

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

**DIRECT TESTIMONY
OF
RICHARD E. THAYER
ON BEHALF OF
LEVEL 3 COMMUNICATIONS, LLC**

August 30, 2010

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 **A.** My name is Richard E. Thayer. I am employed by Level 3 Communications, LLC
3 (“Level 3”). My business address is 1025 Eldorado Boulevard, Broomfield, CO
4 80021.

5 **Q. PLEASE DESCRIBE YOUR RESPONSIBILITIES AT LEVEL 3.**

6 **A.** I am Senior Corporate Counsel at Level 3. In that role I am primarily responsible
7 for negotiating and finalizing interconnection agreements between Level 3 and
8 other carriers in the U.S. Additionally, I am responsible for dispute resolution
9 between Level 3 and other carriers when the subject matter of those disputes lies
10 within the areas of interconnection agreements or the regulations regarding the
11 exchange of traffic.

12 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL BACKGROUND.**

13 **A.** From 1989 until 2002, I worked as an attorney for AT&T. My responsibilities
14 included acting as: managing counsel for an AT&T subsidiary company,
15 American Transtech; General Attorney responsible for all commercial affairs for
16 AT&T in the Pacific Northwest (including interconnection agreements); and Vice
17 President responsible for AT&T’s wireless regulatory activities in the Pacific
18 Northwest and AT&T Broadband, formerly TCI. I joined Level 3 in 2003 in my
19 present position. A more comprehensive CV describing my qualifications is
20 attached hereto as Exhibit A.

21 **Q. PLEASE PROVIDE LEVEL 3’S POSITION ON THE PROPOSED MERGER OF**
22 **QWEST WITH CENTURYLINK.**

23 **A.** Level 3 believes that with the adoption of targeted, common sense conditions,
24 the Commission can approve the proposed transaction between “Qwest,” “Qwest
25 Operating Companies,” “CenturyLink,” and the “CenturyLink Operating
26 Companies,” as those terms are defined in the joint applicants’ application for

1 approval.¹ For ease of reference, when speaking about the transaction, I will
2 refer to it as the “Proposed Transaction,” to the involved companies as the
3 “Applicants,” and to the post transaction company as the “Combined Entity.”

4 **Q. WHY DOES THIS TRANSACTION RAISE CONCERNS FOR LEVEL 3?**

5 **A.** This merger is one of first impression because the entire operation of a Regional
6 Bell Operating Company (“RBOC”) will be taken over by an Independent
7 Incumbent Local Exchange Carrier (“ILEC”) that serves predominately rural
8 territories. If the Proposed Transaction is completed, the resulting entity will
9 combine businesses and management that have been forced to open their
10 markets to local competition with those that, for the most part, have not. For the
11 Combined Entity’s management, primarily from CenturyLink, its introduction to
12 the ways of competition may run counter to past obligations or experiences of
13 managing a rural ILEC. To ensure that the Combined Entity understands and
14 meets its obligations, the Commission will need to adopt common sense
15 conditions before it approves the transaction. Level 3 also believes that the
16 Commission must be vigilant to ensure that the Combined Entity does not meet
17 the same fate as Hawaii Telephone or Fairpoint.

18 **Q. WHAT CONDITIONS DOES LEVEL 3 BELIEVE ARE NECESSARY BEFORE**
19 **THE COMMISSION CAN APPROVE THE PROPOSED TRANSACTION?**

20 **A.** Level 3 believes the Commission should:

- 21 1. Promote stable and predictable interconnection rights by:
- 22 a. Extending the term of existing interconnection agreements as set
23 forth in the Joint CLEC testimony;

¹ *Application For Approval of Merger Between CenturyTel, Inc. and Qwest Communications International, Inc.* Docket UM 1484 (May 24, 2010) (“Application”).

- 1 b. Requiring the Combined Entity to allow the portability from one
2 state to another of the existing interconnection agreements between the
3 Applicants and that CLEC; and
- 4 c. Requiring Qwest to extend its existing Statements of Generally
5 Available Terms (“SGAT”) for a period of five years.
- 6 2. Provide explicit guidance that, in light of the decision by the United States
7 Court of Appeals for the District of Columbia upholding the order of the Federal
8 Communications Commission (“FCC”) in the Core Communications Mandamus
9 case,² all ISP-bound traffic is now subject to the rate set by the FCC, including
10 what has been labeled in the past as “virtual NXX” traffic. Specifically, the
11 Commission should impose the following conditions:
- 12 a. The Combined Entity shall compensate terminating carriers at the
13 appropriate rate for ISP-bound traffic and that ISP-bound traffic shall
14 include traffic provisioned using virtual NXX codes; and
- 15 b. The Combined Entity shall treat all locally-dialed ISP-bound traffic
16 including virtual NXX traffic, as telecommunications traffic in the
17 calculation of relative use factors for purposes of 51 C.F.R. § 703(b).
- 18 3. Take steps to prevent the Combined Entity from arbitraging the Rural
19 CLEC exemption to circumvent the CLEC access rate cap;
- 20 4. Ensure that the Combined Entity passes through to competitors the
21 synergies captured through network integration and the establishment of new
22 routes or capacity;
- 23 5. Require all contracts between the affiliates of the Combined Entity for
24 telecommunications services and network interconnection to be made publicly
25 available;

² *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) (“*D.C. Circuit Decision*”).

