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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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<br>**JOINT APPLICANTS' POST-HEARING BRIEF** |

Pursuant to the Commission's November 16, 2010 Notice of Schedule for Filing Briefs, Qwest Communications International, Inc. ("QCII") and CenturyLink, Inc. ("CenturyLink")[1] (collectively, "the Joint Applicants" or "Applicants") hereby file their post-hearing brief.

## INTRODUCTION

On May 19, 2010, QCII and CenturyLink filed an application jointly requesting the approval of the indirect transfer of control of QCII's operating subsidiaries, Qwest Corporation ("Qwest Corporation" or "QC"), Qwest LD Corp. ("QLDC") and Qwest Communications Company, LLC ("QCC") (Qwest Corporation, QLDC and QCC referred to as "Qwest Operating Companies," all Qwest entities referred to collectively as "Qwest") to CenturyLink (the "Application").[2] The evidence presented at hearing demonstrates that this transaction (the "Transaction") meets the public interest requirements of Utah Code Ann., §§ 54-4-28 through 54-4-30, and will result in a combined company with greater network and financial resources to provide voice, broadband data, and other advanced communications services to Utah customers. The combination will result in a company that will have the national breadth and local depth to provide a compelling array of products and services to its customers.

The Joint Applicants believe the evidence supports approval of the Application without additional conditions or commitments. Even so, in the interest of resolving disputes and assuring this Commission that the merger is indisputably in the public interest, the Applicants have entered into several settlements and stipulations containing a wide array of commitments that will benefit customers. The Joint Applicants have reached settlements with the Utah Division of Public Utilities ("Division"), the Office of Consumer Services ("OCS"), the Salt Lake Community Action Program ("SLCAP"), the United States Department of Defense and all

[1] CenturyLink was formerly known as CenturyTel, Inc., and changed its name to CenturyLink, Inc. with shareholder approval on May 20, 2010.

[2] As the Joint Applicants explained in the Application (p. 2), in Utah, CenturyLink does not provide any local exchange services, with the exception of service provided by CenturyLink of Eagle (Colorado) to nine (9) lines in San Juan County along the border with Colorado.

Federal Executive Agencies ("DOD/FEA"), 360networks (USA), Inc. ("360networks") and, most recently, Integra Telecom, Inc. ("Integra") (collectively, "Settlements"). These intervenors' resulting support for approval of the Transaction, including from Integra (the most vigorous advocate of the group of competitors knows as the "Joint CLECs"), provides strong evidence that the Transaction is in the public interest and that Commission should approve this Application.[3] The Settlements, especially on wholesale issues (the Integra and 360networks Settlements, and section III.B of the Division Settlement), provide more than sufficient protection for wholesale customers, and as such, the Commission should reject all of the additional conditions that the remaining, non-settling competitor intervenors continue to seek.

## BACKGROUND

On April 21, 2010, Qwest Communications International, Inc., CenturyTel, Inc., and SB44 Acquisition Company ("Acquisition Company") entered into an Agreement and Plan of Merger ("Merger Agreement") which describes the Transaction.[4]

Under the terms of the Merger Agreement, QCII will become a wholly-owned, first-tier subsidiary of CenturyLink. Exhibit A to the Application depicts the pre- and post-Transaction corporate structure. As shown, there will be no change in corporate structure of the respective CenturyLink and Qwest operating entities as a result of the Transaction. QCII's operating subsidiaries, QC, QCC, and QLDC, will remain subsidiaries of QCII. Further, because this Transaction is at the parent company level, no local exchanges or assets are being sold, combined or transferred to a new provider.[5]

[3] Although the Communications Workers of America ("CWA"), the labor union for Qwest occupational employees, was not a formal intervenor in this docket, the Joint Applicants also settled with the CWA, and the CWA supports the merger based on the settlement. See e.g., Tr., pp. 73, 116, 117, 162.

[4] A copy of the Merger Agreement is available at http://www.centurylinkqwestmerger.com/downloads/sec-filings/Qwest-8K%204-22-10.pdf, and was incorporated in the Application.

[5] A more detailed summary of the Transaction can be found in the Application (pp. 3-5), as well as in the Direct Testimonies of Jeffrey Glover (pp. 4-6) and Jeremy Ferkin (pp. 3-6).

## STANDARD OF REVIEW

Utah Code Ann. §§ 54-4-28 through 54-4-30 grant the Commission authority to approve the transfer requested in this Application. In approving this Transaction, the Commission must find, after investigation and hearing, that the proposed merger is or will be in the public interest.[6]

As the Joint Applicants demonstrate in this post-hearing brief, (a) the Joint Applicants have satisfied their burden that the Transaction is in the public interest, and thus this Commission should approve it; (b) the Joint Applicants' pledge to comply with numerous retail, wholesale, and broadband terms and commitments, as contained in the various Settlements is further evidence that the Transaction is in the public interest; (c) the assurances provided in these Settlements propels the balance of evidence even more decidedly in the Joint Applicants' favor; and (d) the remaining, non-settling intervenor CLECs have failed to meet their burdens regarding their proposed affirmative conditions beyond those contained in the various Settlements.

## ARGUMENT

### I. THE MERGER BENEFITS UTAH

In light of the state and national trends associated with access line loss, wireless and cable competition, and customer demand for increased broadband capacity and higher bandwidth content, this merger provides substantial benefits for Utah. Direct Testimony of Jerry Fenn, Exhibit ("Ex.") JA-1 ("Fenn Direct"), pp. 22-23.[7] The Transaction will create a financially strong and stable provider that has an enhanced ability to invest in local and national networks,

[6] The applicable statutes merely provide that the proposed merger is or will be in the public interest. The remaining CLECs may argue the merger must provide a net benefit to the public based on this Commission's order more than 10 years ago in the U S WEST/Qwest merger. Report and Order of June 9, 2000, Docket No. 99-049-41. The Joint Applicants do not believe any net benefit is required because the context of the U S WEST/Qwest merger was far different from this merger. Nevertheless, even if the Commission employs a net benefit requirement, the Joint Applicants have shown that the Transaction will provide a net benefit and thus is in the public interest.

[7] As stated in Mr. Fenn's testimony, according to the FCC's Local Competition Report, as of June 2008 there were 2.05 million wireless subscribers in Utah, while there were only 1.02 million wirelines (both ILEC and CLEC). In fact, wireless lines have increased more than 144%, from 830,000 in June 2001. The FCC data show that the wireless share of the total access line market has grown significantly over this timeframe, and wireline access lines now account for less than 34% of all wireline/wireless connections in Utah. Fenn Direct, pp. 18-19.

deploy broadband and other advanced services, and provide outstanding service quality to its customers. The combined company will be positioned to compete effectively for customers in the increasingly competitive telecommunications market, in Utah and nationally. Fenn Direct, pp. 4-5; Direct Testimony of Jeffrey Glover, Ex. JA-2 ("Glover Direct"), pp. 6, 10, 16-20.[8]

The evidence presented here, based on CenturyLink's performance and experience, demonstrates that this merger will result in a stronger company with improved service quality. Mr. Jeffrey Glover and Mr. Jeremy Ferkin testified that CenturyLink has a long history of successfully completing mergers and that the financial justification for this Transaction is compelling. Glover Direct, pp. 12-15; Direct Testimony of Jeremy Ferkin, Ex. JA-3 ("Ferkin Direct"), pp. 10, 13, 14-15, Rebuttal Testimony of Jeremy Ferkin, Ex. JA-R6 ("Ferkin Rebuttal"), pp. 9-16, 16-20. Mr. Ferkin and Qwest Utah President Jerry Fenn testified that the merger was an appropriate response to the industry trends seen nationwide, as well as in Utah. Fenn Direct, pp. 10-21, Ferkin Direct, pp. 6-9. Furthermore, Mr. Ferkin and Mr. Fenn explained that the Transaction will bring more competition to the national telecommunications market, providing benefits to large business customers. Ferkin Direct, pp. 7-9, 17-20; Fenn Direct, pp. 14-15. There are also benefits for Utah residential customers, such as the merged company's ability to more effectively compete against large cable providers like Comcast, and against wireless providers. See Fenn Direct, pp. 14-23; Ferkin Direct, pp. 7-9, 17-20 (discussing CenturyLink's Go-to-Market business model). Even before agreement was reached on the Division Settlement, Division witness Casey Coleman observed in his testimony that there are a variety of telecommunications services available to individuals and businesses within the State of

[8] All of the Joint Applicants' Direct, Rebuttal, Surrebuttal and Supplemental Response testimonies, and all exhibits attached to those testimonies, were admitted into the record. Transcript ("Tr."), pp. 17, 566, 581, 587.

