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BEFORE THE ARIZONA CORPORATION COMMISSION  
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KRISTIN K. MAYES  
Chair  
GARY PIERCE  
Commissioner  
PAUL NEWMAN  
Commissioner  
SANDRA D. KENNEDY  
Commissioner  
BOB STUMP  
Commissioner

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AZ CORP COMMISSION  
DOCKET CONTROL

JOINT NOTICE AND APPLICATION OF	)	DOCKET NOS.	T-01051B-10-0194
QWEST CORPORATION, QWEST	)		T-02811B-10-0194
COMMUNICATIONS COMPANY, LLC, QWEST	)		T-04190A-10-0194
LD CORP., EMBARQ COMMUNICATIONS,	)		T-20443A-10-0194
INC. D/B/A CENTURY LINK	)		T-03555A-10-0194
COMMUNICATIONS, EMBARQ PAYPHONE	)		T-03902A-10-0194
SERVICES, INC. D/B/A CENTURYLINK, AND	)		
CENTURYTEL SOLUTIONS, LLC FOR	)		
APPROVAL OF THE PROPOSED MERGER OF	)	<b>PAC-WEST'S NOTICE OF FILING</b>	
THEIR PARENT CORPORATIONS QWEST	)	<b>REBUTTAL TESTIMONY</b>	
COMMUNICATIONS INTERNATIONAL INC.	)		
AND CENTURYTEL, INC.	)		

Pac-West Telecomm, Inc. ("Pac-West") hereby files the attached Rebuttal Testimony of James Falvey, Pac-West Vice President, Regulatory Affairs & Senior Counsel.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of November 2010.

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Arizona Corporation Commission  
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Original and 13 copies of the foregoing  
Filed this 10<sup>th</sup> day of November 2010 with  
Docket Control

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

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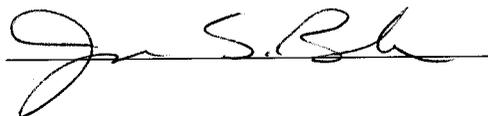
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**REBUTTAL TESTIMONY**

**OF**

**JAMES C. FALVEY**

**VICE PRESIDENT, REGULATORY AFFAIRS**

**ON BEHALF OF**

**PAC-WEST TELECOMM, INC.**

**NOVEMBER 10, 2010**

1 Q. ARE YOU THE SAME JAMES C. FALVEY WHO FILED TESTIMONY IN THIS  
2 PROCEEDING ON BEHALF OF PAC-WEST DATED SEPTEMBER 27, 2010?

3 A. Yes.

4 Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

5 A. The purpose of my rebuttal testimony is to respond to some of the testimony filed by the  
6 Commission Staff. Pac-West is encouraged by the fact that Commission Staff understand  
7 the importance of this proceeding and that Staff has recommended that the Commission  
8 exercise its clear authority to refuse to approve the merger absent certain critical  
9 procompetitive conditions. As part of my rebuttal testimony, I also suggest some  
10 constructive improvements to Staff's conditions. The merger will only be in the public  
11 interest if meaningful procompetitive conditions are imposed. In addition, I respond to the  
12 CenturyLink/Qwest witnesses, who suggest that the Commission does not have authority  
13 to refuse to approve the merger, or to impose conditions that would ensure that local  
14 competition is not extinguished by the larger, more entrenched Merged Company. If the  
15 Merged Company is allowed to continue to erect barriers to entry through protracted  
16 litigation, expensive interconnection disputes, nonpayment of bills, Arizona consumers  
17 will not receive the benefits of lower prices, innovative new services, and improved  
18 customer service. The conditions recommended by Pac-West, the Joint CLECs, and the  
19 Commission Staff provide a means to ensure that the Merged Company will adopt the  
20 best practices, rather than the worst practices, of CenturyLink and Qwest.

21

22

1 **Q. WERE ALL OF THE CONDITIONS PROPOSED BY PAC-WEST AND THE**  
2 **JOINT CLECS ADDRESSED BY STAFF?**

3 A. No. Although Staff honed in on many of the critical issues, there are certain conditions,  
4 such as the ability to port interconnection agreements from other states, that Staff did not  
5 address in Direct Testimony. Although I will not review in this Rebuttal Testimony all  
6 the issues filed in my Direct Testimony, it will be critical for the Commission to parse  
7 through each of the conditions proposed by the CLECs in this proceeding, particularly in  
8 the area of interconnection which remains a fundamental requirement for effective CLEC  
9 competition.. Given the large number of grievances lodged by CLECs in this proceeding  
10 concerning their difficulties with both Qwest and CenturyLink, it is understandable that  
11 the Staff was not able to address all of the proposed conditions in their testimony.

