BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of CENTURYLINK, INC. Application for Approval of Merger Between CenturyTel, Inc. and Qwest Communications International, Inc.	Docket UM 1484 JOINT CLEC REPLY BRIEF

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INTRODUCTION

As discussed in the Joint CLEC Opening Brief, the Commission cannot approve the proposed acquisition ("Proposed Merger") of the Qwest Operating Companies ("Qwest") by CenturyTel, Inc. and its affiliates ("CenturyLink") without first determining that it is in the public interest. This determination is not a perfunctory exercise and there is no presumption that this transaction serves the public interest or should be approved. To the contrary, this determination is a serious Commission responsibility that necessarily turns on facts related to the Proposed Merger's impact on the public interest, including its impact on local competition. Qwest and CenturyLink (collectively, the "Merging Companies") have the burden to prove that their Proposed Merger is in the public interest and they have failed to meet that burden.

The significant public interest risks of this Proposed Merger are evidenced by: (1) the dramatic disparity in size, scope and legal responsibilities between the acquiring ILEC and the Bell Operating Company being acquired; (2) CenturyLink's history of anticompetitive or inferior wholesale systems, practices and service offerings compared to Qwest's; (3) indications that CenturyLink's wholesale practices are likely to continue, while being imported into Qwest's territory; (4) the failures and serious operational problems associated with several recent ILEC mergers; (5) the well-documented operational problems experienced by CenturyLink following its purchase of Embarq; (6) the short interval between CenturyLink's prior acquisition of Embarq and its proposed acquisition of Qwest; and (7) the substantial synergy savings the Merging Companies expect to obtain from the Proposed Merger, especially considering there is no geographic overlap between CenturyLink and Qwest ILEC service areas.

In the face of an extensive record documenting these public interest risks, the Merging Companies nevertheless seek approval of their Proposed Merger based on conclusory or unsupported claims of benefits, and on settlement agreements with Commission Staff and Integra Telecom, Inc. [1] that do not adequately address a number of critical competitive concerns expressed by a number of other Oregon wholesale customers. Throughout their opening brief, the Merging Companies assign much significance to their agreement with Integra and (in an apparent effort to further exalt the Integra settlement) refer to Integra as the "most vigorous advocate of the" CLECs.[2] The Joint CLECs do not necessarily agree with this characterization of Integra. However, to the extent it reveals the Merging Companies' perspective, it exposes their divide and conquer strategy of picking off the perceived "squeaky wheel" in hopes of neutralizing the ability of the remaining CLECs to advocate for needed protections against anticompetitive aspects of the Proposed Merger not sufficiently addressed in the Staff Settlement. The Staff Settlement (because it incorporates the substantive provisions from the Integra settlement agreement) only addresses the risks and harms that are most relevant to Integra's operations, but does not adequately address other issues that are critical to other CLECs (and competition generally).

[1] Because the Staff and Integra settlement agreements are nearly identical, Joint CLECs will use the phrase "Staff Settlement" herein to refer to both of these agreements.
[2] CenturyLink's and Qwest's Opening Post-Hearing Brief ("CenturyLink Br."), at p. 2, fn. 3.

Consequently, the enticements that the Merging Companies agreed to provide to specifically address Integra's internal systems and business model are of limited or no value to other CLECs with different systems and operations. The Merging Companies' charge that the Joint CLECs are now trying to "have their cake and eat it too" [3] is ill-considered and fails entirely to appreciate the very significant differences among the various CLECs. The Joint CLECs are, at considerable expense, only continuing to pursue the same conditions that they proposed at the outset of this proceeding (as modified in some respects by the Joint CLECs to address concerns raised by the Merging Companies) which the Integra and Staff Settlements failed to include. Such conditions are necessary to prevent substantial harm to them and to the competitive balance in Oregon. The Merging Companies attempt to persuade this Commission that any conditions beyond the Settlement Agreements are somehow unreasonable, and that their deigning to agree to certain additional Joint CLECs conditions somehow make the Staff Settlement sufficient, is not proof. It's conjecture. Moreover, the fact that the remaining CLECs don't agree that the Staff Settlement goes far enough to protect competition is not evidence that the conditions sought by them will result in a windfall or unfair competitive advantage as the Merging Companies would have the Commission believe. While the deal may have been acceptable to Integra, the Staff Settlement certainly does not, as the Merging Companies unreasonably contend, "squarely address every reasonable and legally-cognizable concern that a CLEC could raise in this merger proceeding."[4]

[3] *Id.* at p. 3.
[4] *Id.* at p. 2.

The Merging Companies have failed to sustain their burden of establishing that the Proposed Merger is in the public interest.[5] Accordingly, the Commission should deny the application for approval of the Proposed Merger unless it is conditioned on additional commitments,[6] set forth below, that are essential to adequately protect the public interest in local competition.

ARGUMENT

I. THE MERGING COMPANIES HAVE FAILED TO DEMONSTRATE ANY SIGNIFICANT PUBLIC INTEREST BENEFITS FROM THE PROPOSED MERGER

In their opening brief, the Merging Companies refer to "strong evidence" of benefits from the Proposed Merger. While the Merging Companies' desire for approval of their transaction is undoubtedly strong, the evidence supporting it is not. The alleged benefits of the transaction, as put forth by the Merging Companies, are often dramatically overstated, and not supported by the record. The record clearly reflects serious public interest risks associated with the Proposed Merger, but it does not establish any significant public interest benefits.

A. The Alleged Benefits of The Proposed Merger Are Overstated And Largely Unsupported

To support their claim that the Proposed Merger will have public interest benefits, the Merging Companies rely on general, largely unsupported assertions without specific or credible evidentiary support. For example, they claim that the "combined company" will have "national breadth and local depth"[7] and that the transaction will "create a financially-strong and stable

[5] Indeed, it appears in many places of their brief that the Merging Companies are not even aware that they bear the burden to demonstrate that their contemplated merger will not harm others, arguing for instance that the Joint CLECs have not met "their burden" to show that certain conditions are necessary to protect the public interest and to avoid harm. *See, e.g., id.* at p. 3.
[6] That is to say, those commitments originally advocated by the Joint CLECs and not included in the Staff or Integra Settlements.
[7] CenturyLink Br., at p. 1.

provider with an enhanced ability to invest in local and national networks and deploy broadband and other advanced services"[8] These general assertions have little, if any, probative value in determining whether the Proposed Merger is in the public interest. The Merging Companies' generic claims of "synergies" are oft-repeated in nearly all telecommunications mergers and, as Dr. Ankum testified, such claims "mean little or nothing unless they are adequately substantiated by fact-based analyses – and in the instant Application they surely are not."[9]

The Merging Companies offer no specific evidence explaining precisely how the public interest would benefit from further strengthening the competitive position of the State's largest ILEC. To the contrary, the evidence shows that the larger combined ILEC would, if anything, enhance the market power of both ILECs to the detriment of competition.[10] The Commission should not assume that a massive aggregated company will benefit consumers or the public interest. It is the Merging Companies' burden to prove the resulting benefits through record evidence. They have failed to do so.

Similarly, while the Merging Companies claim the transaction would enhance their ability to "deploy broadband and other advanced services," they have failed to provide any specific plans for deploying any of these services. When asked about its post-merger plans, CenturyLink has been unable to provide *any* details (such as rollout plans and projections) and does not know whether the Qwest network is even currently capable of providing the advanced services that CenturyLink has identified as a benefit of the Proposed Merger.[11]

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[8] *Id. at* p. 5.
[9] Joint CLECs/1, Ankum/25, lns. 11-14.
[10] *See e.g.,* Joint CLECs/1, Ankum/46, 62, and 65.
[11] *See, e.g.,* Joint CLECs/1, Ankum/57, lns. 1-6 (referencing CenturyLink Response to OR PUC Staff Data Request #33, CenturyLink Response to IA OCA Data Request #004A, and CenturyLink Response to WA UTC Staff Data Request #52).

Moreover, they have failed to establish any specific consumer benefits -- such as lower prices or higher service quality -- resulting from having their two respective ILEC networks under the same corporate umbrella. Apparently relying on Ms. Peppler's testimony, the Merging Companies assert that combining the two ILECs' networks will "optimize their network capacity," resulting in the deployment of "additional bandwidth-intensive services[.]" However, such vague statements fail to provide the requisite support to establish that the Proposed Merger is in the public interest. There is no evidence of what the Merging Companies mean by the term "optimize," or how it will lead to more high bandwidth services for Oregon consumers other than general references to the larger scale and scope that the Merged Company will enjoy after the Proposed Merger. These claims are particularly unavailing against the backdrop of the specific and extensive evidentiary record regarding the serious risks the Proposed Merger poses to wholesale customers and local competition.

The Merging Companies apparently believe that if they simply *maintain* current service levels they will somehow "*exceed* the public interest[.]"[12] This perhaps explains their rather oblique position that, even though the Merging Companies cannot reasonably assure that service levels will not decline, they have nevertheless satisfied the "no harm" standard.

