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BEFORE THE ARIZONA CORPORATION COMMISSION

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2010 DEC -8 P 4: 19

AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE JOINT NOTICE AND)	DOCKET NOS. T-01051B-10-0194
APPLICATION OF QWEST CORPORATION,)	T-02811B-10-0194
QWEST COMMUNICATIONS COMPANY, LLC,)	T-04190A-10-0194
QWEST LD CORP., EMBARQ)	T-20443A-10-0194
COMMUNICATIONS, INC. D/B/A CENTURY)	T-03555A-10-0194
LINK COMMUNICATIONS, EMBARQ)	T-03902A-10-0194
PAYPHONE SERVICES, INC. D/B/A)	
CENTURYLINK, AND CENTURYTEL)	
SOLUTIONS, LLC FOR APPROVAL OF THE)	
PROPOSED MERGER OF THEIR PARENT)	
CORPORATIONS QWEST COMMUNICATIONS)	
INTERNATIONAL INC. AND CENTURYTEL,)	
INC.)	

**NOTICE OF FILING TESTIMONY
REGARDING THE SETTLEMENT
AGREEMENT**

Level 3 Communications, LLC, McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services, and tw telecom of arizona llc hereby give notice that they are filing the attached Testimony of Timothy J. Gates.

RESPECTFULLY SUBMITTED this 8th day of December 2010.

ROSHKA DEWULF & PATTEN, PLC

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Arizona Corporation Commission
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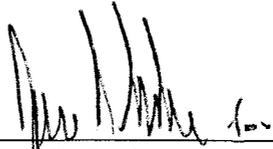
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN MAYES, Chairman
GARY PIERCE, Commissioner
SANDRA KENNEDY, Commissioner
PAUL NEWMAN, Commissioner
BOB STUMP, Commissioner

JOINT NOTICE AND APPLICATION OF)	
QWEST CORPORATION, QWEST)	
COMMUNICATIONS COMPANY, LLC,)	
QWEST LD CORP., EMBARQ)	Docket No. T-01051B-10-0194
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SOLUTIONS, LLC FOR APPROVAL OF THE)	Docket No. T-03902A-10-0194
PROPOSED MERGER OF THEIR PARENT)	
CORPORATIONS QWEST)	
COMMUNICATIONS INTERNATIONAL INC.))	
AND CENTURYTEL, INC.)	

TESTIMONY

OF

TIMOTHY J GATES

REGARDING THE SETTLEMENT AGREEMENT

ON BEHALF OF

**tw telecom of arizona llc; Level 3 Communications, LLC; and
McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services**

December 8, 2010

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1 **I. INTRODUCTION AND PURPOSE**

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

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

5 **Q. ARE YOU THE SAME TIMOTHY GATES WHO FILED DIRECT TESTIMONY**
6 **IN THIS PROCEEDING ON SEPTEMBER 27, 2010, AND SURREBUTTAL**
7 **TESTIMONY ON NOVEMBER 10, 2010?**

8 A. Yes.

9 **Q. ON WHOSE BEHALF ARE YOU FILING THIS TESTIMONY?**

10 A. My testimony is being filed on behalf of a number of CLECs: tw telecom of arizona llc;
11 Level 3 Communications, LLC; and McLeodUSA Telecommunications Services, Inc. d/b/a
12 PAETEC Business Services (collectively referred to in this testimony as "Joint CLECs").

