BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Joint Application of Qwest Communications International, Inc. and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company, LLC, and Qwest LD Corporation	DOCKET NO. 10-049-16

SUPPLEMENTAL TESTIMONY OF

TIMOTHY J GATES

ON BEHALF OF

tw telecom of utah llc; McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services; Integra Telecom of Utah, Inc., Electric Lightwave, LLC, and Eschelon Telecom of Utah, Inc.; and Level 3 Communications, LLC

Exhibit Joint CLECs 2SP

CONFIDENTIAL VERSION
SUBJECT TO PROTECTIVE ORDER IN CASE NO. 10-049-16

October 28, 2010

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INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Timothy J Gates. My business address is QSI Consulting, 10451 Gooseberry Court, Trinity, Florida 34655.

Q. ARE YOU THE SAME TIMOTHY GATES WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING ON AUGUST 30, 2010 AND SURREBUTTAL TESTIMONY ON OCTOBER 14, 2010?

A. Yes.

Q. ON WHOSE BEHALF ARE YOU FILING THIS SUPPLEMENTAL SURREBUTTAL TESTIMONY?

A. My testimony is being filed on behalf of a number of CLECs: **tw telecom of utah llc**; McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services; Integra Telecom of Utah, Inc., Electric Lightwave, LLC, and Eschelon Telecom of Utah, Inc.; and Level 3 Communications, LLC. (hereafter collectively referred to in my testimony as "Joint CLECs").

PURPOSE OF TESTIMONY

Q. PLEASE EXPLAIN THE PURPOSE OF YOUR TESTIMONY.

A. The purpose of my testimony is to identify and discuss some of the problems and unanswered questions with the Company-DPU Proposed Partial Party

Settlement,[1] including the failure to seek input from any CLECs in negotiating the settlement. My testimony explains how the proposed settlement fails to adequately address the serious wholesale and competition-related risks associated with the proposed merger. As I discuss below, approving the merger with the limited conditions in the Company-DPU Proposed Partial Party Settlement would fail to protect the public interest and competition.

DISCUSSION

I. EXCLUSION OF CLEC INTERVENORS FROM SETTLEMENT NEGOTIATIONS

Q. DOES THE PROPOSED SETTLEMENT ENTERED INTO BY THE DIVISION OF PUBLIC UTILITIES ("DPU" OR "DIVISION") AND THE JOINT APPLICANTS RESOLVE THE WHOLESALE AND COMPETITION-RELATED PROBLEMS ASSOCIATED WITH THE PROPOSED TRANSACTION?

A. No. The Company-DPU Proposed Partial Party Settlement[2] raises more questions than it answers, and certainly does not maintain the status quo or provide the certainty required by the competitive carriers and their customers. Further, as will

[1] Settlement and Agreement and Stipulation of the Joint Applicants and Utah Division of Public Utilities, Docket No. 10-049-16, October 14, 2010 ("Company-DPU Proposed Partial Party Settlement" or "proposed settlement"). The Joint Applicants have also filed proposed settlements with the Office of Consumer Services and Salt Lake Community Action Program, which are not addressed in my testimony.

[2] The Company-DPU Proposed Partial Party Settlement requires approval by the Commission and has not yet been approved.

be discussed below, there is no evidence to support the proposed settlement as being in the public interest.

Q. PLEASE BRIEFLY DESCRIBE THE COMPANY-DPU PROPOSED PARTIAL PARTY SETTLEMENT.

A. The proposed settlement is organized according to five categories: (A) Broadband, (B) Wholesale, (C) Service Quality (retail), (D) Reporting, and (E) Compliance. There are seven individual commitments under the Wholesale category pertaining to: (1) Operational Support Systems ("OSS"), (2) Interconnection Agreement Negotiations, (3) Protection Against any New Rates or Tariff Charges, (4) Utah Performance Assurance Plant ("UPAP"), (5) Change Management Process, (6) FCC Obligations, and (7) Status as a Bell Operating Company ("BOC"). My testimony will focus on the Broadband, Wholesale and Compliance categories.

Q. IS THE COMPANY-DPU PROPOSED PARTIAL PARTY SETTLEMENT SIMILAR TO A PROPOSED SETTLEMENT THAT HAS BEEN FILED IN ANY OTHER STATE?

A. Yes. The Company-DPU Proposed Partial Party Settlement is similar to a proposed settlement that was recently executed by the Joint Applicants and the Minnesota Department of Commerce ("DOC") in Minnesota as well as a proposed settlement recently executed between the Joint Applicants and certain carriers in Iowa. Like the proposed settlement in Utah, the proposed settlements

in Minnesota and Iowa have not been approved by a state commission. And like the proposed settlements in Minnesota and Iowa, the proposed settlement in Utah fails to protect competition and the public interest. As discussed below, the proposed settlement in Minnesota was based on the proposed settlement in Iowa. Due to the similarities between the proposed settlements in Minnesota and Utah, it appears that the Minnesota proposed settlement (filed in Minnesota on October 4, 2010) was used as the foundation for the proposed settlement in Utah, which was filed ten days later (on October 14, 2010). I will discuss the proposed settlements in Minnesota and Iowa below as they are relevant to the shortcomings of the proposed settlement in Utah.

Q. WERE THE JOINT CLECS ASKED WHETHER THEY WANTED TO BE INVOLVED IN THE NEGOTIATIONS THAT LED TO THE COMPANY-DPU PROPOSED PARTIAL PARTY SETTLEMENT?

A. No. The Joint CLECs were not notified that negotiations were being conducted, and no CLECs were consulted by the Division in the course of those negotiations. A key unanswered question is why the Division negotiated and executed a partial-party settlement before it had even seen the responses of the other parties in surrebuttal testimony,[3] before it had even heard what any witnesses had to say at the hearing, and without even notifying other parties to the proceeding of, much less involving other parties in, settlement negotiations.

[3] The Company-DPU Proposed Partial Party Settlement was filed the same day as pre-filed surrebuttal testimony was filed in this proceeding (October 14, 2010).

Q. DID CLECS ASK TO BE INVOLVED IN ANY SETTLEMENT DISCUSSIONS IN UTAH?

A. Yes. Integra sent an email to state commission staffs, including to employees of the Division, dated September 27, 2010 (more than two weeks before the Company-DPU Proposed Partial Party Settlement was filed), which expressly asked to be included in negotiations, if any. Despite this request, CLECs were not asked to participate in negotiations that led to the Company-DPU Proposed Partial Party Settlement, and were not informed that such negotiations were ongoing in Utah.

Q. WERE THE JOINT CLECS ASKED WHETHER THEY WANTED TO BE INVOLVED IN THE NEGOTIATIONS THAT LED TO THE PROPOSED SETTLEMENT IN MINNESOTA BETWEEN JOINT APPLICANTS AND THE MINNESOTA DOC?

A. No. Like in Utah, the Joint CLECs were not notified that negotiations were being conducted in Minnesota, and no CLECs were consulted by the Minnesota DOC in the course of the negotiations in Minnesota.[4] And like in Utah, the proposed settlement in Minnesota was filed before surrebuttal testimony was submitted and before the hearings were conducted. During cross examination in Minnesota, the Minnesota DOC witness was asked why the DOC did not wait to see surrebuttal

[4] Hearing Transcript in Minnesota Docket No. P-421 et. al./PA-10-456, ("MN Hrg. Tr."), Vol. 1, p. 189, line 15 - p. 190, line 6. The portions of the Minnesota hearing transcript referenced in this testimony are attached to my testimony as Exhibit Joint CLECs 2SP.4.

testimony or have the benefit of the hearings before executing a partial party settlement in that state. Her response suggested that the Minnesota DOC was primarily concerned about avoiding the filing of surrebuttal testimony. She said, "…it was easier not to have filed that while we're also negotiating a settlement."[5] This response does not address why the Minnesota DOC chose not to consider evidence presented by other parties in surrebuttal testimony (which was made available on the very day the Minnesota DOC chose to settle) or evidence that was presented shortly afterward at the evidentiary hearing.

Since Utah Surrebuttal was due on the same day as the Company-DPU Proposed Partial Party Settlement was filed, it is likely that negotiating a settlement at the same time as developing testimony may have been a pressing issue for the Division like it apparently was for the Minnesota DOC.

Q. IS THE PROPOSED SETTLEMENT JUSTIFIED BASED ON ADMINISTRATIVE EFFICIENCY?

A. No. A settlement supported by all of the parties might have been efficient, but a partial-party settlement, even if approved, does not alleviate the workload of the Commission. The Joint Applicants and parties not subject to a proposed settlement simply proceed with the case. Indeed, in Minnesota, the Minnesota DOC witness testified that the DOC's surrebuttal testimony had already been prepared and the DOC did not notify its witnesses until the day of the surrebuttal

[5] MN Hrg. Tr. Vol. 1, p. 160, lines 20-23.

filing deadline that they were to stop working.[6] Therefore, the DOC's workload in preparing written testimony was not reduced. Since surrebuttal testimony was due in this proceeding on the same day the Company-DPU Proposed Partial Party Settlement was filed, I expect that the DPU also worked to review parties' positions and prepare surrebuttal testimony before the work was stopped due to the proposed settlement. In fact, the piece-meal proposed settlement has resulted in additional work for the parties and the Commission, as it is now the subject of additional testimony, argument, and consideration, along with any motions regarding the Division's earlier testimony. Particularly because the proposed partial settlement involves a government agency (the Division) that has proceeded without consulting intervenors in the very matter being settled, it must be subject to scrutiny. To the extent that administrative efficiency was a consideration in the partial party negotiations between the Joint Applicants and Division, adjustments to the hearing schedule could have been made to allow ample time for negotiations among all parties and, if still needed, another round of testimony and a hearing.[7]

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6 MN Hrg. Tr. Vol. 1, p. 204, lines 4-19.

7 Integra filed a motion to amend the schedule on October 11, 2010, three days before the Company-DOC Proposed Partial Party Settlement was filed, due to Joint Applicants' refusal to provide certain documents in response to discovery. Integra asked to move the hearings back to December 8-9, 2010. Under the schedule change proposed for discovery-related reasons, the Utah hearing would still have taken place before the hearing scheduled in Washington, and the change in the Utah hearing date would not have affected the overall timeline for review of the proposed transaction. Moreover, if settlement had been reached as a result of discussions, costs of participating further in the Utah proceeding could have been avoided, such as costs of supplemental testimony, hearing participation, etc. Had the hearing been postponed as proposed, there would have been ample time for the Division to respond to the intervenor's request to participate in negotiations; negotiated with all of the parties

Q. IN MINNESOTA, THE DOC EXPLAINED THAT IT DID NOT INVOLVE CLECS IN NEGOTIATIONS BECAUSE IT RELIED ON THE WORD OF THE JOINT APPLICANTS THAT JOINT APPLICANTS WERE SEPARATELY NEGOTIATING WITH CLECS AND SOME CLECS WERE BEING DIFFICULT. COULD THIS EXPLAIN WHY CLECS WERE NOT INVOLVED IN THE NEGOTIATIONS IN UTAH?

A. Yes. I expect that the Joint Applicants were telling the Division the same story as they were telling the Minnesota DOC during their pursuit of a settlement with both government agencies. The Minnesota DOC witness admitted in the recent hearing in Minnesota that the Department's negotiators had simply accepted the word of the Joint Applicants that Joint Applicants were separately negotiating with intervenors[8] and the suggestion of Joint Applicants that intervenors were somehow being difficult or not accepting of those negotiations.[9] She also said that she had read a recent ex parte to that effect.[10]

The Minnesota DOC should not have relied on the Joint Applicants' representations of separate negotiations with CLECs.

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rather than only the Joint Applicants; and, if a more inclusive settlement had been reached, achieved administrative efficiencies for all. Instead, the parties are incurring the added expense of participating in the continued hearing and of addressing the proposed partial-party settlement. See Exhibit Joint CLECs 2SP.1 (ex parte letter of Cbeyond, Integra and Socket Telecom in FCC WC Docket No. 10-110, Oct. 7, 2010).

8 MN Hrg. Tr. Vol. 1, p, 238, lines 14-17.

9 MN Hrg. Tr. Vol. 1, p, 239, lines 13-14. The Minnesota DOC witness referred to "…their representation that they were doing the reach-out and it wasn't going well." *Id*.

10 MN Hrg. Tr. Vol. 1, p, 238, lines 14-17. The Minnesota DOC witness appears to be referring to the September 29, 2010, ex parte letter filed by Qwest and CenturyLink with the FCC in WC Docket No. 10-110.

Q. IF THE DOC HAD SOUGHT TO VERIFY THE STATEMENTS OF THE JOINT APPLICANTS, MIGHT THAT HAVE HAD AN IMPACT ON THEIR NEGOTIATIONS?

A. Yes. The recent Minnesota hearing established that if the Minnesota DOC had verified the facts, it would have found that the Joint Applicants were not in negotiations with several CLEC intervenors and, in fact, had never even contacted some CLEC intervenors regarding negotiations.[11] In addition, the FCC ex parte letter by the Joint Applicants on which the Minnesota DOC relied wrongly accused a CLEC, which is an intervenor in this docket (Integra), of delay.[12] Although the Minnesota DOC witness indicated she reviewed an FCC ex parte by Joint Applicants,[13] the DOC made no effort to inquire into the accuracy of the Joint Applicants' claim, did not wait until the CLECs had an opportunity to respond to the FCC so that the DOC would have the positions of both parties available to it,[14] and did not contact Integra about the ex parte or negotiations – even after receiving an explicit request from Integra to be included in any negotiations. The Minnesota DOC witness did not explain why, in an adversarial proceeding, its obligations may be met by accepting one adversary's statements over the others' with no investigation or even a single contact to verify facts.

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11 MN Hrg, Tr. Vol. 2B, p. 151, line 15 – p. 152, line 21; p. 141, line 24 – p. 143, line 24.

12 September 29, 2010, ex parte letter filed by Qwest and CenturyLink with the FCC in WC Docket No. 10-110 at p. 2 (specifically referencing Integra).

13 MN Hrg. Tr. Vol. 1, p. 238, lines 14-17.

14 A copy of the ex parte letter of Integra, Cbeyond, and Socket Telecom in FCC WC Docket No. 10-110 (Oct. 7, 2010) in response to the Joint Applicants' claims is attached as Exhibit Joint CLECs 2SP.1.

To the extent that similar representations by the Joint Applicants' led the DPU to not inform CLECs about negotiations in Utah, the DPU should not have relied on those representations because those representations are false. At the very least, it would have been a prudent approach to contact CLECs to determine whether the Joint Applicants' representations were accurate, particularly given Integra's request to be included in any negotiations in Utah.

Q. DID THE JOINT APPLICANTS OR THE DIVISION ATTEMPT TO INCLUDE THE JOINT CLECS IN THE NEGOTIATIONS IN UTAH?

A. No. Mr. Denney stated in the Utah hearings on October 27, 2010 that the Joint Applicants did not approach Integra or other CLECs in an attempt to negotiate.

Q. HAVE THE JOINT APPLICANTS ATTEMPTED TO EXPLAIN AWAY THEIR FAILURE TO ENGAGE ALL INTERVENOR CLECS IN SETTLEMENT NEGOTIATIONS?

A. Yes, but without success. At the Minnesota hearing, CenturyLink's witness Mr. Hunsucker testified as to why CenturyLink had not contacted a number of CLECs at all regarding settlement:

> we just don't have the time to get to every carrier. . . . you know, when we're dealing with the current integration, this merger proceeding, and all the proceedings going around the country, including prepare testimony, discovery responses, et cetera, time doesn't permit us to get to everyone.[15]

[15] MN Hrg. Tr. Vol. 2B, p. 153, lines 15-23.

Mr. Hunsucker's explanation is unpersuasive for several reasons. First, Mr. Hunsucker's representation that time did not permit the Joint Applicants to get to "everyone" suggests that omissions were minor. To the contrary, on cross examination in Minnesota, it became clear that the Joint Applicants had reached out to almost **no one** among the CLEC intervenors in the Minnesota proceeding -- no attempt to reach POPP.com, Orbitcom, TDS Metrocom, Charter or Cbeyond (all intervenors in Minnesota) regarding settlement and no attempt with respect to tw telecom until the week of the Minnesota hearing.[16]

Second, the time pressures mentioned by Mr. Hunsucker are of CenturyLink's own making. Recall that the Joint Applicants are urging that the schedules in multiple states be expedited and that they refused to agree to streamlined procedures for discovery.[17] CenturyLink also rejected Integra's proposal to adjust the schedule in this matter, as had been proposed before the proposed settlement was filed, which would have also allowed settlement discussions to take place in an effort to avoid unnecessary litigation.[18]

Finally, the lack of time to "meet with everyone" does not explain CenturyLink's failure to include CLEC intervenors in its discussions with the DPU in Utah or DOC in Minnesota or at least negotiate with multiple CLECs collectively. After

16 MN Hrg. Tr. Vol. 2B, pp. 151-152.

17 Direct Testimony of Timothy Gates, Utah PSC Docket No. 10-049-16, Exhibit Joint CLECs 2, August 30, 2010 ("Gates Direct"), pp. 74-79 & Exhibit Joint CLECs 2.4.

