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

SUPPLEMENTAL RESPONSE TESTIMONY

OF

JERRY FENN

QWEST COMMUNICATIONS INTERNATIONAL, INC.

November 2, 2010

PUBLIC VERSION

I. BACKGROUND

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND POSITION WITH QWEST CORPORATION.

A. My name is Jerry Fenn, and I am Utah State President for Qwest. My business address is 250 E. 200 S., Suite 1614, Salt Lake City, Utah 84111-2003.

Q. DID YOU PREVIOUSLY FILE DIRECT AND REBUTTAL TESTIMONY IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE FOR YOUR SUPPLEMENTAL RESPONSE TESTIMONY?

A. The purpose of my supplemental response testimony is to provide support for the settlement ("DPU Settlement") between the Joint Applicants and the Utah Division of Public Utilities ("DPU"). Additionally, I respond to the October 28, 2010 supplemental testimony of Timothy J. Gates by addressing the alleged issues and concerns that he raises. Specifically, I respond to his alleged concerns about the settlement process, the Joint Applicants' broadband investment commitment in the DPU Settlement and the agreed-upon provision regarding the "Tier 2" payments in the Qwest Utah Performance Assurance Plan ("UPAP"). My testimony demonstrates that despite the Joint CLECs' opposition to the DPU settlement, the settlement provides reasonable commitments that are sufficient for the Commission to find that the merger transaction between the CenturyLink and Qwest parent companies ("the Transaction") is in the public interest and

thus that the Commission should approve it without any of the Joint CLECs' proposed conditions. Finally, I discuss Mr. Gates' arguments regarding certain documents known as the Hart-Scott-Rodino ("HSR") documents that the Joint Applicants produced to the CLECs in discovery, and how Mr. Gates completely takes these documents out of context in his attempts to bolster his advocacy.

Q. ARE OTHER WITNESSES OFFERING SUPPLEMENTAL RESPONSE TESTIMONY IN THIS PROCEEDING ON BEHALF OF THE JOINT APPLICANTS?

A. Yes. Two other witnesses present supplemental response testimony on behalf of the Joint Applicants. For CenturyLink, Michael Hunsucker addresses the wholesale commitments that the Joint Applicants have agreed to in the DPU settlement, as well as certain of Mr. Gates' arguments relating to the HSR documents. Further, Michael Williams of Qwest addresses the UPAP and "additional" PAP."

II. SUPPORT OF THE DPU SETTLEMENT AGREEMENT

Q. PLEASE SUMMARIZE THE JOINT APPLICANTS' SUPPORT FOR THE DPU SETTLEMENT.

A. The Joint Applicants entered into arms-length negotiations with the DPU after the DPU's witness, Casey Coleman, had filed his rebuttal testimony, and after the Joint Applicants had reached settlement in Minnesota with the Minnesota Department of Commerce ("DOC").

We reached out to Mr. Coleman and others at the DPU in early October 2010 shortly after Mr. Coleman's rebuttal testimony stated that the DPU believed that a previous Joint Applicants' settlement with various CLECs in Iowa appeared to achieve the contemplated requirements that the DPU was advocating. Given my previous experience with the DPU, I believed that the DPU would be reasonable and would negotiate in good faith, and that if we could sit down to negotiate, and if both sides were willing to be reasonable and were willing to compromise somewhat, it was very possible that we could reach a settlement.

Accordingly, I personally met with Mr. Coleman, Mr. Clair Oman, Mr. Bill Duncan, Mr. Phil Powlick and DPU attorney Patricia Schmid on several occasions on October 11 and October 12, 2010, along with others from Qwest and CenturyLink. These discussions were fruitful, and eventually, by October 14, 2010, the parties agreed to a settlement, which included numerous retail commitments by the merged company, as well as the significant wholesale commitments that the Joint Applicants had agreed to with the Minnesota DOC in that state.

Thereafter, on October 14, 2010, the same day that the settlement with the DPU was finalized, the Joint Applicants filed the DPU Settlement with the Commission so that all parties in the proceeding received notification of the settlement well in advance of the scheduled October 26-27, 2010 hearings. The Joint Applicants urge the Commission to approve the DPU Settlement as in the public interest and because it adequately addresses the most important concerns that the DPU had raised in Mr. Coleman's rebuttal testimony, and represents a fair and reasonable settlement that balances the Joint

Applicants' interests with the interests of its customers, including its wholesale customers, in Utah.

Q. SHOULD THE COMMISSION APROVE THE DPU SETTLEMENT WITHOUT CHANGES AND ADDITIONAL CONDITIONS?

A. Yes. The Commission should approve the DPU Settlement without changes and additional conditions. Additionally, the Commission should approve the settlements with the Utah Office of Consumer Services ("OCS"), the United States Department of Defense ("DOD"), and the Salt Lake Community Action Program ("SLCAP") without changes or additional conditions. These settlements confirm that the Commission should find that the Transaction is in the public interest, and thus that the Commission should approve the merger without any of the Joint CLECs' proposed conditions.

Q. PLEASE SUMMARIZE THE DPU SETTLEMENT, AND IDENTIFY WHICH QWEST OR CENTURYLINK WITNESSES WILL ADDRESS QUESTIONS CONCERNING EACH PORTION OF THE SETTLEMENT.

A. The DPU Settlement contains conditions in five general areas, including the following:

A. Broadband Commitment: The Joint Applicants commit to invest at least $25 million in broadband infrastructure over five years to benefit retail customers, with 15% of the investment to be made in unserved or underserved areas. (I will address any questions concerning this condition.)