13 **Q. PLEASE EXPLAIN THE PURPOSE OF YOUR TESTIMONY.**

14 A. Qwest and CenturyLink (hereafter referred to collectively as "Joint Applicants") have
15 reached a proposed settlement with the Utilities Division Staff ("Staff") and the Residential
16 Utility Consumer Office ("RUCO") (hereafter referred to as the "proposed settlement").
17 According to the proposed settlement, it addresses and resolves the outstanding issues
18 among the settling parties related to CenturyLink's proposed acquisition of Qwest.
19 Pursuant to Procedural Order dated November 23, 2010, the Administrative Law Judge
20 directed settling parties to file testimony in support of the proposed settlement by
21 December 1, 2010, and non-settling parties to file testimony addressing the proposed

1 settlement by December 8, 2010. On December 1, 2010, Staff submitted the testimony of
2 Elijah Abinah and Joint Applicants submitted the testimony of James Campbell, Jeff
3 Glover, Michael Hunsucker and Karen Stewart in support of the proposed settlement. The
4 purpose of my testimony is to address the proposed settlement, as well as the Staff and
5 Joint Applicants' testimony in support of the proposed settlement. My testimony will
6 explain why the proposed settlement does not adequately address certain concerns critical
7 to the Joint CLECs, concerns that will lead to merger-related harm to local competition and
8 the public interest.

9 **Q. HOW IS YOUR TESTIMONY ORGANIZED?**

10 A. My testimony will focus on four particularly critical areas: (i) inadequate extension of
11 Qwest Operations Support Systems ("OSS"); (ii) inadequate extension of wholesale
12 agreements; (iii) failure to include an Additional Performance Assurance Plan ("APAP");
13 and (iv) inadequate moratoriums on non-impairment filings and forbearance petitions. The
14 Joint CLECs explained in detail in their prior testimony the merger-related public interest
15 harms posed by the proposed transaction in relation to OSS integration, continued
16 availability of wholesale products and services at current rates, and post-merger wholesale
17 service quality deterioration. In my testimony below, I will explain why the proposed
18 settlement does not adequately address these issues and how the conditions in the proposed
19 settlement can be supplemented to rectify these shortcomings. The Commission should not
20 approve the proposed transaction without the addition of a limited number of additional
21 commitments/conditions addressing these concerns.

1 **Q. ARE YOU ADDRESSING ALL OF THE CONDITIONS IN THE PROPOSED**
2 **SETTLEMENT?**

3 A. No. My testimony focuses on the conditions in the proposed settlement related to
4 “Wholesale Operations” (proposed settlement conditions 19 through 31).

5 **Q. DO YOU HAVE ANY GENERAL COMMENTS ABOUT THE WHOLESALE**
6 **CONDITIONS IN THE PROPOSED SETTLEMENT?**

7 A. Yes. I appreciate Staff’s acknowledgment that conditions related to Qwest’s wholesale
8 operations are needed in order for the proposed transaction to be in the public interest, as
9 well as Staff’s efforts in attempting to craft a settlement agreement to address concerns of
10 Qwest’s wholesale customers. The wholesale conditions in the proposed settlement are not
11 *bad* or contrary to the public interest as far as they go; the problem is that they fall short of
12 addressing merger-related harms associated with the proposed transaction in a number of
13 critical areas.

14 **Q. ARE YOU DISPUTING THAT THE SETTLEMENT PROVIDES BENEFITS?**

15 A. No. I am concerned about the sufficiency of the commitments in the proposed settlement.
16 Staff and Joint Applicants repeatedly state that CLECs (including non-settling CLECs) will
17 receive benefits from the commitments in the proposed settlement,¹ but this should not be
18 the focus when evaluating the adequacy of the proposed settlement. Instead, the proper
19 focus is whether the proposed settlement sufficiently addresses the risks of harm to the

¹ Direct Testimony of Elijah Abinah on behalf of Arizona Corporation Commission Utilities Division, December 1, 2010 (“Abinah Testimony”) at p. 18-23; Testimony in Support of Settlement Agreement of James Campbell on behalf of Qwest, December 1, 2010 (“Campbell Testimony”) at p 4, lines 14-16; and Testimony in Support of Settlement Agreement of Michael Hunsucker on behalf of CenturyLink, December 1, 2010 (“Hunsucker Testimony”) at p. 7, lines 11-13.