1 6. Prohibit the Combined Entity from using billing disputes with one entity to
2 threaten disconnection of services or refuse to provision new orders across the
3 Combined Entity;

4 7. Prohibit the Combined Entity from continuing or expanding improper 8YY
5 homing switched access arbitrage practices. All telecommunications carrier
6 entities of the Combined Entity will assess tandem transport switched access
7 charges based on call routing to the nearest tandem according to the currently
8 published LERG, even when such a tandem is a non-Embarq tandem;

9 8. Require Qwest to cease its practice of denying dispute claims purely on
10 the basis that they are older than 90 days from the date originally billed; and

11 9. Require Qwest to cease its practice of using its interstate tariffs as a
12 claimed basis for establishing billing analogs for intrastate charges that are not
13 tariffed in its intrastate tariffs.

14 **Q. ARE THESE THE ONLY CONDITIONS THAT LEVEL 3 BELIEVES THE**
15 **COMMISSION SHOULD CONSIDER?**

16 **A.** No. Level 3 supports the conditions proposed by the Joint CLECs, and is one of
17 the sponsors of the testimony offered by Messrs. Gates and Ankum in support of
18 those conditions. My testimony is intended as a complement to testimony
19 offered by the Joint CLECs, but with a particular focus on Level 3's particular
20 concerns.

21 **Q. PLEASE EXPLAIN LEVEL 3's POSITION ON INTERCONNECTION**
22 **AGREEMENTS.**

23 Interconnection agreements are the lifeblood of a competitive
24 telecommunications infrastructure. Without them, a carrier cannot exchange
25 traffic or provide services within a specific area. Because of their importance,
26 companies invest substantial time and effort in those agreements before they

1 invest funds in their networks. It is crucial that the Commission ensure that the
2 interconnection process continues as smoothly as possible while the Combined
3 Entity goes about integrating its systems and streamlining its operations. It can
4 do so by adopting three common sense conditions related to interconnection.

5 They are:

6 1. The Combined Entity shall allow competitive providers to extend existing
7 interconnection agreements as described in the testimony of Mr. Gates and as
8 stated in the Joint CLEC combined Conditions List.

9 2. The Combined Entity shall allow competitive providers to import any
10 interconnection agreement between the CLEC and the Applicants, including all of
11 their ILEC affiliates, into the operating territory of another affiliate. For example,
12 Level 3 should be able to import the Embarq-Level 3 interconnection agreement
13 into the Qwest region.

14 3. Qwest shall agree to keep its existing SGAT available, without changes,
15 for five years.

16 **Q. WHY SHOULD THE COMMISSION REQUIRE AN EXTENSION OF THE**
17 **INTERCONNECTION AGREEMENTS?**

18 **A.** To ensure that the Combined Entity can focus on integrating its operations and
19 meeting its wholesale commitments, the Commission should require the
20 Combined Entity to allow competitive providers to elect to extend the existing
21 interconnection agreement between the parties for a period of three years from
22 the closing date of the transaction. This requirement must expressly include all
23 agreements in “evergreen” status.

24 The competitive industry is concerned that the Combined Entity will
25 decide to terminate those agreements and force carriers into renegotiations that
26 will eventually result in the CLECs filing for arbitration. The CLECs and the

1 Combined Entity have limited resources to devote to any project. Level 3 would
2 prefer that the parties devote those resources, personnel and financial, toward
3 ensuring the wholesale commitments are met.

4 **Q. WOULD A CONDITION EXTENDING THE INTERCONNECTION**
5 **AGREEMENTS BE UNIQUE TO THIS TRANSACTION?**

6 **A.** No, it would not. Similar conditions have been adopted in orders approving the
7 mergers of AT&T and Bell South; SBC and Ameritech; Fairpoint and its purchase
8 of the Verizon territories in New Hampshire, Vermont and Maine; and the Frontier
9 acquisition of certain Verizon territories.

10 **Q. PLEASE DISCUSS LEVEL 3's PROPOSAL TO REQUIRE PORTABILITY OF**
11 **INTERCONNECTION AGREEMENTS.**

12 **A.** Level 3 believes that the Commission should require the Combined Entity to
13 allow a competitive carrier to import into Utah any interconnection agreement that
14 it maintains in another state. So, for example, Level 3 would have the option of
15 extending an interconnection agreement it already has in Utah or it could notify
16 the Combined Entity that it wants to use the Nevada interconnection agreement
17 between Level 3 and Embarq in Utah. Only state-specific pricing changes would
18 be required and those changes should be automatic. The Combined Entity
19 should not be allowed to delay implementation of an imported agreement by
20 claiming that negotiations are required to make the agreement state specific.