B. Wholesale Commitments: The Joint Applicants agree to numerous significant wholesale commitments, including regarding Operational Support Systems ("OSS"), interconnection agreement extensions and negotiations, protections against any new rates or tariff changes, the Utah Performance Assurance Plan ("UPAP"), the Change Management Process ("CMP"), certain FCC obligations, and keeping Qwest's status as a Bell Operating Company ("BOC"). (Michael Hunsucker will address questions regarding the wholesale commitments, with the exception of the UPAP, which Michael Williams of Qwest will discuss.)

C. Service Quality Commitment: The combined company commits that it will not seek a waiver from the Commission's service quality rule, R746-340, sections 8 and 9, for at least two years following the close of the merger. (Michael Williams will address any questions concerning this condition.)

D. Reporting Commitment: The combined company commits to certain broadband investment reporting requirements, to be in effect for two years from the close of the merger. (Michael Williams will address any questions concerning this condition.)

E. Compliance Commitment: The combined company commits to continue to comply with all applicable federal and Utah laws and regulations. (Questions can be directed to all Qwest and CenturyLink witnesses.)

III. RESPONSE TO MR. GATES' TESTIMONY ABOUT THE SETTLEMENT

Q. IN HIS SUPPLEMENTAL TESTIMONY, MR. GATES STATED THAT THE DPU SETTLEMENT "CERTAINLY DOES NOT MAINTAIN THE STATUS QUO."[1] PLEASE RESPOND.

A. The Joint CLECs continue a theme that their proposed conditions merely maintain the "*status quo*" while the settlement with the DPU does not. However, their view of maintaining the "*status quo*" would have the effect of shackling the combined company with many new and additional regulatory requirements and obligations, such as the "additional" Performance Assurance Plan (or "APAP"). The Joint CLECs fail to mention that today, the "*status quo*" means that Qwest has flexibility to do many things that Joint Applicants could not be able to do under the Joint CLECs' conditions. For example, the *status quo* today means that Qwest has flexibility to pursue elimination or significant changes to the UPAP in Docket No. 09-049-60. Further, the *status quo* also means that Qwest has the flexibility to make changes to its OSS consistent with the CMP without the various conditions that the Joint CLECs seek to impose through this merger proceeding.

[1] Supplemental Testimony of Timothy J. Gates ("Gates Supplemental"), page 2, line 16.

The CLECs also conveniently fail to mention the competitive nature of the market today, and that other larger competitors, such as Comcast, have no regulatory obligations to provide wholesale services to their competitors.

Q. IN HIS SUPPLEMENTAL TESTIMONY, MR. GATES STATES THAT "THE JOINT CLECs WERE NOT NOTIFIED THAT NEGOTIATIONS WERE BEING CONDUCTED, AND NO CLECs WERE CONSULTED BY THE DIVISION IN THE COURSE OF THE NEGOTIATIONS."[2] SHOULD THE COMMISSION BE CONCERNED ABOUT THE PROCESS THAT THE JOINT APPLICANTS AND DPU FOLLOWED TO REACH A SETTLEMENT?

A. No. First, nothing in the settlement process between the Joint Applicants and the DPU was inconsistent with Commission's rule.[3] The following is my response related to specific provisions contained in the PSC rule:

1. Like the pertinent statute,[4] the Commission rules allow for settlements to be presented to the Commission. The rule, however, does not require that settlement be reached with all parties in a proceeding for the Commission to consider and approve a settlement.
2. R746-100-10.E.5 provides that "[t]he Commission may require the parties offering the settlement to show that each party has been notified of, and allowed to participate in, settlement negotiations." This language is permissive only. The rule does not prevent any party in a settlement from negotiating with a subset of all parties in a proceeding or to require notification to other parties not involved in

[2] Gates Supplemental, page 4, lines 14 and 15.

[3] Utah Public Service Commission Rule R746-100-10.E.5 provides as follows:

Settlements:

a. Cases may be resolved by a settlement of the parties if approved by the Commission. Issues so resolved are not binding precedent in future cases involving similar issues.

b. Before accepting an offer of settlement, the Commission may require the parties offering the settlement to show that each party has been notified of, and allowed to participate in, settlement negotiations. Parties not adhering to settlement agreements shall be entitled to oppose the agreements in a manner directed by the Commission.

[4] See e.g., Utah Code Ann., § 54-7-1(3); see also Utah Code Ann., § 54-4a.-1 (settlements by the DPU).

the settlement discussions before a settlement is reached. The Joint Applicants notified the Joint CLECs of the DPU Settlement when they filed the settlement with the Commission on October 14, 2010.

3. Since the Joint CLECs are "[p]arties not adhering to the settlement agreements," they have been given the opportunity "to oppose the agreement in a manner directed by the Commission." That is precisely what they have done in their October 28, 2010 supplemental testimony.

4. The record of the cross examination of Integra witness Douglas Denney on Wednesday, October 27th, clearly demonstrates that there have been many settlement discussions and conferences that have taken place with the Joint CLECs in other jurisdictions and on a national and regional basis. Nothing in the Commission rules requires that settlement discussions take place in Utah, or that the settlement discussions be Utah-specific. The Joint CLECs have had full knowledge of the numerous settlement discussions and conferences that have already taken place regarding the same issues they have raised in this proceeding. The Commission should not be persuaded by the Joint CLECs' opposition to the DPU Settlement. The DPU Settlement has not precluded the Joint CLECs from engaging in their own settlement discussions with the Joint Applicants, and indeed, there have been many such discussions to date.