18 Exhibit Joint CLECs 2SP.1.

all, there are four CLECs participating in this proceeding collectively as the Joint CLECs. Instead of trying to find time to meet with each intervenor separately, CenturyLink would then have been able to cover more issues with more parties at one time. One set of negotiations for all parties would have been more efficient for all.

Q. AT THE MINNESOTA HEARING, THE MINNESOTA DOC WITNESS TESTIFIED THAT THE DEPARTMENT "FELT COMFORTABLE THAT CLECS IN IOWA WERE SATISFIED" WITH THE IOWA SETTLEMENT.[19] IS THIS A REASONABLE BASIS FOR APPROVING A PROPOSED SETTLEMENT IN UTAH (OR ANY STATE OUTSIDE OF IOWA)?

A. No. The Minnesota DOC's witness testified that, instead of relying on the testimony of Minnesota intervenors, she was "comfortable"[20] that a recent Iowa settlement met wholesale and competitive concerns in Minnesota because certain CLECs in Iowa agreed to that settlement. The Minnesota DOC witness testified that the Department "felt comfortable" with the time frames in the Minnesota proposed settlement because "CLECs in Iowa were satisfied with these time frames and we didn't have a reason to go with something different."[21]

[19] MN Hrg. Tr. Vol. 1, p. 230, lines 6-8; p. 232, lines 2-3; p. 242, lines 9-11; p. 244, lines 8-12; p. 245, lines 5-9.

[20] MN Hrg. Tr. Vol. 1, p. 230, lines 6-8; p. 232, lines 2-3; p. 242, lines 9-11; p. 244, lines 8-12; p. 245, lines 5-9.

[21] MN Hrg. Tr. Vol. 1, p. 230, lines 6-8.

Q. IS IT REASONABLE TO RELY ON THE IOWA OR MINNESOTA SETTLEMENTS FOR PURPOSES OF CRAFTING A SETTLEMENT IN UTAH?

A. No. Settlements of other parties in other states with different laws and standards should never be the sole basis for a settlement in another state with different intervenors, laws and standards. The Iowa settlement is not a reasonable basis for resolving the wholesale and competitive problems identified in the record of this proceeding (or the proceeding in Minnesota) for a number of reasons. First, only one of the current four CLEC intervenors in Utah (PAETEC) is a party to the Iowa settlement.[22] Second, as PAETEC has made clear, it agreed to the Iowa settlement based on unique circumstances in Iowa and with the express understanding that the settlement would not be used to represent PAETEC's views in any other jurisdiction. In fact, the Iowa settlement expressly states that conditions in Iowa are unique and contains terms expressly precluding its use in any other jurisdiction as an indication of any party's position on the conditions necessary to satisfy or adequately address CLEC concerns with the proposed transaction.[23]

[22] On September 30, 2010, 360Networks, a party to the Iowa Settlement, filed a letter providing notice of its withdrawal as an Intervenor in the Utah proceeding.

[23] PAETEC's Motion to Enforce Settlement Before the Iowa Utilities Board, Docket No. SPU-2010-0006, dated October 1, 2010, is attached as Exhibit Joint CLECs 2SP.2. PAETEC's Reply In Support of Its Motion to Enforce Settlement, Docket No. SPU-2010-0006, dated October 6, 2010, is attached as Exhibit Joint CLECs 2SP.3.

Given the express limits on the use or relevance of the Iowa settlement, it is unreasonable to simply import the terms of the Iowa settlement to resolve the serious wholesale and competitive concerns identified by the CLECs in this proceeding. Those concerns are set forth and supported in detailed CLEC testimony in this proceeding. The Commission's public interest imperative to protect local telecommunications competition from potential merger-related harm requires reliance on the parties and record in this proceeding, not proposed settlements that have been reached under different circumstances between different parties in other states.

Q. DO THE SPECIFIC TERMS OF THE IOWA SETTLEMENT STATE THAT IT SHOULD *NOT* BE USED IN OTHER STATES?

A. Yes. The Iowa Settlement states:

> This Settlement Agreement has been prepared and executed for the purpose of resolving issues between Applicants and the CLEC Intervenors in this docket. ***The parties agree that the schedule, the governing law, and the market conditions in Iowa are unique. The agreement is applicable in this docket only***, except to the extent necessary to implement the agreement in relevant future proceedings in accordance with its terms. . . . [T]he Parties recognize and agree that this settlement ***resolves only the Iowa proceedings***, and the Parties to this agreement are not restrained from presenting any position, view or agreement in any other jurisdiction reviewing the merger transaction and further agree that ***they shall not use this agreement in any other proceeding as evidence of any other Party's position in that proceeding.***[24]

[24] Joint Motion for Approval of Settlement Agreement and Certain Intervenors' Motion to be Excused from the Hearing, Iowa Docket No. SPU-2010-0006 (September 28, 2010) ("Iowa Settlement") at pp. 1-2.

As PAETEC, one of the parties to the Iowa Settlement (in Iowa but not other states) has explained, the Iowa Utilities Board ("IUB") proceeding suffered from several serious limitations, including a very short statutory timeframe for review that precluded sufficient discovery.[25] CenturyLink's own witness testified that the legal threshold in Iowa is "very low."[26] These limitations apparently left the CLECs in Iowa little choice but to accept a settlement that does not adequately address the numerous problems that must be cured in order for the proposed transaction to be consistent with the public interest.[27]

Q. CAN YOU PROVIDE SOME EXAMPLES OF WHY THE FEW CONDITIONS IN THE PROPOSED SETTLEMENTS FROM OTHER STATES ARE INADEQUATE FOR FINDING THAT THE PROPOSED TRANSACTION IS CONSISTENT WITH THE PUBLIC INTEREST IN UTAH?

A. Yes. For example, the proposed Iowa and Minnesota settlements do not, among other things, (1) require that the Merged Company provide at least the same level of wholesale service quality as legacy Qwest or subject the Merged Company to remedy payments for merger-related service quality degradation; (2) require that

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25 *See*, Exhibit Joint CLECs 2SP.2, PAETEC's Motion to Enforce Settlement, IUB Docket No. SPU-2010-0006, pp. 3-4 (filed Oct. 1, 2010) ("PAETEC IUB Motion"); *see also id.* (discussing the IUB's history of approving transactions without imposing any conditions).

26 MN Hrg. Tr. Vol. 2B, p. 79, lines 11-14.

27 Exhibit Joint CLECs 2SP.2. PAETEC IUB Motion, pp. 3-4 (explaining that the unique circumstances in Iowa factored into PAETEC's willingness to make certain compromises that it would not necessarily have made in other jurisdictions).

the Merged Company provide CLECs with conditioned copper loops in compliance with applicable interconnection agreements as well as state and federal law; or (3) preclude the Merged Company from increasing wholesale rates for commercial offerings or special access services or discontinuing special access term and volume discount plans.

Q. HAS THE ONLY CURRENT CLEC INTERVENOR IN THIS PROCEEDING WHICH IS A PARTY TO THE IOWA SETTLEMENT TAKEN A POSITION AS TO WHETHER JOINT PETITIONERS ARE ABIDING BY THE TERMS OF THE IOWA SETTLEMENT?

A. Yes. According to PAETEC, the Joint Applicants violated the terms and purpose of the Iowa settlement by advocating use of that settlement to the FCC, and PAETEC has filed a motion before the Iowa Board asking the Board to enforce its terms.[28] The very day after the Iowa Settlement was submitted to the Iowa Board with specific language indicating that Iowa is unique and that it could not be used in any other proceeding as evidence of a party's position, the Joint Applicants erroneously reported to the FCC that "[t]he Iowa settlement resolved all of the CLEC intervenors' concerns…"[29] This sort of conduct by Joint Applicants discourages settlement, as it calls into question whether a settlement agreement

[28] Exhibit Joint CLECs 2SP.2, PAETEC IUB Motion at 1 (arguing that "CenturyLink and Qwest violated both the letter and the spirit of Paragraph 1" of the Iowa Settlement, which provides that the parties "shall not use this agreement in any other proceeding as evidence of any other Party's position in that proceeding").

[29] Exhibit Joint CLECs 2SP.2, PAETEC IUB Motion at 2.

may indeed be relied upon. PAETEC's motion was filed on October 1, 2010, nearly two weeks before the Company-DPU Proposed Partial-Party Settlement was filed in this matter on October 14, 2010.

Q. PLEASE SUMMARIZE YOUR TESTIMONY ON EXCLUSION OF CLEC INTERVENORS FROM NEGOTIATIONS.

A. The history of proposed settlements shows that the Joint Applicants executed a proposed settlement in the Iowa merger review proceeding that contains very few, limited conditions. That settlement was negotiated due to the unique circumstances in Iowa and was written expressly so that it applied only to Iowa and did not represent the parties' position in other jurisdictions. The ink was barely dry on the proposed settlement in Iowa when the Joint Applicants sent an ex parte letter to the FCC the next day erroneously claiming that, "[t]he Iowa settlement resolved all of the CLEC intervenors' concerns…"[30] Since that time, the Minnesota DOC has settled with the Joint Applicants based on a proposed settlement from Iowa that does not even address some of the concerns the Minnesota DOC raised in pre-filed testimony[31] and the Utah DPU has now

[30] Exhibit Joint CLECs 2SP.2, PAETEC IUB Motion at 2.

[31] The Minnesota DOC not only did not file its already-prepared surrebuttal testimony in the Minnesota proceeding, but also did not offer and in effect withdrew its earlier filed testimony by DOC employees Andrew Bahn, Kathleen Doherty, Bruce Linscheid, and Michael McCarthy. *See*, Department letter to Administrative Law Judge ("ALJ") Barbara Neilson and the parties dated October 1, 2010, in Minnesota Docket No. P-421, et.al./PA-10-456. This action left notable differences between the earlier testimony of the Minnesota DOC witnesses and the testimony of the Minnesota DOC witness who sponsored the proposed Minnesota settlement (Ms. Wells) unexplained. For example, the only reason provided by Ms. Wells for not including in the proposed settlement a condition relating to conditioned copper loops was the very argument by the Joint Applicants that DOC witness Mr. McCarthy rejected in his earlier testimony. *Compare* MN Hrg. Tr. Vol. 1, p. 183, lines 6-8 *with*

followed suit and executed a settlement with the Joint Applicants substantially similar to the proposed settlement in Minnesota – a settlement which does not address all of the concerns the Utah DPU raised in its pre-filed testimony.[32] The proposed settlement in Utah is based at least in part on a proposed settlement from Iowa that does not address the Joint CLECs' concerns and which should not be used in any state other than Iowa. Moreover, the Joint CLECs' were not involved in negotiations of the proposed settlement in Utah (and, before that, in Minnesota), and indications are that this is due, in part, to false representations made by the Joint Applicants.

In a nutshell, the Joint Applicants have executed proposed settlements with the Utah DPU and Minnesota DOC that do not address CLECs' concerns by, first, falsely claiming that the Iowa settlement addresses CLECs' concerns and that separate negotiations were ongoing with CLECs, and then keeping Joint CLECs in the dark about ongoing negotiations with other parties so that CLECs could not respond to the Joint Applicants' false representations and so that CLECs' experience and input could not be taken into account in negotiations. All the

Rebuttal Testimony of DOC Mr. McCarthy (Sept. 13, 2010) in Minnesota Docket No. P-421, et. al./PA-10-456, p. 4, lines 1-11 & p. 8, line 1 – p. 9, line 11.

[32] For example, DPU Staff's proposed merger conditions (Attachment CJC1.1 to the direct testimony of Casey Coleman) contained DPU Condition 3: "CenturyLink will continue to provide intrastate transit service in all ILEC territories subject to the same rates, terms, and conditions that were provided as of the Merger Filing Date unless approved or directed otherwise by the Commission." This condition is not in the proposed settlement. Also, DPU Condition 5, regarding BOC obligations was much more in line with Joint CLECs' proposed condition 13 than the "Status as a BOC" in the proposed settlement. DPU conditions 8 and 9 were substantially similar to Joint CLECs' proposed conditions 15 and 16, yet those conditions are not contained in the Company-DPU Proposed Partial Party Settlement.

while, the Joint Applicants are reaping rewards from this tactic by securing agreement from government agencies that had initially set a higher hurdle to merger approval.

Q. DO BI-LATERAL SETTLEMENTS IN A CASE SUCH AS THIS PROTECT THE PUBLIC INTEREST?

A. Not necessarily. The process itself limits the quality of the result. The Commission will ultimately determine whether the merger is in the public interest, but for one party – the DPU charged with promoting the public interest – to engage in settlement discussions without including parties that are impacted by the proposed settlement, is not likely to meet the public interest standard. Indeed, it is clear that what the DPU has accepted as a settlement does not address key concerns of parties affected by the proposed merger.

The wholesale and competitive concerns posed by the merger in Utah are explained and supported in detailed testimony filed in this case. The public interest is ill-served by reliance on a settlement that, by its terms, was based on another state's unique circumstances and was not to be used in other jurisdiction as evidence that CLEC concerns were adequately addressed, and which was established without input of major stakeholders. The proposed partial-party settlement involving a state agency begs the question of why no effort was made to engage other parties to this proceeding in discussions with the Joint Applicants

and DPU and to attempt to reach an agreement that actually resolved the Joint CLECs' legitimate concerns.

Q. ARE YOU SUGGESTING THAT HAD THE JOINT CLECS BEEN INVOLVED IN THE NEGOTIATIONS IN UTAH THAT ALL OF THE ISSUES WOULD HAVE BEEN RESOLVED TO THE PARTIES' SATISFACTION?

A. Given the recent history in Utah we will never know the answer to that question. But even if only a few of the disputes were resolved by all the parties, it would have been a step forward and reduced the number of issues to be resolved by the Commission. Further, had the Joint Applicants and the Division included the Joint CLECs, or even some of the CLECs, there would have been more and better information available for the Division in negotiating a settlement. In short, there is nothing to gain by excluding the Joint CLECs.

Q. DOES THE EXCLUSION OF THE JOINT CLECS FROM NEGOTIATIONS COLOR THE REPRESENTATIONS MADE BY THE JOINT APPLICANTS IN THIS CASE?

A. Yes. The Joint Applicants' exclusion of the Joint CLECs' from negotiations is more evidence that Joint Applicants do not truly "value" CLEC wholesale customers as they claim.[33] The DPU's exclusion of other parties from discussions

[33] Surrebuttal Testimony of Timothy Gates on behalf of Joint CLECs, Utah Docket No. 10-049-16, Exhibit Joint CLECs 2SR, October 14, 2010 ("Gates Surrebuttal") at p. 3.

also runs counter to the DPU's mission to "promote[] the public interest in utility regulations" and "assure that all utility customers have access to safe, reliable service at reasonable prices."[34] The end result is a few insufficient and ineffective commitments that do not provide needed assurances that CLECs – as well as CLEC end user customers – will have access to reliable service at reasonable prices post-merger. The proposed settlement has resulted in more filings and hearings and is **not** an agreement that serves the public interest.

II. INADEQUACY OF THE PROPOSED PARTIAL-PARTY SETTLEMENT.

Q HAVE YOU REVIEWED THE PROPOSED PARTIAL-PARTY SETTLEMENT IN UTAH?

A. Yes.

Q. IS THE SETTLEMENT IN THE PUBLIC INTEREST?

A. No. The Company-DPU Proposed Partial-Party Settlement contains a limited number of conditions, which are framed in the document as "commitments" by the post-merger Company. The proposed settlement states:

> Based on the commitments contained in this agreement, the Division finds that the merger transaction at issue in this docket is in the public interest as contemplated by Utah law, and agrees to support approval of the transaction, with the conditions contained in this Stipulation, before the Utah Public Service Commission and without additional conditions.[35]

[34] http://www.publicutilities.utah.gov/about.html

[35] Company-DPU Proposed Partial-Party Settlement at p. 1.

This language suggests that the Division's position is that, absent Commission adoption of merger conditions, the proposed transaction should be rejected. The Joint CLECs agree that the proposed transaction should be rejected absent adequate merger conditions.[36]

Q. PLEASE EXPLAIN WHY THE "COMMITMENTS" IN THE PROPOSED SETTLEMENT DO NOT ADEQUATELY PROTECT THE PUBLIC INTEREST.

A. The key issue for resolution is the nature and extent of the conditions that are needed before the Commission could find that the proposed transaction is in the public interest. The Joint CLECs have provided extensive testimony and background in support of each of their recommended conditions. Exhibit Joint CLECs 2SR.1 to my Surrebuttal Testimony is an Issues Matrix that summarizes Joint Applicants' Position Statements and Joint CLECs' Position Statements for each of the Joint CLECs' recommended conditions (Exhibit Joint CLECs 2.8) to resolve this matter. Each of those conditions is needed to not cause harm and to meet the public interest standard. Yet, none of those proposed conditions has been included in the Company-DPU Proposed Partial-Party Settlement. Some of the conditions in the proposed settlement purport to address a small fraction of the concerns raised by the Joint CLECs, but fail to adequately resolve those concerns. Because the support for those conditions is in previous testimony, this testimony

[36] Gates Direct at p. 111, lines 8-18.

focuses on the inadequacies and problems associated with, and questions raised by, the limited list of conditions in the recent Company-DPU Proposed Partial-Party Settlement. I address them in the order in which they appear in the proposed settlement.