21 **Q. WOULD A PORTABILITY REQUIREMENT FOR INTERCONNECTION**
22 **AGREEMENTS BE UNIQUE TO THIS TRANSACTION?**

23 **A.** No, it would not. A similar condition was imposed by the FCC in the
24 *AT&T/BellSouth Order*. In doing so, the FCC found that such conditions "should

1 reduce any incremental effect on the pending merger on the incentive to
2 discriminate.”³

3 **Q. PLEASE EXPLAIN LEVEL 3’s CONCERNS REGARDING THE QWEST SGAT.**

4 **A.** Since the Combined Entity will be focused on integrating its operations and
5 meeting its wholesale commitments, it is important that competitors limit friction
6 caused by expiring interconnection agreements. That’s why Level 3 believes it is
7 important to extend the existing agreements and allow for the importation of other
8 interconnection agreements the Combined Entity maintains. There is a third step,
9 however, that Level 3 believes the Commission should take to allow competitors
10 flexibility, and that is, requiring Qwest to agree to keep its SGAT available for five
11 years. By doing so, the Commission will ensure that competitive providers have
12 sufficient options to establish interconnection arrangements with the Combined
13 Entity. Everyone will then be focused on integration, implementation and
14 exchanging traffic instead of arbitrating new interconnection agreements. Five
15 years is the appropriate time period for offering the SGAT because it provides a
16 consistent approach to interconnection for competitors to rely upon. When it
17 comes to interconnection, the public interest requires certainty so that
18 appropriate investments can be made in the respective networks. With the
19 adoption of this simple, common sense solution, Level 3 believes the
20 Commission can promote a competitive playing field in the marketplace.

21 **Q. IF THE COMMISSION PROVIDES AN OPTION TO EXTEND THE**
22 **INTERCONNECTION AGREEMENTS OR TO IMPORT AN AGREEMENT**
23 **FROM ANOTHER STATE, DOES THAT RESOLVE ANY DISPUTES OR**
24 **ISSUES SURROUNDING THE COMBINED ENTITY’S WHOLESALE**
25 **OBLIGATIONS?**

³ *Memorandum Opinion and Order*, In the Matter of AT&T Inc. and BellSouth Corporation
Application for Transfer of Control, WC Docket No. 06-74, released March 26, 2007.

1 **A.** While those two steps would go a long way in ensuring that the parties focus on
2 operating their businesses and providing services to end-users, the Commission
3 must resolve the outstanding issues with respect to contract interpretation. It
4 won't do much good to extend an agreement when the parties have serious
5 policy disagreements over the interpretation for implementation of the
6 agreements. It's in everyone's best interests to resolve interconnection issues.

7 **Q. WHAT ISSUES SHOULD THE COMMISSION RESOLVE?**

8 **A.** One important issue the Commission should resolve involves intercarrier
9 compensation for ISP-bound traffic. Any condition regarding agreements will be
10 hollow unless this question is explicitly addressed. Without clear guidance,
11 regulatory and judicial litigation involving the interpretation of interconnection
12 agreements will drag on and agreements ported into a state will spur new
13 conflicts.

14 The most litigated issue that Level 3 has experienced in the Qwest
15 service territory for the past 10 years has been the treatment of locally dialed
16 ISP-bound traffic. Qwest has taken every opportunity to oppose its obligation to
17 pay terminating compensation for that traffic, arguing that the ISP must be
18 physically located in the same local calling area as the Qwest end user making
19 the call. The dockets of the state commissions as well as state and federal courts
20 are full of proceedings interpreting and reinterpreting the *ISP Remand Order*.
21 With each conflicting interpretation, the unsuccessful party pushes the matter
22 further up the appellate ladder.

23 **Q. WHY SHOULD THE COMMISSION RESOLVE THE TREATMENT OF ISP-
24 BOUND TRAFFIC HERE?**

25 **A.** Resolution of the applicable interconnection obligation concerning ISP-bound
26 traffic is necessary to ensure that the Combined Entity does not force its

1 competitors to litigate issues that have been finally resolved by the United States
2 Court of Appeals for the District of Columbia Circuit in its review of the *Core ISP*
3 *Order*.⁴ As incumbents, CenturyLink, Qwest and Embarq have every incentive to
4 dispute the application of the intercarrier compensation regime for ISP-bound
5 traffic by pressing invalidated arguments to avoid paying their competitors for
6 traffic that their end users originate. In the context of this merger, however, the
7 question isn't just whether the Combined Entity will thwart competition, but it also
8 goes to the basic economic assumptions the Applicants have made when
9 examining this transaction and whether the Applicants will force competitors to
10 subsidize the operations of the Combined Entity.

11 **Q. PLEASE EXPLAIN WHAT YOU MEAN BY THE BASIC ECONOMIC**
12 **ASSUMPTIONS MADE BY THE APPLICANTS.**

13 **A.** In preparing for this transaction, CenturyLink has made some basic assumptions
14 about the expenses that Qwest incurs, such as reciprocal compensation, and the
15 revenue it receives, such as inter- and intrastate access charges. In the case of
16 ISP-bound traffic, Qwest and CenturyLink have taken the position that unless the
17 ISP's modem is in the same local calling area as their customer, then the call is a
18 toll call and access charges apply. While the *Core ISP Order* and the D.C. Circuit
19 Court's affirmation reject this interpretation, and while the Utah Commission has
20 at least in part rejected this interpretation of the federal law, Level 3 expects
21 Qwest to continue to argue—wherever and whenever it can—that “VNXX” traffic
22 is not covered by the FCC's established regime for ISP-bound traffic. One
23 question for the Commission is whether the Combined Entity is assuming it will

⁴*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-bound traffic*, CC Docket Nos. 96-98, 99-68, 01-92, et al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (rel. Nov. 5, 2008) (“Core ISP Order”); *D.C. Circuit Decision*.