5. During the June 9, 2010 technical/scheduling conference in this proceeding, no party requested that settlement conferences be included in the formal process for Utah. The Commission rule also does not require that formal settlement conferences be included in a proceeding. Not including formally-scheduled settlement conferences does not exclude any party from entering in settlement discussions with other parties in a proceeding.

6. In my experience with this Commission, it is clear that settlement of issues has always been encouraged. Frankly, based on the fruitless settlement discussions with the Joint CLECs occurring elsewhere, I am of the opinion that it would have been highly unlikely to have reached settlement with the Joint CLECs just in Utah and that had they been participants in the settlement discussions, the likely outcome would have been no settlement whatsoever.

Q. IN HIS TESTIMONY, MR. GATES RAISES CONCERNS ABOUT THE TIMING OF THE DPU SETTLEMENT.[5] SHOULD THIS BE A CONCERN TO THE COMMISSION?

A. No. The Commission rule does not preclude parties from reaching settlements at any time during the proceeding. The Joint CLECs raise a red herring argument by suggesting

[5] Gates Supplemental, starting on page 4, line 16.

that there is a problem with the timing of the settlement. They apparently claim that the DPU somehow should have waited until it had reviewed the Joint CLECs' surrebuttal testimony, or waited to hear what witnesses had to say at the hearing.[6] This is incorrect; the parties are permitted to resolve open issues and the DPU certainly had available to it the CLECs' positions and proposed conditions.

Q. IN HIS TESTIMONY, MR. GATES ATTEMPTS TO COMPARE WHAT HE ALLEGES HAPPENED IN THE SETTLEMENT IN MINNESOTA[7] WITH WHAT HE BELIEVES MAY HAVE HAPPENED HERE IN UTAH. PLEASE RESPOND.

A. The Commission should disregard all of Mr. Gates' supplemental testimony regarding what he alleges happened in Minnesota in the settlement between the Joint Applicants and the DOC in that state.[8] There is no legitimate reason that the Joint Applicants should be required to respond to or have to litigate in Utah his various allegations involving Minnesota because it is not relevant to Utah. Mr. Gates is simply wrong about what he believes may have happened in Utah. Rather, it appears that all Mr. Gates does is rely on his supplemental testimony in Minnesota, involving actual witnesses, events and testimony in Minnesota, for this proceeding, even though the procedural background and the pertinent facts and witnesses are different than those here in Utah. The Commission should completely disregard all of this testimony.

[6] Gates Supplemental, starting on page 4, line 16.

[7] Gates Supplemental Testimony, starting on page 6.

[8] See, for example, all of Mr. Gates' supplemental testimony references to what the DOC, or its witness, Ms. Wells, testified to in the hearing in Minnesota (at pages 5-12, 17-18, 24-25, 30, 34-35, 44-45, 48, 50, 54-55, 57-57-60, 73-74, 86-87 (including citing a Minnesota DOC settlement provision), 95-96 and 98). It appears that Mr. Gates simply copied and pasted his testimony in Minnesota for this proceeding, without regard to the different, and inapplicable, procedural posture here in Utah, including completely different witnesses and negotiation histories. I do not believe that what the Minnesota DOC witness may have testified to in the Minnesota proceeding has any bearing on the settlement issues here in Utah.

In his supplemental testimony, Mr. Gates engages in a misplaced effort to create an inference of inappropriate actions by the Joint Applicants and/or the DPU. However, Mr. Gates conveniently ignores the positions that Mr. Coleman advocated in his September 30, 2010 rebuttal testimony. These statements should have alerted the Joint CLECs that the DPU had significant concerns about the scope and breadth of the CLECs' testimony and their onerous and unnecessary proposed conditions, and further, that it had also reviewed the Iowa Agreement, which the DPU believed "appears to achieve the contemplated requirements advocated by the Division."[9] The DPU arrived at its own independent conclusions regarding the Iowa settlement prior to the commencement of the settlement discussions with the Joint Applicants in Utah.

From the Joint Applicants' perspective, the following statements in Mr. Coleman's rebuttal testimony caused them to believe that fruitful settlement discussions with the DPU could be possible:

- When reviewing the testimony of the other parties in this docket, the Division observes that the Commission must be cautious about going too far in placing conditions upon the combined company that might harm the competitive marketplace.[10]
- If the Commission were to adopt every suggested condition, the public benefits of the merger would be greatly reduced. The merged companies would have greater regulations enforced on them than they are subject to today. This greater regulation could result in a loss of the flexibility that is necessary in a competitive marketplace.[11]
- The Division feels that this agreement (attached to this testimony as Attachment 1) provides a solid foundation that the Commission can work from to begin crafting similar conditions for Utah. One specific area

[9] Rebuttal testimony of Casey Coleman ("Coleman Rebuttal"), page 8, lines 172-173.

[10] Coleman Rebuttal, page 7, lines 152-155.

[11] Coleman Rebuttal, pages 7 and 8, lines 160-164.

where the Iowa Agreement does not have any conditions is in broadband deployment. As stated earlier in the Division's testimony, we feel the Commission should adopt specific broadband measures as well as the other measures, outlined in the Iowa agreement.[12]

Q. IN HIS SUPPLEMENTAL TESTIMONY, MR. GATES STATES THAT "ONE SET OF NEGOTIATIONS FOR ALL PARTIES WOULD HAVE BEEN MORE EFFICIENT FOR ALL."[13] DO YOU AGREE?

