FILED WITH
Executive Secretary
October 01, 2010
IOWA UTILITIES BOARD

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: QWEST COMMUNICATIONS INT'L, INC. AND CENTURYTEL, INC.	DOCKET NO. SPU-2010-0006 **PAETEC'S MOTION TO ENFORCE SETTLEMENT** ***(Expedited Relief Requested)***

On Monday, September 27, 2010, certain Intervenors, including McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services, Inc. ("PAETEC") filed a Joint Motion to Approve Settlement with Applicants. The Motion included all of the terms of a settlement that was reached on September 26, after contentious negotiations that included numerous incremental changes in position by both sides. Among the most important, and contentious, provisions are set forth in Paragraph 1:

> This Settlement Agreement has been prepared and executed for the purpose of resolving issues between Applicants and the CLEC Intervenors in this docket. **The parties agree that the schedule, the governing law, and the market conditions in Iowa are unique. The agreement is applicable in this docket only,** except to the extent necessary to implement the agreement in relevant future proceedings in accordance with its terms. The Parties agree that with this Settlement Agreement and the provisions agreed to by the Parties for Iowa summarized below, the proposed merger between Qwest and CenturyLink is consistent with and not contrary to the public interest within the meaning of Iowa Code § 476.77. **At the same time, however, the Parties recognize and agree that this settlement resolves only the Iowa proceedings, and the Parties** to this agreement are not restrained from presenting any position, view or agreement in any other jurisdiction reviewing the merger transaction and **further agree that they shall not use this agreement in any other proceeding as evidence of any other Party's position in that proceeding**.

(Emphasis added.) Unfortunately, the ink was barely dry on the settlement before CenturyLink and Qwest violated both the letter and the spirit of Paragraph 1.

The day after the settlement was filed, on September 28, 2010, CenturyLink and Qwest had an *ex parte* meeting with FCC staff. The required disclosure letter, filed with the FCC on September 29, 2010[1], described Applicants' presentation as follows:

> CenturyLink and Qwest noted at the outset that they recently entered into a comprehensive settlement agreement in Iowa with all of the wholesale intervenors in that state . . . The Iowa settlement resolved all of the CLEC intervenors' concerns regarding the combined companies' Operations Support Systems (OSS), change management systems (CMP), interconnection agreements (ICAs) and performance metrics. . . . The Iowa settlement thus addresses and resolves the same major categories of concerns as raised by the CLECs in their recent [FCC] *ex parte* filings.

As the Board is aware from the pre-filed testimony, the settlement certainly terms do <u>not</u> "resolve all of the CLEC intervenors' concerns." The CLECs, most of which operate in both CenturyLink and Qwest territories and have ample basis for comparison, raised consistent, legitimate, and specific concerns about the prospect of CenturyLink making detrimental changes to Qwest's wholesale practices in Iowa. Settlement by its nature, however, involves compromise by all parties. It defies both the nature of settlements and any reasonably honest discussion of this particular settlement to suggest to a regulator that compromise terms "resolved all concerns."

While such a misleading statement clearly violates the intent of Paragraph 1 of the Iowa settlement, the Applicants went on to violate the letter of the Iowa settlement. By suggesting that the Iowa settlement "resolves" the concerns that CLECs have raised before the FCC, to the extent that Iowa settling CLECs have filed comments and/or *ex parte*'s with the FCC, Applicants make the Iowa settlement "evidence of any other Party's position" in the FCC proceeding. Both of these statements – and most of the Applicants' *ex parte* – betrays the Applicants' concurrence

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[1] *See* **Attachment A**.

that *"[t]he parties agree that the schedule, the governing law, and the market conditions in Iowa are unique. The agreement is applicable in this docket only. . ."* [2]

"Settlement agreements are essentially contracts, and general principles of contract law apply to their creation and interpretation." *Sierra Club v. Wayne Weber LLC*, 689 N.W.2d 696, 702 (Iowa 2004)(citations omitted). The intent of the parties controls the interpretation issues. *Magina v. Bartlett*, 582 N.W.2d 159, 163 (Iowa 1998). In order to be bound, the contracting parties must manifest their mutual assent to the terms sought to be enforced. *Sierra Club*, 689 N.W.2d at 702 (*citing Kristerin Dev. Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986)).

The plain language of the settlement manifests a mutual intent to limit the impact of the settlement to Iowa, and an acknowledgement that unique factors made the terms applicable solely in Iowa. That was a material term for PAETEC, and the value of the settlement is substantially diminished if that term is not honored. As the Board is aware, imposition by the Board of mandatory conditions upon approval of reorganizations has not been common.[3] Moreover, the short statutory time-frame made protracted discovery fights in Iowa impractical; as a result, no Iowa CLEC obtained the materials the Applicants deemed "Highly Confidential." Given that the Board has historically approved transactions without imposing conditions, PAETEC (and presumably other settling parties) was willing to make certain compromises in

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[2] CenturyLink and Qwest did not provide a copy of the Iowa settlement in their *ex parte* presentation. Had they done do so, it might have prompted the FCC Staff to question the representation given the language in the settlement agreement. From the disclosure letter, however, it appears that the settlement was described in person, and only provided the next day with the letter.

