BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the 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**

LEVEL 3 COMMUNICATIONS, LLC POST HEARING BRIEF

December 6, 2010

I. INTRODUCTION & SUMMARY

As the Commission is aware, in addition to the settlement reached by Staff just prior to the hearing on the merits, the Joint Applicants have reached a settlement with Integra Telecom.[1] While the Integra Settlement addressed certain wholesale issues, it did not address the issues and conditions raised by Level 3 Communications, LLC ("Level 3"), issues that affect all competitive carriers operating in the Utah telecommunications marketplace and are not a "fix" to Level 3-only disputes.

The issue before the Commission is straight forward: does the Commission rely on the Joint Applicant's good intentions and approve the merger application without conditions, or does it approve the merger with conditions intended to protect the Utah economy, the Utah telecommunications marketplace and scarce public resources.[2] As shown by all competitive local exchange carrier ("CLEC") intervenors throughout this proceeding, the Joint Applicant's proposed merger must meet certain minimum criteria and should only be approved by the Commission if appropriate conditions are imposed to prevent anticompetitive behavior that will occur as a direct result of the transaction. Importantly, not a single intervenor supported approval of the merger application without conditions. The Integra Settlement, the only settlement before the Commission that takes a realistic look at wholesale issues, does not go far enough, however. The conditions sponsored by Level 3 will reduce billing disputes, minimize discriminatory treatment of competitive carriers by the Combined Entity, and reduce litigation in the entire

[1] *See* Notice of Settlement Agreement between Joint Applicants and Integra Telecom, Inc., and Request for Approval, filed November 9, 2010. ("Integra Settlement")

[2] Level 3 is aware that the Commission also has the authority to reject the merger applicaton.

telecommunications marketplace. The proposed conditions will have an impact industry-wide, and the fact that Level 3 was the sole sponsor should not take away from the issues sought to be addressed.

Prohibit the Combined Entity from using billing disputes with one entity from threatening disconnection, disconnecting or refusing to provision new orders by any of entities of the Combined Entity.

The leveraging of billing disputes across Combined Entity affiliates can only result from the combination of the two companies, and here there is no question that CenturyLink is the acquiring company and its management team will be in control of "interpreting" interconnection agreement terms and related decisions post merger. The Combined Entity will be doing so from the operational context of an independent, often rural, local exchange carrier and not from the perspective of a Regional Bell Operating Company ("RBOC") like Qwest. The Commission must insure that the Combined Entity does not use its newly realized scope and reach to force CLECs into less than optimal service and operating conditions as a result of the leveraging of billing disputes between affiliates. The proposed condition impacts the entire Utah telecommunications marketplace and can hardly be said to be a "Level 3" issue, and Level 3's proposed condition is necessary to protect the whole competitive industry.

Prohibit the Combined Entity from engaging in rural CLEC arbitrage.

The FCC adopted the rural access exemption to promote competitive entry into the more rural areas of RBOC territories. Rural LEC carriers are exempted from the FCC's order capping CLEC access charges when the rural ILEC operates a CLEC in

territories meeting specific criteria.[3] Instead of mirroring the rate of the RBOC, the rural CLEC is allowed to charge the access rates of its rural parent.

If the proposed condition is not adopted, the Combined Entity will have an incentive to set up a rural CLEC and let Qwest lose customers to that CLEC. The rural CLEC can then charge the higher CenturyLink ILEC access rates instead of the lower Qwest rates. The Combined Entity can increase access revenue by taking advantage of the FCC's rural exemption and transferring traffic that would normally be terminated to Qwest to instead be terminated to a rural CLEC affiliate. Regulatory rates will be artificially maximized and competition would be hurt as a result of forcing ***all*** competitive, terminating carriers to pay more for services because of a loophole in the rules.

The higher rates that CenturyLink can recover in the Qwest territories will create an incentive for the Combined Entity to "lose" customers to its CLEC affiliate to maximize corporate profits. These higher rates are hardly in the public interest and will ultimately be passed on to the customers of other carriers who terminate traffic in Qwest territories. The Joint Applicants should be provided unequivocal guidance that such activity is prohibited.

> ***Require the Combined Entity to allow carriers to use new or expanded interconnection routes established by affiliates of the Combined Entity that are in adjoining service territories, and require notice of these network modifications by the Combined Entity. In addition, all contracts between the affiliates of the Combined Entity for telecommunications services and network interconnection must be made publicly available.***

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[3] The FCC has defined a Rural CLEC as a CLEC that does not provide service, by originating or terminating traffic within any incorporated place of more than 50,000 inhabitants based on most recently available Census Bureau statistics or an urbanized area as defined by the Census Bureau. *See* 47 C.F.R. § 61.26(a)(6).