1 receive access charges for ISP-bound traffic, thus inflating its revenue, or
2 whether it will pay the reciprocal compensation rate, thus reducing some
3 revenue. The second question is how either outcome impacts the ability of the
4 Combined Entity to meet its commitments based on its financial projections.

5 **Q. IS THE ONLY QUESTION SURROUNDING ISP-BOUND TRAFFIC THE**
6 **TERMINATION RATE FOR THE TRAFFIC?**

7 **A.** No. The classification of ISP-bound traffic impacts more than compensation. It
8 goes to whether the Combined Entity can shift the cost of interconnection for
9 facilities on its side of the network to its competitors.

10 **Q. PLEASE EXPLAIN.**

11 **A.** In the past, Qwest has used the now discredited legal theory that ISP-bound
12 traffic falls under Section 251(g) to argue that such traffic cannot be counted as
13 local traffic when calculating the relative use factor (“RUF”) charges that apply to
14 local interconnection facilities. RUF charges apportion the cost of an
15 interconnection facility based on the flow of the traffic. So, if all the traffic on a
16 facility was local and Qwest delivered 80 percent, Qwest credits the terminating
17 carrier for that percentage of the usage. However, Qwest has argued that ISP-
18 bound traffic must be excluded from the calculation of RUF charges because
19 Qwest claims it does not fall within the scope of Section 251(b)(5). That
20 argument was cut out from under Qwest and CenturyLink by the *D.C. Circuit*
21 *Decision*. It’s unfortunate, but the acceptance of Qwest’s flawed position by a
22 number of states has resulted in millions of dollars in subsidies by competitive
23 carriers for the network operations of Qwest.

24 **Q. CAN YOU PLEASE BRIEFLY SUMMARIZE THE LEGAL TREATMENT OF**
25 **ISP-BOUND TRAFFIC?**

26 **A.** Yes, based on the *D.C. Circuit Decision* upholding the FCC’s *Core ISP*

1 *Order*, all ISP-bound traffic falls under the scope of Section 251(b)(5). The Court
2 also upheld the Commission’s ability to set the rate for ISP-bound traffic under its
3 Section 201 authority because ISP-bound traffic is interstate in nature. Since the
4 traffic falls under 251(b)(5), it is subject to the Part 51 Rules. The application of
5 those rules to ISP-bound traffic is not new, because even when the Commission
6 tried to regulate ISP-bound traffic under 251(g), it was **explicit** that the finding did
7 not “alter carriers’ other obligations under our Part 51 rules, 47 C.F.R....”⁵ Under
8 those rules: “A LEC may not assess charges on any other telecommunications
9 carrier for telecommunications traffic that originates on the LEC network.”⁶ Now
10 that the FCC’s legal basis for treating such traffic as covered by Section
11 251(b)(5) in the Core ISP Order has been affirmed by the D.C. Circuit Court, the
12 application of the Part 51 rules to ISP-bound traffic is settled and the Combined
13 Entity may not assess RUF charges on ISP-bound traffic.

14 Despite the clarity of the *D.C. Circuit Decision* and the *Core ISP Order*,
15 Level 3 expects the Combined Entity to continue to argue the opposite. Such a
16 refusal in the face of this clear ruling will result in unnecessarily adding more
17 complaints to the Commission’s docket. It is in everyone’s best interests to avoid
18 any additional litigation on these issues.

19 **Q. HAS CENTURYLINK AGREED TO PAY RECIPROCAL COMPENSATION ON**
20 **ALL ISP-BOUND TRAFFIC?**

21 **A.** Yes. Embarq, which is now a subsidiary of CenturyLink, pays \$.0004 per
22 minute of use for ISP-bound traffic exchanged with Level 3.⁷ In that agreement,
23 ISP-bound traffic “includes ... traffic provisioned using virtual NXXs.”

⁵ *ISP Remand* at Footnote 149

⁶ As part of the *ISP Remand Order*, the Commission deleted the word “local” from its original rule.

⁷ It’s worth noting that the rate is lower than the \$.0007 set by the *ISP Remand Order*.

1 **Q. PLEASE SUMMARIZE LEVEL 3's POSITION ON RECIPROCAL**
2 **COMPENSATION FOR ISP-BOUND TRAFFIC AND RUF CHARGES IN THIS**
3 **PROCEEDING.**

4 **A.** The Commission needs to resolve the treatment of ISP-bound traffic for two
5 reasons. The first is so that it can better understand the basic economic
6 assumptions made by Qwest and CenturyLink that underlie this transaction. If the
7 business model for the Combined Entity is based in part on continuing to try to
8 charge access fees on ISP-bound traffic and shifting network expenses to
9 competitive providers, the Commission needs to understand this because the law
10 no longer supports that assumption. Then, the Commission needs to determine
11 whether a transaction based on such an illegal assumption is in the public
12 interest.

13 The second reason is to bring the Combined Entity in line with the law
14 and to make sure that companies can focus on building their networks and
15 dealing with integration issues rather than fighting old battles that have been
16 settled by federal law.