A. No, I do not. In Oregon, for example, there have been numerous formal scheduled settlement conferences among all the parties since August, and yet there still has not been any settlement. Additionally, the originally-scheduled hearings in Oregon set for the week of October 18th were delayed as a result of the CLECs' motion to delay the schedule, and the Administrative Law Judge in Oregon based his decision in part to allow time for even more settlement discussions. The situation in Utah, however, is far different from that in Oregon. For example, here, the Joint Applicants have been able to reach settlement with the DPU, OCS, SLCAP and DOD, and URTA has agreed that Mr. Hunsucker's surrebuttal testimony addresses its concerns. Further, 360networks has now withdrawn from the proceeding as well. Thus, the only parties remaining are the Joint CLECs. Further still, the October 26-27 hearings took place as originally scheduled during the technical/scheduling conference back in June. Finally, the recently-scheduled hearing on November 4th only became necessary because of Integra's motion to amend the schedule, initially based only upon the HSR documents issue.[14]

[12] Coleman Rebuttal, page 8, lines 176-182.

[13] Gates Supplemental, page 12, lines 4 and 5.

[14] The additional hearing on November 4th has also given the Joint CLECs an opportunity to have more time to challenge the DPU Settlement.

The Joint CLECs' belief that one set of settlement discussions with all parties in Utah would have been more efficient is belied by the facts, and appears to be more an excuse to have the Commission reject the DPU Settlement and to delay the proceeding with numerous months of settlement conferences, like those that have occurred in Oregon, but without any settlement. Obviously, the fact that the Joint Applicants have reached settlement with other parties in the Utah proceeding does not preclude the Joint CLECs from negotiating their own reasonable settlement. However, in my opinion, if settlement is going to happen with the Joint CLECs it will most likely happen only on a global or regional basis since the principal issues the CLECs raise are company-wide and not specific to Utah. Given the lack of settlements in other states such as Oregon, despite extensive meetings and conferences, it is very doubtful that a settlement in Utah alone could be reached.

Q. IN HIS SUPPLEMENTAL TESTIMONY, MR. GATES OPPOSES THE DPU SETTLEMENT BY CHALLENGING THE BROADBAND COMMITMENT.[15] IS HIS ANALYSIS CORRECT?

A. No. First, Mr. Gates erroneously attempts to show that the level of committed broadband investment in Utah is somehow proportionately lower than a similar commitment in Minnesota. His analysis, however, is fundamentally flawed because in comparing the broadband commitment in Utah to the broadband commitment in Minnesota, he evidently failed to include the number of CenturyLink access lines in both Utah and Minnesota to his analysis. If Mr. Gates had added the mere nine (9) CenturyLink access lines in Utah

[15] Gates Supplemental, starting on page 24.

to the number of Qwest access lines in Utah and compared it to the approximately 143,600 CenturyLink access lines in Minnesota and the number of Qwest access lines in Minnesota to his analysis, he would have seen that the relationship of Utah access lines to Minnesota access lines is slightly less than 50%. That illustrates the $25 million in broadband commitment in Utah is comparable to and in fact slightly more generous than the $50 million broadband commitment in Minnesota and is an appropriate commitment.

Additionally, the Joint Applicants commit to invest "**at least** $25 million in broadband infrastructure." The combined company is obviously going to make investments based upon prudent economic factors, including consideration of the competitive marketplace. In contrast, no other broadband providers, including Comcast or the Joint CLECs, have made any commitment about minimum level of broadband investments in Utah. Moreover, the $25 million commitment in this merger proceeding compares favorably to the commitment in the Qwest/U S WEST merger for Qwest to invest up to $15 million to deploy broadband.

Finally, I fail to understand why the CLECs have any objection to the broadband investment commitment in the DPU Settlement, especially since it does not even address a wholesale issue. It appears that this may be an opposition for the sake of opposition because the CLECs do not have all of their proposed conditions in that settlement or because they do not believe the DPU Settlement goes far enough.

Q. IN COMPARING THE BROADBAND COMMITMENT IN UTAH TO MINNESOTA, THE COMMITMENT IS TO INVEST FIFTEEN (15%) PERCENT IN UTAH FOR UNSERVED OR UNDERSERVED AREAS IN COMPARISON TO

THIRTY THREE PERCENT (33%) IN MINNESOTA. SHOULD THE COMMISSION BE CONCERNED WITH THE LOWER PERCENTAGE COMMITMENT IN UTAH IN COMPARISON TO MINNESOTA?

A. No, definitely not. One of the problems with attempting to compare Minnesota with Utah is that the states are very different. Qwest has had a good track record of investing in broadband services in Utah. I previously stated the following in my rebuttal testimony:

> Further, for more than 12 years, Qwest has been investing in broadband in Utah, and has increased significantly the areas where broadband is now available. Qwest has invested in Utah based on rational economic principles, including an anticipated return on investment. For the most part, any remaining locations in Qwest's service territory without Qwest-provided broadband services are locations where making such deployments may not be economically sound or feasible. Some of the areas that Qwest does not serve, however, may already be served by another broadband provider, such as, for example, Comcast. Forcing the combined company to make uneconomically-sound or less than prudent investments would harm the combined company in the competitive market. If policymakers are concerned about expanding broadband availability to un-served areas, there are other ways to address these issues, such as the federal stimulus program, additional appropriations to the Utah Rural Broadband Service Fund.[16]

Mr. Gates recognizes the competitive nature of the broadband market in Utah based upon the FCC information he cites and which, as he stated, "shows an alternative broadband provider present in 91% of the communities in which Qwest's 53 Utah exchanges reside."[17] Given the competitive nature of the broadband market in Utah, the Commission need not be concerned about the commitment to invest fifteen percent in unserved or underserved areas. The DPU also recognized that prudent investments have the potential to help make further capital expenditures possible when Mr. Coleman stated: "A company like Qwest has to be wise and prudent with their capital

[16] Rebuttal Testimony of Jerry Fenn, starting of page 9.