Utah, and that competition is robust. Direct Testimony of Casey J. Coleman, DPU Ex. CJC 1.0 ("Coleman Direct"), pp. 5-6, 7-8.[9]

The Transaction combines two leading communications companies with customer-focused, industry-leading capabilities together with complementary networks and operating footprints. It is a stock-for-stock transaction that requires no new financing or refinancing and adds no new debt. The Transaction will provide the combined company with greater financial resources, access to capital and financial, managerial and operational strength to invest in networks, systems and employees that will enable it to reach more customers with a broad range of innovative products and voice, data and entertainment services over an advanced network to better compete in the competitive marketplace. The combination creates a robust, national 180,000 mile fiber network that will allow CenturyLink to deliver strategic and customized product solutions to residential, business, wholesale, and government customers throughout the nation by combining Qwest's significant national fiber-optic network and data centers and CenturyLink's core fiber network. Ferkin Direct, pp. 7-8. Approving the transaction is in the public interest. Ferkin Direct, pp. 8-9.

Some intervenor witnesses attempted to draw comparisons between the Transaction and certain "troubled" telecommunications transactions as evidence that this merger might possibly create service problems.[10] Importantly, however, no witness offered any evidence that *this* Transaction will result in service quality problems, and the Joint Applicants effectively

[9] See also Rebuttal Testimony of Casey J. Coleman, DPU Ex. DPU CJC-1.0R ("Coleman Rebuttal"), p. 7 ("When reviewing the testimony [of other parties], 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," and "…when combining each condition into an overall requirement for the merger, the Division is concerned that enacting every suggestion could be a 'death by one thousand cuts'"). Mr. Coleman also noted: "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 flexibility that is necessary in a competitive marketplace. Coleman Rebuttal, pp. 7-8.

[10] See e.g., Direct Testimony of Timothy J. Gates, Ex. Joint CLECs 2 ("Gates Direct"), pp. 88-10 (attempting to compare this Transaction to the Hawaii Telecom or FairPoint New England transactions); Direct Testimony of August Ankum, Ex. Joint CLECs 1 ("Ankum Direct"), pp. 24-37 (same); Surrebuttal Testimony of Timothy J. Gates, Ex. Joint CLECs 2SR ("Gates Surrebuttal"), pp. 52-59 (same).

distinguished this Transaction from the troubled transactions. All of these witnesses' advocacy and arguments attempting to compare the Transaction to these "troubled" transactions were based on nothing more than speculation and conjecture, without taking into consideration the very different structure and financing of this transaction compared to other transactions. These differences include, most notably, that the other transactions involved one company acquiring access lines of another company, instead of acquiring the entire company, as here. Rebuttal Testimony of Michael Hunsucker, Ex. JA-R5 ("Hunsucker Rebuttal"), pp. 9-10.[11] In addition, unlike those other transactions, the Transaction is a stock-for-stock merger with no incremental debt and does not involve complex financial engineering such as has been the case with other transactions. Ferkin Rebuttal, p. 38. Further still, Mr. Ferkin discussed in length the numerous distinctions between this merger and those other transactions, including that CenturyLink has previously acquired and integrated numerous other companies' operations, the companies involved in the troubled transactions had to build "de novo" back-office software (i.e., OSS) that manages key operational functions, and that there is no pressure for CenturyLink to "flash cut" to a new OSS. See e.g., *Id*. pp. 35-45 (Mr. Ferkin rebutting in detail the CLEC claims that the Transaction is similar to the previous problematic ILEC mergers).

## II. THE MERGER IS IN THE PUBLIC INTEREST

The testimonies of CenturyLink's and Qwest's witnesses as summarized above demonstrate that the Transaction is or will be in the public interest as required by Utah Code Ann., §§ 54-4-28 through 54-4-30, and that the merged company will continue to provide

[11] An illustrative example of the CLECs' desperate attempts to compare this Transaction to several troubled transactions was their misleading use of Hart-Scott-Rodino ("HSR") documents, without attaching them, to claim that the Applicants' financial advisors had "compared" this Transaction to the other transactions. Supplemental Response Testimony of Timothy J. Gates, Ex. Joint CLECs 2 SP ("Gates Supplemental"), pp. 54-56. However, as Qwest Utah President Jerry Fenn pointed out, these "comparisons" were very misleading because all that the financial advisors did was to list telecommunications industry transactions, and certain financial metrics, over the past decade. However, they never compared integration issues of these troubled mergers with this Transaction. Supplemental Response Testimony of Jerry Fenn, Ex. JA HC Supp. R1 ("Fenn Supplemental"), pp. 17-24, and Highly-Confidential Exs. A-F (Hearing Exs. JA HC Supp. R1.1 – R1.6).

reliable, quality telecommunications services to Utah customers. Importantly, the Division agrees. The settlement and stipulation that the Joint Applicants and the Division reached ("Division Settlement") was designed to further ensure that this Transaction is in the public interest. Hearing Ex. DPU-CJC 1.1R. Division witness Casey Coleman testified extensively and comprehensively that, given the Division Settlement, the Division considers the Transaction to be in the public interest. Supplemental Response Testimony of Casey J. Coleman, DPU Ex. CJC 2.0SR ("Coleman Supplemental"), pp. 1, 3, 16-17; see also Tr., pp. 499-501, 512-513, 518-519, 521-524, 527-528, 531, 536-537, 545-546, 555-556. Mr. Coleman testified that the 24-month OSS (Operational Support Systems) commitment, and other commitments, in the Division Settlement are in the public interest and provide a level of certainty to CLECs.[12]

The Division Settlement, particularly in light of the Division's role as "the keeper of the public interest" with no economic self-interest (Tr., pp. 616-617), constitutes strong evidence that this Application is in the public interest and that the Commission should approve it. That conclusion is only enhanced by the settlement agreements reached by the Joint Applicants with Integra, 360networks, the OCS, the SLCAP, and DoD/FEA.

## III. THE MERGED COMPANY HAS FINANCIAL, TECHNICAL, OPERATIONAL AND MANAGERIAL RESOURCES TO MEET THE PUBLIC INTEREST

The Joint Applicants presented essentially unrefuted testimony that they have the financial, technical, operational, and managerial resources necessary to meet the regulatory and legal obligations applicable to the Qwest operating companies. While some intervenors

[12] As Mr. Coleman noted, "the Stipulation, taken as a whole, meets the public interest test." Coleman Supplemental, p. 1. See also, p. 3 ("The Division believes the public interest is met with this proposed settlement because it provides the foundation to address both wholesale and retail customers' concerns and provides stability both during and after the merger," and the Division Settlement balances the Joint Applicants' position with "some sense of stability for all 95 CLECs operating in Utah, and provides expanded broadband to thousands of retail customers within the State of Utah); p. 4 ("The Division believes the Broadband commitment provides a benefit to retail customers which is tangible and measurable," and because in Utah, "broadband is an unregulated service" and "[b]ecause of that[,] the Commission is unable to dictate any broadband deployment service). See also Tr., pp. 568, 600 (broadband is not regulated by the Commission), 617-619 (Mr. Gates' reluctant admission that the Commission does not regulate broadband and cannot force Qwest to make broadband investments or invest any particular amount).

speculated about various post-Transaction scenarios that might pose an alleged threat to wholesale services, they produced no competent or persuasive evidence to contradict the Joint Applicants' testimony regarding the financial, technical, operational and managerial fitness of the combined company.