17 **Q. ARE THERE OTHER POLICY ISSUES THE COMMISSION SHOULD**
18 **CONSIDER IN RESOLVING INTERCARRIER COMPENSATION FOR ISP-**
19 **BOUND TRAFFIC?**

20 **A.** Yes. While the country, and especially regulators, are focused on ensuring
21 ubiquitous deployment of broadband facilities, the simple truth is that for the
22 foreseeable future, dial-up internet access will remain a primary vehicle for
23 internet access for many residents in Utah and across the country. Whether it is
24 because of price or lack of access to a broadband provider, dial-up access will
25 remain a necessity for many Americans for years to come. The Commission
26 must consider the future of dial-up services as part of any state plans to roll out

1 broadband access. Any money spent by either the Combined Entity or the
2 competitive industry fighting over the compensation regime for dial-up services is
3 money that could have been spent on broadband deployment.

4 When the FCC adopted the *ISP Remand Order* in 2001, it did so with the
5 goal of stopping what it saw as an arbitrage opportunity. The FCC did that by
6 reducing the compensation rate, capping the amount of compensable traffic and
7 excluding new markets from any compensation regime. However, a few years
8 later, the FCC found that the arbitrage threat was gone and lifted the cap on
9 compensable traffic and the new market exclusion. In supporting its decision, the
10 FCC cited the decrease in dial-up traffic and the increasing migration of
11 Americans to broadband internet access services.

12 One of the “compelling” events that Qwest and CenturyLink have touted
13 to shareholders is that the Combined Entity will be a stronger company with an
14 “extensive 173,000 mile fiber network” and the “enhanced ability to competitively
15 rollout strategic products such as IPTV and other high-bandwidth services”⁸ that
16 will be able to continue its broadband deployment. Meeting the Company’s
17 economic assumptions will be crucial to that expanded deployment of broadband
18 services. And while that transition occurs, it is important to ensure that all end
19 users can access the internet, not just those who purchase broadband services
20 from the Combined Entity. Resolving these settled issues of compensation for
21 ISP-bound traffic and the treatment for RUF charges will ensure that companies
22 devote their resources to broadband deployment while at the same time ensuring
23 that a competitive market exists for dial-up services for those consumers who
24 choose not to or are not afforded the opportunity to purchase broadband access.

⁸ See:
<http://www.centurylinkqwestmerger.com/downloads/presentations/Investor%20Presentation-4-22-10.pdf>, Slide 8

1 **Q. DOES LEVEL 3 HAVE ANY SPECIFIC RECOMMENDATIONS FOR THE**
2 **COMMISSION?**

3 **A.** Yes, Level 3 recommends that any order granting approval for the transaction
4 include the following language:

5 1. The Combined Entity shall compensate terminating carriers at the
6 appropriate rate for all locally dialed ISP-bound traffic, and all locally dialed ISP-
7 bound traffic shall include traffic provisioned using “virtual NXX codes.”

8 2. The Combined Entity shall treat all locally dialed ISP-bound traffic,
9 including any “virtual NXX traffic,” as telecommunications traffic in the calculation
10 of relative use facilities for the purposes of 51 C.F.R. § 703(b).

11 By adopting these conditions, the Commission will provide the explicit
12 guidance that the industry, regulators and courts have sought since the release
13 of the *ISP Remand Order*. With that issue resolved, the industry can turn its
14 attention to deploying capital in a manner that will grow networks and help
15 expand broadband networks across the country instead of funding litigation. It’s
16 time that the telecommunications industry stop paying by the hour to determine
17 what it can charge by the minute.

18 **Q. PLEASE EXPLAIN LEVEL 3’s CONCERN WITH RESPECT TO THE**
19 **COMBINED ENTITY ESTABLISHING A RURAL CLEC.**

20 **A.** Traffic pumping is a growing problem in the telecommunications industry. It is
21 one that Qwest has been aggressive in pursuing at the FCC and before state
22 commissions.

23 **Q. PLEASE DESCRIBE TRAFFIC PUMPING.**

24 **A.** There are many descriptions or variations around the concept of “traffic
25 pumping.” For purposes of my testimony, I will focus on a specific type—that’s
26 where a Rural CLEC that is affiliated with an ILEC sets up operations in the

1 territory of an RBOC adjoining its incumbent parent. Under FCC rules, a rural
2 carrier can create a competitive local exchange carrier and can compete in the
3 rural areas of an adjoining incumbent local exchange carrier. While that is not
4 unique, the twist arises when the Rural CLEC takes advantage of an exemption
5 from the FCC's requirement that CLECs cap their interstate access charges at
6 the rate of the incumbent local exchange carrier. While the Applicants have not
7 indicated that they will act in such a manner, that exception would allow
8 CenturyLink to set up a Rural CLEC in qualified Qwest exchanges. This would
9 create an incentive for the Combined Entity to move conference call, chat line,
10 adult entertainment, or other high volume customers to the Rural CLEC. The
11 incentive may be so great that Qwest stops marketing such services in its
12 territory and cedes them to the Rural CLEC of its parent. In either case, the Rural
13 CLEC would be able to charge higher access rates than Qwest or its
14 competitors.