[17] Gates Supplemental, page 27, lines 18 and 19.

expenditures, ensuring that each dollar used is maximizing the profit potential of the company and providing the funds to make further capital expenditures."[18] Furthermore, broadband coverage in Qwest's footprint in Utah is more extensive than it is in Minnesota. The committed fifteen percent of broadband investment for unserved and underserved areas is reasonable considering the market conditions and current broadband coverage n in Utah.

Q. MR. GATES MAKES OTHER COMMENTS ABOUT THE FIFTEEN PERCENT BROADBAND COMMITMENT FOR UNSERVED AND UNDERSERVED AREAS.[19] DO YOU AGREE WITH HIS COMMENTS?

A. I agree there is a significant level of broadband competition that exists in Utah, but I disagree that a 15% commitment for unserved or underserved area "adds little if any public benefit."[20] This is especially so given that many of these areas are not very economical to deploy broadband, and that the low returns on investment in these areas might mean that the combined company would be unlikely to deploy broadband in those areas absent the commitment. Finally, the minimum $3.75 million that the combined company has agreed to invest in unserved or underserved areas in Utah is $3.75 million more than any commitments that the Joint CLECs, Comcast or Baja Broadband[21] (which he references in his supplemental testimony) have made.

[18] Coleman Rebuttal, page 4, lines 67- 70.

[19] Gates Supplemental, starting on page 27.

[20] Gates Supplemental, page 27, line 27.

[21] Gates Supplemental, page 28, lines 4-6.

Q. ARE THERE ANY OTHER EXAMPLES OF THE JOINT CLECs' ATTACKS OF THE BROADBAND COMMITMENT IN THE DPU SETTLEMENT?

A. Yes. Mr. Gates challenges the provision to "benefit *retail* customers in Utah."[22] Given that Mr. Gates has been involved in the Minnesota proceeding, I assume he is aware of the cross examination of the Department of Commerce witness by the attorney representing Sprint, T-Mobile and CBeyond in Minnesota that caused the Joint Applicants to further clarify that the investment in Minnesota would be for "retail" services. I understand that in Minnesota, CLECs were concerned about any wholesale investment of "fiber to the cell site" being included in the reported investment levels, even though it could be argued that fiber to the cell site enables advancement of wireless-based broadband. Thus, the term "retail" was included in the DPU Settlement in Utah in response to the concerns raised in Minnesota and to clarify the nature of the broadband investment.. Mr. Gates, however, now makes the argument "that the Joint Applicants do not want their wholesale customers to derive any benefit from this commitment."[23] In my opinion, this change in position from the CLEC position in Minnesota is another example of how the CLECs' opposition here is simply an attempt to leverage what they can gain to obtain "benefit" for themselves. I fail to understand how committing to a minimum level of broadband investment is "an apparent attempt by the Joint Applicants to gain a competitive advantage over CLECs in the provisioning of advance services."[24]

[22] Gates Supplemental, starting at page 30.

[23] Gates Supplemental, page 30, lines 18-19.

[24] Gates Supplemental, page 30, lines 20-21.

In short, clarifying that the commitment was to benefit retail consumers was consistent with what happened in Minnesota and was appropriate.

Q. IN HIS SUPPLEMENTAL TESTIMONY, IN REFERENCE TO THE UPAP AND "TIER 2" PAYMENTS, MR. GATES STATES THAT "ANOTHER SIGNIFICANT WAY IN WHICH THE PROPOSED COMMITMENT WOULD WEAKEN THE UPAP IN THAT IT EXPRESSLY ALLOWS QWEST TO SEEK ELIMINATION OF TIER 2 PAYMENTS."[25] PLEASE RESPOND WHY THAT CONDITION WAS INCLUDED IN THE DPU SETTLEMENT.

A. There is really nothing inappropriate, or surprising, about this condition. Anyone who attended the technical conference in Docket No. 09-049-60 in January 2010, which included representatives from XO and Integra, two of the Joint CLECs in this proceeding, would remember the discussion that took place. I recall that the Commissioners expressed concerns during this meeting about the continuation of the Tier 2 payments in the UPAP. The DPU Settlement states that

> [w]ithin three (3) months of the merger close, the Company will file a motion in Docket No. 09-049-60 with the Commission to limit the scope of that proceeding to consider only the elimination of the "Tier 2" payments, along with any other mutually agreed upon changes between the parties in that proceeding. The DPU agrees to support the elimination of the Tier 2 payments.

This provision would allow a motion to be filed to consider elimination of the Tier 2 payments in the UPAP. This provision, however, does not mandate the elimination of the Tier 2 payment, but simply enables the Commission to consider such elimination in light of the concerns expressed during the January 2010 technical conference. The CLECs,

[25] Gates Supplemental, page 74, lines 9 and 10.

including Integra, are not precluded from opposing elimination of the Tier 2 payments in Docket No. 99-049-60. It is my understanding that Integra has stipulated to the elimination of the Tier 2 payments in Idaho.

IV. HART-SCOTT-RODINO DOCUMENTS

Q. MR. FENN, IN BOTH OF MR. GATES' SURREBUTTAL AND SUPPLEMENTAL TESTIMONIES, MR. GATES MAKES NUMEROUS ALLEGATIONS AND ACCUSATIONS BASED ON THE HART-SCOTT-RODINO "("HSR") DOCUMENTS THAT BOTH QWEST AND CENTURYLINK PRODUCED IN RESPONSE TO THE INTEGRA DATA REQUESTS. DO YOU HAVE ANY GENERAL COMMENTS ABOUT THESE ACCUSATIONS?