### A. The merged company will have strong financial fitness

Mr. Glover of CenturyLink details the financial strength of the merged company. As Mr. Glover states, "the proposed transaction will create a carrier with major scope and scale, and the financial resources and flexibility to provide high-quality communications services to customers and communities in Utah and across the country." Glover Direct, pp. 15-18. Mr. Glover's testimony depicts the pro forma profile of the post-merger company, which will serve 17 million access lines, approximately 5 million broadband subscribers, and more than one million enterprise customers. *Id.*, p. 4. According to Mr. Glover, the pro forma financial profile of the company, as of year-end 2009, would include pro forma revenues of $19.8 billion, EBITDA of approximately $8.2 billion and free cash, excluding any estimated synergies, of $3.4 billion. *Id.*

Based on these financials, Mr. Glover testifies that "the merged company is expected to have one of the strongest balance sheets in the U.S. telecommunications industry." Glover Direct, pp. 4-5. Mr. Glover explains that the anticipated synergies of $575 in annual operating expenses and $50 million in annual capital expenditures are conservative, in total representing only 8% of Qwest's 2009 cash operating costs. Mr. Glover describes these synergies as "realistic when compared to other merger-related ILEC-transaction synergies that generally have been 20%+ of the target company's cash operating expenses in recent years." *Id.*, pp. 12-13. Mr. Glover also explains that, even without the synergies, the merged company is expected to realize $1.7 billion in remaining cash flow that could be used for additional investment, debt repayment, or other appropriate uses. *Id.*, p. 11. Because CenturyLink expects to be financially sound, the combined company "will not be unduly pressured to achieve financial synergies by

investors or other stakeholders." Ferkin Rebuttal, p. 22. Clearly, the merged company will be financially capable of continuing to provide reliable, quality services to Utah customers. The intervenors did not directly refute the company's anticipated financial strength, and no intervenor conducted cross-examination of Mr. Glover.

Therefore, the Joint Applicants have met their burden to demonstrate that the merged company will have the financial fitness and capability to continue to provide reliable, quality telecommunications services in Utah.

**B. The merged company will have significant technical and managerial resources**

The Joint Applicants' witnesses also describe in detail the strength of the technical and managerial resources available to the merged company as the result of this combination of two industry-leading telecommunications companies. Ferkin Direct, pp. 9-10. Mr. Ferkin describes the deep managerial experience and quality of the management team that has already been named for the post-merger company, including CEO Glen Post, Chief Financial Officer R. Stewart Ewing, and Chief Operating Officer Karen A. Puckett. These executives bring a combined total of over 88 years experience in the telecommunications industry, including significant experience relating to mergers and acquisitions. *Id*., p. 10. CenturyLink has also named Christopher K. Ancell as President of the Business Market Group for the post-merger company, who will continue to lead Qwest's growing and successful enterprise segment. *Id*. In addition, CenturyLink has named several other executives, drawing from the expertise of both CenturyLink and Qwest, all with significant experience and proven track records in the telecommunications industry. See, e.g., *Id*., pp. 14-15; Hunsucker Rebuttal, pp. 4-5; Supplemental Response Testimony of Michael R. Hunsucker, Ex. JA-HC-Sup-R2 ("Hunsucker Supplemental"), pp. 19-20.

CenturyLink will also benefit from the strong employee base for both companies. As Mr. Ferkin explains, it is anticipated that the majority of Qwest's employees will be retained because

they are necessary to carry out the local market focus that is the hallmark of CenturyLink's service provisioning model. Ferkin Rebuttal, pp. 10-12.[13]

Mr. Ferkin discusses the operational strengths that CenturyLink brings to the merged company, including its substantial and successful experience with the integration process in past mergers. Ferkin Direct, pp. 14-15. These mergers include, most recently, the Embarq-CenturyTel merger, which closed in July 2009. The Embarq merger involved CenturyLink's integration of more than 5 million access lines in 18 states. As Mr. Ferkin explains, this integration is well underway, with all of the human resources and financial systems successfully integrated shortly after closing, 50% of the billing system integration expected to be completed by year-end 2010, and full billing systems integration completed during the third quarter of 2011. *Id*. pp. 16-17.[14]

Some intervenor witnesses have pointed to operational problems experienced with the Embarq/CenturyLink billing system conversion, specifically in North Carolina, and speculated that these issues indicate CenturyLink would have trouble with the integration of the Qwest systems. See e.g., Gates Surrebuttal, pp. 13-24; Gates Supplemental, pp. 80-81. However, while it is true that some issues occurred with the billing systems conversion in North Carolina, these issues were minor in the context of the total scope of the conversions from the Embarq systems. As Mr. Hunsucker pointed out, while there is no way to guarantee avoidance of all issues with any system cutover (including those made by the CLECs and other service providers), CenturyLink took the necessary steps to address these issues, minimize any impacts to customers

[13] In addition, through its settlement with the CWA, CenturyLink has made explicit commitments to retain experienced front-line workers. These commitments satisfy CWA's concerns. Although the CWA did not intervene in Utah, these commitments result in CWA's support and its finding that the Transaction is in the public interest.

[14] CenturyLink's past successful integration experiences demonstrate that it is capable of performing the Qwest integration without customer harm. Ferkin Rebuttal, pp. 9-10. Against this evidence, opposing intervenors such as the non-settling CLECs offer nothing more than speculation about what "could" happen, without any evidence as to the probability of the supposed outcomes, and without examining the probability of whether such events might occur. Hunsucker Rebuttal, pp. 8, 9, 10, 45; see also Hunsucker Supplemental, pp. 16-23 (discussing Mr. Gates' numerous unfounded speculative opinions arising from his selective review of HSR documents); see also Rebuttal Testimony of Robert Brigham, Ex. JA-R2, pp. 3-5, 6-8. CenturyLink's demonstrated history and proficiency in smoothly integrating operations of acquired companies demonstrates the *high probability* that this integration will be successful, and significantly outweighs the *possibilities* that the intervenors discuss.

and to ensure they are resolved prior to any future conversions. Hunsucker Supplemental, pp. 7-8.[15] The record demonstrates that CenturyLink has significant experience with successful integrations. Through this experience, it has developed a methodology for integration that is designed to maximize efficiency, minimize difficulties and, above all, ensure that the Transaction benefits, rather than harms, customers.[16]

Mr. Ferkin also describes the operational characteristics that have made CenturyLink a leading telecommunications company, including its regional operating model and local "go-to-market" strategies. Ferkin Direct, pp. 17-19. CenturyLink has successfully employed these practices in the Embarq markets and intends to bring the same benefits to the Qwest markets, including Utah, after the merger. *Id*. These markets include more urban markets, as well as the rural markets that had been CenturyLink's traditional focus. The evidence shows that CenturyLink's operational and marketing strategies bring important benefits to these urban markets as well. *Id*.

In short, the Transaction will also allow the post-merger company to draw on the network and operational strengths of both Qwest and CenturyLink, which Mr. Ferkin cites as a key benefit of the merger. Ferkin Direct, p. 8. The evidence overwhelmingly shows that the merged

[15] As Mr. Hunsucker explained, during the OSS conversion of the North Carolina market to the new CenturyLink billing and operational systems, some of the facilities records were loaded incorrectly, due to the way in which facilities records were constructed differed between the legacy CenturyTel and Embarq areas. As a result, some records initially did not load correctly in the conversion. CenturyLink immediately researched the problem and learned that approximately one-sixth of the records did not load correctly. Accordingly, CenturyLink took the necessary steps to address the issues and minimize any impacts to customers. Indeed, three months after the North Carolina conversion was completed, CenturyLink's service quality metrics rose on a year-over-year comparison. Finally, CenturyLink is working to ensure that this record issue is addressed prior to any future conversions resulting from the Embarq integration. Hunsucker Supplemental, pp. 7-8.

