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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	Post-Hearing Brief of the Division of Public Utilities Docket No. 10-049-16

In accordance with directions from the Public Service Commission (Commission), the Division of Public Utilities (Division) submits this brief in support of the Settlement Agreement and Stipulation of the Joint Applicants (defined below) and the Division that was entered on October 13, 2010 (Settlement Agreement), Attachment 1 hereto. The Settlement Agreement satisfies procedural and substantive requirements, is just and reasonable in effect, is supported by the facts, is in the public interest, and should be approved by the Commission. The Joint Competitive Local Exchange Carriers' (Joint CLECs) arguments to the contrary are meritless and are countered effectively by both the law and the facts.

I. Background

On May 19, 2010, Qwest Communications International, Inc. (QCII) and CenturyTel, Inc. (Joint Applicants) filed with the Commission their "Joint Application for Expedited Approval of Indirect Transfer of Control (Joint Application)." In the Application, the Joint Applicants sought Commission approval for the indirect transfer of

control of three QCII subsidiaries, Qwest Corporation Qwest Communications International, Inc., Qwest LD Corporation, and Qwest Communications Company (Qwest), to CenturyLink. Similar applications were filed in many states and, in several instances, the requested indirect transfer of control has been granted.

The Joint Applicants represented to the Commission that "The Transaction combines two leading communications companies with customer-focused, industry-leading capabilities, together with complementary networks and operating footprints."[1] In response to the Joint Application, several CLECS moved for and were granted intervention. In addition, several of these intervenors banded together in a group identified as the Joint CLECS.[2] A procedural schedule was established, discovery was conducted, and rounds of testimony were filed. Prior to the scheduled hearing dates, settlements between certain parties were reached. In addition to the Settlement Agreement between the Joint Applicants and the Division, settlements were reached between the Joint Applicants and the Office of Consumer Services (Office), and the Joint Applicants and Salt Lake Community Action Program (SLCAP). During the first two days of the hearing, a settlement agreement was reached between the Joint Applicants and the Department of Defense and all other Federal Executive Agencies (Federal Executive Agencies). Finally, on November 9, 2010, after all hearings were completed, the Joint Applicants and Integra Telecom of Utah (Integra) reached a settlement. Out of these numerous settlements involving only two parties, the Joint CLECs chose to contest only the settlement between the Joint Applicants and the Division.

[1] Joint Application at page 2.
[2] tw telecom of utah LLC; McLeodUSA Telecommunications Services, Inc., d/b/a/ PAETEC Business Services; Integra Telecom of Utah, Inc.; Electric Lightwave, LLC; Eschelon Telecom of Utah, Inc; and Level 3 Communications LLC comprised the Joint CLECs.

Integra took issue with the Settlement Agreement, initially filing a letter on October 19, 2010 with the Commission. As a result, the Commission ordered additional rounds of testimony and a separate hearing date to address the Settlement Agreement.

After the hearing dedicated to the Settlement Agreement, Integra and the Joint Applicants entered into a settlement agreement. This settlement agreement was filed on November 9, 2010.

II. The Two Party Settlement Agreement Satisfies the Requirements of the Applicable Statutes and Rules

The Settlement Agreement between the Joint Applicants and the Division was reached and presented to the Commission in a manner consistent with applicable statutes and rules. Settlements between two parties are specifically recognized as being presentable to the Commission. Involvement of every party is not required for a settlement to be approved

a. Issue

The Joint CLECs alleged that because the Joint Applicants and the Division reached a settlement agreement without directly involving other parties in the process, the Settlement Agreement should not be approved by the Commission. The Joint Applicants misread the applicable statutes and rules. The Settlement Agreement process involving the Joint Applicants and the Division is consistent with applicable statutes and rules, and the Settlement Agreement should be approved. The merits of the Settlement Agreement are not discussed in this section, but are addressed in detail in the next section.