Again, this condition impacts the entire industry and is not limited to Level 3. All carriers should be able to take advantage of the interconnection routes established between ***adjoining*** territories and adjoining Combined Entity affiliates. The proposed condition does not cover non-contiguous areas and does not require the construction of any new facilities, but requires that the route be made available if Qwest and CenturyLink ***establish*** that route or already maintain one for their use. This condition affects all carriers operating in Utah and the Combined Entity should not have any problems accepting this condition since it calls for interconnection the Combined Entity provides to itself and its' affiliates. Technical feasibility and traffic volumes would be moot since Qwest and CenturyLink would have established that direct route. It is imperative that the Commission ensure that the competitive environment remain strong and vibrant. Allowing the Combined Entity to improve network efficiency without making those interconnection efficiencies available to all competitors will not benefit Utah consumers and cannot be deemed to be in the public interest.

Prohibit the Combined Entities from continuing or expanding the improper homing of 8YY switched access charge and transport practices.

CenturyLink has and is routing 8YY traffic in a manner that incurs artificially high transport charges. When an 800 call originates with a wireless carrier and is then handed to CenturyLink, CenturyLink is not routing the call to the nearest tandem and then to the terminating LEC, but instead treats the wireless facility to which the call is first delivered as a CenturyLink end office and routes the call to a distant tandem to which that "end office" is homed. CenturyLink charges the full transport from the wireless "end office" thereby artificially inflating the transport costs above what would be engineered in an efficient network. It cannot be in the public interest to allow a hybrid

carrier to route traffic among its affiliates for the sole purpose of imposing higher costs on competition.

If the proposed condition is not adopted, this practice could go into effect across the Qwest region and the Combined Entity's national footprint, impacting consumer choice since competing carriers will face excessive costs for delivering services. Those higher costs, which the Combined Entity may not impose on its own customers if it chooses the most efficient and lowest-cost form of routing, could force competing carriers to stop providing competitive services in Utah.

Require Qwest to cease its unlawful and arbitrary practice of denying dispute claims solely on the basis that they are more than 90 days beyond the date originally billed.

There is no doubt that Qwest unilaterally imposes 90-day deadlines on accepting billing disputes, and the ability to unilaterally alter contract provisions and impact billing disputes harms the entire telecommunications industry and not just Level 3. The proposed condition protects all competitive carriers from the unilateral actions of the Combined Entity.

Qwest's strategy is to negotiate with individual companies to resolve these sorts of issues, issues that were created by Qwest. Qwest feels free to alter its contractual agreements through the unilateral policy decisions that it makes. This unilateral ability of Qwest or the Combined Entity to impose new conditions on the competitive industry through policy changes that impact contractual rights reveals that the mere extension of the interconnection agreements may not provide the certainty that the industry and Commission believe they are getting with the Integra Settlement.

In effect, the scheme creates a subsidy for the carrier that imposes the limitation because the "barred" carrier would have to assume the loss of an otherwise legitimate

credit or revenue either by reduced margins or by reduced revenues. Both the subsidy to Qwest, and the Combined Entity, and the lost revenue or incurred cost to the CLEC will harm fair and reasonable competition in the local exchange market. The problem will be exacerbated if the Combined Entity develops different policies based on the size of its competitors. For example, a billing dispute of $200,000 may be typical for Qwest or the Combined Entity but it could result in the death of smaller competitors. The Combined Entity should be explicitly prohibited from taking such unilateral acts nor specifically allowed under the interconnection agreements or tariff.

> ***Require the Combined Entity to compensate terminating carriers at the appropriate rate for ISP-bound traffic and direct that ISP-bound traffic shall include traffic provisioned using virtual NXX codes, and insure that all locally dialed ISP-bound traffic in the calculation of relative use factors pursuant to 47 C.F.R. §703(b).***

The issue of how the Combined entity compensates terminating carriers for ISP-bound traffic provisioned using virtual NXX codes impacts ***all*** terminating carriers. To argue that this concern is somehow a "Level 3" issue is misguided and ignores the fact that the entire dial-up industry is affected.

How the Joint Applicants will treat the question of compensation for ISP-bound traffic and how ISP-bound traffic is treated when calculating how much a carrier pays for local interconnection infrastructure affects all terminating carriers. These compensation questions are crucial and go to the heart of the economic viability of the commitments the Joint Applicants have made to the Commission, including the deployment of broadband facilities. Forcing competitors to terminate traffic from Qwest for free and by forcing competitors to bear costs for traffic on the Qwest side of points of interconnection through relative use fees, impairs the ability of all competitive carriers providing dial-up to maintain just and reasonable rates.

Dial-up access will remain the primary vehicle for Internet access for many Utah residents and across the country for years to come irrespective of the deployment of broadband facilities. Utah consumers who chose not to purchase broadband or cannot afford to purchase broadband should not be relegated to the single ISP that Qwest currently offers. Yet, unless the Joint Applicants abide by the requirements of the *Core Mandamus Order* and pay terminating carriers the appropriate reciprocal compensation rate, competitive carriers may not be able to compete with Qwest in this area, leaving Utah consumers with little or no choice in ISP providers.