[16] Likewise, any argument that the non-settling CLECs may make regarding CenturyLink's request and granting from the FCC of a waiver of the FCC's one-day porting requirement would be without merit. As Mr. Hunsucker explained, CenturyLink is engaged in a rolling cutover to the Embarq OSS in order to assure continued billing quality for its end users. Meeting the one-day interval effective date proposed in the FCC's order would have required CenturyLink to implement changes to a system that is being discontinued. Contrary to the CLECs' implication, the FCC offered a waiver process for just such a situation, and thus CenturyLink applied for and was granted a waiver under that process. Further, the waiver is only for a specific time period and will expire in February 2011. CenturyLink will be processing porting orders within a one-day interval long before any OSS integration activities take place in regards to the Qwest OSS. Hunsucker Supplemental, pp. 8-9.

company will have more than sufficient technical, operational and managerial resources to provide reliable and quality services to Utah customers after the merger.

## IV. THE TRANSACTION IS IN THE PUBLIC INTEREST FOR RETAIL CUSTOMERS

### A. The company's operational and financial strength will benefit retail customers

The financial and managerial aspects of the merger, together with the commitments outlined in the Division, OCS, SLCAP and DOD/FEA Settlements, will provide important benefits for retail customers. First, as Mr. Ferkin detailed in his testimony, the merger will create a stronger company that will benefit customers through a more diverse product mix, and the enhanced ability to deploy advanced services, such as higher-speed broadband and IPTV. Ferkin Direct, pp. 7, 11, 14, 17. Mr. Fenn echoes Mr. Ferkin's description of the ways in which customers will benefit from the merger, testifying that the company will be "stronger and more stable from a financial perspective than either entity would be on its own," which will allow the combined entity to "invest in a network capable of providing enhanced products and services." Fenn Direct, pp. 10-11. Further benefits to customers that Mr. Fenn described include the optimization of both companies' network capacity, which will benefit Utah customers through the merged company's ability to deploy "additional bandwidth-intensive services such as broadband service and advanced business products." *Id.* p. 25.

### B. Commitments in the various retail settlements benefit customers

Beyond the strengthening of the companies, the commitments that the Joint Applicants make in the various retail settlements with the Division, the OCS, the SLCAP and the DOD/FEA further ensure identifiable benefits for Utah residential and business retail customers. These benefits are realized in part through the Joint Applicants' broadband commitments, as well as their commitments to the OCS and SLCAP regarding rates and Lifeline customers, and the commitments to the federal government in the DOD/FEA settlement.

### 1. The Division Settlement

Specifically, the Joint Applicants have committed in the Division Settlement to invest at least $25 million in broadband infrastructure to serve retail customers over the next five years. Of the $25 million minimum commitment, the Joint Applicants have committed to invest at least 15% in unserved and underserved areas. Division Settlement and Stipulation Agreement, Joint Applicants' November 4 Ex. 1 ("Division Settlement"), ¶ III.A.[17] The Division Settlement also maintains service quality requirements for at least two years. *Id*., ¶ III.C. Finally, the Division Settlement requires extensive broadband reporting requirements. *Id*., ¶ III.D.

The Joint Applicants' guarantee of a minimum investment level in broadband is an important public interest benefit that would not occur but for the merger, as the Commission does not regulate broadband investment requirements. See Coleman Supplemental, p. 4; see also Tr., p. 568; Tr., p. 600 (Mr. Gates admitting broadband is not regulated by the Commission), Tr., pp. 617-619 (Mr. Gates admitting that the merged company is not obligated to make any broadband commitment, and the Commission cannot compel it to do so, or to invest any particular amount).[18] The Applicants have offered commitments in both the retail and wholesale contexts that will serve the public interest with increased broadband availability and competition.

As Mr. Coleman testified at the November 4th hearing regarding the Division Settlement:

> …the negotiated settlement provides a benefit to retail customers within the State of Utah by ensuring that at least 25 million over five years is invested in broadband infrastructure. The negotiated settlement is in the public interest because it provides benefits to retail customers that citizens would not have absent a settlement. Tr., p. 501.
>
> …….
>
> The agreement provides the best framework to keep the market environment consistent for all parties, while preventing the death by 1,000 cuts of a healthy telecommunications marketplace in the State of Utah. Tr., p. 501.

[17] Division Stipulation and Agreement, at ¶ III.A. The Division and the Joint Applicants agree that "unserved" means areas that do not have access to any broadband service, while "underserved" means areas that have broadband service up to and including 1.5 mbps download speed.

[18] For example, Mr. Coleman testified: "The Division believes the Broadband commitment provides a benefit to retail customers which is tangible and measurable." Coleman Supplemental, p. 4. Further, he testified that in Utah, "broadband is an unregulated service," and "[b]ecause of that[,] the Commission is unable to dictate any broadband deployment service." *Id.*

Some CLECs have attempted to portray the broadband commitment as insignificant in comparison to Qwest's historical broadband spending, or in comparison to commitments made in other states, like Minnesota. Gates Supplemental, pp. 23-32. However, as Mr. Fenn testified, the CLECs' objections ignore the important benefits to Utah consumers of a specific dollar commitment exclusively dedicated to retail broadband investment and, specifically, the commitment to spend an identified portion to provide service to customers in unserved and underserved areas. See, Tr., pp. 567-568; Fenn Supplemental, pp. 11-15. Further, the broadband commitment provides a significant benefit, especially since while Qwest has previously made significant broadband deployments, it is not obligated to make any such commitments because broadband is not regulated, and the $25 million commitment is comparable to Qwest's broadband commitment in Minnesota when one considers combined access line totals of the merged company. Fenn Supplemental, pp. 11-12. Mr. Fenn also explained why Mr. Gates' arguments about the investment percentage for unserved and underserved areas were without merit. *Id.*, pp. 12-15. Mr. Coleman also explained numerous reasons why the broadband commitment was sufficient and in the public interest. Coleman Supplemental, pp. 2-8. In short, there was no competent, credible or persuasive evidence to oppose or object to the broadband commitments in the Division Settlement.

### 2. The OCS and SLCAP Settlements

The OCS and SLCAP settlements also provide benefits to Utah customers, especially low-income Lifeline customers. Significantly, no party opposed these settlements, or denied they are in the public interest. For example, in the OCS Settlement, the Joint Applicants agree not to seek a waiver from the service quality requirements of R. 746-340, sections 8 and 9, for at least two years. They further agree to not increase the residential measured service rate during 2011, and if they raise basic residential service rates during 2011, they agree to provide an additional off-setting credit to Lifeline customers that would negate the amount of any such

increase until the end of 2011. See OCS Settlement, filed October 14, 2010; see also Tr., pp. 477-480 (OCS witness Eric Orton testifying in support of the OCS Settlement as being in the public interest). Likewise, the Joint Applicants made similar commitments in the SLCAP Settlement, and agreed to meet annually with SLCAP for two years to discuss any concerns that they may have about affordable rates and to provide updates on Lifeline services. The company also agreed to publish Lifeline advertisements in several Utah newspapers. See SLCAP Settlement, filed October 15, 2010; see also Tr., pp. 481-483 (SLCAP witness Sonya Martinez testifying in support of the SLCAP Settlement as being in the public interest).

### 3. The DOD/FEA Settlement

Finally, the DOD/FEA Settlement is in the public interest, and it too was not opposed in any way. For example, that settlement provides that, if the DoD/FEA maintains certain volume levels, the Joint Applicants commit to not increase current pricing on retail business lines with or without Qwest packages (single or multi-line), Centrex, Qwest Utility Line™, and PBX trunks for *three years*. They also agree that if, at commencement or during volume and term price plan duration, the rate charged for any service covered by the Settlement is higher than the price listed in the applicable tariff, catalog or price list, the post-merger company will reduce the price for such services to the lower tariff, catalog or price list rate, and the price commitment will apply to such price. See DOD/FEA Settlement filed on October 27, 2010, and Ex. DOD/FEA-6; see also Tr., pp. 462-472 (DOD witness Charles King testifying in support of the DOD Settlement).