b. Applicable Statutes and Rules

The Commission encourages settlements and it is not necessary to involve all parties in specific settlement negotiations. Indeed, "the commission may adopt any settlement proposal entered into by two or more of the parties to an adjudicative proceeding."[3] Importantly, the statute does not require that settlements involve every party to be approved. Although the Commission's rules indicate that "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 [emphasis added],"[4] the Commission is not mandated to make such an inquiry. Note that the rule uses the permissive "may" rather than the prescriptive "must." Intervenors who are nonparties to settlement agreements have their procedural rights preserved because, upon their request or in other circumstances, the Commission "shall conduct a hearing before adopting a settlement proposal [emphasis added]."[5]

c. Analysis

The Settlement Agreement between the Joint Applicants and the Division satisfies the applicable Commission statutes and rules and should be approved. Normally the Division has "involved other parities in settlement discussions, or provided notice that such discussions are ongoing."[6] However, for several reasons, the Division did not do so in this instance. The Division achieved a settlement with the Joint Applicants, and believes that if all parties participated in the process, no such settlement

[3] Utah Code Ann. § 54-7-1(3)(b);
[4] R746-100-11(f)(5)(b).
[5] Utah Code Ann. § 54-7-1(3)(e)(ii). See also supra which provides that "parties not adhering to settlement agreements shall be entitled to oppose the agreements in a manner directed by the Commission."
[6] Supplemental Rebuttal Testimony of Philip Powlick, lines 49-50.

may have been reached.[7] Moreover, the Division believes that it is unlikely that that participation by additional parties would have produced a result that would have been "significantly different."[8]

The parties had ample opportunity to challenge the Settlement Agreement, and the Joint CLECs seized that opportunity. Concerns about the Settlement Agreement, expressed in a letter to the Commission dated October 18, 2010, were appropriately addressed by the Commission. The Commission took action including delaying the hearing on the Settlement Agreement, allowing another round of testimony to address the Settlement Agreement, and also providing a date upon which to conduct a separate hearing addressing only issues involving the Settlement Agreement. The Joint CLECs vigorously, albeit unpersuasively, challenged the Settlement Agreement through 154 pages of testimony, not including exhibits, filed by Joint CLEC witness Mr. Timothy J. Gates. The Division responded with focused testimony, which effectively rebutted the Joint CLECs' arguments. At the hearing on the Settlement Agreement, Division Witnesses Mr. Casey Coleman and Dr. Philip Powlick were grilled by the Joint CLECs' attorney. Such cross-examination served only to support the Settlement Agreement.

The settlement agreement between Integra and the Joint Applicants, executed only days after than the hearing dedicated to the Division's Settlement Agreement, is further evidence that the Settlement Agreement did not prevent a CLEC from reaching an independent settlement with the Joint Applicants.

III. Because the Settlement Agreement is Just and Reasonable in Effect, Supported by Record Evidence and Material Facts, and is in the Public Interest, It Should Be Approved by the Commission

[7] Id. at lines 83-89.
[8] Id. at lines 97-99.

The Settlement Agreement plainly meets the requirements for approval by the Commission, and should be so approved. The Division took seriously its responsibilities in negotiating the Settlement Agreement, balancing the different interests that the Division must take into consideration. The Settlement Agreement is just and reasonable in its effect, in the public interest, and supported by the record and facts in this case.

a. Issue

The Settlement Agreement meets the requirements for approval, and should be approved by the Commission. The Settlement Agreement facilitates a competitive environment for all 95 CLECs authorized to operate in Utah and the incumbent telephone company, while providing operational certainty and stability to the CLECs. It allows the new newly merged company to be nimble, as the marketplace requires, as well as providing benefits to retail customers that would otherwise be unavailable to them. There have been no persuasive challenges to the justness and reasonableness of the Settlement Agreement. Approval of the Settlement Agreement is amply supported by record evidence and the facts in this case. No evidence supports a contention that the Settlement Agreement is not in the public interest.

b. Applicable Statutes

The Commission must apply several statutes when considering approval of a document such as the Settlement Agreement and the approval of an application for a merger. Statutes include Utah Code Ann. § 54-7-1 dealing with settlements, and Utah Code Ann. § 54-4-28, 29, and 30 addressing approval of merger and acquisition of utilities.