A. Yes, I do. It appears that Mr. Gates has tried to develop so-called "harms" by going through the voluminous HSR documents that both companies produced to the Joint CLECs in discovery to search for anything that he can then offer to support his many positions. However, while I can only speak about the Qwest HSR documents that he cites to in his testimony,[26] I am struck by what I find to be completely erroneous assertions based on a few select words from those documents that he then takes completely out of context. It is curious that although he and the other Joint CLEC witnesses attach so many documents as exhibits to their testimonies, Mr. Gates failed to include *even one HSR documen*t as an exhibit, in either of his two pieces of testimony, to support his assertions.

[26] See Gates Surrebuttal, p. 31 (discussing Qwest HSR document 4(c)-5); p. 52 (discussing Qwest HSR document 4(c)-52); pp. 54-56 (discussing Qwest HSR documents 4(c)-30, 4(c)-34, 4(c)-70, 4(c)-22, 4(c)-37 and 4(c)-33); pp. 66-67 (discussing Qwest HSR document 4(c)-30); and Gates Supplemental, pp. 70-71, 79-80, and 92-94 (discussing Qwest HSR document 4(c)-44).

Q. ARE YOU SURPRISED THAT MR. GATES FAILED TO ATTACH ANY OF THE HSR DOCUMENTS THAT HE CITED TO EITHER OF HIS TESTIMONIES?

A. Yes. This is especially so given that Integra made much ado about these very documents by filing a motion to compel and a motion to delay the hearing. Throughout the October 20, 2010 hearing on the motion to delay the hearing, the CLECs argued about the alleged importance of these documents, about the volume of documents (they claimed the Qwest documents alone totaled about 1,500 pages), and the alleged delays in obtaining such documents. They did so, however, despite the fact that they had received the *vast majority* of the HSR documents back in June and July in other state proceedings, and that Mr. Gates should have had access to such documents at that time. And they did so despite the fact they had received that same handful of withheld documents a full three weeks (October 1st) before their motion to delay was heard (and 13 days before they filed surrebuttal testimony). Indeed, all but one (Qwest HSR document 4(c)-44) of the Qwest HSR documents that Mr. Gates discusses are discussed in his October 14th surrebuttal, which was filed before the motion to delay the hearing was heard on October 20th.

Q. WHY DO YOU BELIEVE THE PROCEDURAL BACKGROUND ABOUT THESE HSR DOCUMENTS IS RELEVANT HERE?

A. I raise this procedural background because despite all of this activity, Mr. Gates cites to only ten (10) pages from all of the 82 Qwest HSR documents (totaling "1,500 pages"), and then he does not even attach the pages of the cited documents as exhibits to his testimonies. Had he attached the documents, the Commissioners would be able to see for themselves if what Mr. Gates is arguing is a fair reading, in the appropriate context, of

the facts. I do not understand his reason given for not attaching the pertinent documents, or at least the pertinent pages that are cited, which was that he leaves that technical issue up to the lawyers. Given that the CLECs, including Mr. Gates, attached more than 50 exhibits, totaling close to/more than 1,000 pages, into the record, it is surprising that these documents were not attached here. In my opinion, the documents cited do not support the conclusions he reaches. I have given a few examples below.

Q. MR. GATES CONTENDS THAT THE HSR DOCUMENTS SHOW THAT QWEST ADMITS THE HAWAIIAN TELECOM AND THE FRONTIER MERGERS ARE COMPARABLE TO THE CENTURYLINK/QWEST MERGER. DO THE HSR DOCUMENTS SHOW THAT?

A. No. As background, in his October 14th surrebuttal, at pages 54 through 56, Mr. Gates argues that after he had filed his direct testimony, he had obtained "new information" that somehow "undermine[d] the Joint Applicants' claim that recent troubled mergers are irrelevant to the proposed transaction." The basis for this contention is, according to Mr. Gates, that various financial analysts had "compared" this transaction to these "troubled" transactions, and that these "comparisons" were the "very thing for which the Joint Applicants are criticizing the Joint CLECs."[27]

However, Mr. Gates failed to attach the various Qwest HSR documents that he cited to.[28] As the Commission can see from the attached highly-confidential exhibits that I present here, all that the Qwest HSR documents show is that these financial analyst firms

[27] Gates Surrebuttal, pp. 54-56.

[28] See Gates Surrebuttal, pp. 31, 52, 54-56; Gates Supplemental, pp. 70-71, 79-80, 92-94. He did not include any CenturyLink HSR documents that he cited either. See Gates Surrebuttal, pp. 26, 43, 66-67; Gates Supplemental, pp. 70-71, 77-78, 89, 94.

compared the *financial metrics* of *numerous* recent telecommunications mergers. They did so as part of the "due diligence" review that the Qwest Board of Directors was obligated to conduct to analyze the proposed merger with CenturyLink. As the Commission can see, these documents merely *list* numerous (as many as 16) telecommunications transactions going as far back as 2000. All these financial analysts did was analyze basic financial information, such as dates of the transaction announcements, market capitalizations, number of access lines and the like, of these previous transactions. There was no comparison of the risks of integration for the purposes of providing wholesale services, which is the connection that Mr. Gates has attempted to make between those troubled mergers and the CenturyLink/Qwest merger.