## V. THE MERGER IS IN THE PUBLIC INTEREST FOR WHOLESALE CUSTOMERS

Throughout this proceeding, the Joint CLECs alleged numerous purported but unsubstantiated concerns that CenturyLink would not be able to maintain wholesale services at the same level that CLECs currently receive from Qwest because of alleged potential integration problems. See e.g., Gates Direct, pp. 24-31, 31-88; Gates Surrebuttal, pp. 13-64; Ankum Direct,

pp. 65-91.[19] These CLECs proposed 30 lengthy and unnecessary conditions. Gates Direct, pp. 110-195, and Ex. TG-8 (Hearing Ex. Joint CLECs 2.8).[20] The Joint Applicants, however, demonstrated that the Transaction would be in the public interest without any conditions. Hunsucker Rebuttal, pp. 4, 53, and generally, pp. 15-45; Hunsucker Supplemental, pp. 3, 23-24; see also Tr., pp. 88-89, 92. 94, 97-100 (Mr. Hunsucker testifying on cross-examination against the need for conditions).

Nevertheless, in an attempt to address any such concerns regarding the effect of the merger on wholesale services, the Joint Applicants engaged in discussions with various intervenors to understand their concerns and to see if the parties could reach agreement to alleviate any such concerns. Tr., pp. 140-142, 150 (Mr. Hunsucker answering Commissioner Campbell's and redirect examination questions by confirming there have been numerous settlement negotiations with CLECs in several states and individually). The result of these discussions is that the Joint Applicants have entered into three separate settlements that have resulted in a *monumental shift in the landscape* since the CLECs filed their testimony advocating for all of these conditions, and even since the hearing. That is, shortly before the October 26-27 hearing, the Joint Applicants settled with the Division (and 360networks before that), and the Division Settlement was a subject of the November 4th hearing. Moreover, since then, and within days of the November 4th hearing, the Joint Applicants entered into a comprehensive settlement with the lead "Joint CLEC," Integra. All three wholesale settlements are in the public interest. More importantly, these settlements include numerous comprehensive wholesale commitments that address the Joint CLECs' purported concerns, offering more than sufficient

[19] The CLECs originally comprising "the Joint CLECs" were Integra Telecom of Utah, Inc. ("Integra"), Eschelon Telecom of Utah, Inc. ("Eschelon"), Electric Lightwave, Inc. ("ELI"), McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services ("PAETEC"), tw telecom of Utah llc ("tw telecom"), and Level 3 Communications, LLC ("Level 3"). As set forth above, Integra and its Eschelon and ELI affiliates (collectively "Integra") have settled with the Joint Applicants and thus are no longer part of the Joint CLECs.

[20] The original Joint CLECs' 30 proposed conditions encompassed a variety of issues, including operations support systems, wholesale service quality, wholesale customer support, wholesale service availability, wholesale rate stability and compliance. See Hearing Ex. Joint CLECs 2.8.

protection for CLECs. Thus, the Commission should not accept any of the additional "conditions" that the remaining non-settling CLECs continue to seek.

### A. The Division Settlement regarding wholesale issues meets the public interest

#### 1. The Division Settlement addresses numerous wholesale issues

First, the wholesale commitments in the Division Settlement (section III.B) provide additional benefits and protections to CLECs and to the public interest. Specifically, the Division Settlement provides the Commission with wholesale protections regarding Operational Support Systems ("OSS"), interconnection agreement ("ICA") negotiations, ICA extensions and opt-ins, rates and tariff changes, and the maintaining of the Utah Performance Assurance Plan ("PAP") and the Change Management Process ("CMP"), while maintaining FCC obligations and Qwest's status as a Bell Operating Company ("BOC"). Division Settlement, Joint Applicants November 4 Ex. 1, ¶ III.B.[21]

#### 2. The Division found that the Settlement provides certainty for CLECs

As Mr. Coleman testified, the Division Settlement "provides certainty in the wholesale market and answers many of the concerns raised by the Joint CLECs." He states that "[i]n negotiating the [Division Settlement,] the Division worked to provide benefits to all the CLECs operating within Utah and craft commitment[s] that would prove beneficial for all CLECs." Coleman Supplemental, pp. 2; see also pp. 8-10 (OSS commitments are in the public interest), 10-12 (ICA commitments are in the public interest), 12-14 (wholesale service quality commitments are in the public interest), 14-15 (the status as an RBOC and compliance with law

[21] For example, regarding OSS, the merged company agrees it will not discontinue wholesale OSS for at least 24 months post-closing, and if there is a Qwest OSS change or retirement, the merged company will utilize the CMP, with at least six months notice. Division Settlement, Joint Applicants November 4 Ex. 1, ¶ III.B.1. There are also protections regarding interconnection agreement extensions and negotiations (*Id*., ¶ III.B.2), and even more generous protections are available with the subsequent Integra Settlement. Further, regarding protection against new rates or tariff changes, these protections are for at least 36 months, and include protections against fees associated with Access Service Requests ("ASRs") and Local Service Requests ("LSRs"), directory listings or directory listing storage, non-published number charges, Local Number Portability charges, or E911 records transactions or storage charges. *Id*., ¶ III.B.3. Regarding the Utah PAP, the merged company agrees not to seek to modify or terminate it

commitments are in the public interest), and 15-16 (additional proposed CLEC conditions, such as regarding copper loops, dark fiber, FCC language or new rates, are not included and are not applicable or appropriate here). Mr. Coleman further testified on November 4th as follows:

> The negotiated settlement between the Division of Public Utilities and Joint Applicants provides certainty in operational support systems, interconnection agreements, performance assurance plans, protection against any new rates or tariff changes, change management process, FCC obligations, status as a BOC, and service quality. Tr., p. 500.
>
> With those commitments in place the Division believes many of the most important concerns raised by CLECs have been addressed, and stability post-merger has been provided for a reasonable period of time. *Id.*
>
> Additionally, providing certainty and stability for the wholesale marketplace, that impacts all 95 CLECs in the state, is in the public interest. *Id.*
>
> ……
>
> A vibrant telecommunications market will continue to persist as CLECs, Qwest, and other companies are financially healthy and able to adapt to the changing dynamic marketplace. Tr., p. 501.

### 3. The CLECs failed to meet their burden opposing the Settlement

The CLECs opposed the Division Settlement by filing supplemental testimony (Gates Supplemental, pp. 2-21, 21-94), and appearing at a third day of the hearing on November 4, 2010. However, the evidence from the Applicants refuted the CLECs' opposition. For example, as shown above, Mr. Coleman showed why the Joint Applicants' OSS and ICA commitments were sufficient and in the public interest. Coleman Supplemental, pp. 7-12. He also showed why the commitment to keep the Utah PAP for at least 36 months provided certainty regarding wholesale service quality and thus was in the public interest. *Id.*, pp. 12-14. Mr. Hunsucker likewise did so. Hunsucker Supplemental, pp. 4-6, 7-9 (discussing OSS commitment), 9-13 (discussing ICA commitments), 13-16 (discussing merger effects on competition), 16-23 (rebutting Mr. Gates' arguments based on Hart-Scott-Rodino ("HSR") documents); see also Fenn Supplemental, pp. 6-10 (describing arms-length negotiations and rebutting Mr. Gates regarding

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for at least 36 months, and requires extensive reporting to the Division and each CLEC. *Id.*, ¶ III.B.4. Finally, regarding the CMP, the merged company agrees to maintain the current CMP for at least 36 months. *Id.*, ¶ III.B.5.

the process and timing of settlement negotiations), 16 (discussing elimination of PAP "Tier 2" payments), 17-28 (rebutting Mr. Gates' misleading use of HSR documents); Supplemental Response Testimony of Philip Powlick, DPU Ex.. PP 3.0, pp. 2-9 (finding the Division Settlement to be reasonable and in the public interest, explaining the settlement negotiation process, and rebutting Mr. Gates' speculative claims about settlement negotiations).