B. THE MERGING COMPANIES BASE THEIR ALLEGED PUBLIC INTEREST BENEFITS ON A FUNDAMENTALLY FLAWED ANALYSIS

The Merging Companies base their claims of merger benefit on two fundamentally flawed assumptions: (1) that the larger size of the combined company would better serve the interests of Oregon consumers; and (2) that CenturyLink's alleged success with prior mergers

[12] CenturyLink Br., at p. 5.

guarantees the success of the Proposed Merger in this case. Both assumptions are without merit. The Commission must carefully weigh the credibility of these claims given the extensive evidence in the record demonstrating that merger transactions frequently fail to produce the public interest benefits promised by the merging organizations.

1. There Is No Basis to Conclude that the Merged Company's Larger Size Will Further the Public Interest

The premise of the Merging Companies' claim that the Proposed Merger will serve the public interest is that the *combination* of Qwest and CenturyLink will create a larger incumbent telephone company that is better able to serve Oregonians. The Merging Companies repeatedly refer to the post-closing entity as the "combined" company, suggesting that CenturyLink and Qwest will "combine forces" and resources to create one large "super-sized" incumbent telephone company. Thus, the Merging Companies' arguments rely upon the false premise that a larger "combined" company will emerge from this transaction.

This, however, does not accurately reflect the two companies' relative positions post merger. In fact, the Merging Companies have repeatedly stated throughout their testimony that they will *not* combine the two companies, but will instead continue to operate Qwest as a *separate* legal entity. In particular, to assuage concerns raised by competitors with respect to post-closing operations, CenturyLink witness Mr. Hunsucker testified that "the operating entities, including wholesale operations, will stay in place post-merger[.]"[13]

Further, to the extent that the two companies can, or do, combine resources (if not operations) in the future, there is no reason to believe that a larger incumbent telephone company would benefit retail or wholesale customers in Oregon. Notably, Qwest is already the largest wireline provider in Oregon. An incremental increase in its size and scope (through a

[13] CTL/800, Hunsucker/3, lns. 12-13.

combination of its assets and CenturyLink's assets) does not necessarily support the conclusion that it will be better positioned to compete effectively with smaller, more nimble competitors in the state. As Dr. Ankum explained, the history of mergers in the communications industry does not support the conclusion that a larger, combined company will increase local investments, much less succeed.[14] Dr. Ankum's testimony provides good reason for this Commission to review with a critical eye the Merging Companies' promises of potential benefits from this transaction.

The Commission must rely upon actual facts in the record rather than mere promises of future benefits from the Merging Companies. For this reason the Commission should give little, if any, weight to the claim that the so-called "combined company" will use CenturyLink's financial resources to invest in local networks or deploy broadband to any significant degree. As discussed above, the Merging Companies' claims rely almost entirely on rhetorical assertions rather than specific facts or meaningful commitments to benefit Oregon customers -- wholesale or retail.

2. CenturyLink's Prior Acquisitions Do Not Support the Claim That the Proposed Merger Will Benefit the Public Interest

The Merging Companies' claim that CenturyLink has had success with past mergers[15] is of dubious veracity and, in any event, is largely irrelevant here. As Century Link witness Mr. Jones has acknowledged, "there are no prior transactions that are comparable in size and scope to this one for CenturyLink."[16] The prior mergers highlighted by CenturyLink witnesses were not

[14] *See, e.g.,* Joint CLECs/1, Ankum/35 (discussing "high degree of risk of failure" for ILEC mergers and acquisitions) and 43-44 (discussing "profound risks posed by this transaction").
[15] CenturyLink Br., at pp. 10-11.
[16] Tr. 12/16/10, Vol. 1, p. 38, lns. 16-19.

even close to the size of this transaction. To the contrary, many of CenturyLink's prior acquisitions involved the acquisition of small companies with relatively limited service areas. For example, Mr. Jones points to a prior acquisition of one company with 600,000 access lines, and also several other Verizon-owned properties totaling nearly 2 million lines.[17] Even CenturyLink's recent acquisition of Embarq (approximately 5 million access lines) still involves only one-half the number of lines now being acquired from Qwest (approximately 10 million lines, spanning 14 separate states). Clearly, the sizes of CenturyLink's prior acquisitions do not match the size of the Proposed Merger.

CenturyLink has historically operated primarily in less-densely populated areas of the country and only recently acquired a few more urban areas through its Embarq acquisition.[18] It has very little experience with the types and quantities of wholesale obligations and relationships found in Qwest's territories.[19] Moreover, as Mr. Jones has also acknowledged, CenturyLink has never actually operated a Bell Operating Company ("BOC").[20] These dissimilarities further refute the Merging Companies' claims that CenturyLink has the requisite experience to successfully integrate the entirety of Qwest's BOC local exchange operations.

Even assuming that CenturyLink has successfully integrated its prior acquisitions without harm to the public interest, such "past success in this business is no assurance at all of future success[.]"[21] The whole point of the conditions proposed by the Joint CLECs is to provide a reasonable "assurance policy that if things go wrong, [there are] certain conditions that insulate CLECs"[22] from future competitive harm.

[17] CTL/500, Jones/14-15.
[18] Joint CLECs/8, Gates/25, ln. 17 to 26, ln. 2.
[19] *Id.* at lns. 2-4.
[20] Tr. 12/16/10, Vol. 1, p. 39, lns. 5-7.
[21] Tr., 12/17/10, Vol. 1., p. 117, lns. 24-25.
[22] *Id.* at p. 118, lns. 1-4.

Of course, the foregoing assumptions are not supported by the record, and CenturyLink's record with prior acquisitions is hardly free from serious problems. To the contrary, as documented and discussed in the Joint CLEC Opening Brief, CenturyLink has experienced substantial problems integrating its acquisition of Embarq.[23] What the Merging Companies disarmingly call a "minor" issue (and even a "single hiccup") in the North Carolina integration of Embarq assets was actually a significant and persistent problem that took over seven months to fix.[24] These problems are particularly disconcerting in light of the dramatically larger size and scope of Qwest's operations and the fact that Qwest processes exponentially higher volumes of wholesale orders than CenturyLink/Embarq.[25]

Even more problematic is the fact that the Proposed Merger is coming so soon after CenturyLink's acquisition of Embarq -- before integration of Embarq is even complete. Not only have the Joint CLEC witnesses testified to the risks associated with the overlap between these transactions, but the investment community has weighed in as well. Moody's Rating Service, for instance, gave CenturyLink a negative rating outlook based on the risks associated with CenturyLink's effort to acquire Qwest immediately following its acquisition of Embarq, stating:

> The negative rating outlook . . . reflects the considerable execution risks in integrating a sizeable company so soon after another large acquisition [Embarq in July 2009].[26]

Even CenturyLink recognized these risks associated with the Embarq transaction in its own S-4 filing with the SEC, stating:

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[23] *See* Joint CLEC Opening Brief, pp. 7-8 and materials cited therein.
[24] Joint CLECs/19, Gates/25 to Gates/26; Tr. Vol. 1 (12-16-2010), p. 119, ln. 19 to p.122, ln. 1, p.132, lns.17-25 (Schafer); *see also* Hearing Exhibit Joint CLECs/23 (CenturyLink Supplemental Response).
[25] *See, e.g., id.* at pp. 8-9.
[26] *See* Joint CLECs/1, Ankum/43, fn. 77 and CTL/302.

> Moreover, these integration initiatives are expected to be initiated before CenturyLink has completed a similar integration of its business with the business of Embarq, acquired in 2009, which could cause both of these integration initiatives to be delayed or rendered more costly or disruptive than would otherwise be the case.[27]

Therefore, the Embarq transaction not only shows CenturyLink's track record of problems that are likely to reappear in its acquisition of the substantially larger Qwest, it also increases the risk of problems with the Proposed Merger given that the two transactions closely overlap (which will doubtlessly put significant strain on CenturyLink's already thin resources).

3. Prior Merger Failures ***Are*** Relevant To The Proposed Merger

The reality is that most mergers do not succeed and the record reflects two prominent recent merger failures in the telecommunications industry -- Hawaiian Telcom and FairPoint.[28] The Merging Companies argue that any comparisons to the Hawaiian Telcom and FairPoint merger failures are "flawed" in large part because those failures resulted because the companies involved had to build new Operational Support Systems ("OSS") from scratch with pressure to "flash cut" to the new OSS.[29] The Merging Companies assert that CenturyLink will not face the same OSS operational problems and cost-overruns as Hawaiian Telcom or FairPoint, but these distinctions are unpersuasive for several reasons.

First, the record indicates that CenturyLink will likely move CLECs to its own OSS.[30] Among other things, CenturyLink's refusal to commit to retaining Qwest's current OSS for any period longer than two years suggests an intent to convert wholesale customers to its own OSS shortly thereafter. At a minimum, there is a definite risk that such a conversion will occur after two years. Second, CenturyLink has experienced its own serious service issues in connection

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[27] *See* Joint CLECs/8, Gates/82 (referencing CenturyLink Form S-4 Registration Statement at p. 16).
[28] Joint CLECs/1, Ankum/25-36.
[29] CenturyLink Br., p. 22.
[30] *See* Joint CLECs/19, Gates/6, lns. 3-10 (citing HSR Filing Attachment 4(c)-52).

with OSS integration efforts as part of its acquisition of Embarq, which suggests a likelihood that CenturyLink will implement its own OSS and that there will be operational problems. Finally, the claim that the Merging Companies' systems are "fully operational and tested" is inaccurate as applied to CenturyLink's systems in the Qwest region. Qwest's OSS systems were subject to thorough third-party testing at commercial volumes before being implemented and they have been in operation at current wholesale volumes or higher for nearly 10 years. In contrast, CenturyLink's OSS systems have not been subject to third-party testing and have not been used for anything close to Qwest's commercial wholesale volumes.