II. THE COMMISSION MUST RESTRICT THE ABILITY OF THE COMBINED ENTITY TO LEVERAGE BILLING DISPUTES ACROSS ITS AFFILIATES.

As Level 3 witness Richard E. Thayer explained in his testimony, the combination of Qwest and CenturyLink will create an opportunity for the Combined Entity to leverage a billing dispute that one of its entities may have with a competitive local exchange carrier ("CLEC") to refuse to provision or slow roll the delivery of services that the CLEC is purchasing in another state or from another affiliate of the Combined Entity.[4] For example, assume that Level 3 and Qwest have a billing dispute for $100 for transport charges in Utah while at the same time Level 3 has no outstanding billing disputes with CenturyLink. But for the proposed transaction, Qwest and Level 3 would work to resolve that billing dispute and CenturyLink would have no interest in how it was resolved since it is a separate entity from Qwest. But, post-merger, Qwest and CenturyLink will be affiliates of the Combined Entity, creating an incentive for the two companies to leverage their provisioning of services by slow rolling or refusing to provide services to a CLEC in order to force a disadvantageous settlement of an unrelated dispute. The possibility of this

[4] Exh. 1.0, Thayer Direct Testimony, at. 20:9-19.

scenario is uncontroverted. The anti-competitive impact can manifest itself in the context of acquiring a customer. Without the certainty that services will be provisioned by Qwest unfettered by threats as a result of a CenturyLink dispute, a CLEC is unable to properly price and bid the services to be delivered. Multiply this scenario across multiple customers and multiple CLECs and the detriment to the CLEC community and Utah consumers is not difficult to understand.

The Joint Applicants did not attempt to refute the possibility that the Combined Entity may engage in this type of behavior. Rather, CenturyLink witness Michael R. Hunsucker acknowledged that there was a "possibility that we could" leverage billing disputes. Hunsucker tried to downplay the possibility by pointing out that the individual contracts between the carriers would control the relationship between an affiliate of the Joint Applicant and a CLEC.[5] However, Level 3's uncontested testimony shows that any contract language that pre-dates this proposed transaction would not have contemplated the possibility of a CenturyLink entity refusing to deliver services because of a billing dispute with Qwest.[6] It is also uncontested that billing disputes are leveraged as a result of internal policy changes by the carriers and are not the result of negotiations.[7]

One of the major themes set forth by the Joint Applicants is that the transaction does not allow the parties to modify existing contracts. Hunsucker argues that the acquisition of Qwest by CenturyLink doesn't change any of "Qwest's or CenturyLink's

[5] Exh. JA-R5, Hunsucker Rebuttal Testimony, at 45:4-11.

[6] Exh. 1.0, Thayer Direct Testimony, at 5:91-97.

[7] *Id.*

existing rights or obligations"[8] and therefore the merger has no impact on either entity's rights and obligations per-merger or post-merger. But while arguing that the transaction does not change any of its contractual rights or obligations, the Joint Applicants refused to commit that the Combined Company would not leverage billing disputes across affiliates. [9] Such conduct can only result from the combination of the two companies. There is no question that CenturyLink is the acquiring company and its management team will be "interpreting" interconnection agreement terms and related decisions if and when the merger is approved. They will be doing so from the operational context of an independent, often rural, local exchange carrier and not from the perspective of a RBOC like Qwest.

A transaction that creates an entity that can leverage billing disputes across its footprint, whether in Utah or elsewhere, fails to promote just, reasonable, non-discriminatory, and non-preferential rates as required by Utah Code § 54-4-4. Allowing the Combined Entity to leverage billing disputes will have a negative impact on the goal of maintaining just and reasonable rates as required by Utah law.[10] Leveraging billing disputes will force competitive carriers to pay rates that are in error and excessive, that are not bargained for or required by regulation, or that are not appropriate in order to provide services.

Moreover, the harm from leveraging billing disputes is heightened if it occurs in response to a request for services that will be used in the provision of services to a

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[8] Exh. JA-R5, Hunsucker Rebuttal Testimony, at 45:11-14.

[9] Tr., Vol I, 130:15-25.

[10] Utah Code § 54-4-4.1(1)(c).

customer. By linking unrelated billing disputes, possibly from across the nation, to obtaining the inputs necessary to provide service to a customer by a CLEC, the Combined Entity's conduct would not promote the fair and reasonable competition for local exchange service in a competitively neutral regulatory manner.[11] Crucially, however, the Combined Entity's conduct could also have a detrimental impact on the customer's confidence and ability to choose its competitive local exchange carrier.

The effects of the proposed transaction are apparent. Neither Qwest nor CenturyLink could leverage the other's billing disputes but for the approval of this transaction. If the transaction is not consummated, then the bill leveraging problem would not exist.

Before the Commission can approve the transaction, it must impose a condition that prohibits the Combined Entity from leveraging billing disputes across affiliates. By doing so, the Commission will eliminate any ambiguity that such action is permissible and will establish a framework for rapid Commission resolution in the event such anti-competitive behavior is attempted – thereby saving the scarce resources of the Commission and the CLEC community which will otherwise need to be allocated to the litigation which will inevitably ensue.

