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 REPLY IN SUPPORT OF ITS MOTION TO ENFORCE SETTLEMENT**

When numerous CLECs intervened in this matter and raised concerns about how they would be treated by a larger, combined ILEC in Iowa, the Applicants' rebuttal testimony claimed the concerns were "nothing more than unfounded speculation." See Miller Rebuttal at 3. Applicants seemed shocked that PAETEC and other CLECs did not simply trust the Applicants. That the Applicants now engage in bait-and-switch negotiations, semantic games, and the search for loopholes to evade their Agreement shows why the "trust gap" exists – and validates PAETEC's concerns that the Applicants will continue to look for loopholes rather than complying in good faith with their wholesale commitments going forward.

Qwest and CenturyLink argue at footnote 3 of their responsive brief that "[i]n exchange for agreeing to merger conditions. . . Applicants insisted on public disclosure of the terms of the settlement and the ability to advocate for those terms in other jurisdictions. . ." This distortion of the negotiations requires correction. Because the Iowa process was less robust than that in states without a short statutory deadline, PAETEC was willing to settle this case -- but only if there were assurances that it would not prejudice PAETEC's position in other jurisdictions. The CLECs felt so strongly about this potential problem that they initially proposed that the settlement be entirely confidential. Applicants opposed such confidentiality ***not*** because they

forthrightly said they wanted to use the settlement elsewhere, but rather they argued that there were outstanding discovery requests in other proceedings, and requests from commissions, that could not be complied with if the Iowa settlement were confidential. Further, Qwest noted, it had run afoul of commissions in the past by not disclosing settlements. It was for this seemingly reasonable purpose – to permit responses to lawful discovery and comply with filing requirements – that the CLECs relented on confidentiality. But in doing so, the CLECs required two protections: (1) the agreement had to be "self-limiting," that is, on its face it had to acknowledge that Iowa was a unique circumstance; and (2) the terms had to preclude use of the settlement to prejudice the position of any settling CLEC in any other jurisdiction.

Not only was it PAETEC's understanding that this was the basis for the deal ultimately made, the Applicants continued to reassure the CLECs. Applicants stated in negotiations that they, too, had a reason to want limits on use of the Iowa agreement, because they did not intend to offer the extension of terms to CMRS providers outside of Iowa. Based on this assurance that the Applicants also didn't want the Iowa Settlement voluntarily paraded all over, the CLECs felt the terms were acceptable.

It was never the stated intent or understanding of ***any*** party that Qwest and CenturyLink were free to, or even wanted to, do what they promptly did: tell every decision maker they could find about the Iowa settlement, and represent that it resolved all CLEC concerns. But as deceiving as this bait-and-switch was, the Applicants didn't just violate the intent of the Agreement – they violated the terms of the Agreement.

As predicted in the Motion to Enforce, Applicants finely parse the language of Paragraph 1 and compare it to their FCC *ex parte* filing in an effort to show compliance. First, it should be obvious that no settlement negotiation can ever predict every possible thing a party may do or try

to do in the future. There is no magic language PAETEC could have used to capture the intent of Paragraph 1 that could express with precision every word the Applicants could or could not use. At some point, any such provision will reach a point at which the Applicants have a simple choice: honor the known intent of the language in good faith and with the fair dealing required in any contract, or twist it to find a technicality. That Applicants chose the latter and continue to defend their subsequent action as being consistent with the agreement speaks volumes. But what is even more astounding is that they went so far as to clearly violate the express contractual terms.

In paragraph 4 of their responsive brief, Applicants have four bullet points to try and put the best spin on their actions. But they cannot avoid their own fourth bullet point. As even the Applicants admit, the Agreement provides that the Iowa settlement cannot be used in any other proceeding to tie a CLEC to the Iowa position in the non-Iowa proceeding. Applicants admit that they argued "the Iowa settlement thus ***addresses and resolves*** some major categories of ***concerns as raised by the CLECs*** in their recent *ex parte* filings with the FCC." That is, the Applicants argued that the Iowa settlement resolves the CLECs concerns at the FCC – something the CLECs not only never agreed to, but rather PAETEC made it known to Applicants that this was a deal breaker and insisted on language expressly forbidding the Applicants from making such representations. The Applicants voluntarily agreed to the language in Paragraph 1 that the Iowa situation was "unique" due to the law, the schedule and the market, and was therefore not applicable elsewhere. The parties discussed in negotiations that fact that Applicants could represent that an agreement was reached in Iowa, that it was reasonable ***for Iowa***, and Applicants could suggest it would be reasonable in another jurisdiction. The two limits ***repeatedly*** discussed were that the reasonableness had to be expressly in the context of Iowa, and that it could not be

used to characterize the CLECs' position elsewhere. Applicants' *ex parte* does both. On a call regarding this issue after PAETEC's motion was filed, counsel for CenturyLink asked where counsel for PAETEC believed the "line" was. PAETEC's response, which it believes summarizes this issue well, is that while it is impossible to say exactly where the line is without knowing what Applicants want to say, the easiest clear rule given the context and language of the Agreement is "don't mention the CLECs." That is how the Board should interpret – and enforce – Paragraph 1.

Finally, the Board should note two other problems with Applicants' arguments that are concerning. First, Applicants argue at page 1 of their responsive brief that they accurately presented the settlement because they provided the FCC with the entire Agreement. They do not deny, however, that they held their *ex parte* presentation first, and only provided the full agreement the next day, which leaves ample room for mischief and mischaracterization during the meeting itself when the FCC staff would not have known of the limiting language in the agreement, and defeats the known purpose of putting the "disclaiming" language in Paragraph 1. Second, no matter how narrowly Applicants' technical arguments look at each "tree" in Paragraph 1, the Board should nonetheless be concerned about the "forest": the bigger-picture issue is that Applicants characterization of the Iowa settlement in other jurisdictions is ***inherently*** misleading to decisionmakers because Applicants characterize it as "fully resolving" the CLEC concerns. That is simply contrary to the reality of settlements. Settlement is a bargained for exchange in which each side moves from its litigating position, taking into account risks, costs, resources and many other factors. It is a "good enough under the circumstances" compromise that may resolve all *claims*, but in no way resolves all *concerns*. For Applicants to be less than forthright with commissions should be troubling for this Board, and should leave the Board wary

of how forthrightly the Merged Entity will deal with Iowa customers, competitors, and policymakers.

The Applicants misled PAETEC as to its intent in needing to remove the confidentiality language in Paragraph 1. Nonetheless, PAETEC insisted on certain protections in the remainder of the paragraph which – fully knowing the CLECs' concerns -- Applicants voluntarily accepted. Within 24-hours of the settlement, Applicants violated not only the spirit, but the actual terms of the Agreement. Applicants mischaracterized the meaning of the settlement, and used it to directly represent a resolution of CLEC concerns in other jurisdictions – despite the tying of the CLECs to the settlement positions being clearly prohibited. PAETEC (and presumably other CLECs) settled the Iowa case for very specific reasons that are not present in other states. The ability to keep the settlement from damaging PAETEC's position elsewhere was a fundamental part of the calculation of the trade-offs involved in the settlement. Applicants' failure to act with good faith and fair dealing has fundamentally reduced the bargained-for value to PAETEC. For the process and the settlement to have any meaning, the Board must enforce Paragraph 1 and quickly provide curative relief, before the breach is impossible to cure and Applicants are rewarded for their violations.

Respectfully submitted this 6th day of October, 2010.

/s/ Bret A. Dublinske

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ATTORNEYS FOR PAETEC

PROOF OF SERVICE

The undersigned certifies that on October 6, 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