A. Broadband

Q. PLEASE DISCUSS THE BROADBAND "COMMITMENT" IN THE PROPOSED SETTLEMENT.

A. The Company-DOC Proposed Partial-Party Settlement states:

> The Joint Applicants and the Company shall commit to invest at least $25 million in broadband infrastructure ("Broadband") to benefit retail customers in Utah over a five-year period beginning on January 1, 2011 and concluding five years thereafter. In the event the transaction does not close, this Broadband capital commitment will be null and void. Fifteen percent of the Broadband investment will be made in areas in Utah that are unserved or underserved. **For purposes of this agreement, "**unserved" means no wireline broadband service is available, and "underserved" means Broadband wireline service up to and including 1.5 megabits per second ("Mbps") download speed. The Company agrees to make annual filings that document the Company's compliance with this Broadband commitment for a period of five years. These Broadband annual filings are subject to confidentiality afforded materials containing trade secrets and that are considered protected records under the Utah Government Records Access Management Act ("GRAMA"). For the first two years, this Broadband filing requirement will be satisfied by the Company's filings made under Section III.D.1., herein. If the Company meets its Broadband financial commitment in less than five years, this reporting requirement will be terminated.[37]

[37] Company-DPU Proposed Partial-Party Settlement at p. 2.

The $25 million commitment over five years does little if anything to advance the public interest.

Q. PLEASE EXPLAIN WHY THE $25 MILLION OVER FIVE YEARS IS INADEQUATE TO ADVANCE THE PUBLIC INTEREST.

A. The $25 million commitment over a five year period represents a very small amount relative to other ongoing broadband investments in Utah. For instance, Qwest reports that its Utah broadband capital expenditures budget for 2010 for broadband is **[***BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL***]** Therefore, the Joint Applicants' broadband commitment in Utah to spend, on average, $5 million per year is a commitment to spend about **[***BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL***]**

Q. HAVE THE JOINT APPLICANTS COMMITTED TO SPENDING MORE ON BROADBAND IN ANY OTHER STATES IN EXCHANGE FOR TRANSACTION APPROVAL?

A. Yes. In the proposed Minnesota settlement, Joint Applicants have committed to investing $50 million over five years on broadband, or $10 million per year. This is double the amount Joint Applicants have committed to Utah.

In addition, Qwest reports that it has 601,199 retail access lines in Utah,[38] which means that the Utah broadband commitment of $5 million per year amounts to $8.32 in broadband investment per retail access line per year (over five years). The $10 million per year committed to Minnesota over the 1,068,799 retail access lines[39] Qwest reports for that state, amounts to broadband investment of $9.36 per retail access line per year in Minnesota.[40] Not only is Utah's broadband commitment one-half of the Minnesota broadband commitment in real dollar terms, it is also $1.04 (or more than 10 percent) **less** than the Minnesota commitment on a per-retail access line basis. As I recently explained in the Minnesota proceeding, even the $50 million commitment in Minnesota is a paltry amount that does not benefit the public interest in that state,[41] and the same goes for the even smaller commitment in Utah.

Q. ARE YOU SUGGESTING THAT THE STATE WOULD HAVE BEEN BETTER OFF WITH RESPECT TO BROADBAND INVESTMENT IF THE DIVISION HAD NOT AGREED TO THE $25 MILLION OVER FIVE YEAR AMOUNT?

A. Yes. The Joint Applicants' commitment to spend $25 million over five years on broadband in Utah is **[***BEGIN CONFIDENTIAL** [redacted] **END**

38 http://www.centurylinkqwestmerger.com/downloads/qwest_statebystate/qwest-utah.pdf

39 http://www.centurylinkqwestmerger.com/downloads/qwest_statebystate/qwest-minnesota.pdf

40 http://www.centurylinkqwestmerger.com/downloads/qwest_statebystate/qwest-minnesota.pdf ($10 million per year divided by 1,068,799 Minnesota retail access lines).

41 Supplemental Surrebuttal Testimony of Timothy Gates, Minnesota Docket No. P-421, et. al./PA-10-456, October 18, 2010.

CONFIDENTIAL*]** than they would have spent absent the merger commitment. Certainly, the dollar amount of the commitment is **[***BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL***]** what would be required to ***expand*** broadband availability and speeds, which the Joint Applicants have identified as a benefit of the proposed transaction. For example, Joint Applicants' witness Jerry Fenn testified that "[t]he combined company's financial resources will allow the company to better meet the challenge of providing broadband to more customers at higher speeds" and that "[t]he combined post-merger company will he better equipped to offer innovative voice and broadband services … [at] greater broadband speeds and reach than either company could achieve alone."[42] Joint Applicants' witness Jeremy Ferkin testified similarly that the merger would accelerate the deployment of broadband, stating:

> CenturyLink will become stronger, and more diverse and flexible, by leveraging the complementary financial, operational and network strengths of each of the two companies. This will help to ensure and accelerate the continued deployment of advanced, broadband services to the benefit of both residential and business customers and competition in general.[43]

In spite of these claims of ***enhanced and accelerated*** broadband deployment resulting from the merger, the data shows that Joint Applicants have committed to invest **[***BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL***]** in Utah

[42] Direct Testimony of Jerry Fenn on behalf of Qwest Communications International, Inc., Utah Docket No. 10-049-16, May 27, 2010 ("Fenn Direct") at pp. 22 and 20-21.

[43] Direct Testimony of Jeremy Ferkin on behalf of CenturyLink, Inc., Utah Docket No. 10-049-16, May 27, 2010 ("Ferkin Direct") at p. 20.

on broadband than the amount Qwest already invests. This can hardly be viewed as a significant benefit to the public interest. To the contrary, it is a step back from past commitments and an even larger retreat from the Joint Applicants' claims that the merger will enhance broadband deployment.

Q. THE BROADBAND COMMITMENT STATES THAT FIFTEEN PERCENT OF THE BROADBAND COMMITMENT WILL BE USED IN "UNSERVED OR UNDERSERVED AREAS." DOES THAT PROVIDE ANY ASSURANCE THAT THE BROADBAND INVESTMENT COMMITMENT IN THE PROPOSED SETTLEMENT WILL SIGNIFICANTLY ADVANCE THE PUBLIC INTEREST?

A. No. The commitment to spend fifteen percent of the $25 million on unserved or underserved areas adds little if any public benefit. The total five-year commitment to unserved and underserved areas is $3.75 million, or $750,000 per year. This amounts to just **[***BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL***]** In addition, the FCC's list of cable providers operating in Utah communities[44] shows an alternative broadband provider present in 91% of the communities in which Qwest's 53 Utah exchanges reside. I suspect that the vast majority of these competing broadband providers offer speeds in excess of

[44] http://www.fcc.gov/mb/engineering/liststate.html

1.5 Mbps. For example, the FCC shows that Comcast serves communities where 31 of 53 Qwest Utah exchanges reside. Comcast advertises various tiers of high-speed internet ranging from between 12 Mbps and 50 Mbps download speeds.[45] Baja Broadband is identified in 5 of the communities in which Qwest Utah exchanges reside, and states that its residential high-speed internet speeds start at 6 Mpbs.[46] Therefore, Qwest already has a competitive incentive to deploy broadband, or upgrade its current broadband service, in these areas. That others have deployed broadband in these areas casts serious doubt on the claim that it is uneconomic to deploy broadband in these areas or to upgrade speeds in areas where Qwest already provides broadband at 1.5 Mbps or less. As a result, the commitment to spend approximately $750,000 per year on broadband infrastructure in these unserved or underserved areas simply memorializes expenditures that would clearly be in the merged company's competitive interest.

Q. DOES THE AGREEMENT CONTROL HOW THE $3.75 MILLION WOULD BE ALLOCATED AMONG UNSERVED AND UNDERSERVED AREAS OVER THE FIVE YEAR PERIOD?

A. No. The proposed settlement would allow the entire $3.75 million to be invested in underserved rather than unserved areas. The proposed settlement defines "underserved" areas broadly and vaguely to include any area with "broadband wireline service up to and including 1.5 megabits per second ('Mbps') download

[45] http://www.comcast.com/Corporate/Learn/HighSpeedInternet/speedcomparison.html

[46] http://www.bajabroadband.com/services.htm

speed." There is no assurance that the $3.75 million committed to underserved areas is more or even equal to what the merged company would otherwise invest in those areas absent the settlement. To the contrary, the Joint Applicants likely face competitive pressure to make significant broadband investments to increase speeds in at least some of the exchanges where current broadband offerings fall below the 1.5Mbps threshold.

Q. ARE THERE COMPETITIVE CONCERNS ASSOCIATED WITH THE JOINT PETITIONERS' POST-MERGER BROADBAND INVESTMENTS?

A. Yes. Since it is clearly in the Joint Applicants' economic interest to expand and enhance their broadband offerings in Utah, there can be no doubt that they will continue to make substantial investments in broadband with or without the merger. And one would expect those investments to include areas where they face competition from another broadband provider, which is in nearly every Qwest exchange in Utah. According to the Joint Petitioners, the merger will result in even more broadband investment than would otherwise occur. Yet, as the Joint Petitioners make investment commitments consistent with their existing plan to ramp up their broadband investments post-merger, they are unwilling to accept any commitments regarding the provision of conditioned copper loops, which many CLECs depend on to provide competitive broadband services. They are also unwilling to make any commitments to continue providing (or temporarily cap prices on) certain wholesale services such as dark fiber, Qwest

Wholesale Broadband or special access services, including DS1 and DS3 channel terminations – all of which are often used to deliver competitive broadband services. At the same time, there is nothing to prevent the Merged Company from continuing to retire copper loops, thus further reducing the availability of network facilities that CLECs rely upon to provide competitive broadband services. Therefore, as the Joint Petitioners advocate a partial party settlement that simply memorializes their own economic interest in making broadband investments, they refuse to make any commitments to preserve, much less enhance, the availability of competitive broadband offerings.

Q. IS THE BROADBAND COMMITMENT WORDED IN A WAY THAT SIGNALS THE JOINT APPLICANTS' INTENT TO USE THE BROADBAND COMMITMENT TO RAISE BARRIERS TO ENTRY FOR CLECS ATTEMPTING TO PROVIDE ADVANCED SERVICES IN COMPETITION WITH THE MERGED COMPANY?

A. Yes. The Broadband commitment states that broadband investment commitment will be made to "benefit ***retail*** customers in Utah." (emphasis added) This language, which is not included in the Minnesota proposed settlement, was added for a reason. That reason appears to be that the Joint Applicants do not want their ***wholesale*** customers to derive any benefit from this commitment. Or, in other words, adding this language is an apparent attempt by the Joint Applicants to gain a competitive advantage over CLECs in the provisioning of advanced services.

This new language is particularly concerning in light of my direct testimony explaining that Qwest is already engaging in conduct to raise the barriers to entry for CLECs who are attempting to compete with Qwest for advanced services.[47]

Q. DOES THE BROADBAND COMMITMENT HAVE ANY IMPACT ON WHETHER THE PROPOSED TRANSACTION IS CONSISTENT WITH THE PUBLIC INTEREST?

A. No. The Joint Applicants have done nothing more than promise to make investments that will likely serve their own private economic interests. And the amounts they pledge to invest in broadband appear to **[***BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL***]** of what the Joint Applicants would be expected to spend based on prior investments and the investments of alternative broadband service providers. The broadband commitment appears all the more meaningless when considered in the context of the Joint Applicants' claims that the merger will ***enhance*** broadband investments. There is simply no credible basis for claiming that this merger commitment advances the public interest, particularly when viewed in light of the extensive conditions that were omitted from the proposed settlement. Indeed, the broadband commitment is worded in such a way that it appears to condone discrimination against CLECs and give the Joint Applicants a competitive advantage for winning end user customers. Any alleged value does not outweigh

[47] Gates Direct at pp. 183-189.

the risks that remain unaddressed because of the failure of the Company-DPU Proposed Partial-Party Settlement to address the vast majority of competitive wholesale concerns raised by intervenors.

B. Operational Support Systems ("OSS")

Q. PLEASE ADDRESS THE PROPOSED SETTLEMENT TERMS ON OSS.

A. The Company-DPU Proposed Partial-Party Settlement states:

> Qwest Corporation or any successor entity (pre-merger or post-merger "Qwest" or "Qwest Corporation") will not discontinue its wholesale Operations Support Systems ("OSS") for a minimum of 24 months, post transaction closing.
>
> In the event that any Qwest OSS is subsequently changed or retired, Qwest Corporation will utilize the terms and conditions set forth in the Change Management Process ("CMP") and consistent with the CMP condition below, but in no event shall there be less than 6 months notice of the retirement of the legacy Qwest OSS from current Qwest territories.
>
> During that six-month notice period established for retiring a Qwest OSS, any interconnected CLEC or Commercial Mobile Radio Service ("CMRS") provider shall be permitted to test the proposed replacement OSS, and the Company shall cooperate with such testing, at no charge to the testing carrier, including but not limited to making available a testing environment.[48]

This condition is extremely vague and much more limited than the conditions proposed by Joint CLECs. For instance, the proposed settlement is silent with respect to wholesale customer support and system availability (e.g., type and level of data, information, and assistance needed for OSS functions and business

[48] Company-DPU Proposed Partial-Party Settlement at p. 3.

practices and procedures (Joint CLEC Conditions 16, 18, and 19)). Moreover, the 24-month time frame falls short of the lower end of the estimated time frame during which the Joint Applicants expect to realize synergies from the merger – the period of greatest risk to wholesale customers and their end user customers. To the extent these issues are not addressed in merger conditions, wholesale customers of the Merged Company, and in turn their end user customers, lack certainty and clarity. As the Colorado Public Utilities Commission's Telecommunications Section Chief (and former Qwest OSS witness[49]) recently testified: "Although Qwest is the larger entity and has more experience in the wholesale market, any changes made by CenturyLink to Qwest's back-office systems, to Qwest's business processes, to Qwest's interconnection negotiation template, or to Qwest's CMP increase the possibility of uncertainty among the interconnecting carriers. This uncertainty will in turn effect competition in general."[50]

Q. DOES THE FIRST PARAGRAPH REGARDING THE OSS ADDRESS THE JOINT CLECS' CONCERNS?

[49] Appendix A to the Answer Testimony of Lynn Notarianni, *In the Matter of the Joint Application of Qwest Communications International, Inc. and CenturyLink, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, et al.*, Colorado Docket No. 10A-350T. Ms. Notarianni testified on behalf of Qwest and its predecessor US WEST in more than 45 proceedings regarding operations and systems matters. *Id*. She provided project management oversight and OSS testimony in the 271 proceedings to gain 271 long distance entry. *Id*.

[50] Answer Testimony of Lynn Notarianni, Colorado Docket No. 10A-350T, September 15, 2010 ("Notarianni Colorado Answer Testimony") at p. 52, lines 4-9.

A. No. The first paragraph of the above-quoted proposed condition reflects a particularly minimal commitment. The Joint Applicants commit only to "not discontinue" certain Qwest OSS. This is very different from CenturyLink's testimony at the Minnesota hearing that what CenturyLink "has committed to is the 24-month moratorium before we make ***any changes***."[51] CenturyLink's commitment that CenturyLink will not make any changes needs to be reflected in a clear, transparent written condition to be enforceable, to avoid later disputes and to ensure that the settlement is nondiscriminatory.

Q. COULD THE LANGUAGE AS WRITTEN BE CONSTRUED BY CENTURYLINK AS ALLOWING CHANGES TO QWEST'S OSS DURING THE 24 MONTHS FOLLOWING POST TRANSACTION CLOSING?