III. THE COMMISSION SHOULD PROHIBIT THE COMBINED ENTITY FROM ENGAGING IN RURAL CLEC ARBITRAGE.

Utah law requires the Commission to determine that the combination of CenturyLink and Qwest promote a competitive telecommunications marketplace while

[11] *See* Utah Code § 54-4-4(1)(i)(C) (stating that the Commission should establish nondiscriminatory rates and charges).

protecting and maintaining just and reasonable rates.[12] It is difficult to see how that standard can be met when the proposed transaction eliminates the potential competitive entry by either party into the territories of the other, and provides the economic incentive for the Combined Entity to engage in access charge arbitrage.[13] If the Combined Entity is permitted to take advantage of a regulatory loophole that would allow CenturyLink to operate in the Qwest territory but to evade the cap on access charges imposed on Qwest, the loss of a potential competitor will produce bizarre results. For this transaction to meet the legally mandated standard, neither the loss of a competitive threat nor the opportunity to engage in regulatory arbitrage can occur. Absent conditions to prohibit that result, this transaction cannot meet the requirements of Utah law and must be rejected.

As Level 3 witness Thayer explained, the Federal Communications Commission ("FCC") has tried to promote competitive entry in the more rural areas of RBOC territories.[14] The FCC has done this by exempting the rural incumbent local exchange carrier from its order capping CLEC access charges when the rural CLEC operates in territories meeting specific criteria.[15] Instead of mirroring the rate of the RBOC, the rural CLEC is allowed to charge the access rates of its rural parent.

If the proposed combination does not take place, both Qwest and CenturyLink would maintain their pre-merger incentive to enter the other's markets on a competitive

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[12] Utah Code § 54-4-4.

[13] Exh. 1.0, Thayer Direct Testimony, at 15:6-14.

[14] *See* 47 C.F.R. § 61.26(f).

[15] The FCC has defined a Rural CLEC as a CLEC that does not provide service, by originating or terminating traffic within any incorporated place of more than 50,000 inhabitants based on most recently available Census Bureau statistics or an urbanized area as defined by the Census Bureau. *See* 47 C.F.R. § 61.26(a)(6).

basis. CenturyLink could take advantage of the FCC's exemption from the CLEC access charge cap to help fund its competitive entry into the Qwest territories. However, once the entities are combined, CenturyLink would no longer have the incentive to enter an adjoining Qwest market to compete for new customers since it would then be competing against an affiliate. Instead, the Combined Entity will have an incentive to have a CenturyLink ILEC affiliate set up a rural CLEC and let Qwest lose customers to that rural CLEC, which can then charge the higher CenturyLink ILEC access rates instead of the lower Qwest rates. The Combined Entity can increase access revenue by taking advantage of the FCC's rural exemption and transferring traffic that would normally be terminated to Qwest to instead be terminated to a rural CLEC affiliate. Regulatory rates will be artificially maximized and competition would be hurt as a result of forcing competitive, terminating carriers to pay more for services because of a loophole in the rules.

The Joint Applicants did not challenge the potential harms described by Level 3 witness Thayer. Instead, CenturyLink witness Hunsucker side-stepped the issue, saying that Mr. Thayer's testimony is "unfounded" speculation.[16] But, since Utah law allows rural ILECs to establish CLECs, the competitive threats to the telecommunications markets described by Thayer must be addressed before this transaction can be found to be in the public interest.

Without appropriate conditions imposed, the infrastructure to support the rural CLEC will not in itself lead to improved infrastructure for higher speed telecommunications services or greater capacity for voice, video or data. Improved

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[16] Exh. JA-R5, Hunsucker Rebuttal Testimony, at 26:21-27:9.

infrastructure will only occur if the Combined Entity collects the excessive, arbitrage-driven rates to fund its deployment of broadband, in which case it would be relying on its competitors to subsidize its broadband commitments. However, with the Combined Entity's dividend commitments to its shareholders, it is unlikely that the funds so collected would be put to this use. The public interest does not require subsidization of the Combined Entity.

In this case, when a rural CLEC is established solely for the purposes of taking advantage of a regulatory loophole, its entry into the market does not encourage fair and reasonable competition for local exchange telephone services in a competitive neutral manner.[17] As described in Thayer's uncontested testimony, Qwest would have an incentive to "lose" certain customers to the rural CLEC of its CenturyLink ILEC affiliate in order to secure higher access revenues for the combined corporation than Qwest could deliver.[18] The rural CLEC may actually never expand its network or seek to compete against Qwest, but it would instead just focus on maximizing revenues from a specific set of customers and thus harm its competitors by imposing higher rates. Since this scenario can only occur as a result of the proposed transaction, without the proposed safeguards the transaction cannot be found to encourage "fair and reasonable competition" or to be competitively neutral.

The uncontested record shows that the proposed transaction poses significant harm, and the harm arises only as a result of the combination. Unless those harms are

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[17] Tr. Vol. I, 126:25-127:4 (CenturyLink witness Hunsucker testified that, if not prohibited by state law, CenturyLink could from purchase a rural LEC. *See* Tr., Vol. I, 127:5-16 (Hunsucker testifying that rural LEC could set up a rural CLEC).

