness makes clear that the Joint
3 Petitioners' "evidence" based on the Minnesota Supreme Court's decision is
4 lacking. In fact, far from precluding the Commission's approval of the APAP
5 condition, their testimony regarding the two performance dockets can only
6 support, not undermine, the APAP condition.

7 **B. CLECS SHOULD BE PROTECTED FROM A POST MERGER**
8 **REDUCTION IN WHOLESALE SERVICE QUALITY**

9 **Q. DOES PERFORMANCE DEGRADATION HARM CLECS?**

10 A. Yes. I discussed this issue previously in this testimony. While Mr. Williams
11 erroneously argues that performance degradation may not result in harm, he also
12 argues that performance degradation may be the result of non merger related
13 factors,³⁰ or, if it is a result of merger related factors, that the payments aren't
14 correlated with the magnitude of the harm.³¹

15 **Q. COULD PERFORMANCE DEGRADE POST MERGER FOR NON**
16 **MERGER RELATED REASONS?**

17 A. Yes, this is possible, but the APAP already contains provisions to deal with most,
18 if not all, of these situations. Mr. Williams raises several potential factors that
19 could result in a degradation of performance that might not be merger related.

³⁰ Williams Rebuttal, p. 22, fn 11.

³¹ Williams Rebuttal, p. 22, lines 13-15.

1 These factors are: seasonal variations,³² external factors,³³ weather,³⁴ changes in
2 the customer base,³⁵ CLEC operating practices,³⁶ and the comparison of the
3 current month to a pre-merger annual average.³⁷ Section 13.3 of the proposed
4 APAP reads as follows (emphasis added):³⁸

5 Qwest **shall not be obligated to make payments** for any
6 measurement if and to the extent that non-conformance for that
7 measurement was the result of any of the following: 1) a Force
8 Majeure event, including but not limited to acts of nature, acts of
9 civil or military authority, government regulations, embargoes,
10 epidemics, terrorist acts, riots, insurrections, fires, explosions,
11 earthquakes, nuclear accidents, floods, work stoppages, equipment
12 failure, power blackouts, volcanic action, other major
13 environmental disturbances, unusually severe weather conditions,
14 inability to secure products or services of other persons or
15 transportation facilities or acts or omissions of transportation
16 carriers; 2) an act or omission by a CLEC that is contrary to any of
17 its obligations under its interconnection agreement with Qwest or
18 under federal or state law; an act or omission by CLEC that is in
19 bad faith. Examples of bad faith conduct include, but are not
20 limited to: unreasonably holding service orders and/or applications,
21 “dumping” orders or applications in unreasonably large batches,
22 “dumping” orders or applications at or near the close of a business
23 day, on a Friday evening or prior to a holiday, and failing to
24 provide timely forecasts to Qwest for services or facilities when
25 such forecasts are required to reasonably provide services or
26 facilities; or 3) problems associated with third-party systems or

32 Williams Rebuttal, p. 22, fn 11.

33 Williams Rebuttal, p. 22, fn 11.

34 Williams Rebuttal, p. 23, line 13

35 Williams Rebuttal, p. p. 23, lines 13-14.

36 Williams Rebuttal, p. 23, line 14.

37 Williams Rebuttal, p. 23, line 15.

38 See Exhibit Integra 1.1, APAP § 13.3.

1 equipment, which could not have been avoided by Qwest in the
2 exercise of reasonable diligence, *provided, however*, that this third
3 party exclusion will not be raised in the State more than three times
4 within a calendar year.
5

6 This provision covers weather (part 1), external factors (part 3), and CLEC
7 operating practices (part 2).

8 In addition, section 16.1.1 of the proposed APAP allows for a party to request
9 removal of a PID or submeasure with evidence of no harm, non-Qwest related
10 causes, or other factors. This section is copied below:³⁹

11 Any party may submit a root cause analysis to the Commission
12 requesting removal of a PID or sub-measure from the APAP. In the
13 analysis and recommendations concerning the root cause analysis,
14 the Commission is to consider, at a minimum, whether the root
15 cause analysis provides evidence of no harm, the same harm as
16 covered by other PID measures, non-Qwest related causes, or other
17 factors which directly relate to the harm or circumstances specific
18 to the PID or sub-measure being analyzed.