A. Yes. Any number of ways exist for the post-merger combined company to modify Qwest's OSS or make the OSS less useful and more manual without actually "discontinuing" the OSS. Notably absent, for example, is any commitment to maintain at least the same OSS functionality or at least the same electronic flow through of orders as provided by Qwest before the merger filing

[51] MN Tr. Vol. 2B, p. 84, lines 10-12 (emphasis added). Note that this verbal commitment is that CenturyLink ("we") will not make any changes. See *id*. ***CLEC-initiated*** changes would still be allowed via CMP. *See,* Company-DPU Proposed Partial-Party Settlement at p. 6, §III(B)(5) (last sentence of paragraph 5).

date, ***including during the initial 24-month***[52] ***period***. This is true even though the testimony shows that the negative merger-related impacts that FairPoint's systems failures had on service quality for retail and wholesale customers in Vermont were due in part to inadequate automated flow through of orders designed to flow through to provisioning and billing without manual intervention.[53] Despite the significance of flow through, CenturyLink has indicated that it ***does not even track*** the number of orders that flow through systems without manual intervention.[54] In contrast, Qwest "routinely provides" flow through information on its website.[55] Particularly as the OSS condition in the Company-DPU Proposed Partial-Party Settlement contains no testing that would measure electronic flow through, CenturyLink's failure to even track the information is a significant problem. The proposed settlement provides no way to measure the Merged Company's post-transaction ability to meet its 271 obligations with respect to flow through.

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[52] A 24-hour month period is, in any event, too short. A minimum period of three years, followed by additional steps before OSS are integrated or replaced, is needed. *See*, Joint CLEC condition 19 and subparts and related testimony.

[53] Gates Direct at pp. 99-100 (quoting Vermont Board findings).

[54] CenturyLink response to Integra information request number 25(f). CenturyLink goes on to state that the company, however, "has staffed its operations team with the resources necessary" to deliver service to CLECs. See *Id.* In the absence of any evidence that orders flow through, this response seems to suggest that the orders in fact do not flow through, so CenturyLink has to have additional staff on hand to process orders manually. This raises a question as to what happens to this staffing when the merged company implements the promised synergies. The Minnesota DOC witness testified at the Minnesota hearing that the proposed settlement does not address "layoffs, keeping call centers open, keeping the same number of employees." MN Hrg. Tr. Vol. 1, p. 233, lines 6-9. In contrast, Joint CLEC Condition 18 addresses such issues.

[55] Qwest response to Integra information request number 25(g).

Q. HAS ELECTRONIC FLOW THROUGH BEEN RELIED UPON AS AN INDICATOR OF THE ADEQUACY OF SYSTEMS?

A. Yes. The FCC has looked to order flow through as a potential indicator of wide ranging problems that underlie a determination of whether a BOC provides nondiscriminatory access to its OSS.[56] The FCC has concluded that, to meet a BOC's ongoing 271 obligations, the BOC must show that its OSS are capable of flowing through orders in a manner that affords competing carriers a meaningful opportunity to compete and its OSS are capable of flowing through orders in substantially the same time and manner as for retail orders.[57] Also important to the analysis of whether a BOC is providing access to ordering functions in a nondiscriminatory manner is the BOC's ability to return timely order confirmation and reject notices, accurately process manually handled orders, and scale its system.[58] The above-quoted condition does nothing to ensure these requirements are met. Instead, the condition is phrased in a manner that seems to permit the Merged Company to make substantial changes to OSS so long as it can argue it has not discontinued the OSS. If one of the merger-related changes is deterioration in the amount of electronic flow through (*i.e.*, increased manual handling) in Qwest territory, the merger will result in harm in the form of the Merged Company backsliding on its 271 BOC obligations in Qwest's region.

56 FCC Memorandum Opinion and Order, WC Docket No. 02-314 (FCC 02-332), December 23, 2002 ("Qwest 9-State 271 Order") at ¶85.

57 Qwest 9-State 271 Order at ¶106.

58 Qwest 9-State 271 Order at ¶¶85 & 106.

This is the opposite result from that expected by the FCC, which said that it expects "flow through rates will ***improve*** over time."[59]

Q. ARE JOINT CLECS ALSO CONCERNED ABOUT LOSING OSS FUNCTIONALITY DUE TO CENTURYLINK'S SYSTEMS INTEGRATION?

A. Yes. There are serious concerns that pre-ordering functionality, for example, available through Qwest's existing OSS will be lost if CenturyLink attempts to replace Qwest's OSS with CenturyLink's OSS. Qwest's website states:

> Performing Pre-Ordering activities allows you to validate details (e.g., end-user account information, facility and service availability, addresses, loop qualifications) ***prior to*** submitting service requests and ***avoids unnecessary errors and/or delays of your request***.[60]

In contrast, the ***inability*** to perform these functions before placing an LSR – as with CenturyLink's OSS[61] - is more likely to result in unnecessary errors and delays. The inability to validate Channel Facility Assignments ("CFAs") and Network Channel ("NC")/ Network Channel Interface ("NCI") codes before placing an order are both examples of this. Both of these pre-order functions were identified by CenturyLink as not available when ordering via LSR from CenturyLink in discovery responses.[62] Both of these functions are available when

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59 Qwest 9 State 271 Order at ¶111 (emphasis added).

60 http://www.qwest.com/wholesale/clecs/preordering.html (emphasis added).

61 See, *e.g.*, Exhibit Integra 2SR.1.

62 Exhibit Integra 2SR.2 and Exhibit Integra 2SR.1.

ordering via LSR from Qwest.[63] Both are important aspects of the "pre-ordering"[64] phase of OSS. A CFA[65] is, generally speaking, an address (defined by a number or code) that identifies for carriers a specific point of access or connection to the network.[66] Before a CLEC places an order, the CLEC needs to validate whether a CFA is available or in use. If it is available, a CLEC may submit an order using that CFA. If it is in use, the CLEC needs to request a different CFA when placing an order. If a CLEC cannot validate the CFA in advance and must first submit an order, the CLEC will find out only after placing the order (and paying any fees associated with that order and waiting for any interval associated with this process) whether the CFA is in use. If the CFA is in use, a delay results because the CLEC must then re-submit an LSR using a different CFA to find out if that CFA is available.

Similarly, a CLEC needs the ability to validate NC/NCI code combinations. Industry standard codes, known as NC and NCI codes, are used in ordering to

63 http://www.qwest.com/wholesale/clecs/preordering.html

64 The FCC defines OSS to include five functions: (1) pre-ordering, (2) ordering, (3) provisioning, (4) maintenance and repair, and (5) billing. See Qwest 9 State 271 Order, *passim* and specifically ¶¶ 516-528; see also 47 C.F.R. §51.313(c) & §51.319(g). In the context of a BOC's 271 responsibilities, the FCC has described each of these five functions as "critical." FCC Bell Atlantic 271 Order, ¶81.

65 A CFA is sometimes referred to as a "channel," "connecting," or "circuit" facility assignment.

66 "Connecting Facility Assignment allows a CLEC to query for and obtain a list of valid and available CFAs and channel assignment records." See: http://www.qwest.com/disclosures/netdisclosure409/26/Chapter05_.pdf

distinguish among products.[67] An ILEC, such as Qwest, may accept LSRs for only certain combinations of NC and NCI codes. The NC/NCI code pre-order function allows a CLEC to validate that a particular NC/NCI code combination will be accepted by the ILEC for ordering the desired service. Without this validation capability, errors may result such as delivery of the wrong service, and delays may result such as when the ILEC later rejects an NC/NCI code combination as invalid.

Pre-ordering functionality, such as CFA and NC/NCI code validation, is important. In reviewing Qwest's compliance with its 271 obligations, the FCC said:

> [P]re-ordering includes gathering and verifying the information necessary to place a new service order. Given that pre-ordering represents the first exposure that a prospective customer has to a competing carrier, inferior access to the incumbent's OSS may render the competing carrier less efficient or responsive than the incumbent. The applicable standard is whether the BOC provides access to its OSS that allows competitors to perform pre-ordering functions in substantially the same time and manner as the BOC's retail operations. For those pre-order functions that lack a retail analogue, the BOC must provide access that affords an efficient competitor a meaningful opportunity to compete.[68]

Joint CLECs' recommended Condition 13 confirms that, in the Qwest ILEC territory, the Merged Company will be a Bell Operating Company (BOC) with 271 obligations, including an obligation not to backslide with respect to those

[67] See Joint CLEC Initial Comments, Integra Exhibit 2.1 at pp. 43-49 for a discussion of NCI codes.

[68] Qwest 9-State 271 Order ¶38 (footnotes omitted).

obligations. Joint CLECs' recommended Conditions 16 and 19 assure that, in the Qwest ILEC territory after the Closing Date, the Merged Company will provide at least the types and level of data, information, and assistance and at least the same data and ***functionality*** as provided by Qwest prior to the merger filing date. If the Merged Company is allowed to integrate, migrate, or consolidate to OSS with less functionality – such as the reduced pre-ordering functionality of EASE reflected in Exhibit Integra 2SR.2 – then the Merged Company may argue that it is not discriminating because its retail operations also have reduced functionality. This would turn the clock back to pre-271 days in terms of wholesale support, while the Merged Company still maintains the benefits of its interLATA 271 authority. CenturyLink's OSS used currently for its retail and wholesale operations have not had to meet the 271 requirements that the Qwest OSS have met.[69] The Joint CLECs' recommended conditions, including Conditions 16 and 19, help prevent backsliding in this regard.

Q. DO YOU HAVE OTHER CONCERNS ABOUT THE WAY THE PROPOSED SETTLEMENT CONDITION IS WORDED WITH RESPECT TO OSS?

A. Yes. The above-quoted language states that "***wholesale*** Operations Support Systems" will not be discontinued.[70] The meaning of the word "wholesale"

[69] See, e.g. Direct Testimony of Timothy Gates, August 30, 2010, at p. 39.

[70] Company-DPU Proposed Partial-Party Settlement at p. 3 (emphasis added).

before OSS is undefined and it is unclear in this context,[71] particularly as to whether and how use of "wholesale" here limits applicability of the condition. For instance, if CenturyLink intends to limit this condition to the issue of CenturyLink EASE versus Qwest IMA, even though the FCC's definition of OSS is much broader, then CenturyLink should make this clear so that the parties may address the problems with that proposal. If changes are later characterized as changes to OSS other than "wholesale" OSS, the language of the condition may allow changes to those OSS as early as day two after closing of the transaction.[72]

Q. WHY WOULD CLECS BE CONCERNED ABOUT CHANGES TO QWEST "RETAIL" OSS?

A. Some OSS are common to wholesale and retail.[73] Assuming that some OSS are purely retail and even assuming that only those retail OSS may be changed on or after day two, it is unclear why the Division, in advocating the public interest

[71] Joint CLECs refer to wholesale OSS in their proposed Condition 16 relating to the amount of information and data that a wholesale customer needs to use the systems and be apprised of changes (unlike a retail customer that does not have to use the systems or adjust its processes to changes in the systems) and in Condition 19(c) with respect to coordinated testing with CLECs (whereas retail customers do not test systems with the ILEC). In contrast, Condition 19(b) regarding third party testing refers to any Qwest system that was subject to third party testing, and "OSS" (not wholesale OSS) is the term used in Condition 19 regarding the minimum time period during which Qwest's OSS will remain in place. If CenturyLink is using a similar distinction, then "wholesale OSS" is too narrow with respect to the applicable time period in this condition.

[72] MN Hrg. Tr. Vol. 2B, p. 84, lines 22-25 (an immediate change is "day one after closing of the transaction").

[73] For example, outside plant data for assignment of facilities purposes is contained in Qwest's Loop Facilities and Control Center System ("LFACS"), see http://www.qwest.com/wholesale/guides/glossary.html#t; trunk inventory for all customers, wholesale and retail, is contained in Qwest's OSS known as Trunk Inventory Record System ("TIRKS"), see http://www.telcordia.com/products/tirks/index.html; and the technician records and associate scheduling data for all customers, wholesale and retail, is contained in Qwest's OSS known as Work Force Administrator ("WFA"), see http://www.qwest.com/wholesale/systems/mediacc-ebta.html.

before the Commission, would indicate that an OSS condition limited to wholesale systems is sufficient when public agencies in other states are recommending conditions with respect to retail OSS as well.[74]

The FCC defines OSS to include five functions: (1) pre-ordering, (2) ordering, (3) provisioning, (4) maintenance and repair, and (5) billing.[75] OSS include manual, computerized, and automated systems, together with associated business processes and ***the data maintained in those systems***.[76] As explained in my previous testimony, some functions are performed through CLEC-facing OSS (such as when a CLEC places an order using an ILEC interface) and others are via back-end or back-office OSS (such as a billing system, changes to which may impact CLECs even though CLECs do not input information directly into the system),[77] and data integrity is a key issue in any merger-initiated OSS migration

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74 *See, e.g.*, Oregon PUC Staff Condition 29 and Washington UTC Staff Condition 33.

75 See *Local Competition Order*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos.* 96-98, 95-185, 11 FCC Rcd 15499 (1996), *passim* and specifically ¶¶516-528. See also, Qwest 9 State 271 Order at ¶¶ 33-34 & footnote 83 to ¶34, which states: *"Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3989, ¶ 82 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). **The Commission has defined OSS as the various systems, databases, and personnel used by incumbent LECs to provide service to their customers.** *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18396-97, ¶ 92 (2000) (*SWBT Texas Order*)" (emphasis added). *See also,* 47 C.F.R. §51.313(c) and §51.319(g).

76 *Local Competition First Report and Order*, at ¶¶ 517-18 (emphasis added).

77 Gates Surrebuttal at p. 134.

or conversion.[78] As the experiences in other mergers have shown, merger-related changes to systems and migration of data from one system to another (including back-end systems) can result in significant retail and wholesale customer impacting problems.[79] It is unclear whether all of these systems and the data maintained in these systems are included in the term "wholesale OSS" as used in the OSS commitment of the proposed settlement.[80]

The second paragraph of the proposed commitment relating to OSS applies "subsequently" to the minimum 24-month post transaction time period. Although this second paragraph uses the term "Qwest OSS" versus "wholesale OSS," the previous paragraph defines OSS as Qwest's "wholesale Operations Support Systems." It is unclear whether OSS in the second paragraph, therefore, is intended to mean all Qwest OSS or those that the Company defines as wholesale OSS. Ambiguous language is more likely to lead to disputes. In addition, although use of the word "subsequently" in the second OSS paragraph appears to suggest that CenturyLink will not make changes to OSS via CMP during the time period identified in the first paragraph, the condition does not actually say that. There is either (1) no commitment that CenturyLink will not make changes to Qwest OSS (other than not discontinuing them) during this time period via CMP, or (2) if there is an intent that CenturyLink will not change Qwest OSS via CMP

[78] Gates Surrebuttal at p. 135, lines 4-5.

[79] Gates Surrebuttal at pp. 134-138.

[80] It is also unclear whether and to what extent Joint Applicants believe that such changes are subject to CMP.

during the initial time period, the parties' intent is not transparent in the document.

Q. THE OSS COMMITMENT IN THE UTAH PROPOSED SETTLEMENT IS SIMILAR TO THE OSS COMMITMENT IN THE MINNESOTA PROPOSED SETTLEMENT. DID THE JOINT CLECS ATTEMPT TO CLARIFY WHAT OSS CHANGES WOULD BE HANDLED THROUGH CMP DURING THE MINNESOTA HEARINGS?

A. Yes. The Minnesota DOC witness, however, was unable to answer questions about the operation of the CMP and whether certain changes would be handled through CMP or not upon implementation of this condition.[81] She explained that she is not an OSS expert and that the Minnesota DOC had not consulted an OSS expert before agreeing to this condition and concluding that it furthers the public interest.[82] In addition, she admitted that the Minnesota DOC did not involve CLEC participants in the CMP and CLEC users of OSS to gain their insights,[83] as discussed above.

Q. GIVEN ITS LACK OF EXPERTISE ON OSS, HOW DID THE MINNESOTA DOC JUSTIFY ACCEPTANCE OF THIS CONDITION?

A. The Minnesota DOC witness contended that such knowledge was unnecessary because her understanding of the purpose of the second OSS paragraph is to apply

[81] MN Hrg. Tr. Vol. 1, p. 177, lines 11-13.
[82] MN Hrg. Tr. Vol. 1, p. 171, lines 6-18.
[83] MN Hrg. Tr. Vol. 1, p. 189, lines 19-24.

the CMP for system changes after the closing date in the same manner as before the closing date.[84] As explained in my surrebuttal testimony, if a change to a back-end system is not intended to impact CLECs (*e.g.*, a change to a billing system that will not affect CLECs), the change may not be handled in CMP, and the CMP may become overloaded in any event.[85] If any changes are purely retail, they do not go through CMP at all. To the extent that the Division, like the Minnesota DOC, is relying on the CMP to ensure that the significant retail and wholesale customer impacting problems that have occurred in other mergers with respect to back-end systems and migration of data from one back-end system to another does not occur in Utah, that reliance is misplaced and the commitment provides little certainty in that regard.

Q. DID CENTURYLINK PROVIDE INFORMATION IN RESPONSE TO DISCOVERY THAT UNDERSCORES THE CONCERNS YOU DISCUSS ABOVE IN RELATION TO THE OSS CONDITION IN THE COMPANY-DPU PROPOSED PARTIAL-PARTY SETTLEMENT?