[18] Tr. Vol. I, 127:24-128:15 (Hunsucker acknowledged that a rural CLEC affiliate could market its services to high volume customers).

neutralized, the Commission must reject the transaction because it would not meet the legal requirements as set out in Utah law. In order to meet those standards and contain the harm, the Commission should prohibit the Combined Entity from establishing a rural CLEC that will compete in Qwest territory. In the alternative, if the Commission allows for the creation of a rural CLEC to compete in adjoining Qwest territories, it should require the Combined Entity to cap access rates at the Qwest rate.

IV. THE COMMISSION MUST ENSURE THAT THE COMBINED ENTITY ALLOWS COMPETITORS TO ACCESS NEW ROUTES ESTABLISHED AS A RESULT OF THIS TRANSACTION.

The Commission must evaluate the impact of this transaction to ensure that it encourages technological advancement and enhances Utah's economic development, including economically efficient deployment of infrastructure for higher speed telecommunication services and greater capacity for voice, video, and data transmission. The Commission can achieve this goal by requiring the Combined Entity to make new transport and interconnection routes established by the Combined Entity on a post-merger basis accessible to competing telecommunications carriers. This includes allowing a CLEC to reach a CenturyLink territory through routes established by the Combined Entity with an adjoining Qwest territory or any other network configuration. This condition is required to ensure that the Combined Entity does not use its various regulatory statuses, such as RBOC, incumbent local exchange carrier, or rural ILEC subject to protections under Section 251(f)), to force competitors into costly, inefficient interconnection arrangements that the Combined Entity itself does not have to utilize or incur the costs for.

As the unchallenged testimony of Level 3 witness Thayer proves, this obligation would be imposed only on routes and infrastructure established post-merger.[19] The condition would affect only those network synergies that result from the Combined Entity's network integration and would not require the Combined Entity to undertake any special projects or network build outs specifically for competitive providers, since the condition focuses on the "network synergies" that the Combined Entity establishes post merger for its needs.

The Combined Entity will have powerful incentives post-closing to engage in conduct that would severely disadvantage competitors. For example, if Qwest and CenturyLink decided to route a CenturyLink rural carrier's traffic to a Qwest host tandem adjoining Qwest service territories, it could eliminate the need for the individual company's traffic to be routed through the currently utilized "distant" tandem and possibly reduce transport costs. Yet, the Combined Entity could still require other carriers to reach the individual territories through the historic, more distant tandem routes. Absent the completion of this transaction, those entities could not leverage their networks in that manner without each carrier making the same arrangements available to other carriers.

In order to ensure that such routes and synergies are made available, the Commission must require as part of this condition that all contracts between the affiliates of the Combined Entity for network services and network interconnection be made publicly available. This requirement should also include notice of network modifications.

Adoption of the condition suggested here will help bring the transaction into compliance with Utah law. First, it will encourage carriers to use the most economically

[19] Exh. 1.1, Thayer Direct Testimony, 18:1-10.

efficient infrastructure for higher speed telecommunications services, and by increasing capacity that exists between routes or in the network. Improved access to more efficient interconnection routes meets the criteria of Utah Code § 54-4-4 by reducing the costs of network inputs and functions that will help maintain just and reasonable rates. These proposed conditions will encourage a competitive telecommunications marketplace while protecting and maintaining the wide availability of high-quality telecommunications services by ensuring that carriers will have equal access to the Combined Company's interconnection services and operating territories.[20] The transparency created by adoption of this condition will ensure that no discriminatory conduct is being undertaken, thereby saving Commission resources that will otherwise need to be allocated to the inevitable disputes that will occur if the condition is not adopted.

It is unclear whether the Joint Applicants are seeking a waiver of this requirement or an affirmative finding from the Commission that the Combined Entity will meet those criteria. This is important because the Joint Applicants have made representations to staff, the industry and investors about the scope of the synergies that the Combined Entity will capture. Meeting those synergies and the financial projections are a crucial component of the economic impact of this transaction. If the Commission's decision here is based on specific network synergies that the Combined Entity will implement as a result of this transaction, then the Commission must as a matter of law consider how those synergies will be reached and how they will impact competition. The Commission must require the

[20] *See* Utah Code § 54-4-4(4)(a) (stating that in determining just, reasonable, or sufficient rates, the Commission should consider the prudence of any action taken or expense incurred by a public utility).

Combined Entity to make specific routes that result from the transaction available to competitors, and by requiring notices of network modifications.

V. THE COMMISSION MUST ENSURE THAT THE COMBINED ENTITY DOES NOT ARBITRAGE THE USE OF TANDEMS FOR 8YY SERVICES.

When presented with specific evidence of harmful conduct resulting from CenturyLink and Embarq behavior, and questions about the possibility of this harmful conduct expanding throughout the Qwest region, the Joint Applicants have failed to challenge Level 3 or respond to the specifics. This silence is a warning to the Commission and the industry.