12 **Q. WHICH OF THE CONDITIONS PROPOSED BY STAFF ARE MOST CRITICAL**  
13 **TO PAC-WEST?**

14 A. Conditions 31 and 47 are both of critical importance for Pac-West. With respect to  
15 Condition 31, the Staff has recommend that the Merged Company offer an ICA  
16 amendment that would provide for compensation for all VNXX traffic at the rate of  
17 \$0.0004. Although it appears Staff is intending to help resolve outstanding disputes, Pac-  
18 West currently has an arrangement in place in Arizona whereby it receives compensation  
19 at \$0.0007 for traffic delivered by Qwest for Pac-West to terminate on its network.

20 **Q. WOULD PAC-WEST BE WILLING TO ACCEPT A LOWER RATE IF IT**  
21 **HELPED LEAD TO A SETTLEMENT OF THE PARTIES DISPUTE?**

22 A. Yes. Pac-West filed its complaint in 2005, and the proceeding, already five years old,  
23 could well carry forward for another five years. To make matters worse, for the last two

1 years, Qwest has relied on legal arguments that fly in the face of both FCC and D.C.  
2 Circuit precedent. Although Pac-West firmly believes FCC orders are very clear that all  
3 ISP-bound traffic (including VNXX) must be compensated at \$0.0007, Pac-West would  
4 be willing to accept a rate of \$0.0005 for one year in order to close out the litigation. It is  
5 difficult for Pac-West to go below \$0.0007 because that rate in itself, is well below the  
6 Telecom Act's TELRIC rate as calculated by the Arizona Commission. However, Pac-  
7 West would be willing to agree to settle the currently pending litigation in exchange for a  
8 lower rate of compensation for a set period of time.

9 **Q. DOES PAC-WEST SUPPORT STAFF'S CONDITION 47?**

10 A. Pac-West supports the intent of Staff's Condition 47, but believes it should be  
11 strengthened to ensure that it effectively resolves the outstanding VNXX disputes.  
12 Condition 47 requires that the Merged Company evaluate existing litigation and make a  
13 good faith effort to resolve the issues without further litigation, specifically citing to the  
14 Pac-West/Level 3 VNXX Remand Proceeding. *See, e.g.,* Direct Testimony of Pamela J.  
15 Genung, at 35. The condition is a constructive step in the right direction because Qwest,  
16 to date, has *not* made a good faith effort to resolve the VNXX litigation with Pac-West.  
17 Pac-West made an offer to resolve the VNXX litigation in June 2010. In July 2010,  
18 Qwest declined to make a counteroffer. In the intervening four months, Qwest has made  
19 no counteroffer whatsoever, and has repeatedly and defiantly announced its intent to  
20 continue to litigate the matter to the bitter end. Of course, this type of extensive,  
21 expensive, and obstructive litigation is one of the most effective barriers to entry, and  
22 exceedingly harmful to competitive carrier growth in Arizona. As Staff has recognized,  
23 however, the Commission need not approve the Qwest CenturyLink merger if it finds

1 that the proposal is not in the public interest. Because the Commission has this authority,  
2 this is a critical juncture for the Commission to exert that leverage to put an end to  
3 Qwest's anticompetitive litigation.

4 **Q. DOES THE COMMISSION HAVE THE AUTHORITY TO REQUIRE QWEST**  
5 **TO SETTLE ITS OUTSTANDING LITIGATION?**

6 A. Yes, indirectly. The Commission has the authority to refuse to approve the merger. In  
7 fact, Staff has recommended that the merger Application be denied absent its conditions.  
8 *See, e.g.,* Fimbres Direct at 27. If the VNXX dispute and other litigation create an  
9 unstable environment for Arizona CLECs, the Commission has the authority to defer its  
10 approval until the VNXX dispute and other cases are fully resolved. At that point, it  
11 becomes Qwest's choice whether to continue to litigate on its own, or to settle the cases  
12 sooner rather than later and pursue its merger with CenturyLink.

13 **Q. HOW COULD THE STAFF STRENGTHEN ITS MERGER CONDITION 47?**

14 A. Staff should consider simplifying the condition to say that the Merged Company shall  
15 evaluate existing litigation and settle or litigate to a final, nonappealable order such cases  
16 prior to Commission approval of the merger.

17 **Q. HAS QWEST AGREED IN ITS TESTIMONY TO RESOLVE THE ARIZONA**  
18 **VNXX LITIGATION?**

19 A. No. In fact, Qwest calls Staff's effort to resolve these issues in Condition 47  
20 "unacceptable and inappropriate." Campbell Rebuttal at 4.