A. Yes. As discussed above, some of the concerns about the OSS condition in the proposed settlement relate to electronic flow through, what CenturyLink considers to be OSS, and what changes may be handled through CMP. I provided as Confidential Exhibit Joint CLECs 2SR.5 to my surrebuttal testimony **[***BEGIN CONFIDENTIAL [redacted]

[84] MN Hrg. Tr. Vol. 1, p, 179, lines 1-6.

[85] Gates Surrebuttal at pp. 136-138.

[redacted] **END CONFIDENTIAL***]** This diagram illustrates each of the concerns I discuss above.

Q. PLEASE EXPLAIN HOW THE DIAGRAM PROVIDED AS CONFIDENTIAL EXHIBIT JOINT CLECS 2SR.5 SUPPORTS YOUR CONCERN ABOUT ELECTRONIC FLOW THROUGH.

A. As discussed in my surrebuttal testimony, this diagram shows [*****BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL***]**

As explained in my surrebuttal testimony at pages 36-37, this increased risk of human error is a key reason why the FCC, when evaluating a BOC's 271 capabilities, evaluates the amount of electronic flow through offered by the BOC. Generally, the more orders electronically flow through, the less manual intervention. Any deterioration in flow through [*****BEGIN CONFIDENTIAL**

[redacted] **END CONFIDENTIAL***]** would reflect serious merger-related harm, as well as backsliding with respect to the Merged Company's BOC obligations.

Q. HOW DOES THE DIAGRAM SUPPORT YOUR CONCERN ABOUT CENTURYLINK'S VIEW OF WHAT CONSTITUTES OSS?

A. As I discussed at pages 33-34 of my surrebuttal testimony, [*****BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL***]** So not only does the OSS condition raise questions about what constitutes a ***wholesale*** OSS, CenturyLink's diagram raises a broader concern about **[***BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL***]**

Q. PLEASE EXPLAIN HOW THE DIAGRAM SUPPORTS YOUR CONCERN ABOUT WHICH CHANGES TO OSS CENTURYLINK MAY DECIDE TO MAKE AND TO TAKE TO CMP.

A. Because it is unclear how CenturyLink defines OSS and non-OSS systems, let alone how it defines "wholesale OSS" referenced in the OSS condition in the proposed settlement, it is unclear what changes CenturyLink may believe it does and does not have to take to CMP. Changes to the [*****BEGIN CONFIDENTIAL** [redacted]

[redacted] **END CONFIDENTIAL***]** are subject to CMP for functions that support CLECs and for changes that may affect CLECs.

Q. IS THE SIX MONTH NOTICE COMMITMENT CONSISTENT WITH CURRENT NOTICE REQUIREMENTS UNDER CMP?

A. No. The reference to a six-month notice period creates ambiguity. This is particularly true as the CMP Document which governs Qwest CMP procedures provides for a time period during normal circumstances, absent an acquisition of this magnitude involving Qwest,[86] of at least 270 calendar days -- ***9 months*** -- for both introduction of a new OSS interface and retirement of an existing OSS interface for ***initial steps*** (such as hosting design and development meetings when introducing an interface and sharing the retirement plans when retiring an interface).[87] In contrast, the Company commitment anticipates that all steps, including any needed CLEC modifications to prepare for the ILEC changes and any testing occur ***during*** a six month period. In other words, the proposed commitment is not six months ***advance*** notification at all; it is six month from notice to go-live in production with live customers.[88]

To further complicate matters and muddy the waters, the Joint Applicants' commitment refers cryptically to "testing." There are many known kinds of OSS

[86] Gates Surrebuttal at p. 135.

[87] CMP Document, §7.1 (Exhibit Integra 2.25 at p. 55) & §9.1 (Exhibit Integra 2.25 at p. 69).

[88] According to the Minnesota DOC witness this means that the Joint Applicants could provide notice in 18 months and then go live at the end of the 24th month. MN Hrg. Tr. Vol. 1, p. 181, lines 8-13.

testing (e.g., third party testing, interoperability testing, controlled production testing, etc.).

The Joint CLECs' recommended condition 19(b) specifically references third party testing and further defines third party testing as the types and extent of testing conducted during the Qwest 271 proceedings. Issues such as electronic flow through and scalability that were addressed in the 271 proceedings[89] would therefore be addressed in testing via this language. The Joint CLECs' recommended condition 19(c), which applies before implementation of any replacement system, specifically refers to coordinated testing with CLECs and, significantly, specifies "a stable testing environment ***that mirrors production*** and, when applicable, controlled production."[90] It is critical to ensure that this testing mirrors production to ensure that the ILEC's OSS and the CLEC's systems are capable of interacting smoothly and efficiently. The vague testing language of the Joint Applicants' commitment may simply indicate that the system will physically pass orders without any verification through testing that it works in production.

Furthermore, the inadequate OSS commitment in the Minnesota proposed settlement states that testing will be allowed: "in a timeframe no less than the timeframe provided for under the existing Qwest CMP process…" This phrase

89 Qwest 9-State 271 Order at ¶¶85 & 106.

90 Controlled production consists of the controlled submission of actual CLEC production requests to the ILEC production environment. The ILEC and CLEC use controlled production results to determine operational readiness. Controlled production requires the use of valid account and order data.

was omitted from the OSS commitment in the Utah proposed settlement raising additional questions about the testing that would occur under the OSS commitment in Utah.

Q. IS THIS ANOTHER AREA FOR WHICH INVOLVEMENT OF THE JOINT CLECS IN THE SETTLEMENT DISCUSSIONS COULD HAVE ADDED BENEFIT?

A. Yes. Without any involvement of CLEC users of OSS, the Division may not have understood the significance of these problems with the language to which it has ostensibly agreed.[91] This is all the more reason why CLECs should have been included in the settlement negotiations or at least consulted during the course of those negotiations. With CLEC participation or consultation, the parties could have explored whether the intended commitment would adequately address the OSS concerns of wholesale customers and what language would be needed to address those concerns. None of this exploration occurred. Even assuming the intended meaning is acceptable in any respect, the intended meaning must be transparent and accurately reflected in the document for it to be enforceable and avoid future disputes, which it is not. The Company's commitment is too vague and contains too many problems for the Commission to rely upon it to conclude the transaction is in the public interest.

[91] In any event, the Division's understanding of a term when it entered into the agreement is irrelevant and inadmissible in later disputes about this ambiguous language. *See*, Company-DPU Proposed Partial-Party Settlement at p. 11, ¶ D ("Entire Agreement").

C. Interconnection Agreement ("ICA") - Extension of Term of ICA

Q. PLEASE DISCUSS THE COMPANY-DPU PROPOSED PARTIAL-PARTY SETTLEMENT AS IT RELATES TO INTERCONNECTION AGREEMENTS ("ICAS").

A. The Company-DPU Proposed Partial-Party Settlement states:

> Qwest Corporation will not terminate or change the conditions of any CLEC or CMRS interconnection agreement, with the exception of changes required by law or to the extent Qwest is relieved by law of a current wholesale obligation, unless requested or agreed to by the CLEC or CMRS provider, or in the event of default or other triggering event expressly contemplated by the terms of the agreement, for a period of:
>
> > 1. 36 months from the Closing Date for any CLEC or CMRS interconnection agreement that is not expired as of the Closing Date of the transaction and for any CLEC or CMRS interconnection agreement that has been expired less than three (3) years as of the Closing Date of the transaction
> >
> > 2. 24 months from the Closing Date for any CLEC interconnection agreement that has been expired for more than three (3) years and has been amended to include Qwest's TRRO language and for any other CMRS interconnection agreement; or
> >
> > 3. 12 months from the Closing Date for any CLEC interconnection agreement that has been expired for more than three (3) years and not amended to include Qwest's TRRO language as of the Closing Date of the transaction.[92]

This condition is more limited than the conditions proposed by Joint CLECs with respect to assuming and continuing obligations that are currently in place under

[92] Company-DPU Proposed Partial-Party Settlement at pp. 3-4, §III(B)(2)(a).

Qwest's ICAs, tariffs, commercial agreements, and other existing arrangements with wholesale customers ("Assumed Agreements") (Conditions 6, 7, and 8). Therefore, it offers much less certainty during a time when significant changes will be occurring due to the merger.

Q. DO YOU HAVE CONCERNS REGARDING THE ICA EXTENSION LANGUAGE AS IT RELATES TO THE LAW?

A. Yes. Although I am not a lawyer, I find this language difficult to follow and interpret. The Company's commitment contains a vague exception indicating that the Company may terminate or change any interconnection agreement due to changes in law "or to the extent Qwest is relieved by law of a current wholesale obligation." There is no explanation as to how "changes required by law" are different from being "relieved by law" of an obligation. If the two phrases do not have different meanings, however, presumably the latter language, which is not part of the Iowa settlement,[93] would not have been added in Utah and Minnesota. To the extent that the parties to the proposed settlement have a reason for adding it, that reason is not transparent on the face of the agreement. For a condition to provide any measure of certainty, however, the meaning needs to be known and part of the document.

[93] Iowa Settlement at p. 3, ¶2(b)(i).

Q. THE PROPOSED ICA CONDITION ALSO REFERS TO "TRIGGERING EVENTS." IS IT CLEAR AS TO HOW CHANGES WOULD TAKE PLACE IF SUCH AN EVENT SHOULD OCCUR?

A. No. The Joint Applicants' commitment states that the Company may terminate or change any ICA in the event of any triggering event expressly contemplated by the terms of the agreement. It does not state any requirement to follow any applicable procedures pertaining to such termination in the event such a triggering event occurs. It also identifies no triggering event other than a default, and it does not indicate whether a default needs to be material. As written, the Merged Company could argue that the end of the term of the agreement is a triggering event that allows termination. If there are circumstances other than a material default as defined by the ICA that are intended by this language, those circumstances are not transparent from the language of this condition.

Q. PLEASE ADDRESS THE TIME FRAMES AND WHETHER THEY ARE SUFFICIENT OR APPROPRIATE.

A. The length of time for which an ICA is extended varies in this condition from 12 months to 36 months depending on (1) in some cases, whether the ICA has been amended "to include Qwest's TRRO language"; and (2) when an ICA "expired." First, regarding the FCC's Triennial Review Remand Order,[94] it is unclear why

[94] Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290 (rel. February 4, 2005) ("TRRO").

the commitment refers to "***Qwest's*** TRRO language," and the Minnesota DOC witness was unable to explain at the Minnesota hearing why the word "Qwest's" appears before "TRRO language."[95] The ICAs between Qwest and all of the CLECs identified in Exhibit Integra 2.10, for example, contain TRRO language that was not drafted by Qwest and is different from Qwest's template TRRO language, but the Commission has approved the language of those agreements. At the Minnesota hearing, the Minnesota DOC identified no interest of the DOC or the public in preferring Qwest's TRRO language over that of Commission-approved TRRO language. Although witnesses for the Minnesota DOC and the Joint Applicants, at the Minnesota hearings, suggested that their intent was not to limit this condition to Qwest-proposed or Qwest-drafted language,[96] that intent is not transparent on the face of the agreement.

At the Minnesota hearings, CenturyLink's witness testified that less than one percent[97] of the Qwest Minnesota ICAs fall within the third category: ICAs that have not been amended to include "Qwest's TRRO language." Given that there

[95] MN Hrg. Tr. Vol. 1, p. 191, lines 2-20.

[96] MN Hrg. Tr. Vol. 1, p. 191, lines 2-20 (DOC Wells); MN Hrg. Tr. Vol. 2B, p. 145, line 2 – p. 146, line 2 (CenturyLink Hunsucker). Although Mr. Hunsucker attempted to suggest that the meaning of "Qwest's TRRO language" was clear presumably because these are Qwest agreements with CLECs (see *id*. p. 146, lines 7-17), the introductory language in paragraph 2(a) of the proposed settlement already specifies that only Qwest ICAs are the subject of this provision. CenturyLink may later argue, therefore, that use of "Qwest's" before TRRO language narrows the provision further as to which language must be in a Qwest ICA before the specified time period applies.

[97] MN Hrg. Tr. Vol. 2B, p. 112, line 24 – p. 113, line 2. Although, once asked, CenturyLink was able to provide percentages of CLECs that fall within each category in condition 2a, the Minnesota DOC's witness testified that at the time the DOC entered in to the proposed settlement (and as of her testimony at the hearing), the DOC did not know how many CLECs would be impacted by each category of this condition. MN Hrg. Tr. Vol. 1, p. 211, lines 1-15.

are, at most, a "handful"[98] of such agreements, the Joint Applicants do not explain why they did not simply agree to a single time period for extending the term of all ICAs, with a proviso that if any ICA has not been amended to reflect the TRRO, the parties to that ICA need to either amend it or, if they cannot agree, bring the issue for resolution to the Commission within a certain amount of time. Moreover, this category is a red herring. The TRRO allows ***but does not require*** ILECs to limit availability of certain UNEs. In other words, it allows but does not require an ILEC to seek amendment of ICAs. Unless Qwest both had a right to amend these ICAs (*e.g.*, via change of law or amendment provisions) and ***exercised that right*** via negotiation and, as needed, arbitration pursuant to its rights under Section 252 of the Act, then there is no reason that these ICAs would or should have been amended to reflect the TRRO.

Q. COULD THIS COMMITMENT WITH THE VARYING TIME-FRAMES LEAD TO DISCRIMINATORY RESULTS IN QWEST TERRITORY?[99]

A. Yes. The proposed settlement identifies a time frame for which an ICA is extended -- from 12 months to 36 months, depending on when an ICA "expired." This provision is not based on the ICA experience in Qwest territory, and it may lead to discrimination as well as to disputes over the language.

[98] MN Hrg. Tr. Vol. 2B, p. 112, line 25 – p. 113, line 2 (Hunsucker) ("Actually, category 3 is just a handful of agreements that are very, very old.").

[99] MN Hrg. Tr. Vol. 3, p. 78, line 16.

The Qwest territory is unique in having so many ICAs in evergreen status that have been updated through Qwest's practice of amending rather than replacing ICAs. Joint Applicants made no showing, for example, that the same practice was in place for CenturyTel or Embarq. While CenturyLink suggests that "expired" is synonymous with "outdated,"[100] that is not the case. Qwest-CLEC ICAs have been amended multiple times to keep them up-to-date.[101] The current Qwest-McLeodUSA ICA in Utah, for example, has been amended since its filing with the Utah Commission on April 17, 2000[102] ***twenty-five*** times, with four of these amendments made in the last few years.[103] While the initial term of the ICA may have expired January 1, 2001, there is no reason to assume that this often-amended Commission-approved ICA under which both parties are currently operating is less up-to-date than an ICA that expired later (*e.g.*, less than 3 years ago).

Q. HOW MAY THE NUMEROUS AMENDMENTS MEET THE NEEDS OF THE CARRIERS INVOLVED IN THE ICA?

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[100] Rebuttal Testimony of Michael Hunsucker on behalf of CenturyLink, Inc., Utah Docket No. 10-049-16, September 30, 2010 ("Hunsucker Rebuttal"), at p. 19, line 14.

[101] Mr. Hunsucker testified that, even though the ICAs have been updated via amendment, "those are older contracts, contracts that would have been entered into pre-2005." MN Tr. Vol. 2B, p. 115, lines 22-23. He also claims that even the new amendments have "a lot of operational parameters." *Id*. p. 115, lines 23-25. As the parties are operating under those parameters, and have even amended ICAs to update them to include those parameters, however, he failed to explain why those parameters that are acceptable to the parties to the contract are a problem. Labeling a contract "older" by looking at the first signature date and ignoring its more recent amendments does not change the fact that the ICA is up-to-date through amendments and in effect currently.

[102] Docket 00-2249-01.

[103] Docket 00-2249-01.

A. The number and timing of amendments reflects the different needs of various carriers. As Qwest's witness has previously testified, "tailoring" of ICAs to meet the specialized needs of CLECs is "often necessary for CLEC survival in the competitive telecommunications marketplace."[104] It is troubling, therefore, that CenturyLink views one purpose of this proposed settlement condition "to start bringing those [ICAs] in conformance with current agreements."[105] Different carriers may have different needs. A carrier such as Level 3, for example, may need fewer or different services from Qwest than a carrier such as McLeodUSA or a cable-based CLEC. It would stand to reason, therefore, that Level 3 may not need or desire as many amendments to keep its ICA current (as, for example, Level 3 may not desire to amend its ICA to add a new service that it has no plans to order). Given that neither party has expressed a desire for change, a better assumption absent evidence to the contrary (as here) is that neither has found the ICA to be outdated. As Level 3 indicated through cross-examination at the Minnesota hearing, for example, the fact that Qwest and Level 3 have been actively operating under an ICA since 2005 without either seeking a change in that status suggests that the ICA is suitable for both parties' current needs.[106] In

[104] Rebuttal Testimony of Qwest witness Karen Stewart Rebuttal, MPUC Docket No. P-5340, 421/IC-06-768 (Qwest-Eschelon Minnesota ICA arbitration proceeding), September 22, 2006, p. 36, lines 19-25.