The Merging Companies have failed to provide any evidence indicating that CenturyLink will not convert Qwest wholesale customers to CenturyLink's OSS or that CenturyLink's OSS will be capable of effectively handling Qwest's dramatically larger wholesale and retail volumes. At the same time, CenturyLink has refused to agree to third-party testing at commercial volumes prior to converting Qwest wholesale customers to CenturyLink's OSS even though Qwest's OSS went through such third-party testing before being implemented. Therefore, while the Proposed Merger is not identical to the Hawaiian Telcom and FairPoint mergers, it still presents similar risks associated with OSS conversions unless CenturyLink commits to continue using Qwest's OSS or to subject any conversion from Qwest's OSS to third-party testing with specific performance benchmarks to ensure functionality at least equal to Qwest's OSS following conversion or replacement. Even then, any conversion presents risks of service-affecting problems as acknowledged by CenturyLink.[31]

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[31] *See, e.g.,* Tr. Vol. 1 (12-16-2010), p. 119, ln. 19 to p.122, ln. 1, p.132, lns.17-25 (Schafer)

All of these concerns and risks exist against the backdrop of a history of recent ILEC merger failures and the prevailing view that most mergers do not succeed.[32] Against this backdrop, the Merging Companies offer little more than generalized rhetorical assertions that do nothing to demonstrate that the Proposed Merger is in the public interest. Attempting to turn the entire "no harm" standard on its head, the Merging Companies deem it particularly "important" that "no witness offered any evidence demonstrating that service quality problems will occur in *this* transaction."[33] If the standard required those likely harmed by a merger to affirmatively *prove* that they *will* be harmed, the Commission would never impose conditions on a proposed merger. Indeed, if the Merging Companies' approach was correct, the Commission could not have imposed conditions in the recent Verizon/Frontier transaction based on the *risk* of harm.[34]

The Merging Companies have clearly failed to meet their burden in this proceeding. Far from providing significant benefits, the Proposed Merger poses serious risks to wholesale customers and competition. Given the Merging Companies' failure to establish any significant public interest benefits from this proposed transaction, it cannot be approved without at least ensuring that the risks to wholesale customers and competition are fully addressed.

C. THE RECORD EVIDENCE DEMONSTRATES THAT THE MERGED COMPANY COULD EXERT MARKET POWER TO THE DETRIMENT OF LOCAL COMPETITION

The Merging Companies' failure to acknowledge and address the impact of this transaction on competitors is telling. The Commission cannot accept (or rely upon) an analysis of the public interest factors that largely ignores competitive interests. Such evidence includes the fact that, upon closing, the Merging Companies will be able to exercise significant market

[32] *See, e.g.,* Joint CLECs/1, Ankum/35.
[33] CenturyLink Br., p. 22 (emphasis in original).
[34] *In the Matter of Verizon Communications Inc. and Frontier Communications Corporation Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc*, Order No. 10-067, docket UM 1431 (entered February 24, 2010) (hereafter "*Verizon-Frontier Merger Order*").

power to the detriment of competition because of the increased scope and scale of their merged networks, and their substantially enhanced financial resources.

An entity which, after closing, will serve 17 million access lines with anticipated annual revenue of $19.8 billion is a significant force to be reckoned with in the telecommunications and/or competitive voice services market. With these significant financial resources comes greater leverage against competitors in the marketplace. And, as the record reflects, such competitors are quite frequently also the company's wholesale customers. It is the juxtaposition of these indisputable facts that leads to the conclusion that the post-merger entity will have significant power over its competitors and wholesale customers (*i.e.*, power in the competitive market, or "market power").

That such power will arise from the Merged Company's combined resources cannot be denied. Indeed, the Merging Companies themselves repeatedly tout such resources, size, and financial strength as benefits of the merger. For example, they assert that the "combined company" will benefit from:

1. greater financial resources, including anticipated
   a. combined pro forma revenues of $19.8 billion (as of year end 2009);[35]
   b. anticipated annual earnings before interest, taxes, depreciation, and amortization in excess of $8.2 billion; and
   c. free cash flow of $3.4 billion.[36]
2. a greater ability to reduce its corporate debt;[37]
3. an enhanced ability to invest in its networks and systems;[38]
4. a greater ability to reach more customers with a "broad range" of products; as a result of its control over 17 million access lines, with operations spanning 37 states,[39] and,
5. the use of an 180,000 mile fiber network, as well as complementary networks and operating footprints.[40]

[35] CenturyLink Br., p.7; Qwest/1, Peppler/10, lns. 7-9.
[36] CenturyLink Br., p. 7; CTL/300, Bailey/13, lns. 11-14.
[37] CTL/300, Bailey/14, lns. 13-15.
[38] *Id.*
[39] CTL/100, Jones/11, lines 8-10.
[40] *Id.* at lns. 10-15.

Individually, any of these attributes would lead one to conclude that the Merged Company would have greater power and leverage in the local competition market. Collectively, the combined effect of these attributes leaves no doubt that the Merged Company will have significant power to assert leverage over its competitors that are also its wholesale customers.

This is not a novel theory that the Joint CLECs (or other intervenors) have simply pulled out of thin air. Instead, it is a very real phenomenon that the FCC has recognized as a potentially negative effect of mergers of this size and scope. This "Big Footprint" theory, which the FCC referenced in the context of the CenturyLink/Embarq merger, holds that a merger between two incumbent LECs may increase the merged entity's incentive to engage in anticompetitive behavior by allowing it to capture or internalize a higher proportion of the benefits of such anticompetitive strategies against competitors.[41]

These anticompetitive practices can adversely affect both wholesale and retail customers. As the FCC explained, the resulting effects on competitors can "directly or indirectly *harm customers*, whose business the incumbent LEC is seeking to gain."[42] In other words, as ILECs increase in size and scope, their ability to leverage such size and scope to the disadvantage of competitors also increases. That, in turn, can lead to a degradation of service to end-user customers who are the consumers of voice services in Oregon.

As a result, there can be no dispute that the Merged Company will have greater financial, operational and network resources. Those resources may be used against competitors (who are also wholesale customers) in an anticompetitive manner that undermines competitors' ability to

[41] *In the Matter of Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, n. 106 (2009) (citing *See SBC/Ameritech Order*, 14 FCC Rcd at 14798, ¶ 193).
[42] *Id.* (emphasis added).

provide service. As such, the Commission must recognize that the relative market power of the combined company is not an idle threat, but is instead a significant potential threat to competition, and ultimately consumers, in Oregon.

II. THE MERGING COMPANIES' PUBLIC INTEREST ANALYSIS FAILS TO ADEQUATELY DEMONSTRATE THAT THE PROPOSED MERGER WILL NOT HARM WHOLESALE CUSTOMERS AND LOCAL COMPETITION IN OREGON

In contrast to the Merging Companies' general rhetorical claims of benefits from the Proposed Merger, the record contains extensive, specific evidence of serious potential risks to wholesale customers and local competition if this transaction is approved without further conditions. This evidence includes specific examples of similar ILEC merger failures, CenturyLink's integration problems with its Embarq acquisition, the widely acknowledged increased risk of undertaking the Proposed Merger so soon after CenturyLink's Embarq acquisition, and concrete examples of CenturyLink's anti-competitive policies and practices relative to Qwest's.

The Staff Settlement fails to adequately address these risks. Notwithstanding the Merging Companies' claims to the contrary, the additional commitments proposed by the Joint CLECs to address these risks are within the scope of this proceeding, and are critical to protecting the public interest in local competition.

A. THE STAFF SETTLEMENT DOES NOT ADEQUATELY PROTECT WHOLESALE CUSTOMERS FROM POTENTIAL HARMS ARISING FROM THIS MERGER

The Merging Companies argue that the public interest is satisfied because of the commitments set forth in the Staff Settlement. They contend such settlements are "more than sufficient to address any CLEC concerns related to the merger, and any further conditions would be unreasonable and inappropriate."[43] However, the rationale that what is good for Integra must also be good for all wholesale customers is demonstrably flawed.

As discussed above and in the Joint CLEC Opening Brief,[44] while the Staff Settlement does address a number of concerns, it is tailored to satisfy Integra's specific operational profile, and fails to adequately address concerns that are of critical importance to other CLECs with materially different interests. Curiously, while the Merging Companies question whether there is "convincing evidence" that there are substantial differences between the operations of Integra and other CLECs,[45] they do not even attempt to address the unrebutted evidence of such differences, including the facts that other CLECs rely more heavily than Integra on wholesale/commercial agreements[46] and that other CLECs use different OSS interfaces that would suffer greater disruption from post-merger OSS changes.[47]

Throughout their brief, the Merging Companies suggest that, because the Staff Settlement contains numerous conditions and commitments, they have done enough and nothing more can or should be imposed because they have "allay[ed] any concerns raised regarding any financial or wholesale service quality issue."[48] Clearly, the Staff Settlement does no such thing as the Joint CLECs have presented compelling evidence of additional risks to the public interest that are not resolved by the Staff Settlement.[49]

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[43] CenturyLink Br., p. 23.
[44] Joint CLEC Opening Brief, at pp. 29-31.
[45] CenturyLink Br., p. 22.
[46] Joint CLECs/23, Gates/8-9; and Tr., 12/17/10, Vol. 1, p.72, ln. 23 to p.73, ln. 5 (testimony of Integra witness Mr. Denney that "most of our wholesale purchases from Qwest are out of the * * * interconnection agreements"). *See also* Joint CLEC Opening Brief, at pp. 17-18.
[47] Joint CLECs/23, Gates/9, ln. 20 to p. 10, ln. 3. *See, also* Joint CLEC Opening Brief, at pp. 12-13.
[48] CenturyLink Br., p. 23.
[49] Moreover, like all other parties, the Joint CLECs have compromised on a great number of issues, both in Oregon and elsewhere. The Joint CLECs now seek prophylactic conditions to safeguard against those serious and unreasonable risks to competition that remain outstanding.