15 **Q. IF THE COMBINED ENTITY HAS NOT INDICATED ITS INTENTION TO USE**
16 **RURAL CLECS IN THIS MANNER, WHY SHOULD THE COMMISSION ACT**
17 **NOW?**

18 **A.** The Commission can avoid future disputes over the payment of access charges
19 for this type of traffic. As Qwest appreciates from its experiences with traffic
20 pumping in Iowa and elsewhere, this type of traffic ramps up quickly, which
21 means the amounts in dispute can reach into the millions within a short period of
22 time. Under these circumstances, carriers will resort to self-help, which in turn will
23 lead to litigation.

24 **Q. WOULDN'T QWEST HAVE TO PAY THE HIGHER RATES FOR CALLS**
25 **TERMINATED TO THE RURAL CLEC?**

1 **A.** Yes, presuming that there was no contract tariff between Qwest and the rural
2 CLEC. One issue is that Qwest and CenturyLink could reach a volume and term
3 agreement that reduces the switched access rates. Since Qwest is the dominant
4 provider in the state, chances are it will deliver most of the intrastate traffic to the
5 rural CLEC. It is unlikely that another carrier would be able to get the same rates
6 based on the volume of traffic that Qwest handles. From Level 3's perspective,
7 the bottom line is that Qwest and CenturyLink can shift higher access charges on
8 competitors while keeping their costs down.

9 **Q. WHY SHOULD THE COMMISSION CONSIDER THE FINANCIAL**
10 **IMPLICATIONS OF SUCH AN ARBITRAGE SCHEME?**

11 **A.** The Commission is charged with reviewing this transaction and ensuring that it is
12 in the public interest. Part of the public interest analysis must be an
13 understanding of the long-term financial health of the Combined Entity and its
14 impact on competition.

15 **Q. PLEASE SUMMARIZE LEVEL 3's POSITION ON THIS ISSUE.**

16 **A.** To ensure that the Applicants are not tempted to arbitrage the rural CLEC
17 exemption, the Commission should condition approval with a requirement that
18 CenturyLink mirror the rates charged by Qwest if it operates as a Rural CLEC in
19 the Qwest RBOC territory. In the event that CenturyLink is operating as a Rural
20 CLEC in the Qwest territory at the time of the closing of this transaction, it should
21 reduce its access rates to mirror Qwest. In addition, to the extent that Qwest
22 negotiates an off-tariff agreement with a CenturyLink Rural CLEC for the
23 termination of intrastate or interstate traffic, the Combined Entity must make the
24 same rate available to other interexchange carriers without requiring volume or
25 term commitments. These simple conditions will prevent arbitrage, prevent
26 expansion of the traffic pumping issues that plague the industry, make it easier

1 for the FCC to unify compensation rates by eliminating rate variations within an
2 incumbent's operating territory, and will send appropriate pricing signals to the
3 market

4 **Q. PLEASE EXPLAIN WHY LEVEL 3 WANTS ALL CONTRACTS FOR**
5 **TELECOMMUNICATIONS SERVICES OR NETWORK INTERCONNECTION**
6 **BETWEEN QWEST AND CENTURYLINK MADE AVAILABLE TO THE**
7 **PUBLIC.**

8 **A.** A major theme for all parties filing testimony in this proceeding is the concern that
9 the Combined Entity will be able to use its unique regulatory status as part
10 RBOC, part protected rural carrier to establish preferential deals between the
11 carriers for interconnection, access to each other's poles, ducts and conduits, the
12 exchange of traffic, special access or other switched access services. Under
13 these circumstances, the Combined Entity could also impose additional costs on
14 its competitors. Level 3 believes that by making all agreements between the
15 carriers public and available for public inspection, the public interest will be
16 furthered.

17 **Q. WILL MAKING THE DEALS PUBLICLY AVAILABLE RESOLVE LEVEL 3's**
18 **CONCERN?**

19 **A.** No, not by itself. In addition to making the contracts available, the Combined
20 Entity should allow any party to avail itself of any specific term or rate without
21 regard for any volume or term commitment. As discussed, the Combined Entity
22 will be in a unique position to identify opportunities where it can leverage the
23 network of its affiliates to its advantage and perhaps to the disadvantage of its
24 competitors. Volume and term commitments in this context are inappropriate
25 since the CenturyLink territories are generally free from landline competition. In
26 the past, Qwest and CenturyLink have dealt with each other in arms-length

1 transactions. This merger changes that negotiating dynamic. The Commission
2 can ensure that competition is not harmed, and the public interest met, by
3 ensuring that transactions between the Applicants are open for public review and
4 that the appropriate rates can be selected by other carriers.

5 **Q. PLEASE DESCRIBE LEVEL 3's CONCERNS REGARDING HOW THE**
6 **COMBINED ENTITY WILL TREAT 8YY TRAFFIC.**

7 **A.** This issue involves problems that Level 3 has experienced with the routing of
8 wireless originated 8YY traffic primarily but is something that could happen with
9 any kind of 8YY traffic. As is relevant to this proceeding, Embarq is the ILEC
10 entity that is engaged in an access charge arbitrage scheme Level 3 seeks to
11 address.