[105] MN Tr. Vol. 2B, p. 116, lines 2-4. Problems associated with an ILEC's insistence on its own negotiations "template" terms are discussed in Gates Direct at p. 23 and Direct Testimony of Douglas Denney on behalf of Integra, Utah Docket No. 10-049-16, Exhibit Integra 1, August 30, 2010 ("Denney Direct") at pp. 16-17.

[106] MN Hrg. Tr. Vol. 2B, p. 113, line 8 – p. 114, line 20.

other words, a distinction based on expiration date is a distinction without a difference.

Q. PLEASE ELABORATE ON YOUR STATEMENT THAT THIS COMMITMENT MAY LEAD TO DISCRIMINATORY RESULTS IN QWEST TERRITORY.

A. When two ICAs are both in evergreen status (so there is no "unexpired term"), one carrier (whose contract expired less than 3 years before the Closing Date) will be able to retain its existing ICA a full year longer than the other (whose contract expired before that). This is true even if the latter carrier has updated its ICA via amendment more recently than the former carrier.

Q. DOES THE RATIONALE PROVIDED BY CENTURYLINK JUSTIFY THE DISTINCTION?

A. No. In fact, CenturyLink's rationale is based on a hypothetical that does not capture the facts within Qwest territory. CenturyLink said that "first off," it assumed that ICAs are three-year contracts, so "that constitutes where we came up with the 36 months in the first category."[107] This first assumption ignores that, like many ICAs in Qwest territory, the McLeodUSA contract has been in place, as amended over time, for more than ten years. The first assumption also ignores the experience of Integra and Eschelon to date regarding the length of time needed for negotiations and arbitrations. Based on that experience, only if existing ICAs are

[107] MN Hrg. Tr. Vol. 2B, p. 115, lines 2-6.

extended for a period of 7 years would the time period of the extension begin to cover the time period of the Qwest-Eschelon negotiations, which started in March of 2001 through the Arizona effective date of December of 2009.[108] And, in Colorado, for which no ruling has been issued, or Minnesota, for which the conversions and commingling issue raised in negotiations has not yet resulted in final ICA language, the time period would be longer.[109]

Joint CLECs' proposed Condition 8 deals with extending existing ICAs and refers to the Defined Time Period. The 7 years justified by this example is one alternative for the Defined Time Period, with Joint CLECs' alternative proposal being a minimum of 42 months (3.5 years).[110] Unlike the proposed settlement term, the Defined Time Period in the Joint CLEC recommendation applies whether or not the initial or current term of an agreement has expired. This better reflects the reality in Qwest territory, and the minimum period of 3.5 years is only six months longer than the minimum period[111] that CenturyLink has found workable for the majority[112] of the ICAs in Utah.

CenturyLink added, as part of its rationale for the varying time periods, that:

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[108] Denney Direct at pp. 19-20.

[109] Denney Direct at p. 20.

[110] "Defined Time Period," when used in the Joint CLEC list of conditions, refers to a time period of at least 5-7 years after the Closing Date or, alternatively, a time period that is a minimum of 42 months (*i.e.*, 3.5 years) and continues thereafter until the Applicants are granted Section 10 forbearance from the condition.

[111] MN Hrg. Tr. Vol. 2B, p. 117, lines 21-24 (Mr. Hunsucker indicated that the time period in condition 2a does not require CenturyLink to terminate an agreement, so the time periods are minimums, *i.e.*, the ICAs could "continue on").

[112] MN Hrg. Tr. Vol. 2B, p. 112, lines 22-23.

> [T]he TRRO was issued in 2005, which a three-year contract would have ran those through 2008. And that would be the term – the termination – first possible point of termination of those agreements at the end of – in 2008. And so we were looking for an additional three-year extension or three years would push that through 2011. So if they've been expired less than three years, it would bring an agreement that was basically signed after the TRRO order, and that's where we came up with the 36 months.[113]

CenturyLink provided no examples at the Minnesota hearing of Minnesota three-year contracts that ran from the TRRO's release on February 4, 2005 through February 4, 2008. Contrary to this assumption, Qwest did not address the TRRO by requesting new ICAs with three-year terms. Qwest proposed amending existing ICAs, many if not most of which were "expired" (in evergreen status), to reflect the change in law reflected in the TRRO. Qwest did not even circulate a proposed TRRO amendment until sometime after the TRRO was issued. The assumption of three-year contracts commencing in 2005 to reflect the TRRO is simply factually inaccurate. The TRRO amendment to the Qwest-McLeodUSA Utah ICA was fully executed, for example, on September 30, ***2008***. Applying CenturyLink's logic, the McLeodUSA Utah ICA with Qwest was updated to reflect the TRRO less than three years ago and therefore should be a candidate for the extension of 36-months after the Closing Date using CenturyLink's rationale. Because of the irrelevant fact that the parties chose to reflect the TRRO by amendment rather than via a replacement ICA, however, McLeodUSA loses a full

[113] MN Hrg. Tr. Vol. 2B, p. 115, lines 10-20.

year on their ICA extension vis-à-vis its CLEC competitors. The purported rationale just does not work in Qwest territory.

Q OTHER THAN THE DISCRIMINATION ISSUE DISCUSSED ABOVE, DO YOU HAVE OTHER CONCERNS ABOUT THE ICA LANGUAGE?

A. Yes. In addition to leading to this type of unfair and discriminatory result, the proposed condition is vague and likely to lead to disputes. As stated, the Joint CLEC recommendation applies "whether or not the initial or current term of an agreement has expired ('evergreen' status)." In other words, application of a condition does not depend on how the term "expired" is defined. In contrast, when applying the Joint Applicants' proposed commitment, significant consequences hinge on whether a contract is "expired." Therefore, the parties need to understand the meaning of this term, which is not transparent on the face of the agreement. For example, the Qwest-Level 3 Utah ICA states in Section 5.2.1 that the ICA is effective for a term of 2.5 years and shall terminate on August 20, 2006. Section 5.2.2 provides, however, that the agreement "shall continue in force and effect" and it remains in effect until, 160 days notice by either party and either agreement on a new agreement is reached or the Commission approves a new agreement after arbitration. An agreement that is in "effect" is ongoing and has not expired. CenturyLink should indicate whether, when providing percentages for which ICAs fall within each category, it counted the Qwest-Level 3 ICA in the 36-month category (for ICAs that have not expired)

or the 24-month category (for ICAs that expired more than 3 years ago). When parties disagree, litigation is likely to ensue.

Q. CAN YOU PROVIDE ANOTHER EXAMPLE IN WHICH THE VAGUENESS OF THE ICA COMMITMENT LANGUAGE IN THE PROPOSED SETTLEMENT COULD LEAD TO ADDITIONAL LITIGATION?

A. Yes. As another example, the Qwest-McLeodUSA Utah ICA, at Section 26.2, provides that the agreement "shall terminate on January 1, 2001, or unless otherwise agreed to by the Parties." Qwest and McLeodUSA agreed[114] that the ICA will "remain ***in effect*** on a month-to-month basis,"[115] and "[u]nder this arrangement, the Agreement will continue in full force and effect until terminated by either Party."[116] Qwest's further clarification of the terms states: "…the arrangements between our companies shall continue and be governed by the terms of the expired agreement until the appropriate state commission approves the new agreement."[117] Per and consistent with the language of Section 26.2, McLeodUSA and Qwest agreed that, while the initial *term* expired, the ICA continues in effect until the ICA is replaced by a new agreement. In attempting to

[114] The agreement is memorialized in three letters between Qwest and McLeodUSA: November 14, 2000, letter from Patrick Holton (Qwest) to Lauraine Harding (McLeodUSA); December 5, 2000, letter from Lauraine Harding (McLeodUSA) to Patrick Holton (Qwest); and April 11, 2001, letter from Linda Miles (Qwest) to Lauraine Harding (McLeodUSA).

[115] November 14, 2000, letter from Patrick Holton (Qwest) to Lauraine Harding (McLeodUSA); December 5, 2000, letter from Lauraine Harding (McLeodUSA) to Patrick Holton (Qwest); and April 11, 2001, letter from Linda Miles (Qwest) to Lauraine Harding (McLeodUSA).

[116] November 14, 2000, letter from Patrick Holton (Qwest) to Lauraine Harding (McLeodUSA).

[117] November 14, 2000, letter from Patrick Holton (Qwest) to Lauraine Harding (McLeodUSA).

apply a merger condition dependent upon when "an interconnection agreement . . . has been expired," the parties may disagree as to when this ICA expires: (1) after the initial term; (2) at the end of the most recent renewal year; or (3) not at all, given that the ICA expressly continues ***in effect*** on a month-to-month basis. After all, a contract that is in effect has not expired. CenturyLink should indicate whether, when providing percentages for which ICAs fall within each category, it counts the Qwest-McLeodUSA ICA in the 36-month category (for ICAs that have not expired) or the 24-month category (for ICAs that expired more than 3 years ago). Not only will this type of vague language lead to litigation, but also it may lead to unfair results in the meantime because the Merged Company will be in the position to unilaterally enforce its interpretation of this ICA language by refusing to extend the ICA. The public interest is not served by language that is likely to lead to litigation, particularly when, as here, the language would also introduce the opportunity for unfair results and discrimination.

D. Interconnection Agreement ("ICA") -- Negotiation and Opt-In.

Q. PLEASE ADDRESS THE ICA NEGOTIATION AND OPT-IN LANGUAGE OF THE PROPOSED SETTLEMENT.

A. The Company-DPU Proposed Partial-Party Settlement states:

> Where parties are in negotiations for the initial successor agreement to an agreement covered in subpart III.B.2 above, the interconnecting CLEC or CMRS provider may, at its option, use its currently existing agreement as the basis for negotiating the initial

> successor agreement with Qwest Corporation. Unless mutually agreed otherwise, the parties agree to incorporate the amendments to the existing agreement into the body of the agreement used as the basis for such negotiations of the initial successor agreement. An interconnecting CLEC or CMRS provider may opt-in to an interconnection agreement in its initial term or the extended term provided for in subpart III.B.2 above, if applicable. This provision does not limit any opt-in rights a carrier may have under Section 252(i) or FCC rules or orders. If Qwest Corporation and a requesting CLEC or CMRS provider are in negotiations for a replacement interconnection agreement before the Closing Date, Qwest Corporation will allow the requesting CLEC or CMRS provider to continue to use the negotiation draft upon which the negotiations prior to the Closing Date have been conducted as the basis for negotiating that replacement interconnection agreement.[118]

Negotiation of ICAs, including use of pre-existing ICAs, with both Qwest and CenturyLink, is addressed in Joint CLEC recommended Condition 9. The Joint Applicants are promising synergies and merger benefits throughout their enlarged footprint as the entire company is integrated. Particularly given the Joint Applicants have testified that, for the combined company as a whole, they plan to implement best practices,[119] changes will occur for both legacy Qwest and legacy CenturyLink. The merger conditions, therefore, need to address impacts accordingly and not limit conditions to Qwest.

A significant, unexplained difference between Joint CLECs' Condition 9 and the above-quoted condition is that the latter condition states: "Unless mutually agreed otherwise, the parties agree to incorporate the amendments to the existing

[118] Company-DPU Proposed Partial-Party Settlement at pp. 4-5, §III(B)(2)(b).

[119] Hunsucker Rebuttal at p. 4, lines 11-14.

agreement into the body of the agreement used as the basis for such negotiations of the initial successor agreement." Here is a provision that interjects expense and time-consuming work into the process for no valid reason. Carriers have been operating for years under amended ICAs. Often, those amendments have entirely different numbering schemes from the body of the ICA and contain no references to exactly which sections are being modified. While these differences have not precluded the parties from operating satisfactorily under the amended ICAs for years, if the body of the ICA now has to be modified in negotiations for this administrative purpose, there are sure to be differences of opinion among counsel as to where to place language, which language should be removed from the ICA, where the language should be added, etc. Spending the time and money on these issues, when there is no current dispute as to how the amended ICA works, creates work that imposes burden and expense on CLECs unnecessarily and that may defeat the purpose of allowing use of the existing ICAs to streamline the negotiations process.

Q. ARE THERE EXAMPLES OF THESE TYPES OF WASTEFUL EXERCISES ACTUALLY OCCURRING IN THE INDUSTRY?

A. Yes. Dr. Ankum described a situation in which, despite a Verizon-Frontier merger condition that Frontier assume wholesale agreements and not terminate or change their terms, Frontier sent a letter and adoption agreement which effectively attempted to impose amendment of the wholesale agreement to reflect

certain Frontier processes.[120] Frontier's position would have placed CLECs in the position of either accepting Frontier's unilateral position or expending time and resources to try to negotiate an "adoption agreement," which would have defeated the merger condition that the wholesale agreements remain in place without further negotiation. While the proposed settlement term arises in a somewhat different context, it likewise takes a provision that is meant to avoid re-negotiation and imposes re-negotiation. Neither the Joint Applicants nor the Division have explained why their proposed term begins with "Unless mutually agreed otherwise" (which allows the Merged Company to require re-negotiation to move amendment terms to the body of the ICA by simply not agreeing to do otherwise) instead of with "If mutually agreeable" (which would allow the parties to move amendment terms to the body of the ICA if both desire to do so, but would not require re-negotiation when the amended ICA is working).

Q. DO THE JOINT CLECS AGREE THAT THE PRE-EXISTING ICA SHOULD BE AN AVAILABLE STARTING POINT FOR NEGOTIATIONS?

A. Yes. The Joint CLECs agree that requesting carriers should be allowed to use their pre-existing ICA as the basis for negotiating replacement ICAs;[121] that another requesting carrier may opt-in to an ICA during the extended term of the

[120] Surrebuttal Testimony of August Ankum on behalf of Joint CLECs, Utah Docket No. 10-049-16, October 14, 2010 ("Ankum Surrebuttal") at p. 34 and Exhibit Joint CLECs 1SR.1.

[121] Joint CLECs also agree that a CLEC may elect to use in negotiations a negotiations draft from which Qwest and the CLEC were already negotiating.

ICA and as allowed by Section 252(i) of the Act; and that, if Qwest and a requesting competitive carrier are in negotiations for a replacement interconnection agreement before the Closing Date, the Merged Company will allow the requesting carrier to continue to use the negotiations draft upon which negotiations prior to the Closing Date have been conducted as the basis for negotiating a replacement interconnection agreement. If the Joint Applicants and the Division intend any differences in these provisions due to the language used that is different from Joint CLEC Condition 9, the difference is not transparent from the terms of the proposed settlement.

Neither the Division nor the Joint Applicants explained why this proposed settlement term does not address the final sentence of Joint CLECs' Condition 9: "In the latter situation (ongoing negotiations), after the Closing Date, the Merged Company will not substitute a negotiations template interconnection agreement proposal of any legacy CenturyLink operating company for the negotiations proposals made before the Closing Date by legacy Qwest." CenturyLink's testimony underscores why this language is important when CenturyLink said: "CenturyLink, however, has the right to propose its structure as well and should not be constrained before the fact from doing so."[122] Because the Joint CLECs' final sentence was omitted from this condition in the proposed settlement, it appears that CenturyLink is saying that the parties may continue to negotiate from

[122] Hunsucker Rebuttal at p. 21, lines 8-9.

the existing agreement, but as a practical matter CenturyLink may dramatically change it after the Closing Date.

E. New Rates / Tariff Surcharges

Q. PLEASE ADDRESS THE PROPOSED COMMITMENT REGARDING "PROTECTION AGAINST ANY NEW RATES OR TARIFF CHANGES."

A. The Company-DPU Proposed Partial-Party Settlement states:

> Qwest Corporation agrees that it will not seek approval for new rates, whether pursuant to interconnection agreements or tariff, to establish any new wholesale charges for service order processing, including but not limited to fees associated with Access Service Requests ("ASRs") and Local Service Requests ("LSRs"), directory listings or directory listing storage, non-published number charges, local number portability charges or E911 records transaction or storage charges for 36 months from the Closing Date, unless otherwise required by law or FCC or Utah Commission decision.[123]

Although this proposed commitment is described in the Company-DPU Proposed Partial-Party Settlement as "Protection Against any New Rates or Tariff Changes,"[124] the subject matter is narrower than the Joint CLECs' conditions relating to wholesale rate stability arising from tariff rates, terms, and conditions (Conditions 6 and 7). For example, Joint CLECs' proposed Condition 6 requires the Merged Company to take assignment of all "Assumed Agreements" (ICAs, interstate and intrastate tariffs, commercial agreements and other arrangements

[123] Company-DPU Proposed Partial-Party Settlement at p. 5, §III(B)(3).