CenturyLink has and is routing 8YY traffic in a manner that incurs artificially high transport charges. This occurs when 8YY calls originate on a wireless network and CenturyLink receives the calls from wireless carriers for transport to Level 3, which provides services to the 800 customer. CenturyLink is not routing such a call to the nearest tandem and then to Level 3, but instead treats the wireless facility to which the call is first delivered as a CenturyLink end office and routes the call to a distant tandem to which that "end office" is homed. CenturyLink charges the full transport from the wireless "end office" thereby artificially inflating the transport costs above what would be engineered in an efficient network.[21] Therefore, despite Hunsucker's statements that such charges are limited,[22] the unchallenged testimony of Thayer demonstrates that the bills do not reflect the CenturyLink assertion.[23]

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[21] Exh. 1.SR, Thayer Surrebuttal Testimony, at 12:254-13:262.

[22] Exh. JA-R5, Hunsucker Rebuttal Testimony, at 44:10-17.

[23] Exh. 1.0, Thayer Direct Testimony, at 19:1-18.

Level 3 raises this issue now because it has better understanding of a problem it discovered when CenturyLink purchased Embarq. When the specific conduct by CenturyLink is considered in the context of the proposed transaction, the concern is that it might be imported throughout the Qwest operating territory. Level 3 witness Thayer asked whether the Combined Entity would adopt this practice across its operating territory.[24] The Joint Applicants did not respond. He also asked whether the Combined Entity would route calls that originate in Utah out of state in order to leverage the transport costs or establish an outsourcing arrangement where Embarq does all database dips for the Combined Entity.[25] For the Commission *and the telecommunications industry*, the real issue is whether the Combined Entity exports this practice of inefficient network routing into Utah or the rest of the its service territory, and whether the practice resulting from the combination meets the requirements of Utah law.

Simply put, it cannot be in the public interest to allow a hybrid carrier to route traffic among its affiliates for the sole purpose of imposing higher costs on competition. Allowing a carrier to arbitrage its transport undercuts a competing carrier's ability to maintain just and reasonable rates as required by Utah law.[26] Allowing carriers to choose artificially highs cost routes for traffic does not promote efficient deployment of infrastructure. Instead, it promotes the maintenance of inefficient traffic routing preferences and infrastructure by eliminating incentives to consolidate redundant facilities. If these practices are allowed to go into effect across the Qwest region or the

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[24] *Id*. at 19:4-7.

[25] Exh.1.SR, Thayer Surrebuttal Testimony, at 12:254-13:262.

[26] *See* Utah Code § 54-4-4.

Combined Entity's national footprint, it will impact consumer choice since some carriers will face excessive costs for delivering services.[27] Those higher costs, which the Combined Entity may not impose on its own customers if it chooses the most efficient and lowest-cost form of routing, could force competing carriers to stop providing competitive services.[28]

Throughout this proceeding, Level 3 has recommended a number of targeted, common-sense solutions that would eliminate incentives for the Combined Entity to leverage its market dominance to derive new revenue from inefficient practices. CenturyLink's assertion that there are "no rules" in this area should send off alarm bells.[29] The Commission should require the Combined Entity to route traffic for 8YY to its nearest tandem. And, this condition should encompass traffic of a customer of the Combined Entity without regard to the entity that has the contractual relationship. For example, the traffic of an Embarq customer should be routed to the nearest Qwest, CenturyLink or Embarq tandem capable of 8YY dips. If the Commission declines to impose such a condition, then it should cap the mileage that the Combined Entity can charge to 8 miles. Only by imposing one of these conditions can this issue in proposed transaction comply with Utah law.

VI. THE COMMISSION SHOULD PROHIBIT THE COMBINED ENTITY FROM IMPOSING ARBITRARY DEADLINES ON BILLING DISPUTES.

[27] *Id.*

[28] *Id.*, Subsection (b) (stating that the Commission shall establish just, reasonable, and sufficient rates).

[29] Exh. JA-R5, Hunsucker Rebuttal Testimony, at 44:10-11.

In her testimony, Qwest witness Karen Stewart left no doubt that Qwest unilaterally imposes 90-day deadlines on accepting billing disputes. The issue as Qwest sees it is whether the amount that the successful party can recover from a billing dispute should be capped at 90 days even if the dispute goes back for a number of years.[30]

Stewart did not dispute that Qwest implemented the 90-day condition on billing disputes within the last year.[31] Stewart believes that if Level 3 (or apparently any CLEC) objects, it should seek to negotiate with Qwest an amendment to the interconnection agreement.[32] In her rebuttal testimony, she discussed how Qwest was going to negotiate with individual companies to resolve these sorts of issues. This admission by Qwest shows the true extent of its market power: despite its written interconnection agreements, Qwest feels free to alter its contractual agreements through the unilateral policy decisions that it makes. Given this conduct, Hunsucker's testimony that Qwest and CenturyLink will not "change the ICA at all except to the extent there's a change of law" does not provide comfort to any telecommunications carrier. That testimony is not accurate since Stewart's testimony reflects that there are changes that the Combined Entity does impose by fiat.[33]

The ability to unilaterally alter contract provisions and impact billing disputes harms the telecommunications industry. Limiting the recovery of a legitimate CLEC billing dispute to a 90-day period can be staggering. If a CLEC successfully showed that it had been over-billed by Qwest by $10,000 a month for two years, by Qwest's

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[30] Exh. JA-R4, Stewart Rebuttal Testimony, at 17:9-25.