Moreover, the Merging Companies also misinterpret the applicable "no harm" standard with respect to what exactly needs to be in the public interest. The Merging Companies ask the Commission to impose no further conditions because the *Staff Settlement* "does no harm, and, in fact benefits wholesale customers, and is in the public interest."[50] Of course, the relevant inquiry is not whether the Staff Settlement and its component parts are in the public interest; indeed, the Joint CLECs readily concur that the conditions imposed on the transaction are salutary measures as far as they go. The relevant issue presented in this proceeding, though, is not whether these conditions are good, but rather whether the Proposed Merger itself, without any additional conditions, is in the public interest. Because additional conditions are necessary to prevent harm to competition in the State, the Staff Settlement is insufficient to render the Proposed Merger in the public interest.

As discussed in more detail below, the Staff Settlement falls short of addressing critical concerns identified by the Joint CLECs with respect to OSS; wholesale or commercial agreements; post-merger wholesale service quality; porting of interconnection agreements; the rural exemption; and a temporary moratorium on further non-impairment or forbearance filings. Further, the Staff Settlement is completely devoid of any commitments that address the Joint CLECs' concerns relating to single point of interconnection[51] and non-discriminatory directory listing and assistance.[52]

1. Wholesale and Commercial Agreements

The Merging Companies are also wrong to claim that the conditions relating to disparate treatment in the Staff Settlement for wholesale/commercial agreements and interconnection

[50] CenturyLink Br., p. 20.
[51] *See* CenturyLink Br., Revised Exhibit A at p. 49.
[52] *See id. at* p. 44.

agreements ("ICAs") represents a reasonable compromise. The Merging Companies' assertions in this regard overlook the significant shortcomings of these commitments.

Specifically, as explained in the Joint CLECs Opening Brief, the Staff Settlement lacks a commitment from the Merged Company to extend wholesale agreements, commercial agreements and tariffs (collectively, "wholesale agreements") for a full three years at current rates. A commitment to extend wholesale agreements at current rates is particularly important to ensure post-merger stability and certainty for all wholesale facilities – not just those provided as UNEs under ICAs. In addition, these commitments also ensure that competitors' transaction costs do not increase as a result of the Proposed Merger. Because the adoption of these additional conditions will result in demonstrable protections for competitors in Oregon that otherwise would not be attainable under the Staff Settlement alone, the Merging Companies' claims to the contrary should be rejected.

As the acquiring carrier, it is reasonable to expect that CenturyLink will be inclined to import its own policies and practices into the Qwest region, which includes the vast majority of Oregon's population and the overwhelming majority of competitive carriers. Therefore, there is a significant risk that, rather than retain wholesale practices and offerings that Qwest has developed after years of litigation, arbitrations and negotiation, CenturyLink will gravitate towards its own familiar practices -- particularly as it seeks savings to achieve expected synergies and to pay substantial integration costs. This likelihood further underscores the need to condition the Proposed Merger on a full 36-month extension of wholesale agreements at current rates in effect as of the merger filing date.

The Merging Companies make two arguments in opposition to the Joint CLECs proposed conditions for wholesale agreement services. First, they incorrectly contend that there is no evidentiary basis for an extension of wholesale agreement terms to the same three-year period applicable to ICAs. In fact, there is sufficient and unrebutted evidence in the record that: (a) the wholesale agreements must be extended to at least the minimum synergy period to protect against anticompetitive practices by the Merged Company; and (b) without the conditions proposed by the Joint CLECs, the Staff Settlement will artificially create winners and losers based on, among other things, the type of agreement a CLEC happens to have and the expiration date of such agreement.[53] The Merging Companies also claim that there should be no extensions or additional restrictions on non-Section 251 agreements because they are not required by the Act to provide such agreements to CLECs.[54] This argument, however, again confuses the issue presented in this proceeding, which includes whether the Proposed Merger will cause harm to CLECs. Whether or not the Merged Company is required to provide non-Section 251 agreements, Qwest has been doing so and Oregon CLECs are parties to different types of agreements with different terms. As discussed above, without a condition providing adequate stability for these contractual relationships, certain CLECs will be unfairly and arbitrarily harmed, which in turn would be a merger-related harm to competition in the State. In fact, the merger condition in the Staff Settlement, if left as is, would create competitive harm. The Commission should not allow a poorly crafted condition, whose intent is ostensibly to protect against merger-related harms to competition, to be the very instrument of harm to competition in the State.

For its part, Staff raises two separate arguments. Staff first maintains that it is the FCC, not this Commission, that must determine whether conditions are needed to address CLECs'

[53] Joint CLEC Opening Brief, at pp. 18-22.
[54] CenturyLink Br., at pp. 29.

concerns under interstate tariffs.[55] This argument misses the mark, however, in that these interstate services are used by CLECs to provide *intrastate* services in Oregon in competition with the Merging Companies. Therefore, the Commission has clear authority under the Oregon merger-approval statutes (ORS 759.375 and 759.380) to determine whether a condition relating to these interstate tariffs will protect against merger-related harm to competition in the provision of intrastate services in Oregon. If such a condition would do so, the Commission also has clear authority to require that an applicant commit to such a condition upon merger approval.

Finally, Staff believes that the Merging Companies' witnesses have adequately addressed the Joint CLECs' concerns about Qwest "gam[ing] the timing of extensions by raising rates for certain services prior to the closing" of the Proposed Merger.[56] It appears that Staff may be missing the thrust of this concern, which relates to the use of the merger "Closing" as the trigger for holding rates and terms of wholesale services stable. Assurances by Qwest that is has not already raised these rates is certainly no assurance that it will not do so prior to closing. Moreover, the public interest would not be served by allowing Qwest to do so. As Mr. Gates pointed out at the hearing, without the changes now proposed by the Joint CLECS, the Merging Companies would be able to drastically "undermine[] the spirit" of the Staff Settlement by "drop[ping] another dozen of these types of notices to increase rates" prior to the merger closing.[57] For all these reasons, the modifications to Condition 28 proposed by the Joint CLECs should be adopted by the Commission.

2. OSS

[55] Staff Opening Brief, at p. 19, lns. 7-8 and 20-21.
[56] *Id.* at p. 19.
[57] Tr. 12/17/10, Vol. 1, p. 132, ln. 22 to p. 133, ln. 8.

The Merging Companies claim that the Staff Settlement adequately addresses the Joint CLECs' concerns with respect to OSS, and that the Joint CLECs have misinterpreted CenturyLink's intentions for the post-merger OSS. However, the fundamental flaw of this argument is that it fails to acknowledge that, as noted above, the Staff Settlement is the product of negotiations and compromise with only one of the intervening competitors in this case. It should go without saying that one carrier's compromises cannot be relied upon to adequately protect the other competitive carriers or the general public interest in promoting local competition.

As demonstrated in the Joint CLEC Opening Brief, in order to ensure that the post-merger OSS and related performance levels do not deteriorate, the Commission must include additional protections beyond those in the Staff Settlement. Specifically, approval of the Proposed Merger should be conditioned upon additional commitments from the Merging Companies to (1) retain Qwest's current OSS for at least ***<u>three</u>*** years following close of the Proposed Merger, and (2) apply third-party testing at commercial volumes to ensure that any successor OSS deployed after the three year period is equivalent to the current Qwest OSS.

The Merging Companies' attempt to minimize the fact that there will be post-merger changes to the OSS is disconcerting. They state that "no decisions have been made regarding the OSS to be employed in the future" but, no matter what the Merged Company does, "there is nothing in the record demonstrating that the quality of service would degrade."[58] Such vague assurance that whatever the Merged Company decides to do in the future should be sufficient provides no assurance that the public interest will be protected. That the Merging Companies vigorously oppose retaining Qwest's current OSS for at least three years suggests an intent to

[58] CenturyLink Br., at p. 27.

replace it during the three to five year period over which the Merged Company expects to realize the merger synergies. Otherwise, there would be no compelling reason to oppose a three-year, rather than two-year extension of Qwest's OSS.