Q. CAN YOU GIVE US ANY SPECIFIC EXAMPLES?

A. Yes, I can give you several. For example, in Qwest HSR document 4(c)-22, which is a 71-page pre-merger announcement (April 21, 2010) presentation by Perella Weinberg Partners to the Qwest Board of Directors, the analysts listed **16** telecommunications transactions in the past decade, going back to the 2000 merger announcement between Frontier Telephone and Citizens Communications. All that the analysts did on the page that Mr. Gates cites (page 48) was to *list* certain key facts, such as (1) the dates of the transaction announcements, (2) the target companies and the acquiring companies, (3) the types of monetary consideration involved (cash or stock), (4) the transactions' values, and (5) the estimated operations synergies (estimated run-rates at the time of the transaction announcement and the percentage of synergies to total value of the combined companies) of each transaction. Obviously, these financial analyst firms were listing other telecommunications transactions for the Qwest Board to review. However, nowhere in

this HSR document, or any of the HSR documents, did the financial analysts "compare" any substantive systems or integration problems in these other transactions to this one. Nor did they opine that there are, or can be, any similarities between those transactions and the proposed CenturyLink/Qwest transaction on these integration and systems issues. As they are required to do, they merely compared *basic financial information* about major telecommunications transactions in the past decade, which included the Carlyle/Hawaiian, Fairpoint New England and Verizon/Frontier transactions.

Thus, for Mr. Gates to imply that this financial analyst firm was "comparing" the problems that the Joint CLECs have speculatively raised about systems and integration issues in the Carlyle/Hawaii or Verizon/FairPoint transactions, which comparisons the Joint Applicants have been critical of, is not supported by the documents identified. Attached as Highly-Confidential Exhibit A are the cover page, table of contents and the pertinent section ("IV. Illustrative Contribution and Pro Forma Valuation Analysis"), which includes page 48, of Qwest HSR document 4(c)-22.[29]

Q. IS THAT THE ONLY EXAMPLE OF MR. GATES TAKING THE HSR DOCUMENTS OUT OF CONTEXT?

A. No, not at all. Mr. Gates also cites to page 35 of Qwest HSR document 4(c)-34. This document is a copy of an April 15, 2010 presentation to the Qwest [nicknamed Quartz] Board of Directors regarding "Project Crystal" (proposed transaction with CenturyLink)

[29] Because of the voluminous nature of the HSR documents (one of them, for example, Qwest HSR document 4(c)-44, is 141 pages long), I am only submitting the pertinent pages of the Qwest HSR documents that I discuss here. However, the Joint Applicants will have complete copies of all of the HSR documents that Mr. Gates cites in his testimonies at the November 4, 2010 hearing so that the Commissioners can review them if they so desire. The Joint Applicants will also offer to lodge a copy of all of these HSR documents, as highly-confidential documents under the Commission's current protective order, in the event the Commissioners would like to review them later.

by various financial firms (Lazard, Deutsche Bank and Morgan Stanley). Page 35 merely lists *10* major telecommunications wireline transactions between 2004 and 2009, based on the transaction announcement date, and acquiror and target company, and various financial metrics, like enterprise value, EBITDA and number of access lines. Attached as Highly-Confidential Exhibit B are the cover page, table of contents and page 35 of Qwest HSR document 4(c)-34.[30]

In Qwest HSR document 4(c)-70, which is a January 28, 2010 presentation by Barclays Capital to the Qwest Board, page 5 merely lists *13* telecommunications wireline consolidations from 2004 through 2009. Again, this document merely lists basic financial information such as (1) transaction announcement date, (2) acquiror company, (3) target company, and (4) financial metrics (such as shareholder value and EBIDTA multiples). Because the FairPoint and Carlyle Hawaii transactions occurred during that time period, they are listed, along with 11 others. Attached as Highly-Confidential Exhibit D are the cover page and page 5 of Qwest HSR document 4(c)-70. Likewise, Qwest HSR document 4(c)-37, page 39, merely lists "illustrative synergies in past [telecommunications] transactions," and lists, in graph form, 12 such transactions, including the FairPoint and Frontier transactions. Attached as Highly-Confidential Exhibit E are the cover pages, table of contents and pages 39-40 of Qwest HSR document 4(c)-37.

[30] At page 55 of his surrebuttal, Mr. Gates also refers to Qwest HSR document 4(c)-30, page 22, for the same point that he makes regarding Qwest HSR document 4(c)-34, page 35. Qwest HSR document 4(c)-30 is a copy of another presentation by these same firms (Lazard, Deutsche Bank and Morgan Stanley), but six days later, on April 21, 2010. Page 22 of Qwest HSR document 4(c)-30 is the same chart as page 35 of HSR document 4(c)-34. Attached as Highly-Confidential Exhibit C is the cover page, table of contents and page 22 of Qwest HSR document 4(c)-30.

Finally, in Qwest HSR document 4(c)-33, page 43, there is merely a set of four graphs that merely compare financial metrics, such as revenue, EBITDA, access lines and High-Speed Internet subscribers, of various major telecommunications ILECs, including AT&T, Verizon, the Joint Applicants (combined and stand-alone), Frontier and Windstream. Attached as Highly-Confidential Exhibit F are the cover sheet, agenda and page 43 of Qwest HSR document 4(c)-33.

Q. WHAT IS YOUR CONCLUSION ABOUT MR. GATES' USE OF THESE SIX QWEST HSR DOCUMENTS FOR HIS ARGUMENT THAT THE JOINT APPLICANTS' CRITICISMS OF THE JOINT CLECs' ATTEMPTS TO LINK THE SYSTEMS AND INTEGRATION PROBLEMS OF THESE THREE OTHER TRANSACTIONS ARE NOT WARRANTED?