19
20 **Q. HAVE THE JOINT PETITIONERS PROVIDED ANY EVIDENCE TO**
21 **SHOW THE IMPACT OF THE FACTORS IT MENTIONS?**

22 A. No, most likely because these events are rare and quantifying them would
23 demonstrate that they have very little impact on the PIDs and would not result in a
24 statistical determination of degraded performance. First, many of the PIDs, such
25 as Gateway Availability, Pre-order and Billing, which primarily involve systems,

³⁹ See Exhibit Integra 1.1, APAP § 16.1.1.

1 would not be impacted by the factors listed by Qwest. Second, as described in my
2 direct testimony,⁴⁰ service would have to substantially degrade from current
3 levels before a payment would be made under the APAP. Third, as described
4 above, there already exist provisions in the APAP to handle non-merger related
5 changes to performance.

6 **Q. SHOULD CHANGES TO THE CLEC CUSTOMER BASE IMPACT THE**
7 **JOINT PETITIONERS' ABILITY TO MAINTAIN WHOLESALE**
8 **SERVICE QUALITY?**

9 A. No. The Utah PAP requires Qwest to provide services at parity and this does not
10 change with changes in the CLEC customer base. Just as changes in the customer
11 base do not impact the parity comparison, they would not impact a comparison of
12 pre merger and post merger performance and Qwest provided no example to show
13 why this might be the case. Further, as explained above, if for some reason Qwest
14 believed that non-Qwest related causes, such as a change in the CLEC customer
15 base, was the basis for deteriorating performance, section 16.1.1 of the proposed
16 APAP could be used by Qwest to attempt to demonstrate that this is the case.

17 **Q. WHY IS IT APPROPRIATE TO COMPARE POST MERGER MONTHLY**
18 **PERFORMANCE TO PRE MERGER ANNUAL AVERAGE**
19 **PERFORMANCE?**

⁴⁰ Direct Testimony of Douglas Denney, August 30, 2010, ("Denney Direct"), pp.12-14.

1 A. Comparing monthly performance to an average performance over multiple
2 months is common in Qwest's performance assurance plans.⁴¹ This type of
3 comparison balances the need for a stable and predictable standard (i.e. annual
4 pre-merger average performance) with the need for relatively quick feedback (i.e.
5 monthly payments) so that an affected company may quickly respond to
6 substandard wholesale service quality performance. In addition, it is important to
7 keep in mind that the APAP uses a statistical test to determine whether there are
8 significant variations from prior performance. Pre merger average performance is
9 not used as a benchmark, where any performance below that level triggers a
10 payment. Only performance that deviates significantly from pre merger
11 performance would trigger a payment under the APAP.

12 **Q. HAVE THE JOINT PETITIONERS PROPOSED ANY APAP LANGUAGE**
13 **CHANGES TO ADDRESS THEIR CONCERNS OVER NON-MERGER**
14 **RELATED FACTORS?**

15 A. No. As explained previously, though the Joint Petitioners claim wholesale service
16 quality is important and that the CLEC experience will get better, they have no
17 proposals to simply assure that wholesale service quality doesn't degrade if the
18 merger is approved.

⁴¹ See for Example Utah Qwest Utah SGAT Seventh Revision, Exhibit K, February 4, 2009 ("UT PAP"), http://www.qwest.com/about/policy/sgats/SGATSdocs/utah/UT_7th_revised_6th_amend_Exhibit_K_020409.pdf which compares monthly CLEC performance to the prior six month average Qwest performance.