Utah Code Ann. § 54-7-1(3)(d)(i) states that

(i) The commission may adopt a settlement proposal if:
(A) the commission finds that the settlement proposal is just and reasonable in result; and
(B) the evidence, contained in the record, supports a finding that the settlement proposal is just and reasonable in result.
(ii) When considering whether to adopt a settlement proposal, the commission shall consider the significant and material facts related to the case.

Mergers involving utilities and related issues are addressed by the following three statutes. Commission approval is required for activities such as mergers of utilities. Utah Code Ann. § 54-4-28 states:

> No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest.

Utah Code Ann. § 54-4-29 states:

> Hereafter no public utility shall purchase or acquire any of the voting securities or the secured obligations of any other public utility engaged in the same general line of business without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such purchase and acquisition of such securities, or obligations, will be in the public interest.

Finally, Utah Code Ann. § 54-4-30 states:

> Hereafter no public utility shall acquire by lease, purchase or otherwise the plants, facilities, equipment or properties of any other public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission. Such consent shall be given only after investigation and hearing and finding that said purchase, lease or acquisition of said plants, equipment, facilities and properties will be in the public interest.

c. Analysis

The Settlement Agreement satisfies the statutory requirements listed above and is in the public interest. The Division negotiated and signed a Settlement Agreement that is "just and reasonable in result," is supported by record evidence, and is consistent

with “significant and material facts related to the case.”[9] When negotiating the Settlement Agreement, the Division considered the interests of the CLECS, the Joint Applicants, and the retail customers.[10] Literally over a thousand pages of testimony were filed in this docket, by parties representing a myriad of interests, ranging from CLECS (competitors of the Joint Applicants), to various large customers such as the Federal Execution Agencies, a party (the Office) representing small residential customers and small businesses, and a party (SLCAP) representing the interests of low income customers. Hundreds of pages of discovery requests were made and answered.

The Division carefully studied the filed testimony and the data responses to determine issues of central importance to the CLECs. In addition, as part of his duties with the Division, witness Mr. Coleman has reviewed numerous interconnection agreements. Core issues involving the CLECs' ability to compete with the Joint Applicants and 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 Bell Operating Company, and service quality were specifically addressed in the Settlement Agreement.

Operational System Support (OSS) conditions for continuance and retirement were specified by the Settlement Agreement. Importantly, the Settlement Agreement required that that “Qwest Corporation or any successor entity . . . will not discontinue its . . . OSS . . . for a minimum of 24 month, post-transaction closing.”[11] In the Division’s opinion, this provision “keeps the marketplace ‘status quo’ for a reasonable time, which

[9] Utah Code Ann. § 54-7-1(3)(d).
[10] See November 4, 2010 Transcript, Testimony of Casey Coleman, pages 499-500.
[11] Settlement Agreement, page 3.

was a major consideration of testimony filed by the CLECs."[12] This provision provided a "certain level of predictability" for CLECs.[13]

Interconnection Agreements were also addressed by the Settlement Agreement. Existing obligations would be honored, and certain extensions of expired agreements were established.[14] A three-year timeframe was established, which, although not as long as requested by the CLECs, provided a window "to keep business as usual while planning for the future, when changes could be necessary."[15] In evaluating timeframes, the Division "tried to balance the need for certainty against timeframes that would be cumbersome for the combined entities."[16]

In the Settlement Agreement, Qwest agrees that with regard to wholesale services that "it will not seek approval for new rates, whether pursuant to interconnection agreements or tariff to establish any new wholesale charges for service order processing …for 36 months after Closing."[17] The Division would look at post merger filed tariff changes to see if precluded changes were sought.[18]

The Settlement Agreement specifically addressed FCC obligations and the status of the merged entity as a BOC.[19] The Division "felt comfortable that CenturyLink was committing, in this stipulation, that they were gonna follow all applicable laws and regulations. Just like Qwest has to today."[20]