21

22

1 **Q. HOW DOES QWEST MISCONSTRUE THE CURRENT STATE OF**  
2 **NEGOTIATIONS WITH PAC-WEST?**

3 A. Remarkably, Qwest makes it sound like it is currently negotiating with Pac-West on the  
4 VNXX issue: "Qwest is generally willing to explore resolution outside of litigation, and  
5 remains willing to do so in these cases at every juncture." Campbell Rebuttal at 4.  
6 Qwest has not, to date responded to any of Pac-West's efforts to settle this litigation.  
7 Qwest also complains that there is no pressure on Pac-West to settle and that Commission  
8 Staff should not make only "one side of a dispute show 'good faith' . . . ." Id. But the  
9 Staff is right on target with its conditions. Pac-West does not need pressure to settle  
10 because Pac-West is already at the bargaining table. It is in fact Qwest that has refused to  
11 talk settlement. Most recently, Qwest called for a full factual hearing which would  
12 further extend the litigation, despite the fact that a proceeding on the briefs, as advocated  
13 by Pac-West, would be sufficient. Moreover, Pac-West has great incentive to settle  
14 because Qwest persists in holding onto its claim that VNXX compensation duly paid to  
15 Pac-West pursuant to a Commission order, must someday be repaid. In light of Qwest's  
16 ongoing intransigence and obfuscation, Pac-West asks the Commission to impose a firm  
17 condition that requires that ongoing litigation be fully resolved prior to merger approval.

18 **Q. DO QWEST AND CENTURYLINK RECOGNIZE THE COMMISSION'S**  
19 **AUTHORITY TO DENY THE APPLICATION, OR IMPOSE CONDITIONS ON**  
20 **THE MERGER?**

21 A. Presumably they do. But both companies have filed testimony that reflects a very limited  
22 view of the Commission's authority to impose conditions. For example, Mr. Hunsucker  
23 takes the extreme position that it is inappropriate for the Commission to impose a

1 condition relating to a matter that is in litigation. Hunsucker Rebuttal at 36, fn. 23. Yet  
2 many critical roadblocks that Qwest has thrown up are going to lead to litigation. In fact,  
3 carving out the entire universe of litigated issues serves to insulate Qwest from review of  
4 some of its most egregious disputes. The Commission should not adopt this limited view  
5 of its own authority.

6 **Q. IN WHAT OTHER WAYS DOES CENTURYLINK VIEW THE COMMISSION'S**  
7 **AUTHORITY TO BE LIMITED?**

8 A. CenturyLink appears to take the position that, if it is not already required by law, then it  
9 cannot be a condition to the Commission's approval of the merger. Mr. Hunsucker, who  
10 does not hold himself out to be an attorney, suggests that, *inter alia*, Section 252(e) of the  
11 Telecom Act precludes the Commission from requiring an ICA amendment as a merger  
12 condition. Yet the FCC, well versed in the details of the Telecom Act, in the BellSouth –  
13 AT&T merger, approved a merger which included ICA extensions, ICA negotiating  
14 templates, and procompetitive porting requirements that are not technically required by the  
15 four corners of the Telecom Act. Hunsucker Rebuttal at 30. Again, if the Commission  
16 deems that the merger without certain procompetitive conditions would be contrary to the  
17 public interest, it is fully within the Commission's authority to deny the application or  
18 impose conditions upon its approval. Given Pac-West's recent experiences with Qwest  
19 delays in negotiating and filing interconnection amendments, it is critical to the  
20 continuing development of competition in Arizona that the ICA-related conditions  
21 proposed by Pac-West and the Joint CLECs be required if the merger is to be approved.  
22