A. Mr. Gates' argument in citing to these six HSR documents on pages 54-56 of his surrebuttal is to try to show that the Joint Applicants' criticisms of the CLECs' comparisons of this transaction to the Frontier, FairPoint and Carlyle/Hawaii transactions that experienced systems and integration problems are not warranted.[31] However, what the Joint Applicants have objected to are the speculative arguments, without any basis, that there is a substantial risk that the integration of Qwest and CenturyLink systems, including wholesale OSS, will result in the problems that these other companies had experienced, and that the CLECs failed to analyze correctly the structures of those transactions in comparison to the CenturyLink/Qwest merger. The documents clearly do

[31] Mr. Gates argues: "This information [HSR documents] *shows* that *other entities* analyzing the proposed transaction, including the Joint Applicants themselves, have *compared* the proposed transaction to the recent troubled transactions – the *very thing for which the Joint Applicants are criticizing the Joint CLECs.*" (Gates Supplemental, pp. 55-56 (emphasis added).)

not support Mr. Gates' contentions. These financial analysts never discussed any of these systems and integration issues when they "compared" the financial aspects of this transaction to these other historic transactions. Their "comparison" was simply to basic financial metrics so that the Qwest Board of Directors could analyze the proposed transaction, as part of the Board's due diligence review.

Q. DOES MR. GATES DISCUSS ANY OTHER QWEST HSR DOCUMENTS THAT ARE NOT FAIR REPRESENTATIONS OF WHAT HE ARGUES?

A. Yes, on page 31 of his October 14th surrebuttal, he quotes from a 15-page Qwest HSR document (4(c)-5) to argue that "Qwest personnel" have concluded that CenturyLink's systems do not have the same "capabilities" as Qwest's existing systems, and that CenturyLink is "biased" toward its systems. Mr. Gates goes on to argue that this document "confirms" his concerns about the changes that CenturyLink has "stated" will occur to Qwest's OSS post-transaction, because it purportedly "shows" that integrating CenturyLink systems into Qwest legacy territory "could" result in "less capability or functionality." He then concludes (at pages 31-32) that CenturyLink's 'bias" toward its systems "underscores [his] contention that CenturyLink's 'methodical' review in selecting the 'best' system provides no assurances to CLECs and their customers." I do not believe these assertions can be fairly extrapolated from these documents.

First, as the Commission can see, this 15-page document is simply [**BEGIN HIGHLY-CONFIDENTIAL**] [redacted]

[redacted]

[**END HIGHLY-CONFIDENTIAL**] Attached as Highly-Confidential Exhibit G is the first page and pages 14 and 15 of the transcript of the April 23, 2010 internal Qwest conference call of Qwest HSR document 4(c)-5.

Q. ARE THERE ANY OTHER QWEST HSR DOCUMENTS THAT MR. GATES DISCUSSES?

A. Yes, there is one other Qwest HSR document that Mr. Gates "discusses." At various times in his supplemental testimony last week (pages 70-71, 79-80 and 93), he cites *generally* to Qwest HSR document 4(c)-44, which is a 141-page document, apparently for the proposition that [**BEGIN HIGHLY-CONFIDENTIAL**]

[redacted] [redacted] [**END HIGHLY-CONFIDENTIAL**] Attached as Highly-Confidential Exhibit H are the cover page, the agenda of an April 1, 2010 CenturyLink senior executive meeting, and the three-page PowerPoint slide that discussed CenturyLink's "strategic focus" (pages 7-9).

Q. MR. FENN, DO YOU HAVE ANY CLOSING REMARKS ABOUT MR. GATES' DISCUSSION OF THE HSR DOCUMENTS?

A. Yes. I believe the documents that Mr. Gates used do not support his arguments. In fact, the Joint CLECs have not marshaled any credible evidence to support their assertions from the voluminous HSR documents produced. It appears to me that the discussions regarding the HSR documents have taken the documents out of context and have overstated their importance. I believe that the Commission, after reviewing these documents, should reject the Joint CLECs arguments on the HSR documents as not supported by the evidence.

This matter should be a straight-forward, regulatory review process to determine whether this merger transaction is in the public interest. It should not become essentially a free-for-all in which the CLECs try to leverage the case into a request for a wide-ranging, onerous and unnecessary list of proposed conditions that have no or little relation to the merger and are unnecessary. The Joint CLECs submitted hundreds of unduly burdensome and often irrelevant data requests and more than 750 pages of testimony and hundreds of pages of exhibits that have the effect of over-complicating this relatively straight-forward matter. The Joint Applicants have, in the spirit of cooperation, despite

believing that no conditions are warranted, agreed to numerous substantial commitments in their settlements with the DPU, OCS, the DOD and the SLCAP. Nevertheless, the CLECs unfairly attack those settlements, from both a procedural and substantive standpoint, by arguing about the settlement negotiation process and by arguing that the commitments in those settlements do not go as far as what they seek in their conditions.

In short, I urge the Commission to reject the Joint CLECs arguments and find that the merger transaction, and the various Utah settlements (which I discussed earlier in my testimony), are in the public interest, and thus that the merger should be approved.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. In my testimony, I have demonstrated that the DPU Settlement is reasonable and in the public interest. The Commission should approve it without any changes. Based upon the record in this proceeding, including the DPU Settlement and the settlements between the Joint Applicants and other parties in this proceeding, the Commission should find that the Transaction is in the public interest and thus the Commission should approve the merger without any of the Joint CLECs' or Level 3's proposed conditions. Finally, the Commission should completely ignore all of the Joint CLEC arguments about the HSR documents. These documents are completely irrelevant to the issues here, and the CLECs have completely taken such documents out of context in an attempt to argue points that are not consistent with the applicable facts.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.