1

2 **C. QWEST IS NOT CURRENTLY PROVIDING SUPERIOR**
3 **SERVICE TO CLECS**

4 **Q. IS QWEST CURRENTLY PROVIDING SUPERIOR PERFORMANCE TO**
5 **CLECS?**

6 A. No. Mr. Williams claims that Qwest is currently providing CLECs with superior
7 service and thus concludes, “if performance were to degrade below 2009’s
8 superior levels while still maintaining nondiscriminatory levels, there would still
9 be no basis for automatically claiming harm.”⁴² Mr. Williams is wrong on two
10 counts. First, there is no evidence that Qwest is providing CLECs with superior
11 service. This will be discussed in more detail below. Second, the purpose of the
12 APAP is not to measure discrimination, as is measured in the Utah PAP, but to
13 measure performance pre and post merger. The Utah PAP was put into place in
14 conjunction with the FCC’s 271 Approval Order to “provide assurance that the
15 local market will remain open after Qwest receives section 271 authorization...”⁴³
16 The APAP is proposed as part of a *no harm*, public interest test of the proposed
17 merger between CenturyLink and Qwest. The plans are different because the
18 issues being addressed are different. Mr. Williams appears to be suggesting that

⁴² Williams Rebuttal, P. 24, lines 10-12.

⁴³ Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Adopted December 20, 2002 (“FCC 271 Approval Order”), ¶ 440.

1 if the Joint Petitioners, post merger, were to degrade both retail and wholesale
2 service quality, the CLECs would not be impacted. This is wrong, as I explained
3 earlier in this testimony, and is directly contradictory of the commitments made
4 by CenturyLink witness Mr. Ferkin when he claimed, “CenturyLink has a long
5 history of successfully executing ILEC transactions, a fact that underscores that
6 the Company fully understands the importance of the customer, and is capable of
7 managing operating risks, and delivering *superior service* through these types of
8 combinations.”⁴⁴ (emphasis added)

9 **Q. WHY ARE QWEST’S CLAIMS OF SUPERIOR PERFORMANCE TO**
10 **CLECS INACCURATE?**

11 A. First, the Act requires that incumbent carriers provide CLECs interconnection that
12 is “at least equal in quality” to that provided to their subsidiaries and retail
13 customers. 47 U.S.C. § 251(c)(2)(C) (2000).⁴⁵ Thus, if Qwest truly were

⁴⁴ Rebuttal Testimony of Jeremy Ferkin, September 30, 2010 (“Ferkin Rebuttal”), p. 47, lines 10-13.

⁴⁵ Section 251(c)(2)(C) of the Act provides:

(c) Additional obligations of incumbent local exchange carriers

* * * *

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

* * * *

(C) that is *at least equal in quality to* that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection[.]

(Emphasis added).

1 providing CLECs with service better than it provides to its retail customers,
2 Qwest would merely be complying with the law. Mr. Williams's suggestion that
3 previous compliance with the law should allow the Joint Petitioners to degrade
4 wholesale service quality, post merger, is concerning.

5 Second, Qwest's methodology for its *superior service* calculation is flawed.⁴⁶
6 Qwest's methodology for its superior service calculation overstates Qwest's
7 performance for benchmark measures and ignores that CLECs mainly serve
8 business customers with Qwest UNEs. Consider OP-3, Installation Commitments
9 Met for 2-wire analog loops. This measure has a benchmark standard that is set at
10 90%. Qwest's actual performance over the past year for 2-wire analog loops is
11 97.6%, which translates to about 11 missed commitments for 2-wire analog loops
12 per month. Qwest would determine that this performance is superior, based on its
13 definition of superior service. However, for retail business services, Qwest
14 performance is 99.2%, about 3 times better than it provides to CLECs. In fact,
15 considering all of the retail products included in the performance plan, it is
16 evident that Qwest routinely performs around 99% for itself. Qwest's
17 determination that it is providing superior service to CLECs is false. Another
18 problem with Qwest's calculation is that many of the parity measures compare

⁴⁶ Qwest explained this calculation in recent testimony related to the Idaho PAP. Direct Testimony of Michael G. Williams, In the Matter of the Petition of Qwest Corporation Requesting Authorization to Withdraw its Statement of Generally Available Terms and Conditions, Case No. QWE-T-08-04, pp. 23-25.