[124] Company-DPU Proposed Partial-Party Settlement at p. 5, §III(B)(3) (heading).

with wholesale customers) without requiring wholesale customers to execute any documents to effectuate the Merged Company's assumption or taking assignment of the obligations. The proposed settlement does not include these requirements. In addition, Joint CLECs' proposed Condition 7(a) requires the Merged Company to continue to offer term and volume discount plans without changes for the Defined Time Period and Condition 7(b) requires the Merged Company to provide transit at rates no greater than the cost-based rate or current rate whichever is lower. Again, these requirements are not included in the proposed settlement's commitment addressing new rates or tariff charges. The need for Joint CLECs' proposed Conditions 6 and 7 is described in earlier testimony, and Joint CLECs address wholesale surcharges specifically in their recommended Condition 24 and subparts.

Q. DOES THE SETTLEMENT BIND ANY SUCCESSOR ENTITIES OF QWEST'S?

A. No. The Joint Applicants' commitment applies only to Qwest Corporation, but specifically excludes any successor entity to Qwest. This omission is telling because other conditions, s*ee* Joint Applicants' Commitment 2.a. at page 3, specifically apply to both Qwest Corporation and "any successor entity." Therefore, because this commitment does not include similar language, its potential application post-closing is limited if (or when) CenturyLink chooses to operate a successor to Qwest Corporation.

Q. DOES THIS PROPOSED COMMITMENT ADDRESS ALL OF THE WHOLESALE SURCHARGES INCLUDED IN JOINT CLECS' CONDITION 24?

A. No. The provision does not specifically identify surcharges related to access to the network interface device ("NID") enclosure as those which Qwest Corporation would be prohibited from assessing upon competitors after closing. Thus, the proposed settlement agreement arguably does not prohibit Qwest from applying wholesale surcharges on a facilities-based competitor that seeks limited access to the customer side of the NID enclosure in order to provision its own network and initiate service to the customer. As noted in previous testimony in this proceeding, the assessment of such surcharges is discriminatory, inappropriately increases competitors' operational costs, and has lead to significant arbitration and/or litigation in other jurisdictions.

Q. DO THE HART-SCOTT-RODINO ("HSR") DOCUMENTS SUPPORT THE JOINT CLECS' CONCERNS ABOUT POST-MERGER WHOLESALE RATE INCREASES AND THE NEED FOR THE JOINT CLECS' CONDITIONS REGARDING WHOLESALE RATE STABILITY (CONDITIONS 6, 7 AND 24)?

A. **[***BEGIN HIGHLY CONFIDENTIAL** [redacted]

[redacted]

[redacted]

[redacted]

[redacted] **END HIGHLY CONFIDENTIAL ***]**

F. Wholesale Service Quality – Performance Indicator Definitions (PIDs) and Performance Assurance Plan (PAP)

Q. PLEASE ADDRESS THE TREATMENT OF THE UTAH PERFORMANCE ASSURANCE PLAN ("UPAP") AND ADDITIONAL

PERFORMANCE ASSURANCE PLAN ("APAP") IN THE COMPANY-DPU PROPOSED PARTIAL-PARTY SETTLEMENT.

A. The Company-DPU Proposed Partial-Party Settlement states:

> Following the Closing Date, Qwest Corporation (pre-merger or post-merger "Qwest" or "Qwest Corporation") shall not discontinue the use of the Utah Performance Assurance Plan ("UPAP") for 36 months after the transaction closing. The Parties agree that the UPAP does not automatically terminate at the expiration of the 36 months, but that the Company may, before the expiration of the 36 months, initiate a proceeding to modify or discontinue the UPAP after the expiration date of the 36-month term. CenturyLink and Qwest Corporation do not waive the right to seek modifications under the terms and conditions outlined in the Qwest UPAP. Qwest Corporation shall continue to provide the monthly reports of wholesale performance metrics to Staff and to each CLEC as set forth in the UPAP, unless modified under the terms and conditions outlined in the UPAP. Within three (3) months of the merger close, the Company will file a motion in Docket No. 09-049-60 with the Commission to limit the scope of that proceeding to consider only the elimination of the "Tier 2" payments, along with any other mutually agreed upon changes between the parties in that proceeding. The Division agrees to support the elimination of the Tier 2 payments.[125]

This proposed condition offers inadequate protections for wholesale service quality. It is limited to the UPAP and does not address other wholesale performance requirements, as does the Joint CLECs' Condition 4 for Qwest. Despite the critical importance of service quality, when the similar Minnesota commitment was explored at the Minnesota hearing, the Minnesota DOC witness testified regarding retail and wholesale service quality that "there was ***no***

[125] Company-DPU Proposed Partial-Party Settlement at pp. 5-6, §III(B)(4).

discussion about whether . . . they needed to be beefed up if there was a merger."[126]

The Joint CLECs' recommended Condition 4 requires that the performance assurance plans that currently exist in the legacy Qwest ILEC territory will remain in place for a minimum of five years – the time period over which the Joint Applicants have claimed the synergy savings from the merger will be accomplished.[127] The Joint CLECs' Condition 4 also establishes a mechanism to assure that the merged company's wholesale performance in the legacy Qwest ILEC territory does not deteriorate compared with pre merger performance (the APAP). These conditions – which are notably absent from the proposed settlement – will help assure that the Merged Company maintains wholesale service quality at current levels and creates disincentives for the Merged Company to achieve synergies at the expense of its competitors through a deterioration of its wholesale market operations.

Q. DOES THE PROPOSED LANGUAGE AT LEAST MAINTAIN THE EXISTING UPAP?

A. No. The proposed settlement not only omits the appropriate incentives but also it appears to allow the Merged Company to discontinue the MPAP after 3 years, even though CenturyLink's own projection is that changes to achieve synergies

[126] MN Hrg. Tr. Vol. 1, p. 237, lines 12-24 (emphasis added).

[127] Direct Testimony of Jeff Glover on behalf of CenturyLink, Inc., Docket No. 10-049-16, May 27, 2010 ("Glover Direct") at p. 11, lines 9-11.

are projected to occur over a longer time period.[128] To further water down this commitment in Utah, the proposed commitment contains language not in the Minnesota commitment which would expressly allow the Merged Company to initiate a proceeding ***before*** the 36-month time-frame to seek to discontinue or modify the UPAP. The Joint Applicants should not be seeking elimination of the UPAP at the same time it is making changes to its wholesale operations in the pursuit of merger-related synergy savings, but that is precisely what the proposed commitment in Utah would permit.

Another significant way in which the proposed commitment would weaken the UPAP is that it expressly allows Qwest to seek elimination of Tier 2 payments – thereby reducing Qwest's financial exposure for providing sub-standard wholesale service quality – and states that DPU Staff will support Qwest's request. This is a move in the wrong direction. Qwest should have more (not less) at stake in relation to wholesale service quality to ensure that that decisions the Merged Company makes to integrate the companies and pursue merger synergy savings does not result in service quality deterioration. This is why the Joint CLECs' proposed APAP is needed.

Q. IS IT CLEAR WHAT IT MEANS TO "NOT DISCONTINUE THE UPAP"?

A. No. It is unclear what an agreement not to discontinue the UPAP means. The UPAP contains provisions by which it can be modified or changed. There is no

[128] Glover Direct at p. 11, lines 9-11.

provision in the UPAP by which Qwest could seek to discontinue the UPAP. Section 16.1 refers to six-month reviews when Commission staff can recommend UPAP changes to the Commission. Section 16.1.l refers to changes that are a result of agreements between CLECs and Qwest. Section 16.1.2 refers to requests to modify or change individual Performance Indicators ("PIDs"), though not the entire plan.[129] The proposed settlement commitment as written allows the Merged Company to discontinue the UPAP after 36 months (and to file a petition to eliminate the UPAP before that 36 months has expired), which is not allowed under the UPAP.

Joint CLECs' Condition 4 provides that the UPAP will not be reduced, eliminated, or withdrawn for at least 5 years (reflecting the Joint Applicants' own projection of the synergies period) and will remain available until the Merged Company obtains approval from the Commission to reduce, eliminate, or withdraw it. This proposal reflects that, during a time of significant change, the Merged Company will not have a previous track record upon which to seek reductions to the UPAP. The proposed settlement does not offer these protections and, as written, expressly allows the Company to seek to discontinue the UPAP even before the 36-month time frame expires and while significant merger-related changes are still occurring and without any transparent parameters for discontinuation.

[129] Qwest Utah SGAT Seventh Revision, Sixth Amended Exhibit K February 4, 2009.

Q. HAS QWEST SOUGHT TO DISCONTINUE ITS PAP IN UTAH OR ELSEWHERE?

A. Yes. On December 15, 2009, Qwest filed a petition for review and termination of the UPAP (Utah PSC Docket No. 09-049-60). A technical conference was held, and settlement meetings were conducted during the first half of 2010, but as explained in DPU Staff's May 13, 2010, letter, "ultimately the differences between the parties could not be bridged through discussions." Despite the differences between the parties on this issue, the Company-DPU Proposed Partial Party Settlement would allow the Joint Applicants, with support from DPU Staff, to seek to water down the UPAP by eliminating Tier 2 payments. This is a significant problem with this proposed commitment because it reduces (i.e., does not enhance or even maintain) the Joint Applicants' incentive to provide quality wholesale service post-merger.

Qwest has also sought elimination of its PAP in Idaho. Qwest has sought to replace the Idaho PAP with a new proposal which Qwest calls QPAP II.[130] Qwest's proposal effectively discontinues any actual QPAP by eliminating self-executing performance payments. Qwest's proposal would effectively discontinue the QPAP, but by branding it with a similar name, QPAP II, the Merged Company may attempt to argue such a proposal is consistent with the

[130] *In the Matter of Qwest Corporation Requesting Authorization to Withdraw its Statement of Generally Available Terms and Conditions*, Idaho PUC Case No. QWE-T-08-04 (http://www.puc.idaho.gov/internet/cases/summary/QWET0804.html).

proposed settlement. Lack of clarity regarding what is actually meant by a proposed agreement not to discontinue the QPAP is a concern and creates additional uncertainty.

Q. IS THERE A RISK THAT THE MERGED COMPANY WILL ATTEMPT TO FURTHER WEAKEN THE UPAP IF THE MERGED IS APPROVED WITHOUT THE JOINT CLECS' PROPOSED CONDITIONS?

A. Yes. In addition to the express language in the proposed settlement that discusses future changes to or elimination of the UPAP, **[***BEGIN HIGHLY CONFIDENTIAL [redacted]

[redacted] **END HIGHLY CONFIDENTIAL ***]** Since legacy CenturyLink is not subject to self-executing performance assurance plans like Qwest's UPAP (with the possible exception of a performance assurance plan in its single largest CLEC market, Las Vegas, Nevada, see, Hunsucker Rebuttal at p. 6, lines 19-21), this reference to **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]** Given that Qwest has already moved to reduce or eliminate PAPs in some states and Joint Applicants have rejected the Joint CLECs' proposed condition related to wholesale service quality in CenturyLink's legacy territory (Condition 5 and subparts), it is logical to conclude that CenturyLink's reference to **[***BEGIN HIGHLY CONFIDENTIAL** [redacted]

[redacted] **END HIGHLY CONFIDENTIAL ***]**

Q. DO THE HSR DOCUMENTS PROVIDE ADDITIONAL SUPPORT FOR YOUR CONTENTION THAT THE JOINT CLECS' PROPOSED CONDITION 4 SHOULD BE ADOPTED OVER THE PROPOSED SETTLEMENT'S UPAP COMMITMENT?

A. Yes. In my surrebuttal testimony, I discussed the service-impacting problems that CenturyLink is experiencing in North Carolina during its integration of Embarq. I noted that these problems included incorrect data mapping, dispatch inefficiencies, and records being loaded into systems incorrectly.[131] **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]** As discussed in my surrebuttal testimony, the integration problems CenturyLink encountered in North Carolina negatively impacted dispatch efficiency and

[131] Gates Surrebuttal at pp. 17-18.

service delivery. In other words, **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]** were applied in North Carolina, service quality deteriorated.[132] Likewise, **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]** Based on the conversion problems in North Carolina, CenturyLink replaced legacy Embarq systems with legacy CenturyTel systems with less functionality **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]**; data about outside plant records were not mapped correctly **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]**; data was misinterpreted and not loaded correctly **[***BEGIN HIGHLY CONFIDENTIAL** [redacted]

[132] Rebuttal Testimony of Duane Ring on behalf of CenturyLink Inc., Minnesota Docket No. P-421, et. al./PA-10-456, September 13, 2010, at p. 5, lines 16-18 ("The problems encountered in North Carolina on top of the heavy seasonal summer load have caused CenturyLink to produce lower service level metrics than desired since conversion.")

[redacted] **END HIGHLY CONFIDENTIAL***]; a deterioration in service quality occurred **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]** This new information shows that no matter how careful CenturyLink may be in planning the **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***]** for the proposed transaction, service-impacting problems can and do occur.

G. Change Management Process ("CMP")

Q. PLEASE ADDRESS THE PROPOSED SETTLEMENT LANGUAGE ON THE CMP.

A. The Company-DPU Proposed Partial-Party Settlement states:

> Qwest Corporation (pre-merger or post-merger "Qwest" or "Qwest Corporation") will maintain the current Qwest Corporation Change Management Process ("CMP") for 36 months after the transaction closing, utilizing the terms and conditions set forth in the CMP Document. CenturyLink and Qwest Corporation do not waive their rights to modify the CMP consistent with the provisions contained in the CMP Document. Pending CLEC Change Requests shall continue to be processed in a commercially reasonable time frame consistent with the provisions contained in the CMP Document.[133]

[133] Company-DPU Proposed Partial-Party Settlement at p. 6, §III(B)(5).

This condition as written appears to allow the Merged Company to discontinue CMP after 36 months, contrary to the CMP Document (which requires unanimous consent to make any change to the CMP Document)[134] and contrary to the company's obligation as a BOC to maintain CMP and not backslide with respect to its 271 obligations. The first sentence states merely that CMP will be ***maintained*** during that 36 month time period using the CMP Document procedures. Notably, it does ***not*** say that, if CMP is terminated or substantially changed, it will be terminated or changed using the CMP Document procedures. The next sentence then reserves only CenturyLink's and Qwest's rights to modify the CMP document, rather than all parties' rights under the CMP Document.

Q. IS THE TIME PERIOD A SIGNIFICANT PROBLEM WITH THIS PROPOSAL?

A. Yes. There should be no limiting time period in this condition. The fact that a condition relating to CMP does not state a time period does not mean that the condition will be in place in perpetuity. The need to maintain CMP, as CMP was developed in the 271 proceedings, is directly related to Qwest's BOC status. If the company no longer offers interstate long distance service, whether CMP is maintained could be considered. As long as the company avails itself of the benefits of its 271 approval, however, then it also must maintain the obligations that resulted in its getting 271 approval.

[134] CMP Document, Exhibit Integra 2.25, §2.1.

The Joint Applicants represent that CMP will be used for merger-related OSS changes (at least after a 24-month period and perhaps even during the initial 24-month period after the closing, depending on how the unclear condition is interpreted).[135] If a change to a back-end system is not intended to impact CLECs, the change may not be handled in CMP.[136] Whether CMP is used may depend, for example, on how the ILEC interprets the CMP Document and on how the ILEC interprets what may affect CLECs. In CMP Re-Design, CLECs raised concerns about ILEC changes to retail and back-end systems that may affect CLECs.[137] In response, Qwest said that "CLECs will be notified on Retail driven changes that impact CLEC interfaces."[138] In addition, the following footnote was added to every page of the CMP Document:

> Throughout this document, OSS interfaces are defined as existing or new gateways (including application-to-application interfaces and Graphical User Interfaces), connectivity and system functions ***that support or affect*** the pre-order, order, provisioning, maintenance and repair, and billing capabilities for local services (local exchange services) provided by CLECs to their end users.[139]

In addition, the CMP Document states, for change requests ("CRs") requesting changes to systems and products/processes: "Qwest will not deny a CR solely on

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135 Company-DPU Proposed Partial-Party Settlement at p. 3, §III(B)(1).

136 Gates Surrebuttal at p. 134, lines 13-14. Even assuming the change is subject to notice and opportunity to comment per the CMP procedures, not all system changes have testing requirements associated with them. See Exhibit Integra 2.25 (CMP Document).

137 Exhibit Integra 2SR.3 at pp. 2-3 (original pages 14-15).

138 Exhibit Integra 2SR.3 at pp. 2-3 (original pages 14-15). See also Completed Action Item 95, available at http://www.qwest.com/wholesale/downloads/2002/021015/CLOSED-CMP_RedesignCoreTeamIssuesActionItemsLog-Rev10-09-02.doc.

139 Exhibit Integra 2.25 (CMP Document), footnote on pages 1-113 (emphasis added). A second footnote on each page states: "Throughout this document, the term "include(s)" and "including" mean "including, but not limited to." *Id*.

the basis that the CR involves a change to back-end systems."[140] At this time, it is not known how CenturyLink will interpret the CMP Document and how CenturyLink will interpret what supports or may affect CLECs. The ambiguity of terminology in Joint Applicants' OSS commitment, which is discussed above, creates additional uncertainty as to which merger-related or migration or conversion changes CenturyLink intends to place through CMP.