Indeed, at the hearing, Mr. Gates admitted he had not been personally involved in settlement discussions, and that he was not aware of any specifics about formal settlement conferences or individual settlement negotiation meetings. Tr., pp. 603-606. He also admitted he had no evidence to support his speculation about the Division's reasons for settling or regarding what the Joint Applicants may have communicated to the Division about settlement negotiations with the Joint CLECs, nor did he have any evidence to contradict the Division's testimony on those issues. Tr., pp. 608-612. And he reluctantly agreed that the Division Settlement addressed the Division's concerns, and that while the CLECs had economic self-interests, the Division was the keeper of the public interest. Tr., pp. 612-613, 616-617. In short, the CLECs completely failed to meet their burden in opposing the Division Settlement.

### B. The Integra and 360network Settlements are in the public interest

Within days of the November 4th hearing session the Joint Applicants settled with Integra, an original member of the Joint CLECs, and the first, most vocal and most active CLEC opponent of this merger.[22] This settlement covers a broad range of issues, and addresses Integra's major concerns such that Integra supports approval of the merger as in the public interest without adoption of the remaining Joint CLECs' proposed conditions. Moreover, the Integra Settlement provides that its terms will be made available to any requesting carrier. Integra now agrees "that [with the terms of its Settlement Agreement] the Transaction is in the

[22] Integra was the first intervenor here. As part of the Joint CLECs, Integra filed more than 500 pages of testimony, and more than 120 pages of its own separate testimony (not part of the Joint CLECs), including more

public interest and should be approved by the FCC and state commissions." Integra Settlement Agreement, Attachment A, ¶ C.[23] The Integra Settlement, coupled with the 360networks Settlement[24] (and the Division Settlement on wholesale issues), fully address any reasonable concerns any party (including the non-settling CLECs) may have regarding wholesale matters.

### 1. The Integra Settlement addresses the CLECs' concerns

Specifically, the Integra Settlement addresses and resolves the following key wholesale issues that the CLECs raised. The settlement:[25]

- Commits to a minimum of 24 months to retain Qwest's current OSS (Attachment A, ¶ B.12)[26] (CLEC Condition 12)
- Commits to not eliminate or withdraw the current Qwest PAP for at least three years after the merger closing date (¶ B.2) (CLEC Condition 3)
- Prevents the Joint Applicants from recovering one-time transaction costs in wholesale rates (¶ B.1) (CLEC Conditions 2 and 3)
- Keeps in place existing wholesale service standards and reports (¶ B.2) (CLEC Condition 4)
- Extends a number of wholesale agreements, including interconnection agreements, commercial agreements over which the Joint Applicants contend the Commission does not have jurisdiction, other wholesale agreements, and term and volume discount plans contained in existing tariffs and individual case basis contracts (¶ B.3) (CLEC Conditions 1, 6, 10, and 21)
- Maintains rates in interconnection agreements and prohibits adding additional rates associated with the customer acquisition and migration process without Commission approval (¶ B.4) (CLEC Conditions 7 and 24)
- Addresses intervals for provisioning of products, even where a contract is silent on the issue (¶ B.5) (CLEC Condition 11)
- Addresses exemption petitions under 251(f)(1) and (f)(2) of the Communications Act. (¶ B.6) (CLEC Conditions 12, 21, and 22)
- Ensures that Qwest Corporation will continue to be classified as a Bell Operating Company (¶ B.7) (CLEC Condition 13)

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than 30 exhibits. This was by far more than any other CLEC intervenor. In addition, Integra propounded more than 180 data requests, not including subparts, while no other CLEC propounded any discovery.

[23] The Integra Settlement was reached and executed on November 6, 2010, two days after the November 4th hearing session. The Joint Applicants filed the Integra Settlement with the Commission on November 8, 2010. A courtesy copy of the Settlement is attached as Attachment A to this post-hearing brief.

[24] The 360networks Settlement addresses how 360networks' interconnection agreements with Qwest will be handled after the merger.

[25] This description is intended to give only a general description of the agreement, and does not modify the terms of the settlement agreement in any way.

[26] All citations to paragraph B in these bullet-point descriptions are the Integra Settlement (Attachment A).

- Prohibits Qwest from seeking reclassification of wire centers as non-impaired before June 1, 2012 (¶ B.8) (CLEC Condition 14)
- Requires the Merged Company to provide updated contact and organizational information (¶ B.9) (CLEC Condition 15)
- Requires the Merged Company to make Operational Support Systems ("OSS") information available to CLECs (¶ B.10) (CLEC Condition 16)
- Ensures sufficient wholesale staffing (¶ B.11) (CLEC Condition 18)
- Provides detailed requirements regarding any future transition to a new wholesale OSS system (¶ B.12) (CLEC Condition 19)
- Imposes certain requirements regarding engineering the network and copper loop retirement (¶ B.13) (CLEC Condition 26)
- Provides for an agreed upon line conditioning amendment (¶ B.14) (CLEC Condition 27)
- Requires Qwest to make the Integra agreement available to any requesting carrier (¶ B.15)

The Integra Settlement is even more comprehensive regarding wholesale issues than the Division Settlement, and was reached with a large, sophisticated CLEC with economic self-interests. Further still, the Integra Settlement is available for any other requesting CLEC that wishes to enter into the same agreement. There should be no question that the Integra Settlement meets the public interest and provides sufficient protection for all CLECs.

**2. <u>There is no evidence in the record to support distinctions among CLECs</u>**

The Joint Applicants expect, based on the non-settling CLECs' advocacy in other states after the Integra Settlement was reached, that these CLECs will argue that the Integra Settlement is not sufficient, or "does not go far enough," or that other CLECs have different "business plans" or "business models" than Integra, and thus that the Commission should adopt their original 30 proposed conditions. However, there is absolutely no evidence in the record to support any such purported distinctions. Any such argument would be belied by the prior uniform "Joint" voice of the intervening CLECs. Up to the point when Integra settled with the Joint Applicants after the Utah hearing here, the original "Joint CLECs" never made any attempt to distinguish themselves from each other, and they never submitted any evidence to that effect. The CLECs cannot now have it both ways - they cannot argue they are "Joint CLECs" when it

benefits them, and now, when one of the CLECs has settled, claim they are different. The Commission should not be persuaded by any CLECs' attempts to try to distance themselves from their former partner after the hearing. There is no evidence in the record to suggest that Integra cares any less about any of these issues (such as, for example, commercial agreements) than any other CLEC. The Commission should reject any such arguments.

### C. There is no basis for adopting any conditions regarding remaining issues

The Joint Applicants expect that the non-settling CLECs will continue to argue for the imposition of the 30 original proposed conditions, including the following: (1) the length of time the Applicants have committed to use Qwest's existing OSS, (2) the length of time they have committed to extend non-Section 251 commercial agreements, and (3) additional issues such as wholesale resources, the "Additional" Performance Assurance Plan ("APAP"), "porting" of ICAs across states or companies, intercarrier compensation issues like Virtual NXX ("VNXX") traffic, the federal rural exemption, interconnection configuration issues, directory listings and directory assistance, non-impairment filings, and other issues that do not belong in a merger approval proceeding. However, the non-settling CLECs' claims that each of these additional conditions that go beyond the Integra Settlement should be imposed are without merit because the Integra Settlement adequately addressed all wholesale issues. See e.g., Hunsucker Rebuttal, pp. 43-45; see also Coleman Surrebuttal, pp. 5-7; Coleman Supplemental, pp. 15-16. Moreover, given that Integra originally shared the Joint CLECs' concerns but has now reached an agreement that enables it to advocate that the public interest is protected with the commitments that the Joint Applicants have made, the non-settling CLECs' continued concerns are extreme and unfounded. They have failed to meet their burden regarding the continued conditions they propose. The Commission should not adopt any conditions beyond the commitments the Joint Applicants make in the Integra, 360networks and Division Settlements.