[3] Although PAETEC strongly asserts that there is nothing on the face of Iowa Code § 476.77 that would preclude the Board from attaching conditions. Indeed, the better argument is that such conditions are within the Board's authority. First, the broad authority granted by Iowa Code § 476.2 suggests that unless the Board is expressly denied a power normally associated with a function, it should be presumed to have the authority. Placing conditions on mergers is not expressly precluded, and it is a function exercised by many other state PUCs and the FCC. Second, § 476.77 itself requires the Board to consider a diverse list of several factors (since added to by the passage of § 476.95). It makes no sense for the legislature to tell the Board to consider a granular list of issues but provide no tool to the Board to addres such issues individually without denying the application in its entirety – to prescribe a review best done with a scalpel that can address specific infirmities in the application but to provide the Board with authority only to approve or deny. The statute should not be read to reach an absurd result; the Board would appear to have authority to impose conditions on its reorganization decisions.

Iowa to ensure some marginal protection for its Iowa operations and customers rather than taking a risk of obtaining no protections at all against degradation of OSS, for example. The calculus in entering into the Iowa settlement also factored into it the expectation (as reflected in the settlement agreement itself) that PAETEC would be able to continue its advocacy for more meaningful pro-competitive commitments or conditions in other jurisdictions. Thus, compromises made in Iowa are not necessarily compromises that would be made in a jurisdiction with adequate time for extensive discovery and a history of attaching meaningful conditions.[4] Limiting the impact the decision to settle in Iowa would have on other jurisdictions was a concern repeatedly expressed to the Applicants, who knew that it was a material term of the settlement – and who ultimately acknowledged that concern when they agreed to include language addressing that concern in Paragraph 1.

The Board should find it extremely troubling that the Applicants would so swiftly go back on their word. They may, in response, come in with fine parsing and argue technicalities that give no respect to the intent of Paragraph 1 – but such a practice should give the Board little comfort as to how the Merged Entity will view its commitments to Iowa, to its Iowa competitors, and to customers. There is cause to be concerned how faithfully Applicants will abide by the other terms of the Agreement they have made going forward as well.

The Applicants freely entered an agreement that restricted their ability to use that agreement as a sword in other jurisdictions. The Board should enforce that commitment just as it would the substantive provisions regarding OSS or CMP. Accordingly, the Board should:

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[4] A more accurate interpretation than what Applicants gave the FCC is that if CenturyLink and Qwest would give 24-36 month extensions on various issues in Iowa, that should be considered a floor – they should give much more in states with long processes and a history of conditions, or where staff or consumer counsel have weighed in against the merger.

(1) Enter an order immediately requiring Applicants to abide by a fair reading of Paragraph 1 and prohibiting them from misrepresenting or misusing the Iowa settlement in any other jurisdiction. **Time is of the essence because Applicants are likely engaging in the same violation (or about to) in many jurisdictions**,[5] and the damage to PAETEC from the misrepresentations is significant.

(2) Further, the Board should ensure that the order has teeth by reminding Applicants that its present consideration of whether to approve the merger is conditioned on the existence of the settlement commitments – but if the Joint Applicants continue to breach the settlement, or the Board chooses not to approve of the settlement, that is a material change and the Board can require Applicants to resubmit a new application, start the timeline over, and give intervenors a new opportunity to make their case in full.

(3) The Board should require Applicants to make a curative filing at the FCC that requires them to withdraw everything on pages 1-2 of their *ex parte* after the first paragraph, stating to the FCC that they were doing so because the Board had ordered them to do so in compliance with the Iowa settlement agreement submitted to the Board.

[5] PAETEC has been advised that the Iowa settlement may have been referenced in testimony filed by the Joint Applicants in other states, but has not had a chance to independently confirm whether that reference also misrepresents the Iowa settlement.

Respectfully submitted this 1st day of October, 2010.

/s/ Bret A. Dublinske
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ATTORNEYS FOR PAETEC

PROOF OF SERVICE

The undersigned certifies that on October 1, 2010, the above and foregoing instrument was electronically filed with the Iowa Utilities Board using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Angela L. Walker-Springer

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September 29, 2010

EX PARTE VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a/ CenturyLink for Consent to Transfer of Control*, WC Docket No. 10-110

Dear Ms. Dortch:

This is to inform you that on September 28, 2010, CenturyLink, Inc. ("CenturyLink") and Qwest Communications International Inc. ("Qwest") along with their outside counsel met with Commission staff regarding the above-captioned proceeding. Bill Cheek, Maxine Moreau, and David Bartlett attended on behalf of CenturyLink. Karen Brinkmann and Alexander Maltas of Latham & Watkins attended as counsel to CenturyLink. Melissa Newman attended on behalf of Qwest. Jon Nuechterlein of WilmerHale attended as counsel to Qwest. Nick Alexander, Carol Simpson, and Don Stockdale attended the meeting on behalf of the Commission.