12 An example of the scheme is described in the following scenario: a
13 wireless 8YY call is originated in Boise and the call is routed to Embarq, who is
14 providing transport services to the wireless carrier. In this call flow, Level 3 is the
15 IXC providing the 8YY service. When the call hits the Embarq network, Embarq
16 must route the call to Level 3. However, instead of handing the traffic off at the
17 Qwest tandem in Boise or through some other interconnection point in Idaho,
18 Embarq backhauls the traffic to its switch in or near Spokane and then sends it
19 back to the Qwest tandem in Boise. What is troublesome about this scenario is
20 that Embarq then bills Level 3 for all the transport from the point of picking up the
21 call in Boise to Spokane and back to Boise. Level 3 has been disputing these
22 transport charges and believes that Embarq should be limiting its tandem
23 transport charges to the amount of transport that represents the distance
24 between the Level 3 POI and the nearest tandem. Level 3's recommendation in
25 this example also reflects the industry practice.

26 **Q. WHY IS THIS ISSUE IMPORTANT IN THIS PROCEEDING?**

1 **A.** This issue is important for a number of reasons. First, it represents the type of
2 inefficient network routing that the Combined Entity is engaging in and could
3 continue to engage in for the purposes of increasing the costs it imposes on
4 competitors. With Embarq, CenturyLink and Qwest all operating as incumbents in
5 the West region, the Combined Entity will have an incentive to home traffic
6 across its affiliates to maximize transport costs. That would not be in the public
7 interest.

8 Second, because routing can be altered relatively easily, the Combined
9 Entity can implement this type of routing changes with no or little notice to the
10 industry. Then like traffic pumping, the impacted carrier will not know about the
11 excessive charges until it is too late. At that point, carriers will open disputes and
12 some party will seek self-help, with the resulting disputes landing in either courts
13 or before the Commission.

14 The third and final reason for why it is an important issue is that the
15 Commission needs to understand if the Combined Entity has included in its
16 financial projections revenues from excessive transport charges for 8YY traffic.
17 The Commission will need to have a complete understanding of those
18 assumptions before it can determine if this transaction is in the public interest.

19 **Q. WHAT IS LEVEL 3'S RECOMMENDATION ON THIS ISSUE?**

20 **A.** With a few common sense conditions, the Commission can resolve this issue
21 and allow the transaction to move ahead. To do that, Level 3 proposes the
22 following language: "The Combined Entity agrees that it will limit any tandem
23 transport charges for 8YY traffic to charges based upon the nearest tandem
24 identified in the LERG to the originating point of each call." This simple
25 requirement will eliminate any incentive for the Combined Entity to re-home 8YY

1 traffic through inefficient routes and creates the incentive for bringing traffic to the
2 nearest, most efficient tandem.

3 **Q. PLEASE EXPLAIN LEVEL 3's CONCERNS REGARDING EXISTING BILLING**
4 **DISPUTES BEING LEVERAGED AGAINST A COMPETITOR.**

5 **A.** This issue focuses on the ability of the Combined Entity to leverage existing
6 billing disputes with one ILEC affiliate to slow or refuse to provision new services
7 by another ILEC affiliate. For example, assume that Level 3's billing dispute with
8 Embarq for improper homing of 8YY traffic continues after the transaction closes.
9 The concern is that one of the other entities, CenturyLink or Qwest, would refuse
10 to provision or process a request for interconnection or some other service order
11 based on the outstanding dispute with Embarq. Level 3 does not believe that the
12 transaction should allow the Combined Entity to refuse to provision services
13 because of billing disputes that existed prior to the transaction or for unique
14 billing disputes that arise afterwards. Absent the proper conditions, the Combined
15 Entity will be able to impair competition by throwing up new roadblocks to the
16 provision of services. But for the completion of the transaction, the existing
17 disputes would not allow Qwest from provisioning services by citing a billing
18 dispute between Level 3 and Embarq. This transaction should not create that
19 incentive.

20 **Q. WHAT IS LEVEL 3's RECOMMENDATION ON THIS ISSUE?**

21 **A.** Level 3 believes that with a simple, common sense condition, the Commission
22 can resolve this issue and allow the transaction to proceed. Level 3 proposes the
23 following language be added to any order:

24 "The Combined Entity shall not refuse to provision services, process
25 orders or threaten disconnection across the entire footprint of the
26 Combined Entity based on a billing or other commercial dispute between

1 any telecommunications provider and any one affiliate of the Combined
2 Entity.”

3 This condition will keep the playing field level between the Combined Entity and
4 its competitors. Because a dispute between Level 3 and Embarq could not be
5 legally used to threaten disconnection in the Qwest territory today, this condition
6 preserves the status quo and eliminates any incentive for the Combined Entity to
7 use its size to force parties into unreasonable settlements.

8 **Q. DOES LEVEL 3 HAVE A POSITION ON THE ISSUES REGARDING**
9 **OPERATIONAL SUPPORT SYSTEMS (“OSS”) RAISED BY THE JOINT**
10 **CLECS?**

11 **A.** Yes. Like many parties, Level 3 is concerned about the ability of the Combined
12 Entity to meet its obligations regarding OSS. Level 3’s experiences in Maine,
13 Vermont and New Hampshire following the Verizon and Fairpoint transaction are
14 a clarion’s call for vigilant oversight when a relatively untested independent ILEC
15 takes over the significantly greater operations of a RBOC. The ink has not dried
16 on the recent transfer of the West Virginia operation of Verizon to Frontier
17 Communications and a complaint has been filed alleging Frontier has not met its
18 OSS commitments.⁹