[31] *See Id.*

[32] *Id.*, at 36:8-13.
[33] *Id.*

calculations, the CLEC would not be entitled to recover $240,000, but only $30,000. Stewart also suggests that the same might apply to a dispute raised by Qwest to charges it received from a CLEC. Both results are inequitable and do not maintain just and reasonable rates. In effect, the scheme creates a subsidy for the carrier that imposes the limitation because the "barred" carrier would have to assume the loss of an otherwise legitimate credit or revenue either by reduced margins or by reduced revenues. Both the subsidy to Qwest and the lost revenue or incurred cost to the CLEC will harm fair and reasonable competition in the local exchange market. The problem will be exacerbated if the ILEC develops different policies based on the size of its competitors. A billing dispute of $200,000 may be a typical business dispute for a large competitor but it could result in the death of smaller competitors.

Finally, a policy that allows for unilateral policy changes that impact interconnection agreements promotes litigation. Contrary to Ms. Stewart's assertions, it is not incumbent on competitive providers to initiate negotiations every time Qwest wants to change a policy. That obligation falls on Qwest, and Qwest appears to have decided to avoid that obligation by unilaterally implementing policies that alter interconnection agreements.

In light of the record surrounding this issue and its anticompetitive impact, the Commission must prohibit the Combined Entity from unilaterally imposing any new policies or changes to an interconnection agreement. The Combined Entity must have the burden of initiating negotiations if it wishes to seek any changes to any established terms or policies. The importance of this issue is reflected in Hunsucker's testimony that parties

can have “differing interpretation of specific or interrelated ICA terms.”[34] CenturyLink understands the need for certainty so it should not object to the Commission taking steps to restrict this type of behavior in order to bring the proposed transaction in line with Utah law.

VII. THE COMMISSION MUST PROVIDE EXPLICIT GUIDANCE WITH RESPECT TO THE TREATMENT OF ISP-BOUND TRAFFIC FOR COMPENSATION PURPOSES AND CALCULATION OF RELATIVE USE CHARGES.

As part of its charge to review this transaction, the Commission has examined the financial assumptions that the Joint Applicants considered when pulling the deal together. Level 3 has consistently argued that those assumptions must include an examination of how the Joint Applicants will treat the question of compensation for ISP-bound traffic and how ISP-bound traffic is treated when calculating how much a carrier pays for local interconnection infrastructure. These compensation questions are crucial. They go to the heart of the economic viability of the Joint Applicants to meet the commitments it has made here, including deployment of broadband facilities. It also goes to whether competitive carriers will continue to be forced to subsidize the network infrastructure that Qwest maintains for calls that their customers originate. Fortunately, recent decisions by the United States Court of Appeals for the District of Columbia and the United States Supreme Court answer those questions. It is imperative that the Commission ensure that

[34] Exh. JA-R5, Hunsucker Rebuttal, at 22:11-14.

Qwest and CenturyLink are in compliance with this new decision or it will not be able to find this transaction meets the statutory requirements.[35]

On January 10, 2010, the United States Court of Appeals for the District of Columbia eliminated any confusion over the legal and regulatory treatment of ISP-bound traffic when it upheld a determination by the FCC that ISP-bound traffic falls under the rubric of traffic covered by Section 251(b)(5) of the Telecommunications Act of 1996.[36] That decision was upheld when the United States Supreme Court denied petitions for certiorari filed by Core Communications and a number of states.[37] Thus the findings of the Court of Appeals are final.

In its decision, the Court of Appeals found that ISP-bound traffic stands at the intersection of Section 251, which encompasses local interconnection, and Section 201, which covers interstate traffic. Writing for the Court, Judge Williams explained:

> Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within that intersection. Given this overlap, § 251(i)'s specific saving of the Commission's authority under § 201 against any negative implications from § 251 renders the Commission's reading of the provisions at least reasonable.[38]

The Court's rationale places on firm-footing the FCC's authority to regulate ISP-bound traffic through its authority under Section 251(b)(5) and Section 201. The Court's

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[35] On cross examination, Stewart admitted that multiple decisions had been issued since the issuance of the 2003 Colorado District Decision she cited testimony. *See* Tr. Vol I, 180:4-6.

[36] *Core Comm., Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) ("*Core Mandamus Order*").

[37] *See Core Comm., Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) *cert. denied*, (U.S. Aug. 6, 2010) (No. 10-185).