Indeed, the Merging Companies' vague suggestion that they might not replace Qwest's OSS is at odds with the evidence in this proceeding. Mr. Gates explained that upon his review of the Merging Companies' Hart-Scott-Rodino ("HSR") documents, he determined that **BEGIN HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXX **END HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER** [59]

Thus, the Joint CLECs' continued advocacy on these conditions is not merely "speculation," as the Merging Companies suggest.[60] In fact, as previously demonstrated in its opening brief, the Joint CLECs have shown that evidence in this proceeding provides a valid basis for concerns regarding the fate of Qwest's OSS post-closing.[61] The record demonstrates that CenturyLink's OSS is not as robust, and does not have the same functionality, as Qwest's OSS.[62] Once CenturyLink replaces Qwest's OSS with its own systems, CLECs in Oregon will be forced to rely on a system with less functionality and capabilities. Such a result will make it significantly more difficult for Oregon CLECs to effectively compete.

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[59] Joint CLECs/19, Gates/6, lns. 7-10.
[60] CenturyLink Br. at p. 27.
[61] Joint CLEC Opening Brief, at pp. 23-29. The evidence put into the record by the Joint CLECs stands in stark contrast to the Merging Companies' concerted effort to provide little substantive discussion of their post-closing intentions. The Commission should not reward a merger applicant for refusing to provide meaningful information necessary for the Commission and intervenors to evaluate the potential impact on the public interest.
[62] *See* Joint CLECs/8, Gates/48-50, 58-60, and 63.

The Merging Companies seek to be restricted on OSS for only two years, not the full three year minimum synergy period during which it is likely they will be attempting to wring out as much integration savings as possible. As Joint CLECs' witness Mr. Gates has noted, it is during this three year time frame that CLECs will be exposed to the most "significant risk of harm related to OSS post-merger."[63] Mr. Gates further cautions that any OSS restriction period "less than three years would provide the means for the Merged Company to act upon its incentive to integrate OSS in such a way that degrades the quality or access by CLECs."[64]

The Merging Companies fail to address the numerous points raised by the Joint CLECs as to how the CenturyLink OSS will not serve as an adequate substitute for the current Qwest OSS, nor do they address the interface and other differences among Joint CLECs that makes the Integra-driven Staff Agreement an inadequate instrument to prevent harm. The Merging Companies' assurances that the CenturyLink OSS is as "robust" and "well-tested" as the Qwest OSS is simply not supported by the evidence in the record notwithstanding their oft repeated assertions. Moreover, their assurances of service quality already appear to be waning, as they pledge in their opening brief to provide wholesale service that is not "materially less" than pre-merger levels, while the Staff Settlement requires that such service be "not less than" prior levels.

Staff takes the position that the three-year requirement is unnecessary because, under Condition 27, CenturyLink cannot replace its OSS (even after the two-year period in the Staff Settlement) unless and until a majority of CLEC and CMRS carriers agree to the change.[65] While the majority vote feature in the State Settlement does provide *some* measure of protection

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[63] Joint CLECs/23, Gates/12, ln. 2.
[64] *Id.* at p. 14, lns. 8-10.
[65] Staff Opening Brief, p. 12-13.

for CLECs, it is by itself not sufficient. Just as the Merging Companies have demonstrated the ability to win over Integra based on promises specifically suited to its operations, the post-merger company may in the months ahead likewise entice certain CLEC and CMRS carriers to agree to an OSS change, which would seriously harm other CLECs whose interfaces or other operational profiles are more vulnerable to such disruption. The point of the three-year protected period is to provide a minimum period of stability that is at least as long as the minimum synergy period during which the Merged Company will be highly motivated to make OSS changes at the expense of CLECs and competition in general. Allowing all CLECs to be subjected to potentially harmful majority rule during the already precarious synergy period is not in the public interest because it doesn't adequately safeguard competitors' expectations of a stable and consistent OSS platform.

Moreover, the Merging Companies fail altogether to address Joint CLECs' request that the Merged Companies' OSS be subjected to third-party testing at commercial volumes. Staff, on the other hand, posits that third-party testing should not be required because, according to Staff, the FCC has not evinced a preference for independent, third-party testing over carrier-to-carrier testing.[66] Staff relies upon an FCC opinion and order but does not reference the portion of the opinion espousing the view that ***internal OSS testing that is not independent and blind is inferior to a truly independent third-party test.***[67] Thus, accordingly to Mr. Gates, because there is no evidence that CenturyLink's legacy OSS is capable of handling the actual commercial usage of Qwest's legacy territory, the next best option -- independent, third-party testing (like that previously undergone by Qwest) -- should be required. All evidence in the record supports a conclusion that such testing is reasonably calculated to address a serious risk of harm.

[66] *Id.* at p. 13.
[67] *See* Joint CLECs/23, Gates/18, lns. 21-24.

Without additional conditions to address the inadequacies of the OSS commitments provided in the Staff Settlement, there simply will not be sufficient safeguards in place to protect Oregon wholesale customers post-merger -- a result that clearly would not be in the public interest. Thus, the Commission should adopt CLEC Condition 27 and thereby reject the Merging Companies' attempt to benefit from their deliberate silence on critical points of concern to the Joint CLECs with respect to OSS.

3. Single Point of Interconnection

The Merging Companies argue that because CenturyLink is not a BOC it does not have any obligation to establish a single point of interconnection per LATA.[68] This argument is misplaced. Section 251 requires all incumbent LECs (not just BOCs) to allow a competitive LEC to interconnect at any technically feasible point.[69] Specifically, the Act sets forth obligations of all ILECs under Section 251 (and elsewhere), and separately sets forth the unique obligations of the former BOCs under Section 271. Because the single point of interconnection rule *stems from Section 251*, which applies to all ILECs, it clearly applies to CenturyLink. Under accepted rules of statutory construction it is clear that Congress intended to subject all ILECs (both non-BOCs and BOCs) to those duties set forth under Section 251(c).[70] Indeed, an *incumbent LEC* is relieved of its obligation to provide interconnection at a particular point in its

[68] CenturyLink Br. at 41.
[69] *See, e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; First Report and Order, CC Docket No. 96-98, FCC 96-325, Released August 8, 1996 (the "*Local Competition Order*") at ¶ 209.
[70] This construction is supported by the fact that the FCC has implemented the SPOI per LATA requirement as a component of its interconnection rules, including 47 C.F.R. § 51.305(a)(2) -- which applies to all ILECs, not just BOCs. Further, it is instructive that the FCC orders which establish the single POI rule never excluded or carved out the non-BOC ILECs from its application. There is no distinction made by the FCC in its orders affirming this rule.

network only if it proves to the state public utility commission that interconnection at that point is technically infeasible.[71]

The Merging Companies also argue that this is not the appropriate forum to address interconnection-related conditions.[72] However, as explained in section II.B.1, below, it is appropriate for the Commission to impose interconnection-related conditions if doing so will ensure that the transaction does not harm wholesale customers and competitors. Because the record shows that CenturyLink's wholesale practices clearly do impair wholesale customers and competitors, the Commission can and should adopt interconnection-related conditions to ensure that those wholesale policies are not imported into the Qwest territories. In addition, as explained below, this Commission has imposed interconnection-related conditions in prior merger cases. Thus, the Commission should adopt a condition that provides CLECs with the right to utilize a single point of interconnection per LATA for all of the Merged Company's entities operating within that LATA.

Staff claims that, "[i]f the transaction is approved, the Merged Company will be required to provide competitors a point of interconnection for each ILEC, as Qwest and CenturyLink are required to do today."[73] Staff overlooks the fact that by maintaining separate legal entities, CenturyLink effectively escapes its legal obligations by forcing competitors to undertake the inefficient, costly and burdensome process of interconnecting with the networks of each separate legal entity operating in the sate. As explained in the Joint CLEC Opening Brief, this occurs even though all are wholly-owned affiliates of CenturyLink, the parent company, and in some

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[71] *In the Matter of Application of SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, FCC 00-238, CC Docket No. 00-65, Released June 30, 2000, ¶ 78 ("Texas 271 Order") (footnotes omitted, emphasis added).
[72] CenturyLink Br. at 41.
[73] Staff Opening Brief, p. 17.

cases are contiguous to one another. It seems ironic that CenturyLink touts the resources and size of the post-merger company,[74] while at the same time arguing that each of the legal entities in Oregon operate separate networks that do not have any common transport facilities linking those networks. To the extent that such entities' networks within a LATA are interconnected, CLECs should also receive the benefit of that single interconnected network by being allowed to establish a single POI per LATA, in accordance with federal law.[75]

4. Porting of Interconnection Agreements

On this issue the Merging Companies raise several arguments. First, they argue that the imposition of an ICA porting obligation would present many questions concerning "how state-specific terms from another jurisdiction would apply in Oregon."[76] Second, the Merging Companies assert that such a condition would permit competitors to "cherry-pick" the best ICA terms for themselves.[77] Third, they argue that there is no basis to "port" an ICA "from one operating company to another."[78] Finally, the Merging Companies object to this condition on the grounds of "fairness."[79]

As to the first point, the Merging Companies apparently misunderstand or deliberately misconstrue the Joint CLECs proposed condition in that they suggest that state-specific terms from another jurisdiction would apply in Oregon. That is simply not the case. The condition would permit the porting of ICAs from Oregon into another state (or vice versa) *subject to* state-

[74] *See* Qwest/1, Peppler/10 to Peppler/13.
[75] Joint CLECs/8, Gates/191, ln. 21 to Gates/192, ln. 7; *see also Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Wireline Competition Bureau, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶ 52 (2002) (affirming competitors' right to single POI per LATA).
[76] CenturyLink Br., at p. 39.
[77] *Id.*
[78] *Id.*
[79] *Id.*

specific pricing and terms.[80] In other words, any state-specific pricing or terms would not be "ported" from another state into Oregon , but would instead be excised from the agreement or replaced with an analogous price or term consistent with Oregon precedent. For example, under this condition a CLEC may wish to port an agreement from the State of Washington into Oregon. To the extent that the Washington Commission had ordered reciprocal compensation rates that differ from the rates in Oregon, the parties would simply strike the Washington rates from the agreement and replace them with the Oregon rates.