19 Level 3 does not rely heavily upon unbundled network elements to
20 provide services like other competitive providers, however, Level 3’s experience
21 for provision of wholesale services from Qwest and CenturyLink is anecdotally
22 similar to the competitive comments. Ensuring an even playing field in the

⁹ *Commission Order*, Petition to Reopen by FiberNet LLC, Case No. 09-871-T-PC, Frontier Communications Corporation (full cite omitted), Public Service Commission of West Virginia, August 16, 2010. The Commission denied FiberNet’s petition to reopen because most of the issues happened after the sale from Verizon to Frontier. The Commission also noted that the issues raised could be best handled in a complaint proceeding; the Commission ruled that the issues would be transferred to a complaint proceeding and also determined that the parties would be given time to mediate the disputes. If mediation does not resolve the issues, the parties are to notify the Commission and the matter will be handled in the complaint case. *Commission Order*, pp. 2-3.

1 wholesale market is a crucial litmus test for whether the transaction is in the
2 public interest. Level 3 agrees that conditions are required to ensure wholesale
3 transactions are completed in a timely, fair and efficient manner.

4 **Q. WHY ARE QWEST'S CARRIER BILLING PRACTICES IMPORTANT FOR THE**
5 **COMMISSION TO UNDERSTAND AND CHANGE AS A CONDITION OF**
6 **APPROVAL?**

7 **A.** At a high level, Qwest's existing carrier billing practices must be modified as a
8 condition of approval for two reasons. First, any improper or inappropriate billing
9 practice can have a significant detrimental effect on competitors. Any delays in
10 payment or underpayment to a competitor harms its financial situation and can
11 even jeopardize a carrier's survival. Second, if CenturyLink is basing any of its
12 financial projections on a continuation of some of the aggressive billing practices
13 of Qwest, it is important for the Commission to understand this and assess the
14 degree to which such practices not only threaten the competitive industry and
15 other carriers such as rural carriers, but also the degree to which such practices
16 reflect some underlying financial weakness that could jeopardize CenturyLink's
17 commitments to the Commission and its customers.

18 **Q. CAN YOU CITE TO ANY EXAMPLES OF BILLING PRACTICES THAT**
19 **WARRANT THE COMMISSION MAKING A CHANGE AS A CONDITION OF**
20 **APPROVAL?**

21 **A.** Yes. A little over a year ago, Qwest informed Level 3 that it would no longer
22 accept any billing disputes that were lodged with Qwest 90 days after the date of
23 the invoice. When challenged on the lawfulness of establishing this apparent
24 arbitrary barrier to lodging good faith billing disputes and asked to point to any
25 legal authority that allows Qwest to implement this practice, Qwest failed to
26 provide any satisfactory legal explanation.

1 **Q. WHY IS THIS IMPORTANT?**

2 **A.** The arbitrary cut-off date imposed by Qwest curtails a CLEC's ability to lodge
3 and collect on a legitimate billing dispute and rewards Qwest by allowing it to
4 keep monies it is otherwise not entitled to. Given the complexity of intercarrier
5 billing, it is not uncommon for billing errors to be discovered months—or even
6 years—after the bills have been received. Qwest's practice in this regard is an
7 assertion of its far greater financial and regulatory litigation resources to the
8 effect that carriers are faced with the choice of either expending scarce
9 resources to litigate with Qwest or just accept its unlawful practice. Qwest should
10 not be allowed to arbitrarily "deem" a 90-day cut-off period to be in effect to the
11 harm of CLECs that rely upon them as an RBOC. A continuation of this practice
12 by the Combined Entity is improper and should not be countenanced by approval
13 of the transaction without this practice being ceased.

14 **Q. IS THERE ANOTHER BILLING PRACTICE THAT YOU CAN CITE TO THAT**
15 **THE COMMISSION SHOULD INVESTIGATE?**

16 **A.** Yes. Level 3 is aware of another example in which Qwest has refused to follow
17 the terms of its own tariffs and has billed Level 3 for charges that are not included
18 within the applicable intrastate tariff. In this case, in the absence of a specific
19 provision in Qwest's intrastate tariff addressing expanded interconnection, Qwest
20 nonetheless billed, and continues to bill, Level 3 a rate that is contained in its
21 interstate tariff (rather than its intrastate tariff), which does have the specific
22 provision in question. In this context, it is critical that the Commission affirm the
23 Combined Entity's obligation to strictly abide by the terms of its tariffs, amending
24 them as necessary to allow for the requisite Commission scrutiny and industry
25 input before Qwest bills and attempts to collect intercarrier charges.

26 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

1 **A.** In my testimony, Level 3 has highlighted a number of areas where conduct by the
2 Combined Entity could threaten to impair competition in general and especially in
3 the Qwest operating territory. That conduct ranges from forcing competitors to
4 subsidize the network operations of the Combined Entity through RUF or
5 excessive tandem transport charges for 8YY traffic to threatening nationwide
6 disconnection over unrelated billing disputes. It is imperative the Commission
7 understand and address these concerns now to ensure that the public interest is
8 met by this transaction. Level 3 has proposed simple, common sense solutions to
9 the issues it has raised. Level 3 urges the Commission to protect competition and
10 adopt these conditions.

11 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

12 **A.** Yes it does. Thank you.