### 1. OSS

The non-settling CLECs make many allegations of potential post-merger harms to OSS; however, the major premise underlying those allegations is the unsupported assertion that CenturyLink plans to promptly uproot Qwest's OSS in Qwest territories and replace it with a CenturyLink OSS. However, in the Integra Settlement, the Joint Applicants have committed to (a) maintain the existing Qwest OSS for at least two years (Integra Settlement, Attachment A, ¶ B.12); (b) provide detailed notification 270 days in advance of replacing or integrating any OSS Systems (*Id*., ¶ B.12.a.); (c) follow the Change Management Process ("CMP") in connection with any such change (*Id*., ¶ B.12.b.); (d) provide notification, joint testing, and training before replacing an OSS interface (*Id*., ¶ B.12.c.); and (e) ensure that any changes to billing systems comply with interconnection agreements and are compliant with Ordering and Billing Forum requirements (*Id.*, ¶ B.12.d.).[27]

The non-settling CLECs' conjecture about potential OSS degradation in Qwest service areas also ignores the key fact that CenturyLink is not simply acquiring access lines from Qwest, but rather, is acquiring the entire company. Hunsucker Rebuttal, pp. 9-10. Since it is acquiring Qwest's existing systems, personnel, documented policies, and processes, CenturyLink will have no immediate need (or be under any time pressure) to make any alterations to OSS in Qwest areas. *Id*., pp. 11-13. In addition, Qwest's OSS experience and knowledge will reside in the post-merger company, especially given that the merged company has appointed a Qwest employee as Vice President of Wholesale Operations. *Id*., pp. 4-5. CenturyLink has repeatedly acknowledged that Qwest's OSS will continue to be subject to Section 271 obligations

[27] Further, beyond these contractual commitments, CenturyLink has repeatedly stated that: (1) it has made no decisions on what OSS it will employ in the long term, (2) it will make a careful, structured examination of both companies' systems and features and draw on the best of both companies' capabilities in order to employ industry leading OSS for the long term, (3) it is committed to giving CLEC customers ample notice of any changes, and (4) it will involve CLEC customers in testing of OSS changes. See e.g., Hunsucker Rebuttal, pp. 9-11, 32-35.

applicable in Qwest territories. *Id*., pp. 49-10.[28] The record simply does not support the non-settling CLECs speculation about degradation of OSS.

Finally, the Applicants expect the non-settling CLECs to argue that the merged company should retain the existing Qwest OSS for at least three years, compared to the minimum two years agreed in the Integra Settlement. This is simply not reasonable, and goes far beyond what those LECs with vested commercial interests (Integra and 360networks), and those with the duty to protect the public interest (like the Division), have found to be sufficient and reasonable.[29]

### 2. ICA and Commercial Agreements

The non-settling CLECs also have sought conditions to ensure that Qwest's current ICAs, as well as other wholesale and commercial agreements, continue in place for a time certain. See e.g., Ankum Direct, pp. 65-75. This condition is reflected in the non-settling CLECs proposed Condition 6. Although the language of the Integra Settlement does not track the non-settling CLECs' proposed condition verbatim, these settlement provisions show that the Applicants made substantial concessions to address CLEC concerns. First, the Applicants have agreed to extend the term of all Qwest ICAs for a period of 36 months. Integra Settlement, Attachment A, ¶ B.3a. Second, the Applicants have agreed to extend the terms for all Qwest wholesale and commercial agreements (which involve services that are not necessarily governed by the Act or that this Commission does not regulate) for 18 months. *Id*., ¶ B.3.b. and c. And, finally, the Applicants have agreed not to change the terms of Qwest's wholesale tariffs for at least 12 months. *Id.*,

[28] And, in fact, CenturyLink has specifically made this commitment in the Integra Settlement (Attachment A), at ¶ B.7.

[29] Likewise, any argument that CenturyLink lacks experience with wholesale orders at commercial volumes similar to Qwest wholesale order volume would be utterly without merit. As Mr. Hunsucker testified, CenturyLink has almost 2,000 interconnection and resale agreements in place today and, like Qwest, its wholesale operations are on a national basis and across a national scale. Indeed, CenturyLink's wholesale department is on pace to process one million orders through its OSS, compared to 1.8 million Qwest orders. Thus, the Joint Applicants have shown that CenturyLink already has commercial wholesale volumes and thus will be able to integrate wholesale operations with Qwest wholesale operations. See e.g., Tr., pp. 50, 79-80.

¶ B.3.d. In making these commitments, the Joint Applicants have agreed to forego substantial rights that remain in place notwithstanding the merger. Nothing more should be required.

Based on arguments the non-settling CLECs have made in other states since the Integra Settlement was reached, the CLECs may argue that the Joint Applicants' commitment to not make changes to applicable commercial agreements for 18 months does not go far enough, especially based on their "business models." Thus, they may argue for a three-year extension for commercial agreements and wholesale tariff terms. However, there is no support in the evidence for additional extensions. The Joint Applicants' commitment regarding non-Section 251 commercial agreements in the Integra Settlement (¶ 3b.) is very reasonable, particularly given that such agreements are not required under the Telecommunications Act nor are within the Commission's jurisdiction.[30] The FCC determined that when CLECs are not impaired without access to an element, it need not be provided based on Section 251 at TELRIC-based rates pursuant to an interconnection agreement. The FCC allowed these network elements and services to be provided through commercial agreements without Section 251 restrictions. Thus, under the law, carriers' reliance on Qwest commercial agreements is a matter of choice. In short, although the non-settling CLECs may assert that the commitments in the Integra Settlement may "not go far enough," the Integra Settlement represents more than a reasonable compromise.

### 3. Wholesale Resources

The non-settling CLEC witnesses also allege that the post-merger company would fail to ensure that adequate resources were directed to maintain wholesale service quality at the current Qwest level. See e.g., See e.g., Gates Direct, pp. 136-142. To address these concerns, the CLECs proposed Condition 18 to require the combined company to maintain dedicated wholesale staffing levels that will provide a level of service "equal to or superior to that which

[30] Many (if not most) commercial agreements are not even legally required under Section 271 of the Telecommunications Act. They are certainly not required under Sections 251 or 252; otherwise, they would be interconnection agreements subject to those sections.

was provided by Qwest" prior to the merger filing. Gates Direct, p. 137; Hearing Ex. Joint CLECs 2.8 (TJG Ex. 8). However, Mr. Hunsucker stated throughout the proceeding the company's intent to maintain sufficient personnel and other resources to ensure the high quality of wholesale services. Hunsucker Rebuttal, pp. 5, 9-11: Hunsucker Supplemental, pp. 19-20, see also Tr., pp. 111-114 (Mr. Hunsucker testifying on cross-examination that the wholesale resources condition is unnecessary, would not allow CenturyLink to reduce costs through attrition of employees whose functions have been automated, or are duplicative or redundant, and that CenturyLink will make sure sufficient resources are available and thus a condition is not needed). Mr. Hunsucker explained that it was to CenturyLink's benefit to ensure that it meet the needs of its CLEC customers. Hunsucker Rebuttal, p. 11.

CenturyLink agreed to memorialize this commitment in the Integra Settlement. Specifically, CenturyLink agrees to "ensure that Wholesale and CLEC operations are sufficiently staffed and supported, relative to wholesale order volumes, by personnel, including IT personnel, adequately trained on the Qwest and CenturyLink systems and processes." Attachment A, ¶ B.11. This provision resolves the non-settling CLECs' purported concern in Condition 18, which contains similar but unworkable language.

**4. APAP**

Condition 4, regarding the Alternative Performance Assurance Plan ("APAP") should no longer be an issue, because, although the APAP was briefly mentioned in Mr. Gates' testimony, it was Integra, and its witness Douglas Denney, that presented the concept, and the arguments for it. See Direct Testimony of Douglas Denney, Joint CLECs Ex. 1, and Joint CLECs' Ex. 1.1 (APAP). Integra, however, has settled and has agreed to withdraw its testimony and support the merger without the existence of an APAP. See Attachment A, ¶ B.2. Since it is no longer supported by its sponsor, the Commission should not even consider the APAP. Further, as the

Joint Applicants have unquestionably demonstrated, the proposed APAP concept is fatally flawed and should not be adopted.