The Merging Companies' second argument, that a porting condition would permit CLECs to "cherry-pick" the most favorable ICA terms, is simply not accurate. In order to "cherry-pick" the most favorable terms from one agreement and apply it in another state the CLECs would have to have the right to engage in the "pick and choose" adoption process. However, those rights were repealed by the FCC in 2005,[81] and the Joint CLECs are not trying to reverse that ruling here. Indeed, nothing in the Joint CLECs' proposed condition suggests that it should have the right to pick and choose terms from one agreement and apply it in another. Instead, the right to "port" an agreement would permit the CLEC to take *all of* the terms of the agreement and apply them in another state (subject to any state-specific pricing or terms).

As to the third argument, that there is no basis to "port" an ICA "from one operating company to another," that is not the Joint CLECs' intent. The Joint CLECs are not asking for the right to port ICAs between operating companies. Indeed, the Joint CLECs have made it clear that their proposed porting condition would only apply to the legacy Qwest territories. In other

[80] See Joint CLECs/11, Ankum/76, lns.1-12.
[81] *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494 (2004).

words, the Joint CLECs' condition would only allow CLECs to port a Qwest agreement from Washington (or another state) into a Qwest territory in Oregon.

Finally, the Merging Companies' final argument is that simple notions of "fairness" should lead this Commission to reject an ICA porting condition. But the record demonstrates that the Merged Company's post-closing size will create the third largest ILEC in the country with billions of dollars of revenues. With that increase in size and scope comes the concomitant market power that the Merged Company could exert over its competitors (which are also wholesale customers). In particular, as Mr. Pruitt testified, an exponentially larger ILEC in Oregon will have the ability to force competitors to engage in long and protracted interconnection negotiations and/or arbitrations that will increase competitors' transaction costs. That, in turn, consumes competitors' resources and undermines their ability to offer competitive local services to Oregonians. Thus, any notion of fairness must account for the relative size and fiscal strength of the merged company vis-à-vis competitors in Oregon. A condition that permits competitors to port agreements in order to reduce their transaction costs with the Merged Company is imminently fair and reasonable.

5. Directory Assistance and Directory Listings

The Merging Companies contend that this is not the appropriate forum to address the Joint CLECs' concerns with respect to directory listings and directory assistance. The Joint CLECs are not asking the Commission to review, revisit or re-litigate disputes that Charter or any other CLECs have had with CenturyLink or Qwest. Instead, the Joint CLECs are simply asking the Commission to ensure that the status quo is maintained for competitors operating in Qwest's territory, such that those competitors will not be offered wholesale directory listing and assistance services in a manner that is inconsistent with federal law. This can be achieved simply by conditioning approval of the transaction on the Merged Company's commitment to comply with federal and state law as it relates to their directory assistance and directory listings responsibilities in all their ILEC territories just as Qwest currently does today.

Nor is it accurate to assert, as the Merging Companies do, that Charter is simply seeking to obtain directory-related services from CenturyLink without any charges. [82] It is also willing to provide its listings without any charges to the Merging Companies. In the Qwest ILEC territories today (i.e., roughly 90 percent of the ILEC access lines in Oregon) CLECs submit directory listings (i.e., basic white or yellow page listings), including changes and deletions, without charge from Qwest.[83] What does Qwest get in return? It maintains the most comprehensive directory in the region, along with the higher advertisement revenues that go with having the most comprehensive directory, and it obtains the listings of CLECs for free. It is a quid pro quo that has been practiced by the major ILECs/BOCs from nearly the inception of the federal Telecom Act. That benefit is no less true for CenturyLink's directories. If CenturyLink is allowed to begin assessing directory listing order, maintenance and storage charges on CLECs, it is one more example of the merger failing to meet the no harm standard – since any anticompetitive costs imposed on customer acquisition or retention is harmful to competition.

The Joint CLECs simply seeks assurances that CenturyLink will fulfill its obligations under Section 251(b)(3) of the Act. Those include the obligation to provide all competing providers with access to "nondiscriminatory access to telephone numbers, . . . directory assistance, and directory listing."[84] In other words, CenturyLink must perform these functions

[82] CenturyLink Br. at 40.
[83] Charter Fiberlink/14, Pruitt/17, lns. 13-21.
[84] 47 U.S.C. § 251(b)(3).

on the same terms that it provides these functions for its own end user customers (i.e., without charge).

As to the Merging Companies' assertion that this is not the appropriate forum to address directory-related conditions,[85] the Joint CLECs incorporate prior arguments as to the need to adopt conditions to ensure that CenturyLink's wholesale practices are not imported into the Qwest territories.[86]

Staff claims that a condition relating to directory listing and assistance services is not necessary because it is redundant to stipulated Condition 31, which states that "CenturyLink and all of its ILECs will comply with U.S.C. Sections 251 and 252." Although CenturyLink claims to adhere to its section 251(b)(3) obligations, the record clearly demonstrates that CenturyLink fails to properly maintain its directory assistance and directory listings databases in the same manner that Qwest does throughout its ILEC service territory.[87] Because Qwest and CenturyLink each have completely different interpretations as to what the law requires with respect to their directory listing and directory assistance obligations, stipulated Condition 31 offers no relief to those competitors directly affected by CenturyLink's anticompetitive directory listing and assistance practices. Thus, adopting a commitment that requires the Merging Companies to comply with federal and state law as it relates to their directory assistance and directory listings responsibilities – as practiced in the vast majority of Oregon today - is not redundant.

6. Rural Exemption

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[85] CenturyLink Br. at 42.
[86] *See, infra*, section II.B.1
[87] Joint CLECs/8, Gates/167 to Gates/171; Charter Fiberlink/14, Pruitt/16, ln. 14 to Pruitt/17, ln. 23.

The Merging Companies suggest that this proceeding is not the appropriate forum for review of the application of the rural exemption. They assert that the Commission can take no action on the rural exemption issue because "the Commission does not have jurisdiction to require such a waiver absent the required findings under federal law."[88] This argument fails to address the underlying concerns raised by the transaction. The Joint CLECs are not seeking to have this Commission address the question of whether the rural exemption can be "terminated" in this proceeding. Rather, the Joint CLECs urge this Commission to determine whether the Merged Company (or its subsidiaries) operating in Oregon would be ***eligible*** for the rural exemption under 47 U.S.C. § 251. Given the context of this proceeding, and the "no harm" standard applicable to this transaction, the Commission should consider whether the public's interest is enhanced if the soon to-be-largest ILEC in the state (and the nation's soon to-be-third largest ILEC) continues to enjoy the benefits of the rural exemption, *i.e.*, a shield designed for the smallest ILECs to avoid having to comply with the statutory obligations under 47 U.S.C. § 251(b) and (c).

As explained in the Joint CLECs' Opening Brief, the public interest is not enhanced by the Merged Company's continued reliance on the rural exemption to avoid legal and regulatory obligations under Section 251. The obligations that some of CenturyLink's subsidiaries currently avoid are the essential market opening obligations that form the cornerstone for many forms of competitive entry in the local voice markets. For example, CenturyLink's subsidiaries have no Section 251(c) interconnection, unbundling, resale or collocation obligations because they continue to hide behind the rural exemption. Any policy rationale that may once have supported the continued reliance on such exemptions, no longer exists given the Merged

[88] CenturyLink Br., at 41.

Company's soon to-be-dominance[89] in Oregon.

In addition, the suggestion that this Commission cannot address the rural exemption issue in this proceeding is misleading. As noted in the Joint CLEC Opening Brief, this Commission has already adopted conditions concerning another ILECs' revocation of the rural exemption in the Frontier-Verizon acquisition.[90] Further, the FCC and other state commissions have also addressed rural exemption revocation issues in decisions approving similar transactions.[91] Therefore, the Commission can act in this proceeding, as it has in others, to condition approval of the transaction on the Merging Companies' commitment not to continue to invoke the rural exemption in the state of Oregon.

Staff suggests that a condition concerning the "rural exemption" is unnecessary because the Proposed Merger will not make it easier for CenturyLink to use the "rural exemption."[92] Staff misses the point. The concern is not whether the transaction will "facilitate" CenturyLink's use of the rural exemption, as Staff suggests. Rather, the concern is whether the post-closing CenturyLink companies should be entitled to continued protection from pro-competitive obligations that all other large ILECs/BOCs operate under today.