1 UNE loops with a combined residential and business retail measure, though most
2 CLECs are using unbundled loops for business customers. Qwest's retail
3 performance for business customers tends to exceed its performance for
4 residential customers. Thus, by including residential customers in the
5 comparison, it is easier for Qwest to pass a statistical test and falsely conclude
6 that it is providing superior service, when in fact it isn't.

7 **Q. DOES THE COMMISSION NEED TO DETERMINE WHETHER OR NOT**
8 **QWEST IS PROVIDING SUPERIOR SERVICE IN ORDER TO REQUIRE**
9 **THE APAP AS A MERGER CONDITION?**

10 A. No. The comparison relevant to the APAP is how the Joint Petitioners' pre
11 merger performance compares to its post merger performance. The intent of this
12 proposal is to assure that wholesale service quality does not degrade as a result of
13 the merger and as a result CLECs are not harmed, in this respect, as a result of the
14 merger.

15

16 **D. THE CLEC PROPOSED APAP CAN BE USED TO MEASURE**
17 **WHOLESALE SERVICE DEGRADATION**

18 **Q. CAN THE PIDS FROM THE UTAH PAP BE USED TO MEASURE**
19 **SERVICE DEGRADATION?**

1 A. Yes. Mr. Williams claims that the PIDs contained in the Utah PAP are not and
2 cannot be designed to measure service degradation.⁴⁷ He further argues, “the
3 PIDs were defined to measure performance against parity or benchmarks, not to
4 properly identify performance degradation.”⁴⁸ He argues that, “the Utah PAP
5 PID's business rules define the dimensions of transactions (e.g., orders or trouble
6 reports) that are to be included and excluded, so as to frame a reasonable
7 comparison for statistical parity evaluations,”⁴⁹ and “the PIDs' lists of inclusions
8 and exclusions for parity evaluations are different than those that would be
9 required to properly identify performance degradations and to exclude factors that
10 would otherwise be accounted for in the parity evaluation itself.”⁵⁰ However, Mr.
11 Williams does not provide a single example to demonstrate that this might be the
12 case. Instead he simply throws up his hands and declares, “it is not possible for
13 the PIDs to be defined and implemented in a manner that would permit them to
14 account for all such factors.”⁵¹

⁴⁷ Williams Rebuttal, p. 24, line 13.

⁴⁸ Williams Rebuttal, p. 25, lines 5-7.

⁴⁹ Williams Rebuttal, p. 7, lines 13-16.

⁵⁰ Williams Rebuttal, p. 7, lines 13-18.

⁵¹ Williams Rebuttal, p. 25, lines 15-17.

1 Despite these claims, most exclusions are fairly obvious and have nothing
2 whatsoever to do with a parity or benchmark comparison. For example, the
3 exclusions for OP-3, installation commitments met, are as follows:⁵²

- 4 • Disconnect, From (another form of disconnect) and Record order types.
- 5 • Due dates missed for standard categories of customer and non-Qwest
- 6 reasons. Standard categories of customer reasons are: previous service at
- 7 the location did not have a customer-requested disconnect order issued, no
- 8 access to customer premises, and customer hold for payment. Standard
- 9 categories of non-Qwest reasons are: Weather, Disaster, and Work
- 10 Stoppage.
- 11 • Records involving official company services.
- 12 • Records with invalid due dates or [application dates](#).
- 13 • Records with invalid completion dates.
- 14 • Records with invalid product codes.
- 15 • Records missing data essential to the calculation of the measurement per the
- 16 PID.
- 17

18 These types of exclusions are typical of what is found in other PIDs. They have
19 nothing to do with whether a measure will be used in a parity or benchmark
20 comparison, nor do they determine the timeframe in which the comparison will
21 take place. They are simply descriptors that allow a true apples-to-apples
22 comparison of performance results, regardless of the statistical calculation that
23 will be applied.