The most fundamental flaw in the APAP is that it does not address the standard contained in the Act – nondiscrimination. Instead, the APAP addresses "performance degradation" or "deterioration," which is irrelevant to the Joint Applicants' statutory obligations. Rebuttal Testimony of Michael Williams, Ex. JA-R3 ("Williams Rebuttal"), pp. 17-27; Supplemental Response Testimony of Michael Williams, Ex. JA-HC-Sup-R3 ("Williams Supplemental"), pp. 2-6; Tr., pp. 184-187, 582-583. Even if performance degradation were an appropriate standard, Mr. Williams demonstrated that the APAP is unnecessary, inappropriate and unreasonable for numerous reasons, including that the APAP does not require any proof of merger-related harm to invoke penalties. Williams Rebuttal, pp. 12-27; Williams Supplemental, pp. 2-6; Tr., pp. 184-189, 582-583.[31] Mr. Williams also showed, in pre-filed testimony and at two different sessions of the hearing (October 26th and November 4th), that the APAP does not accurately measure performance degradation. Indeed, the APAP would result in a *windfall* to CLECs. Williams Rebuttal, pp. 6-7, 9, 10-27; Williams Supplemental Response, pp. 2-9; see also JA Ex. Sup R3.1; and Tr., pp. 582-583, 182-189.

Specifically, as Mr. Williams testified, under Integra's APAP, the post-merger company would be liable for additional payments beyond the current Utah PAP (more than seven-fold, almost *$390,000*, in addition to about $50,000 under the UPAP), even if Qwest's service levels post-merger were *exactly the same* as pre-merger performance. Williams Supplemental, pp. 2-6; JA Ex. Sup R3.1; Tr., pp. 576-581, 582-583; see also Tr., pp. 184-189.[32] This fundamental flaw

[31] The CLECs' attempt to cram several years' worth of work on the original PAP into an APAP as part of this merger approval docket also raises very significant due process concerns. Williams Rebuttal, pp. 6-7, 9, 13, 18.

[32] See e.g., Tr., pp. 576-581 (Exhibit MGW-1 (Hearing Ex. JA Sup R3.1) admitted into the record), Tr., pp. 582-583 (Qwest would be penalized more than $390,000 (or seven times greater than under the Utah PAP in 2009) if the combined company's post-merger wholesale service performance remained exactly the same as in the 12 months before the merger announcement); see also Tr., pp. 184-189 (similar). Moreover, Qwest would still be penalized about $300,000 even if Mr. Denney's modifications on the witness stand on October 27th had been implemented. Williams Supplemental, pp. 6-9; Tr., pp. 582-583.

demonstrates that the APAP is not tied to any sort of service quality performance degradation, much less *merger-related* degradation.

Finally, the APAP's proponent, Integra's Mr. Denney, struggled at the hearing to defend or justify the APAP. For example, he made numerous significant admissions, including:

- It took years and hundreds of people to come up with the original PAP (Tr., pp. 379-386), unlike the cursory process applied to the APAP.
- The PAP is based on nondiscrimination standards under the Telecommunications Act, whereas the APAP concept was based on a different standard, "performance degradation," that is not in the Act. Tr., pp. 386-387.
- Mr. Denney did not know of any state commission that had ever ordered a PAP based on a performance degradation standard. Tr., pp. 387-390.
- Mr. Denney did not know of any state commission that had required a carrier to involuntarily accept a PAP with self-executing penalties. Tr., pp. 391-392.
- The standard "performance degradation" was not even defined in the APAP itself. Tr., pp. 395-396.
- There could be post-merger performance degradation that was *not the result of the merger*, but the APAP had no way to measure (either quantitatively or qualitatively) performance degradation as a result of the merger. Tr., pp. 396-401.
- Mr. Denney believed the APAP would have served its essential purpose even if Qwest had to pay penalties despite no post-merger performance degradation (i.e., post-merger performance stayed exactly the same as pre-merger performance). Tr., pp. 401-405.
- Mr. Denney was not aware that the Utah PAP did not have a provision allowing a comparison of monthly service performance with average performance over multiple months. Tr., pp. 407-411.
- The APAP measures a month's performance versus a year's performance, which can admittedly lead to wild fluctuations. Tr., pp. 411-413.
- Only after APAP penalties exceed $3 million to one CLEC can Qwest seek to cap its liability, but even then, payments are not suspended. Tr., pp. 419-422.
- Mr. Denney did not conduct any statistical analysis to determine whether Qwest would have to pay penalties under the APAP even if post-merger performance stayed the same as pre-merger performance. Tr., pp. 424-427.
- APAP payments are in addition to PAP payments. Tr., pp. 422-423, 428.

In short, Mr. Williams' testimony and Mr. Denney's significant admissions on cross-examination establish without a doubt that the APAP is fatally flawed, is a bad plan that is beyond repair, and has no place in any settlement or as a condition in a merger. Tr., p. 583.

### 5. Issues outside the scope of the merger proceeding

The non-settling CLECs also raised various substantive issues related to individual carrier disputes regarding rates, terms or conditions under which the parties interconnect. This includes a multitude of issues that Level 3 raised regarding its wholesale relationships with Qwest, such as compensation for ISP-bound (Virtual NXX, or "VNXX") traffic and 8YY traffic, "porting" of ICAs across states or companies, the federal rural exemption, interconnection configuration issues, directory listings and directory assistance, non-impairment filings, and billing dispute procedures. See e.g., Direct Testimony of Richard E. Thayer. Throughout the course of the proceeding, the Joint Applicants have maintained that these issues are not affected by the proposed merger and are not appropriate here; rather, they are appropriately addressed through separate arbitration or complaint proceedings before the Commission. Rebuttal Testimony of Karen Stewart, Ex. JA-R4 ("Stewart Rebuttal"), pp. 28-37. Indeed, many of these issues, such as the requested porting of ICAs across states, and the concerns about the rural exemption and the right to make "non-impairment" filings under the FCC's *Triennial Review Remand Order* ("*TRRO*"), are federal issues for which this Commission does not have jurisdiction. Other issues, such as the treatment of VNXX traffic, have already been decided by this Commission. *Id.*, pp. 32-36. And, of course, the remaining issues are issues that can (and should) be appropriately decided in more-focused proceedings, based on full evidentiary records; not in a merger approval proceeding. *Id.*, pp. 23-37.

Finally, the Division also concluded it was not necessary for the Commission to address individual carrier issues to find that the merger is in the public interest. Coleman Surrebuttal, pp. 5-9. Obviously, Integra, by virtue of its settlement with the Joint Applicants, also determined that conditions related to these issues are not necessary to satisfy its public interest concerns.

In short, the Commission should reject any non-settling CLEC assertions that resolution of these issues is appropriate for this proceeding, or necessary to determine that the Transaction

is in the public interest. Instead, the Commission should find that any continued non-settling CLEC concerns have been addressed in the Integra Settlement, which are more than sufficient to address public interest concerns related to the effects of the Transaction on wholesale customers.

## CONCLUSION

The Joint Application has been fully and fairly considered through lengthy proceedings and a fully developed evidentiary record. That record clearly shows that the Joint Applicants have demonstrated that the Transaction is in the public interest. To the extent that some parties raised concerns regarding potential benefits and the avoidance of potential harm to Qwest's Utah customers, these concerns are fully addressed in the settlement agreements reached with the Division, the OCS, the SLCAP, Integra, 360networks and the DOD/FEA, and no further conditions or commitments are necessary or appropriate. Thus, the Commission should find that the Transaction is in the public interest and should approve the Transaction.

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Respectfully submitted,

CENTURYLINK

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