[38] *Core Comm.*, 592 F.3d at 144.

decision also affirms that the FCC was correct to apply its end-to-end analysis to assert interstate jurisdiction. That end-to-end analysis does not depend on the location of the ISP in the call flow but instead depends on the fact that the call originates with a local exchange carrier and terminates with Internet servers around the world. In analyzing whether ISP-bound calls were restricted to the traditional local jurisdictional analysis, the Court found there were not:

> This argument fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged. And the FCC has consistently applied that analysis to determine whether communications are interstate for purposes of § 201. Petitioners do not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate. Given that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to "terminat[e]" at a LEC for purposes of § 251(b)(5).[39]

The Court's language makes clear that, for purposes of ISP-bound traffic, a call to an ISP does not have to terminate at an ISP located in the same calling area to be pulled into the FCC's compensation regime. The local presence of the ISP is of no significance because the end-to-end analysis rests on a call's termination to internet services around the world. The result is the same whether a call is directed to an ISP in the same calling area or is directed through a foreign exchange or virtual nxx arrangements.

With ISP bound traffic ensconced firmly on the foundation of Section 251(b)(5), regardless of the location of the ISP, the analysis turns to whether the ILEC has opted into the compensation regime as set out in the *ISP Remand Order*.[40] Under that regime,

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[39] *Id.*

[40] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98, *et al.*, FCC

the ILEC is entitled to reduce its reciprocal compensation payments for ISP-bound traffic originated by ILEC customers if it offers the same rate for all other forms of Section 251(b)(5) traffic. If the ILEC has not, then state reciprocal compensation rates apply.

Since ISP-bound traffic has been affirmed to fall under Section 251(b)(5), that traffic is subject to the FCC's Part 51 Rules, 47 C.F.R. The application of those rules is nothing new, since even when the FCC relied upon statutory provisions to assert jurisdiction over ISP-bound traffic, the FCC was explicit that the findings did not "alter carriers' other obligations under our Part 51 rules, 47 C.F.R. …"[41]

The relevant rule, 47 C.F.R. 703(b), states: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." The straight-forward application of this rule requires Qwest to end its practice of excluding ISP-bound calls when it calculates RUF charges that apportion the cost of an interconnection facility based on the flow of the traffic. By not treating ISP-bound traffic as subject to Section 251(b)(5), Qwest has reaped millions in illegal subsidies from its competitors who have had to compensate Qwest for traffic that originates on the Qwest network in violation of Rule 703(b).

In light of the clarity provided by the Court of Appeals and the refusal of the Supreme Court to consider the decision, the Commission must address how the Combined Entity will treat ISP-bound traffic for purposes of compensation and relative uses charges. The anticompetitive behavior discussed by Level 3 witness Thayer is

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01-131, 16 FCC Rcd. 9151, Order on Remand and Report and Order (rel. Apr. 27, 2001) ("*ISP Remand Order*").

[41] *ISP Remand Order*, fn. 149.

uncontested on this point, as is his analysis of the potential impact on the finances of the Combined Entity and its ability to meet its broadband commitments.[42]

Finally, if the Commission does not impose conditions forcing the Joint Applicants to comply with the *Core Mandamus Order*, state commissions and the courts will continue to be full of proceedings arguing over the impact of the *ISP Remand Order* and its progeny. Unless the Commission acts now by imposing common sense solutions, it can expect litigation. In order to bring the transaction into compliance with Utah law, Level 3 recommends that the Combined Entity compensate terminating carriers at the appropriate rate for ISP-bound traffic and direct that ISP-bound traffic includes traffic provisioned using virtual NXX codes. Also, the Combined Entity should be required to treat all locally dialed ISP-bound traffic, including virtual NXX traffic, as local traffic in the calculation of relative use factors pursuant to 47 C.F.R §703(b).

VIII. SUMMARY OF LEVEL 3 RECOMMENDATIONS

The competitive harms identified here will not occur but for the proposed merger transaction. In light of this simple fact, and the Commission's obligations under Utah law, Level 3 recommends that the Commission impose the following conditions in any order approving this transaction:

1. Require the Combined Entity to compensate terminating carriers at the appropriate rate for ISP-bound traffic and direct that ISP-bound traffic shall include traffic provisioned using virtual NXX codes;

2. Ensure treatment by the Combined Entity of all locally dialed ISP-bound traffic, including virtual NXX traffic as local traffic, in the calculation of relative use factors pursuant to 47 C.F.R §703(b);

3. Require the Combined Entity to allow carriers to use new or expanded interconnection routes established by affiliates of the Combined Entity that are in adjoining service territories, and

[42] Exh. 1.0, Thayer Direct Testimony, at 9:13-10:4.

require notice of these network modifications by the Combined Entity;

4. Require all contracts between the affiliates of the Combined Entity for telecommunications services and network interconnection to be made publicly available;

5. Prohibit the Combined Entity from using billing disputes with one entity from threatening disconnection, disconnecting or refusing to provision new orders by any of entities of the Combined Entity;

6. Prohibit the Combined Entities from continuing or expanding the improper homing of 8YY switched access charge and transport practices; and

7. Require Qwest to cease its unlawful and arbitrary practice of denying dispute claims solely on the basis that they are more than 90 days beyond the date originally billed.

IX. CONCLUSION

Level 3 has provided un-refuted, credible evidence of the specific harms that will result to the Utah telecommunications industry if this transaction is approved without appropriate conditions. Level 3 believes that absent its proposed conditions, this transaction does not meet the requirements of Utah law and must be rejected.

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Respectfully submitted,

By:___________________________

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