24 **Q. DOES QWEST RELY UPON CHANGES IN PERFORMANCE TO CLAIM**
25 **IMPROVED WHOLESALE QUALITY OF SERVICE?**

⁵² Service Performance Indicator Definitions, Qwest Utah SGAT Seventh Revision, Eighth Amended Exhibit B February 4, 2009 (“UT PID Documentation”), p. 39.

1 A. Yes. Qwest talks of declining Utah PAP payments⁵³ and suggests that it is
2 evidence of the “robust market that provides the meaningful incentives that will
3 assure CLECs of continuing wholesale service quality, regardless of the existence
4 of the current merger transaction.”⁵⁴ Mr. Williams does admit that, “the results
5 produced in accordance with the PIDs can display trends,”⁵⁵ and further admits
6 that, “the Utah PAP performance results do produce monthly ‘indications’ of
7 performance levels (as the "PID" acronym for ‘performance indicator definitions’
8 implies).”⁵⁶ Apparently it is the obligation to actually do something in response
9 to these trends, if they point to declining wholesale service quality, that the Joint
10 Petitioners object to.

11 **E. THE UTAH PAP IS NOT SUFFICIENT TO PROTECT CLECS**
12 **AGAINST A POST MERGER DECLINE IN WHOLESALE**
13 **SERVICE QUALITY**

14 **Q. IS THE UTAH PAP SUFFICIENT TO PROTECT CLECS AGAINST A**
15 **POST MERGER DETERIORATION IN WHOLESALE SERVICE**
16 **QUALITY?**

17 A. No. The Utah PAP serves a crucial function, but does not protect against post
18 merger service degradation. Mr. Williams argues that CLEC concerns are

⁵³ Williams Rebuttal, p. 15, lines 11-13.

⁵⁴ Williams Rebuttal, p. 16, lines 10-13.

⁵⁵ Williams Rebuttal, p. p. 25, line 21 – p. 26, line 1..

⁵⁶ Williams Rebuttal, p. 26, lines 7-9.

1 “irrelevant, because the merger transaction does nothing to change the Utah PAP
2 and wholesale service quality rules,”⁵⁷ but this misses the point.

3 As described in my rebuttal and direct testimony,⁵⁸ the APAP and the Utah PAP
4 are separate plans designed to solve two separate issues. The plans are meant to
5 work in conjunction with one another, not in place of or opposed to one another.
6 Under the Utah PAP, wholesale service quality could deteriorate post merger and
7 never trigger a payment as long as retail service quality deteriorates in tandem.
8 This outcome clearly is not in the public interest and does not serve Utah
9 consumers. Though the Joint Petitioners have professed to care about service
10 quality and have promised high quality performance post merger, they are
11 unwilling to actually commit to any plan that would solidify that promise. The
12 proposed APAP will help assure that the merged company maintains wholesale
13 service quality at current levels and will create disincentives for the merged
14 company to achieve synergies at the expense of its competitors through a
15 deterioration of its wholesale market operations.

16

⁵⁷ Williams Rebuttal, p. 2, lines 14-18.

⁵⁸ Denney Direct, pp. 9-10.