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[12] Supplemental Rebuttal Testimony of Casey J. Coleman, lines 217-219.
[13] Id. at lines 221-222.
[14] See Settlement Agreement, pages 3-5.
[15] See Supplemental Rebuttal Testimony of Casey J. Coleman, lines 277-279.
[16] Id. at lines 271-272. Also see generally id. at lines 239-282.
[17] Settlement Agreement, page 5.
[18] November 4, 2010 Transcript, Testimony of Casey J. Coleman, page 544, lines 16-25.
[19] See Settlement Agreement, pages 6-7.
[20] November 4, 2010 Transcript, Testimony of Casey J. Coleman, page 549, lines 10-15.

The Settlement Agreement also addressed concerns raised by the CLECs about wholesale service quality.[21] For at least 36 months, the Joint Applicants agreed not to discontinue the use of the Utah Performance Assurance Program (UPAP). Monthly reports from the Joint Applicants would continue to be required, and the Joint Applicants would seek termination only of Tier 2 payments."[22] It is the Division's position that the UPAP would not automatically terminate after the 36 months set forth above, but would require specific Commission approval to be discontinued.[23] Note that in 2009, Qwest filed a request to terminate the UPAP, but continuation is assured for at least 36 months post transaction due to the Settlement Agreement. The Division believes that continuation of the UPAP satisfies the CLECs' need that the Joint Applicants not "backslide" when providing service.[24]

The Settlement Agreement also assured the continuation, with the possibility of modifications, of the Change Management Process for 36 months after closing.[25] Processing will continue to be done in a "commercially reasonable manner."[26]

The Division determined that certain issues raised by CLECs were not applicable in Utah. For example, Level 3 was concerned about traffic pumping, but because all of the rural exchanges are owned by independent companies, and are not owned by the Joint Applicants, that issue did not need to be addressed in Utah.[27] Other issues that did not need to be addressed in Utah included certain ISP traffic issues.

[21] See Settlement Agreement, pages 5-6.
[22] Id.
[23] See Supplemental Rebuttal Testimony of Casey J. Coleman, lines 306-314.
[24] Id. at lines 322-338.
[25] See Settlement Agreement at page 6.
[26] Id.
[27] See Supplemental Rebuttal Testimony of Casey J. Coleman, lines 92-143.

The Division also looked at the needs of the Joint Applicants. [28] The Joint Applicants needed to "remain nimble enough to respond to a competitive telecommunications marketplace."[29] The Joint Applicants, the CLECs, and the Division wanted a "healthy, vibrant telecommunications market."[30] The Division kept these concerns in mind when negotiating the Settlement Agreement. The Joint CLECs wanted longer periods of time before changes to various procedures could be made. Certainty and stability were important to the Division, but the new company had to be able to respond to the ever-changing telecommunications world.[31] The Settlement Agreement not only meets the needs of the CLECs, but also the needs of the Joint Applicants.

The Division specifically chose which of the conditions identified by the CLECS and the Division itself to address in the Settlement Agreement. Although the Settlement Agreement does not address each concern identified by the CLECs or every concern raised by the Division, the Division believes that the most important issues are addressed by the Settlement Agreement. The Division took this approach because the Division was worried about decreasing the public benefit of the transaction by causing "death through a thousand cuts to the combined entity."[32] Division witness Mr. Coleman elaborated saying:

> Each additional regulatory requirement would place greater strain on the combined entity until it became much more difficult for the combined entity post-merger to compete in the telecommunications market. Essentially the Division crafted an agreement that provides certainty to customers, both retail and wholesale customers for an adequate amount

[28] Id.
[29] November 4, 2010 Transcript, Testimony of Casey J. Coleman, page 499, lines 17-19.
[30] Id. at lines 21-22.
[31] Id. at lines 15-19.
[32] Rebuttal Testimony of Casey J. Coleman, lines 161 -164.