Because, after closing, CenturyLink will be the third largest ILEC/BOC in the country with more than 17 million access lines, over $19.8 billion in revenue,[93] will have operating

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[89] See Qwest/1, Peppler/10, lns. 10-16 (explaining that the combined company will have more than 911,000 total access lines in Oregon).
[90] Joint CLEC Opening Brief at p. 47 (citing *the Matter of Applications Filed by Frontier Communications Corp. and Verizon Communications Inc. for Assignment of Transfer of Control*, Order, WC Docket No. 09-95; FCC 10-87, ¶ 39 (2010)).
[91] *Id.*; *see also Verizon-Frontier Merger Order*, Appendix A, pp.9-10 (Feb. 24, 2010) (Frontier commits that it "will not seek to avoid any of its obligations on the grounds that it is exempt from any of the obligations pursuant to Section 251(f)(1) or Section 252(f)(2) of the Act.").
[92] Staff Opening Brief at p. 14, lns. 21-23.
[93] Qwest/1, Peppler/10, lns. 7-12; Joint CLECs/1, Ankum/91, lns.1-3.

territory spanning 37 states and will be a BOC in 14 of those states,[94] it will have even greater ability to leverage its size and scope to the disadvantage of competitors by engaging in anticompetitive practices such as avoiding its Section 251 obligations under the guise of the rural exemption. Indeed, it is undisputed that CenturyLink's assertion of the rural exemption has the effect of increasing operational costs for CLECs.[95] If the Commission permits this wholesale practice to be applied in the acquired Qwest territories that result will undoubtedly harm competition and violate the "no harm" standard. As such, given both its absolute and relative size, it is well past time that CenturyLink cease wrapping itself in the protective cloak of the small "rural" carrier. It should qualify neither as a rural carrier under 251(f)(1) nor under 251(f)(2), which applies to carriers with less than 2% of the nation's subscriber lines in the aggregate. CenturyLink will have well in excess of 2% of the nation's access lines following the merger.

7. Moratorium on Non-Impairment Filings

Joint CLECs seek a three-year moratorium during which Qwest will not seek to reclassify its wire centers as "non-impaired." Staff and the Merging Companies complain that a three-year period is too long, and the period should be limited to two years (as currently provided in the Staff Settlement). For reasons discussed in the Joint CLEC Opening Brief, a two-year moratorium (which, depending on the closing date of the Proposed Merger, may actually end up running only approximately 15 months) is insufficient to provide the necessary stability to CLECs during the minimum three-year synergy period in which the Merged Company has the greatest incentive to raise prices and decrease service quality. The Merging Companies have identified no undue hardship that the three-year stability period would cause and have provided no sound reason that the two-year moratorium period will sufficiently protect CLECs during the

[94] Joint CLECs/1, Ankum/89, lns. 25-28.
[95] Joint CLECs/1, Ankum/89, lns. 1-18; Charter Fiberlink/14, Pruitt/15, lns. 9-19.

period in which they are most vulnerable to the Merged Company's efforts to maximize merger efficiencies. The three-year period will still be materially shorter than the 42-month moratorium period previously adopted by the FCC in connection with the AT&T/BellSouth merger.

The Merging Companies additionally assert that the Commission should deny the Joint CLEC's three-year moratorium request because the Commission lacks the jurisdiction to "prohibit an ILEC from obtaining relief if the TRRO criteria are satisfied."[96] However, the Joint CLECs are not asking for an order from the Commission regarding the TRRO criteria. Rather, they request the Commission require, as a condition of granting the Proposed Merger, that the Merging Companies commit that they will not seek such relief for the three-year period. There is no doubt that the Commission can require such a commitment where, as here, one is required to protect the public interest from a risk of harm. In fact, the Commission has previously adopted such a condition in connection with the Frontier/Verizon merger.[97] Moreover, the Merging Companies have already agreed to provide this very type of commitment, albeit for the shorter two-year period.

8. Wholesale Service Backsliding -- APAP

The Merging Companies contend that the Additional Performance Assurance Plan ("APAP") intended to prevent wholesale service quality backsliding is not necessary because, they claim, the Staff Settlement addresses the issue and, even if it did not, the evidence in the proceeding demonstrates that the APAP should not be adopted.[98] These arguments are misguided. First, the commitments set forth in the Staff Settlement do not supplant the need for an additional commitment from the Merged Company to adopt the APAP. In fact, the

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[96] CenturyLink Br., at p. 38.
[97] *Verizon-Frontier Merger Order* at *124 (Settlement Condition 10).
[98] CenturyLink Br., at pp. 30-35.

commitment in the Staff Settlement requiring the Merged Company to meet or exceed the average wholesale performance provided by Qwest to the CLEC for a certain time period post-merger, and to conduct a root cause analysis if wholesale service quality deteriorates, fails to create sufficient and self-effectuating incentives for the Merged Company to maintain wholesale service quality levels post-merger. On the other hand, the APAP ensures that the Merged Company's performance in the legacy Qwest ILEC territory will not deteriorate as compared to pre-merger performance.

Second, as discussed in the Joint CLEC Opening Brief,[99] there is ample evidence in this proceeding that clearly demonstrates the basis for adopting the APAP. Specifically, the APAP is necessary to ensure that wholesale quality does not decline post-merger and to provide an enforceable mechanism to protect impacted CLECs if wholesale quality does decline. There should be quantifiable mechanisms in place to discourage the Merged Company from seeking to achieve synergies at the expense of competition through a deterioration of wholesale service operations. Again, the proposed imposition of the APAP is intended solely to maintain the status quo post-merger, and the fact that the Merging Companies adamantly oppose its adoption signals that they do not intend to make good on their sanguine post-merger projections. The Commission should implement the APAP to prevent merger-related harm to the CLECs.

The Merging Companies and Staff raise several arguments in opposition to the APAP, all of which can be readily refuted. The Merging Companies appear to fundamentally misapprehend the purpose and application of the APAP, which is specifically designed to test whether post-merger wholesale service levels deviate significantly from *pre-merger* wholesale

[99] Joint CLEC Opening Brief at pp. 49-56.

service levels. The Merging Companies claim that the Utah proceeding[100] somehow "exposed" that the APAP does not measure whether the Merging Companies are complying with their Section 271 non-discrimination standard; however, that is the function of the already existing Qwest Performance Assurance Plan ("QPAP"), not the APAP. Staff also comments that the APAP does not protect against "degradation of wholesale service quality"[101] but, again that is *exactly* what the APAP measures and protects against with its self-effectuating remedies. The Merging Companies appear under the impression that the APAP is an improper "amendment of the existing QPAP;"[102] however, the two are distinctly different mechanisms that serve completely different functions, with the only relationship between them being that they happen to share a similar computational design.

The Merging Companies also criticize the APAP as "flawed" and not designed to "accurately measure performance degradation or tie payments to merger-related conduct."[103] Whatever merit such criticism might otherwise have, it has already been directly and completely addressed with a modification to isolate and target only merger-related service degradation. This solution, previously discussed in Joint CLEC Opening Brief at p. 54-55, has been specifically incorporated into the Oregon record and should be adopted by the Commission simply to dismiss any remaining objection by the Merging Companies.

[100] CenturyLink Br., at p. 31. Interestingly, the Merging Companies also appear to argue that there are some "due process concerns" attendant to *their agreement* to use the Utah record in the Oregon proceeding. *Id.* at p. 32, fn. 40. The Merging Companies fail to disclose that the APAP proposed in this proceeding is exactly the same as the one proposed in Utah, which is the very reason the parties and ALJ agreed to conserve time and resources by incorporating select portions of the Utah record in this proceeding. The Joint CLECs fail to see what possible "due process" issues the Merging Companies could possibly have inflicted upon themselves. *See, e.g.*, Tr. 12/17/10, Vol. 1, p. 14, lns. 14-22 (Judge Arlow stating "it appears that you are now in agreement that you will jointly submit the Utah testimony . . . and that will be in lieu of offering" certain evidence in this proceeding).
[101] Staff Opening Brief, p. 21.
[102] CenturyLink Br., at p. 34.
[103] *Id.* at p. 32.

Finally, both Staff and the Merging Companies express concern that the APAP proposal has not been "sufficiently vetted."[104] To the extent the Commission shares this concern or wishes to allow the objecting parties some further or additional participation in the development of the APAP, the Joint CLECs have alternatively requested that the Commission open an expedited docket to consider and adopt appropriate, self-effectuating incentives for the Merged Company to prevent wholesale service quality deterioration after the merger is completed. This would be consistent with the approach taken in the Frontier-Verizon transaction, where the Commission adopted a condition requiring the opening of a new docket to evaluate Frontier's post-merger performance compared with pre-merger performance, and to develop appropriate benchmarks and incentives for Frontier to continue to provide wholesale service quality at pre-merger levels.[105]

B. THE JOINT CLECS' PROPOSED CONDITIONS ARE PROPERLY WITHIN THE SCOPE OF THIS PROCEEDING AND CONSISTENT WITH COMMISSION PRECEDENT

The Merging Companies argue that certain conditions proposed by the Joint CLECs (and other intervenors) are not appropriate for consideration in this proceeding, but must instead be addressed through separate arbitration or complaint proceedings before the Commission because they arise from individual carrier disputes.[106] In addition, the Merging Companies argue that certain conditions raise issues of federal law, which this Commission cannot address because it does not have authority to address such issues.[107]

1. Individual Disputes Are Evidence of Anticompetitive Practices That Can be Eliminated by Commission Action in this Merger Proceeding

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[104] *See, e.g.,* Staff Opening Brief, p. 21.
[105] *Verizon-Frontier Merger Order* at Appendix C, p. 35 (Condition 23).
[106] CenturyLink Br., at 36-38.
[107] *Id.* at 36-37.