No other acquisition of this magnitude involving Qwest, much less of an entire BOC by a non-BOC incumbent LEC, has occurred during the history of Qwest CMP.[141] CMP is designed to address change requests introduced by Qwest as well as submitted by CLECs in the normal course of business. If the CMP is jammed up with merger-related ILEC OSS changes, the backlog of CLEC-requested change requests would quickly grow, leading to significant delay for systems enhancements that CLECs need, or blockage of CLEC-initiated change requests altogether. This would undermine the purpose of the CMP and harm CLEC access to Qwest's OSS.

Q. THE FINAL SENTENCE IN THE PROPOSED SETTLEMENT COMMITMENT RELATED TO CMP REFERS TO A TIME FRAME "CONSISTENT WITH THE PROVISIONS CONTAINED IN THE CMP

[140] Exhibit Integra 2.25, §5.1.4 (Systems Change Request Origination Process) and §5.3 (CLEC Originated Product/Process Change Request Process) (same sentence in both sections).

[141] Gates Surrebuttal at p. 135.

DOCUMENT." IS THERE ANY BASIS FOR THIS LANGUAGE IN THE CMP DOCUMENT?

A. No. There are no certain timeframes/deadlines in the CMP Document for completion of CLEC-requested changes. As such, there is no protection in the proposed settlement term from harm to CLECs and their customers from a merger-related over-load on work in CMP.

H. Relationship of State Order to Federal Communications Commission ("FCC") Order

Q. PLEASE ADDRESS THE PROPOSED SETTLEMENT LANGUAGE REGARDING FCC CONDITIONS.

A. The Company-DPU Proposed Partial-Party Settlement states:

> By virtue of the FCC's jurisdiction, to the extent inconsistent, any required terms and conditions applicable to CLECs or CMRS providers contained in the FCC's order approving the merger will automatically be incorporated into and supersede the terms in this section above, except to the extent it is state-specific. Nothing in this agreement shall preclude CLECs and CMRS providers from obtaining in Minnesota the benefits for additional FCC conditions not addressed in the agreement.[142]

This proposed condition is particularly unclear. Although this condition was the subject of a significant amount of cross-examination during the Minnesota hearing, parties to the Minnesota proposed settlement were unable to provide clarity. The condition apparently turns on actions taken by "virtue of the FCC's

[142] Company-DPU Proposed Partial-Party Settlement at p. 6, §III(B)(6).

jurisdiction," but there is no explanation as to whether this is supposed to be a reference to preemption or something else. If a term or condition is required by "virtue of the FCC's jurisdiction," and it is "inconsistent" with a term or condition adopted by this Commission, then the proposed condition provides that the FCC's term supersedes the terms in the proposed settlement, unless the term is "state-specific." At the Minnesota hearing, the Minnesota DOC witness seemed to suggest that all of the conditions in the proposed settlement were state-specific,[143] which begs the question of why this proposed commitment is in the proposed settlement.

The Minnesota DOC witness testified that she would think that, if the FCC ordered that OSS stay in place longer than any time period ordered by this Commission, the longer FCC time frames would apply in Minnesota.[144] When asked whether, if the FCC ordered that OSS stay in place for a shorter time period than the period ordered by this Commission, would the shorter time period apply, the Minnesota DOC witness repeatedly expressed speculation that such a ruling is unlikely, but did not answer the question as to whether the shorter time frame would supersede a longer one committed to by the Joint Applicants in Minnesota under the terms of the proposed settlement.[145] The proposed commitment is too

[143] MN Hrg. Tr. Vol. 1, pp. 246-250.

[144] MN Hrg. Tr. Vol. 1, p. 202, lines 8-12.

[145] MN Hrg. Tr. Vol. 1, p. 202, lines 13-20; p. 248, lines 10-16; MN p. 249, lines 8-9.

vague to be enforceable and adds to, rather than reduces, the amount of uncertainty related to the proposed transaction.

I. Status as a BOC

Q. PLEASE ADDRESS THE PROPOSED SETTLEMENT LANGUAGE REGARDING STATUS AS A BOC.

A. The Company-DPU Proposed Partial-Party Settlement states:

> The Company agrees that the Utah ILEC operating subsidiary, Qwest Corporation, which is currently classified as a Bell Operating Company ("BOC") pursuant to 47 U.S.C. Section 153(4), will continue to be classified as a BOC after the close of the merger. The agreement in this paragraph is subject to any change of law that may alter the definition of a "BOC" or otherwise change the classification of Qwest Corporation. The Company has no current plans to seek reclassification of Qwest Corporation.

This proposed condition raises a number of questions and concerns. Joint CLECs' proposed Condition 13 states that Qwest will continue to be classified as a BOC and subject to all BOC requirements post-merger, including to not backslide on its BOC obligations. While the first sentence of the Company-DPU proposed commitment appears to touch upon the intent behind Joint CLECs' proposed Condition 13, the remainder of the Company-DPU proposed commitment only serves to create additional uncertainty about CenturyLink's intentions regarding complying with Qwest's existing BOC obligations post-merger.

Q. EXPLAIN HOW THE PROPOSED COMMITMENT CREATES ADDITIONAL UNCERTAINTY.

A. The second and third sentences of this proposed commitment discuss potential reclassifications of Qwest. The second sentence states that the commitment is subject to a change of law that redefines the term "BOC" or otherwise changes the classification of Qwest. The third sentence states that the Company has no "current plans to seek reclassification of Qwest Corporation." While the third sentence was apparently included to assuage concerns that the second sentence may suggest that CenturyLink would seek to reclassify Qwest post-merger, the third sentence is useless for this purpose and provides no protection against the Merged Company seeking to reclassify Qwest post-merger. Regardless of whether there are any "***current*** plans" to reclassify Qwest, those plans could easily change the day the merger is closed, and nothing in the proposed commitment would prevent that outcome. The proposed commitment does not place a prohibition on the Merged Company seeking to reclassify Qwest post-merger, which is an indication that CenturyLink wants to leave open that possibility. Further, there is no need for the second sentence because there is no reason to believe that the definition of "BOC" will change or that the classification of Qwest will otherwise be changed (particularly if the Merged Company does not seek reclassification as the third sentence implies). Just four months ago, the FCC denied Qwest's petition for forbearance from dominant carrier regulations under Sections 251 and 271 in the Phoenix Arizona

Metropolitan Statistical Area ("MSA") due, in part, to Qwest's ability to leverage its market power in the wholesale market to discriminate against competitors in downstream retail markets. This decision made clear that Qwest's obligations as an ILEC and a BOC, and its role as a provider of bottleneck elements in local markets, remain critical to local competition.

Q. DO THE HSR DOCUMENTS SUPPORT YOUR CONCERNS ABOUT THE WORDING OF THE PROPOSED "STATUS OF A BOC" COMMITMENT IN THE PROPOSED SETTLEMENT?

A. **[***BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY**

CONFIDENTIAL*]** that will permeate the Merged Company's treatment of wholesale customers in Qwest's region going forward. Accordingly, the Joint CLECs' proposed Condition 13 should be adopted over the more vague "Status as a BOC" commitment in the proposed settlement.

J. Compliance

Q. WHAT IS THE PROPOSED COMPLIANCE COMMITMENT?

A. The Company-DPU Proposed Partial-Party Settlement states:

> The Company agrees to comply with all applicable federal and Utah laws and regulations.[146]

Q. DOES THIS COMMITMENT OBVIATE THE NEED FOR THE JOINT CLECS' PROPOSED CONDITIONS RELATED TO THE MERGED COMPANY'S POST-MERGER COMPLIANCE WITH EXISTING LAWS AND REGULATIONS?

A. No. The language in the proposed settlement is vague. It does not address any particular issue, any particular law or any particular regulation. As a result, it will not be effective in addressing the potential merger-related harm if the proposed transaction is approved. The Joint CLECs' proposed conditions related to compliance, on the other hand, were designed specifically to address the potential harms related to this particular proposed transaction between Qwest and

[146] Company-DPU Proposed Partial-Party Settlement at p. 6, §III(E).

CenturyLink, and therefore, the Joint CLECs' proposed conditions would be more effective in addressing merger-related harm and preserving the public interest.

For example, the Joint CLECs' proposed Condition 27 specifically addresses federal and state law related to conditioned copper loops. I explained in my direct testimony that this condition was designed to address harm specific to the proposed transaction, harm that would significantly raise barriers to entry for CLECs and make it more difficult for them to offer advanced services to end user customers in competition with the Merged Company. Likewise, I explained at pages 81-82 of my direct testimony that CenturyLink pointed to its integration of Embarq as a reason why it could not comply with the FCC's one-day porting requirement in a timely manner. The Joint CLECs' proposed Condition 22 was included to ensure that the integration of Qwest does not prevent the Merged Company from meeting its porting obligations. Again, the condition was designed to address *this* particular proposed transaction. If the Joint Applicants fully intended to abide by federal and state law regarding conditioned copper loops and number portability post-merger, then it should have no problem agreeing to Joint CLECs' proposed Conditions 27 and 22. However, by agreeing to a proposed commitment to comply with "all" laws and regulations, while at the same time refusing to agree to the Joint CLECs' proposed compliance conditions, raises questions about the Joint Applicants' post-merger plans regarding these

issues and validates the Joint CLECs' concerns about the issues their conditions are designed to address.

Q. DO THE HSR DOCUMENTS SHOW THAT THE JOINT CLECS' TARGETED COMPLIANCE CONDITIONS SHOULD BE ADOPTED OVER THE PROPOSED SETTLEMENT'S VAGUE COMMITMENT?

A. **[***BEGIN HIGHLY CONFIDENTIAL [redacted] END HIGHLY CONFIDENTIAL***]** As I discussed in my direct testimony (at pages 64-66), CenturyLink has stated that "direct response marketing efforts" is one part of its "Go-to-Market" model – the operating model CenturyLink intends to incorporate into Qwest's region post-merger. However, when CLECs asked CenturyLink about its Go-to-Market, including what was included in these "direct response marketing efforts," to determine whether these new tactics, if/when they are incorporated into Qwest's region would result in merger-related harm to competition, CenturyLink objected to the question. I explained that the Joint CLECs' concerns were warranted, particularly in light of the recent examples of inappropriate marketing activity that has occurred between Qwest representatives and CLEC end users customers.[147] I also discussed CenturyLink's waiver of the one-day porting requirement as an example of merger-related activities taking precedence over maintaining

[147] Gates Direct at pp. 151-152. See also, Exhibit Integra 2.19 to Ms. Johnson's Direct Testimony on behalf of Integra.

compliance with existing obligations, and explained that conditions (such as Condition 22 and subparts related to complying with number porting obligations) are needed.[148] **[***BEGIN HIGHLY CONFIDENTIAL [redacted]

[148] Gates Direct at pp. 57-58.

[redacted] **END HIGHLY CONFIDENTIAL***]** This information raises serious questions about CenturyLink's Go-to-Market operating model that it intends to incorporate into Qwest's region if the transaction is approved, and the impact on competition and the public interest if/when it is integrated into Qwest's region. This information also provides additional support for adopting the Joint CLECs' proposed conditions which are clearer, designed specifically for the proposed transaction, and less likely to lead to disputes when compared to the "compliance" commitment in the proposed settlement.

III. MERGER RISKS NOT ADDRESSED BY THE PROPOSED SETTLEMENT

Q. BASED ON YOUR REVIEW OF THE PROPOSED SETTLEMENT, ARE ALL ISSUES ADDRESSED?

A. No. A comparison of the thirty conditions proposed by the Joint CLECs (Exhibit Joint CLECs 2.8) with the meager list of conditions in the Company-DPU Proposed Partial-Party Settlement readily shows that a significant number of important issues are left unaddressed in the proposed settlement. In Minnesota,

the Minnesota DOC witness admitted that the proposed settlement does nothing[149] to address a number of known risks of the proposed transaction: the risk that CenturyLink may lose its investment grade bond rating;[150] the risk that Qwest may lose the ability to use some or all of its net operating losses for federal income tax purposes;[151] and the risk that integration of the two companies, in the attempt to achieve synergy savings, could not go well and cause financial harm to the companies.[152] The Minnesota DOC witness also testified at the Minnesota hearing regarding ***retail and wholesale service quality*** that "there was no discussion about whether…they needed to be beefed up if there was a merger."[153] The proposed settlement neither proposes adequate conditions nor addresses all necessary issues that would result in a merger approval that would protect the public interest.

Q. WHAT ARE SOME OF THE KEY OMISSIONS FROM THE PROPOSED SETTLEMENT?

A. One critical omission is the absence of any commitment to continue providing wholesale services such as dark fiber and Qwest Local Services Platform ("QLSP") that Qwest currently provides as "commercial offerings" or any commitment not to increase wholesale rates for those commercial offerings or

149 MN Hrg. Tr. Vol. 1, p. 235, lines 23-25.
150 MN Hrg. Tr. Vol. 1, p. 235, lines 18-25.
151 MN Hrg. Tr. Vol. 1, p. 236, lines 9-21.
152 MN Hrg. Tr. Vol. 1, p. 236, line 22 – p. 237, line 5.
153 MN Hrg. Tr. Vol. 1, p. 237, lines 12-24.

special access services. These critical commitments are set forth in Joint CLEC Conditions 1 and 7.

Q. WHY ARE THE COMMITMENTS SET FORTH IN JOINT CLEC CONDITIONS 1 AND 7 CRITICAL?

A. Because continued access to these wholesale services is critical to the ability of a number of CLECs to serve their customers and compete in local exchange markets. It is important to recognize that many CLEC retail customers currently rely on services provided by CLECs using Qwest's wholesale commercial offerings. Therefore, a decision to not continue those commercial wholesale offerings or to raise the prices charged for those offerings affects retail customers as well as the wholesale customers (i.e., CLECs) who purchase those commercial offering from Qwest. Affected retail customers that need the same service will either be disconnected or, if any service is available to them, moved to a service that is not from the customer's carrier of choice.

Q. IS THERE REASON TO BELIEVE THAT THE MERGED COMPANY MIGHT ELIMINATE THESE WHOLESALE OFFERINGS OR SIGNIFICANTLY INCREASE THE PRICES CHARGED FOR THOSE SERVICES?

A. Yes. First of all, as explained in the direct and surrebuttal testimony of myself and Dr. Ankum, ILECs such as CenturyLink have an inherent incentive to take actions that impede or harm their CLEC competitors. Secondly, as we also

testified, that inherent incentive will be compounded by the additional post-merger pressure on CenturyLink to achieve its projected synergies. Therefore, the Merged Company will have a powerful incentive to eliminate wholesale services that CLECs rely on to compete with the Merged Company. The Merged Company will also have an incentive to increase the rates it charges for those services. Higher rates would increase the Merged Company's post-merger revenues either directly though higher receipts from CLECs or indirectly by curtailing the ability of CLECs to compete or even possibly eliminating certain CLEC competitors. Because CLECs do not have readily available alternatives to Qwest and CenturyLink for these essential wholesale inputs, the Merged Company will have little business incentive to continue offering these wholesale services and little, if any, downward market pressure on the pricing of those services.

Q. IS THERE ANY ADDITIONAL REASON TO BELIEVE THAT THERE IS A RISK THE MERGED COMPANY WILL STOP OFFERING OR RAISE THE PRICES OF THESE WHOLESALE SERVICES?

A. Yes. On cross examination at the Minnesota hearing, CenturyLink witness, Mr. Hunsucker, stated that "it's generally not [CenturyLink's] intent to provide dark fiber."[154] Since CenturyLink is the acquiring company and will be "calling the shots" post-merger, Mr. Hunsucker's statement provides a compelling basis for

[154] MN Hrg. Tr., Vol. 2B, p. 72, line 19.

concluding that the Merged Company will cease offering dark fiber or at least further raise the price such that it would be completely uneconomical for CLECs to purchase. When asked why CenturyLink does not intend to provide dark fiber, Mr. Hunsucker replied, "[b]ecause we're not obligated -- we don't believe we're obligated to provide dark fiber." At the same time, Mr. Hunsucker could not commit that the Merged Company would provide dark fiber to CLECs even assuming the merged company thought it could make money providing it.[155] This indicates that the Merged Company, driven by CenturyLink's policies, will only do the minimum it believes it has been ordered to do, even in circumstances when the Merged Company could make money as part of its wholesale business. Hence the urgent need to condition this merger on a commitment by the Joint Applicants to continue providing Qwest's current wholesale service offerings without any price increases for at least the period during which the CenturyLink expects to realize its projected synergies – 3 to 5 years. Consequently, the proposed settlement cannot be considered consistent with the public interest without including Joint CLEC Conditions 1 and 7.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

[155] MN Hrg. Tr., Vol. 2B, p. 73, lines 3-10.