CenturyLink and Qwest noted at the outset that they recently entered into a comprehensive settlement agreement in Iowa with all of the wholesale intervenors in that state. A copy of the Iowa settlement is attached to this letter. The Iowa settlement resolved all of the CLEC intervenors' concerns regarding the combined company's Operations Support Systems (OSS), Change Management Process (CMP), interconnection agreements (ICAs), and performance metrics. As a result, the CLEC intervenors support approval of the CenturyLink-Qwest merger by the Iowa Utilities Board.

CenturyLink explained that the types of issues raised in the recent CLEC *ex partes* in this docket, including the purported concerns cited in an *ex parte* filing of September 24, 2010, were negotiated and resolved among the parties in the Iowa proceeding, as embodied in the companies' voluntary commitments in the recent Iowa settlement. The CLEC *ex partes* focus on the merging parties' respective OSS and express uncertainty about the availability of those systems after closing. The terms contained in the Iowa settlement can serve as a model for satisfying those concerns. Specifically:

- The CLECs raise concerns about the possibility of changes to OSS in Qwest areas, and specifically questioned the "continued viability of Qwest's wholesale

OSS" following the merger.[1] In the Iowa settlement, the parties agreed not to discontinue Qwest's OSS for a minimum of 24 months after closing, to utilize the CMP if the Qwest OSS is changed, and to give at least 6 months' notice if the Qwest OSS is retired, thereby resolving the concerns of the CLECs in Iowa.

- The CLECs raise concerns about possible changes to the CMP in Qwest service areas.[2] In the Iowa settlement, the parties committed to keeping Qwest's CMP in place for at least 36 months post closing.
- The CLECs fear discontinuance of Qwest ICAs, and specifically allege (citing no facts whatsoever) that "CenturyLink appears to want to discontinue Qwest ICAs wherever possible."[3] Nothing of the kind has been suggested by CenturyLink. In fact, the Iowa settlement provides for a tiered extension of all Qwest ICAs for up to 36 months, depending on how long the existing agreement has been in place or expired, and depending upon whether TRRO-compliant terms are contained in the ICAs.
- The CLECs raise concerns about CenturyLink continuing Qwest's performance metrics.[4] The Iowa settlement extends the Qwest Performance Assurance Plan for at least 36 months after closing.

The Iowa settlement thus addresses and resolves the same major categories of concerns as raised by the CLECs in their recent *ex parte* filings. CenturyLink and Qwest are committed to working with their wholesale customers, and through the Iowa settlement, they have demonstrated their willingness to engage in good faith negotiation and to provide reasonable assurances to their wholesale customers. CenturyLink and Qwest are confident that they can reach amicable resolution with any CLECs who are similarly interested in negotiation, as opposed to simply seeking to hold up the transaction. CenturyLink noted to the Commission staff that it has made several attempts to set up meetings with Integra, and that Integra has postponed meeting with CenturyLink for several weeks, even while it has filed multiple *ex partes* with this Commission. CenturyLink remains open and willing to sit down with Integra and other CLECs if they are prepared to engage in a meaningful discussion of these matters and resolve them to the benefit of consumers.[5]

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1 *See* CBeyond, Integra Telecom, Socket Telecom and tw telecom Presentation, at 1, attached to September 24, 2010 *ex parte*.

2 *Id.* at 2.

3 *Id.* at 3-4.

4 *Id.* at 5.

5 CenturyLink and Qwest do acknowledge one inadvertent error in their Reply Comments. The statement that tw telecom lacked an EASE account is incorrect; the Reply Comments should have referred to Time Warner Cable rather than tw telecom.

CenturyLink next discussed its integration activities, both in its ongoing integration of Embarq and in its planned integration of Qwest. CenturyLink explained that it has devoted extensive resources to the integration of Embarq, which is progressing on or ahead of schedule. CenturyLink noted that it intends to take the appropriate amount of time to ensure proper completion of the Embarq integration, and thus has no intention of needlessly hastening its integration of Qwest.

CenturyLink also explained that it has both unmatched experience and adequate resources to integrate Qwest's operations after closing. CenturyLink stated that it had recently announced a number of significant personnel decisions for the combined company, including the naming of Qwest's current Vice President of Customer Service Operations as post-merger CenturyLink's Vice President-Wholesale Operations, and the naming of Qwest's current Vice President of Product Management as post-merger CenturyLink's Vice President-Product and Marketing. These personnel decisions ensure that key Qwest executives will remain with the combined company in charge of wholesale operations and product. The applicants are continuing to work through their normal integration planning process to complete the teams who will ensure continuity of services for wholesale as well as retail customers.

Please contact me if you have any questions.

Sincerely,

/s/

Karen Brinkmann
Alexander Maltas
LATHAM & WATKINS LLP

Counsel for CenturyLink, Inc.

cc: Nick Alexander
Carol Simpson
Don Stockdale