> of time. This certainty allows companies time to execute its [sic] business plans as they had anticipated for the short term, while signaling companies that some changes and adjustments are likely in the future.[33]

Unlike the CLECs which are concerned only about the impacts of the merger on wholesale services, the Division is concerned about the impacts of the merger on retail services. Thus, the Division also considered the needs of retail customers when negotiating the Settlement Agreement. Entering into the Settlement Agreement allowed the Division to bind the Joint Applicants to certain broadband deployment provisions, although the Commission has no jurisdiction over broadband. The Settlement Agreement requires the Joint Applicants to spend "at least $25 million in broadband infrastructure ("Broadband") to benefit retail customers in Utah over a five-year period beginning on January 1, 2011."[34] Not only are the Joint Applicants required to spend money that otherwise they would not be obligated to spend, but also the Joint Applicants are required to spend 15% of that money in areas that are unserved or underserved. To track deployment, five years of reports are required.[35] Note that this reporting obligation is new.

Additionally, retail customers receive benefit from the Settlement Agreement because it precludes the company from seeking "a waiver from the requirements of R. 746-340, sections 8 and 9 for two (2) years following the date of the merger."[36] Thus, the Settlement Agreement imposes service quality requirements concerning end user installation, repair, and billing, as well as other services.

[33] Id. at lines 369-377.
[34] Settlement Agreement, page 2.
[35] Id.
[36] Settlement Agreement, page 7.

Finally, the Settlement Agreement imposes additional reporting requirements on the Joint Applicants. New required reports must address: broadband investment, both made and planned, to be filed every six months for two years; a capital expenditure report, made and planned, every six months for two years; a report showing the total Utah headcount in six month increments for two years; broadband availability and speed in six month increments for two years; and company-wide capital expenditures for the previous year, to be provided on the first and second anniversary of the transaction's closing date.[37]

IV. Conclusion

The Division respectfully requests that the Commission approve the Settlement Agreement as filed. The Settlement Agreement is just and reasonable in result, and supported by applicable law and facts. Approval of the Settlement Agreement is in the public interest.

The Commission may, and should, approve this Settlement Agreement between the Joint Applicants and the Division. The Division negotiated a Settlement Agreement to benefit both retail and wholesale customers, and the inclusion of other parties in the negotiation likely would not have altered the results. Taken as a whole, the Settlement Agreement provides certainty to the CLECs, flexibility to the new company, and no degradation of service to the retail customer. The Settlement Agreement thus is just and reasonable, and in the public interest. As shown above, the Settlement Agreement is well supported by evidence in the record and the material facts of the case.

[37] See id. at pages 7-8.

Additionally, the Division believes that the Settlement Agreement addresses "many of the most important concerns raised by CLECs"[38] and concerns important to retail customers. The Settlement Agreement does not address all the concerns identified by the CLECs or every concern raised by the Division, because the Division was worried about decreasing the public benefit of the transaction by causing "death through a thousand cuts."[39] The Division has considered the conditions raised by the parties, and, through the Settlement Agreement, has bound the new company to conditions which will benefit wholesale and retail customers in Utah. This Settlement Agreement 'is in the public interest because it provides benefits to retail customers that citizens would not have absent a settlement. Additionally, providing certainty and stability for the wholesale marketplace that impacts all 95 CLECs in the state, is in the public interest."[40]

Respectfully submitted this ___ day of December 2010.

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[38] November 4, 2010 Transcript, Testimony of Casey J. Coleman, page 500, lines 12-14.
[39] Rebuttal Testimony of Casey J. Coleman, lines 161 -164.
[40] November 4, 2010 Transcript, Testimony of Casey J. Coleman, page 500, lines 20-25.

CERTIFICATE OF SERVICE

Docket No. 10-049-16

I hereby certify that on the ___ day of December, 2010, I served the foregoing Post-Hearing Brief of the Division of Public Utilities upon the following persons via means of e-mail transmission to the e-mail addresses listed below, and via the indicated personal delivery, or regular U.S. Mail.

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