1 Q. DO YOU AGREE WITH MR. HUNSUCKER THAT THE ICA PORTING  
2 CONDITIONS ARE ALSO BEYOND THE COMMISSION'S AUTHORITY?

3 A. No. Again, Mr. Hunsucker adopts a very limited view of the Commission's authority.  
4 Where Qwest or CenturyLink have *already* implemented ICA arrangements in another  
5 state, and a CLEC finds that such procompetitive arrangements would assist its company  
6 in providing competitive services in Arizona, it is not unreasonable for the Merged  
7 Company to port the ICA and its arrangements to Arizona. CenturyLink has already  
8 begun to throw up roadblocks to this procompetitive condition. See Hunsucker Rebuttal at  
9 44-45. One concern raised is that the arrangements would not be "technically feasible."  
10 To begin with, it is unclear why an arrangement that would technically be feasible in New  
11 Mexico, Nevada, Utah, or Colorado would not be technically feasible in Arizona.  
12 Moreover, Pac-West's condition allows the Merged Company to raise specific issues of  
13 "technical infeasibility" once the ported agreement is on file with the Commission.  
14 Nothing in Pac-West's proposal is contrary to 47 C.F.R. § 51.809 because the Merged  
15 Company would still have the ability to claim technical infeasibility. The Commission  
16 should inquire as to why arrangements that work perfectly well in one state, cannot be  
17 made available by the Merged Company in Arizona. In any event, issues of technical  
18 feasibility relating to one small aspect of a contract should not delay or preclude the  
19 Agreement from being ported to Arizona. As for state specific terms, Pac-West's  
20 proposal also allows for state specific pricing to be incorporated into the agreement prior  
21 to filing.

22

1 **Q. DO YOU AGREE WITH MR. HUNSUCKER THAT THE PORTING**  
2 **CONDITION VIOLATES SECTION 251?**

3 A. No, such a requirement would not violate federal law. Mr. Hunsucker claims that a  
4 porting requirement would violate Section 251. Hunsucker Rebuttal at 45. Again, given  
5 that FCC's approval of the BellSouth-AT&T merger – which provided competitive  
6 carriers just such a porting option – it clearly must not violate federal law. Moreover,  
7 when that provision was approved by the FCC, CLECs used the condition to port  
8 procompetitive agreements without the parade of horrors recited in Mr. Hunsucker's  
9 testimony. The Commission should include Pac-West's porting requirement to ensure  
10 that the merger does not only benefit the Merged Company, but also expands competitive  
11 alternatives in Arizona.

12 **Q. IN YOUR VIEW, HAS QWEST'S BEHAVIOR TOWARDS PAC-WEST**  
13 **IMPROVED IN LIGHT OF THE PENDING MERGER APPLICATION?**

14 A. No. In some cases, Qwest has taken more extreme positions than in the past. In my  
15 Direct Testimony, Pac-West complained of unpaid invoices with Qwest. Qwest's billing  
16 disputes have gotten worse in the last two months, and Qwest to date has not been willing  
17 to work through these issues with Pac-West.

18 **Q. WHY IS STAFF'S MERGER CONDITION 25 AN IMPORTANT CONDITION**  
19 **FOR THE COMMISSION TO INCLUDE?**

20 A. Staff's merger condition 25 -- a requirement that Qwest abide by all interconnection  
21 agreements and tariffed arrangements with CLECs -- would seem to be superfluous.  
22 Where Qwest exchange services in an ICA or purchase services from a CLEC tariff, one  
23 would expect that Qwest would make payment for those services. However, in recent

1 weeks, Qwest has increased its disputes and, in one recent instance, failed to make  
2 payment on over \$100,000 of *undisputed* access invoices.

3 **Q. HOW COULD QWEST NOT MAKE PAYMENT ON ACCESS INVOICES THAT**  
4 **WERE NOT DISPUTED?**

5 A. Qwest was reporting payment on Pac-West's June switched access invoice issued by Pac-  
6 West to Qwest. Qwest's payments were significantly delayed, and its payment report  
7 was not issued to Pac-West until four months later on October 8. Leaving the four-month  
8 delay aside, Pac-West's total invoice to Qwest for June was \$224,288.65. Qwest  
9 disputed \$123,429.30 on the June invoice, leaving a total of \$100,859.35 undisputed by  
10 Pac-West and to be remitted with the October report. However, instead of remitting the  
11 \$100,859.35, Qwest claimed that, in its unilateral view, it had *overpaid* on Pac-West's  
12 May invoice and, therefore, it would withhold the entire \$100,859.35. Qwest effectively  
13 took back over \$100,000 of payments that Qwest – but not Pac-West – believed were  
14 overpaid by Qwest on the May invoice. Pac-West raised this issue with Qwest attorneys  
15 on October 21 and 22. Almost three weeks have passed, and Qwest still has not remitted  
16 the undisputed payment due to Pac-West. This is just one example of Qwest's "my way  
17 or the highway" approach to its relationship with CLECs. Pac-West submits that the  
18 Commission should adopt Merger Condition 25, and make it clear that it applies to  
19 billing under Qwest tariffs and payment issues under CLEC tariffs. In addition, Pac-  
20 West requests that the Commission include this dispute as a Condition 47 dispute that  
21 must be resolved prior to the approval of the merger application.

22 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

23 A. Yes, it does.