1 **III. ICA NEGOTIATION PROCESS (JOINT CLEC RECOMMENDED**
2 **CONDITIONS 8 AND 9)**

3 **Q. ARE CHANGE IN LAW PROVISIONS THE ONLY METHOD BY**
4 **WHICH ICAS CAN BE UPDATED, AS MR. HUNSUCKER SUGGESTS?⁵⁹**

5 A. No. Mr. Hunsucker implies that Joint CLEC proposed condition 8, regarding the
6 extension of existing ICAs, is ill advised because:

7 Change of law provisions only cover changes of law. Such provisions do not
8 address interpretation deficiencies within an existing ICA that were only
9 discovered *after* ICA implementation or that arose pursuant to technology or
10 other changes within the industry. In my experience, most ICA disputes are
11 caused by the parties asserting differing interpretations of specific or
12 interrelated ICA terms. It is to both parties' benefit to minimize disputes by
13 renegotiating terms that do not lend themselves to more than one
14 interpretation.⁶⁰

15
16 Changes in law are only one reason that ICAs are amended. Before it was
17 replaced, the initial Qwest-Eschelon ICA in Utah, for example, was amended
18 more than twenty times, and only a handful of those amendments were due to
19 changes in law. Similarly, in Minnesota, the current Qwest-McLeodUSA ICA
20 has been amended thirty times and, in Oregon the current Qwest-Integra ICA has
21 been amended almost 40 times. Condition 6(a) provides that a non-ILEC party
22 may request a change to any Assumed Agreement (which includes ICAs).
23 Therefore, if it truly is “to both parties' benefit to minimize disputes by
24 renegotiating terms that do not lend themselves to more than one interpretation,”⁶¹

⁵⁹ Hunsucker Rebuttal, p. 22, lines 5-11.

⁶⁰ Hunsucker Rebuttal, p. 22, lines 5-11.

⁶¹ Hunsucker Rebuttal, p. 22, lines 5-11.

1 then a CLEC may request an amendment and the parties will be able to
2 renegotiate the terms. In other words, if desired changes are mutually agreeable,
3 Condition 6(a) allows for a change to the ICA. Condition 6(a) also allows
4 changes required by a change of law. What Condition 6(a) does not allow for is
5 the Merged Company to force ICA changes upon CLECs, other than those due to
6 changes in law, during this time of transition.

7 The ICAs have dispute resolution provisions to recognize that, even with contract
8 terms, disputes may arise. Resolution of disputes is no reason to throw out a
9 workable ICA. To the extent the resolution of a dispute alters the terms of the
10 ICA, the agreement can be amended, whether or not there was a change in law.
11 ICAs may also be amended to take advantage of new products or to implement
12 negotiated rates. It may often be more productive to focus on resolving a narrow
13 dispute, rather than attempting to eliminate and replace an entire ICA.

14

15 **IV. UNE PROVISIONING AND MARKETING PRACTICES DOCKET**

16 **Q. WILL THE MINNESOTA COMMISSION DECISION IN THE *UNE***
17 ***PROVISIONING AND MARKETING PRACTICES DOCKET* APPLY TO**
18 **STATES OTHER THAN MINNESOTA?**

19 A. No. Ms. Stewart states that “Mr. Denney implies that proposed conditions 25, 26
20 and 27 are necessary to insure that the CLEC desired outcomes of the disputed
21 issues in the Minnesota Commission Docket No. P-421/CI-09-1066 extend to the

1 Century Link pre-merger entities.”⁶² My testimony states the exact opposite.
2 While noting that the issues raised in the UNE Provisioning and Marketing
3 Practices Docket are not unique to Minnesota, I acknowledge that Qwest is
4 unlikely to implement the results from that case across its region.⁶³ My direct
5 testimony discusses the importance of conditions requiring compliance to the law
6 before the merger is approved.⁶⁴ This is discussed in more detail in the direct and
7 rebuttal testimony of Mr. Gates.⁶⁵

8

9 **V. CONCLUSION**

10 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

11 **A. Yes.**

⁶² Stewart Rebuttal, p. 25, lines 1-5.

⁶³ Denney Direct, pp. 31-32. Note these are the same pages cited by Ms. Stewart.

⁶⁴ Denney Direct, pp. 25-32.

⁶⁵ Gates Direct, pp. 153-194, and Gates Surrebuttal section IV.E.4, IV.E.6 and IV.E.8.