With respect to the first argument, the Merging Companies' contention that a merger proceeding is not the appropriate forum to address "individual carrier issues" (*i.e.*, issues or disputes arising from operational conflicts between the Merging Companies and an intervenor) is undermined by the fact that several elements of the Staff Settlement clearly arise from prior individual carrier disputes between the Merging Companies and various intervenors. For example, the Merging Companies initially argued that CLEC Condition 27 (the condition that would require the Merged Company to provide "conditioned" copper loops) is improper because it arose from an individual carrier dispute.[108] Specifically, Mr. Hunsuker testified that the appropriate process for dealing with intercarrier disputes is via interconnection agreement negotiations.[109] One such dispute involved Qwest's failure to properly condition lines leased as UNEs. In spite of the Merging Companies' protestations, the merger condition concerning line conditioning was incorporated as a formal term of the Integra settlement.[110] Thus, the Merging Companies expressly addressed (and presumably resolved) a prior "individual carrier dispute" with Integra by incorporating the copper loop conditioning term in the Integra settlement.[111]

Similarly, the Merging Companies also claimed that any proposed commitments seeking to address concerns regarding the potential implementation of wholesale surcharges in legacy Qwest ILEC territory post-merger (*i.e.*, CLEC Condition 24) were outside the scope of this proceeding because they were nothing more than "individual carrier disputes."[112] Nevertheless,

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[108] CTL/800, Hunsucker/38, lns. 12-20

[109] *Id.* at Hunsucker/25, ln. 22 to Hunsucker/26, ln. 3.

[110] *See* Staff Settlement § 14.

[111] Further, while Integra was a member of the Joint CLEC it was also pursuing a three year commitment with respect to extensions of interconnection agreements and wholesale agreements, and the continued use of Qwest's OSS, post-closing, one can only conclude that Integra was willing to pay a high price to obtain a resolution to this so-called individualized carrier dispute.

[112] Mr. Hunsucker testified with respect to CLEC Condition 24 "setting charges for services provided to CLECs is an extremely complex and fact-intensive process; it has nothing to do with mergers and is raised merely to be a

both the Integra and Staff settlements include commitments that resolve some of those concerns by stating that the Merged Company will not impose new wholesale service order charges associated with the customer acquisition and migration process.[113] Thus, the Merging Companies have clearly addressed issues arising from prior carrier disputes in both the Integra and Staff settlement agreements. It is equally appropriate for the Commission to address other operational concerns arising from prior carrier disputes that are the basis of other conditions proposed by the Joint CLECs in this proceeding.

More significantly, operational disputes are properly addressed in this proceeding because they are evidence of a broader wholesale practice that may undermine all competitors in Oregon if imported into the acquired territories. Although the Merging Companies attempt to dismiss the Joint CLECs' concerns with certain CenturyLink wholesale practices by arguing that these concerns are simply "individualized" disputes, collectively these practices are evidence of a concerted wholesale policy that CenturyLink engages in with its wholesale customers (which are also competitors).[114] Moreover, raising critical operational concerns in this proceeding does not conflict with prior arbitration rulings because the Joint CLECs' proposed conditions will minimize the risk of merger-related harms on competition by ensuring that the status quo is maintained in the vastly larger Qwest ILEC operating territory post-closing. This approach is consistent with this Commission's "no harm" public interest standard. Further, if the Commission does not address these anticompetitive wholesale practices here, they will undoubtedly arise again in the acquired territories and lead to further carrier disputes before the Commission.

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distraction. Second, independent of the proposed merger, these very issues have already been arbitrated in other state venues..." CTL/800, Hunsucker/40, lns. 11-14.
[113] Staff Settlement § 29; Integra Settlement § 4.
[114] Charter Fiberlink/1, Pruitt/9, lns. 4-12.

Because individual disputes are evidence of a widespread wholesale practice that undermines competitors, it is proper for the Commission to consider such evidence in this proceeding. For that reason, Commission can ensure that the wholesale policies which have lead to prior carrier disputes are not imported into the Qwest territory post-merger by prohibiting such practices through the adoption of the Joint CLECs' additional conditions.

2. The Commission Has Imposed Interconnection-Related Conditions in Prior Proceedings, Consistent with Applicable Law and Precedent

The Merging Companies also argue that this Commission's decision in Order No. 03-552 precludes the Commission from "imposing generic interconnection requirements" in this case.[115] The reasoning supporting this argument appears to be as follows: because the Ninth Circuit has ruled that the FCC, rather than state commissions, has jurisdiction to establish intercarrier compensation obligations, the only time that state commissions can impose any interconnection obligation is in an arbitration proceeding. Or, in the Merging Companies' own words, "any decision in this case involving interconnection rights generically would appear to run afoul of the Order No. 03.-352."[116]

That reasoning fails in several respects. First, this argument relies upon an inaccurate interpretation of Order No. 03-352. The Commission's decision in that proceeding was limited to the question of compensation obligations associated with a certain type of traffic (vNXX), it was not a broad ruling on the scope of the Commission's authority over interconnection matters in all instances. The Commission's own recitation of the scope of the Ninth Circuit decision clearly supports this point. As the Commission itself stated, the Ninth Circuit's opinion in *Pacific Bell v. Pac-West Telecom, Inc.*, "precluded the Commission from adopting generic rules

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[115] CenturyLink Br., at 37.
[116] *Id.*

for the compensation of carriers for the transport of vNXX-based, ISP-bound traffic."[117] Thus, the Order did not address "generic" interconnection rights, as the Merging Companies assert, but was instead focused solely on the question of compensation obligations for a specific type of traffic.

The Merging Companies' argument also fails in a second manner: it ignores recent precedent where the Commission has imposed conditions on merging entities that relate to interconnection obligations. For example, in the Verizon/Frontier transaction the Commission conditioned approval of that transaction on Frontier's agreement to extend the term of ICAs for a period of time after closing.[118] The Commission also imposed a condition that prohibits Frontier from increasing rates in any of its ICAs for a period of time.[119] No competitors intervened in that docket. Therefore, the Commission has clearly imposed its authority to establish certain interconnection-related conditions on entities in proceedings like this one (applicants seeking approval of a merger or sale of lines).

III. THE COMMISSION SHOULD ALSO ADOPT THE MOST-FAVORED STATE PROVISION PROPOSED BY STAFF

The Joint CLECs join in Staff's request that the Commission adopt a most-favored state ("MFS") provision and agree with Staff's arguments in support thereof. Adopting the MFS provision would be consistent with prior precedent of the Commission and would ensure that Oregon customers receive the benefit of protections deemed necessary in other jurisdictions, particularly where this proceeding has been curtailed to some extent by virtue of the Merging Companies' request for expedited consideration. Should they desire to avoid an MFS provision

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[117] *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, Docket UM 108, Order No. 03-552 at 1 (2003).
[118] *Verizon-Frontier Merger Order* at Appdx. A, Condition 32 (2010).
[119] *Id.*

altogether, the Merging Companies could simply ask that the Commission withhold its final determination until after all remaining jurisdictions have completed their respective processes.

The Merging Companies note that most states have already approved the Proposed Merger or are nearing completion of their reviews, leaving only three states and the FCC left to consider this transaction. While the Merging Companies appear to suggest that this makes the MFS provision less suitable here, the fact that there are only four remaining jurisdictions actually makes the MFS provision even less objectionable to the Merging Companies, as there are few remaining jurisdictions that could adopt additional conditions that Oregon might incorporate. There is no sound reason for the Commission to deviate from its recent practice of protecting Oregon's public interest with an MFS provision.

CONCLUSION

For the reasons stated above, the Proposed Merger should not be approved unless conditioned up the following commitments in addition to those contained in the Staff Settlement and the MFS provision:

1. Commitment to extend current wholesale/commercial agreements for at least 36 months from the date the Transaction closes subject to the current rates, terms and conditions in effect as of the date the Proposed Merger was filed with the Commission (May, 2010).

2. Commitment to retain Qwest's current OSS for at least three years from the date the Proposed Merger closes and implement third-party testing at commercial volumes with specific performance benchmarks to ensure that any successor OSS performs at no less than the level of Qwest's current OSS.

3. Commitment to ensure open and reasonable access to and interconnection with the Merged Company's combined network through a single point of interconnection' provided that the Merged Company's affiliates' networks in a LATA are interconnected.

4. Commitment that permits CLECs to opt into operating company-specific ICAs in Oregon and "port" such agreements to another state or opt into ICAs in another state and "port" such agreements into Oregon, provided Commission-required terms and pricing are

added to the agreements ported into Oregon.

5. Commitment to provide directory assistance and listing in compliance with existing law.

6. Commitment not to assert the rural exemption or seek suspensions or modifications for rural carriers under Section 251 of the Act.

7. Commitment to a minimum 36-month moratorium on any further non-impairment or forbearance filings.

8. Commitment to implement the APAP proposed by the Joint CLECs as an enforceable mechanism to prevent or discourage any decline in wholesale service quality post merger.

Dated: February 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE
UM 1484

I hereby certify that the **Joint CLEC Reply Brief** was served on the following persons on February 1, 2011, by email to all parties and by U.S. Mail to parties who have not waived paper service:

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