1 public interest posed by the proposed transaction. I contend that it does not. As a result,
2 the Commission should supplement the conditions in the proposed settlement to address the
3 specific shortcomings identified in this testimony before finding that the proposed
4 transaction is in the public interest. The most important conditions not addressed or
5 addressed inadequately by the proposed settlement that should be added, include at a
6 minimum:

- 7 1. The Merged Company will use and offer to wholesale customers the
8 legacy Qwest OSS for at least three years (Joint CLEC condition 19).
- 9 2. Robust, transparent third party testing will be conducted for any
10 replacement OSS that replaces a Qwest system that was subject to
11 third party testing (Joint CLEC condition 19b).
- 12 3. The Applicable Time Periods for non-UNE commercial and wholesale
13 agreements and tariffs should be the Defined Time Period initially
14 proposed by Joint CLECs, or at a minimum, three years.
- 15 4. The extension of non-UNE commercial and wholesale agreements and
16 tariffs, including term and volume discount plans, should apply to
17 wholesale agreements in place as of the merger filing date, or at least
18 in effect as of the end of 2010. As noted in (3) above, the minimum
19 time period for these agreements should be three years.
- 20 5. The Additional PAP should apply in addition to the QPAP (Joint
21 CLEC condition 4a).]
- 22 6. The moratorium on Qwest requests to reclassify as “non-impaired”
23 wire centers and for forbearance should apply for the Defined Time
24 Period initially proposed by Joint CLECs (Joint CLEC condition 14).

1 **II. PRIMARY SHORTCOMINGS OF THE PROPOSED SETTLEMENT**

2 **A. *The proposed settlement is based largely on a settlement with one CLEC that***
3 ***reflects one CLEC’s perspective and does not adequately protect other CLECs or***
4 ***competition in general.***

5 **Q. STAFF STATES THAT THE WHOLESALE CONDITIONS IN THE PROPOSED**
6 **SETTLEMENT ARE BASED ON THE CONDITIONS IN THE SETTLEMENT**
7 **AGREEMENT BETWEEN JOINT APPLICANTS AND INTEGRA.² DO THE**
8 **CONDITIONS IN THE INTEGRA SETTLEMENT ADEQUATELY ADDRESS**
9 **ALL MERGER-RELATED HARMS TO CLECS AND COMPETITION?**

10 **A.** No. It is important to put the settlement agreement between Joint Applicants and Integra in
11 context. That agreement reflects the perspective and business needs of a single CLEC out
12 of the numerous CLECs that have intervened in this proceeding and the other CLECs who
13 did not intervene. Indeed, the Integra Settlement expressly states that it addresses
14 “Integra’s concerns” and reflects “Integra’s perspective[.]”³ The Integra Settlement
15 reflects compromises that Integra believed were in its own business interests, presumably
16 taking into account its strategy for competing in the market and its own systems or
17 operations. None of the other Joint CLECs – each with a different business plan – was
18 party to that settlement or a participant in its negotiation.

19

² Abinah Testimony at p. 9, lines 1-8.

³ Settlement Agreement between Qwest/CenturyLink and Integra (“Integra Settlement”) at p. 1.

1 **Q. WHY IS A SINGLE PARTY SETTLEMENT NOT SUFFICIENT TO PROTECT**
2 **THE PUBLIC INTEREST?**

3 A. Integra negotiated the settlement to meet its specific business needs. That does not mean
4 that Integra was wrong to enter into the settlement, it just means that the settlement
5 obviously was limited. The public interest in (and benefit from) competition depends on
6 the availability of services from more providers than just the ILEC and one CLEC. Robust
7 competition encompasses multiple CLEC options for consumers, each with different
8 network approaches, target markets and business plans. It also anticipates and
9 encompasses a marketplace that is sufficiently open to new competitors in the future.
10 Hallmarks of effective competition are the existence of multiple alternatives (not just one
11 or two), diversity among alternatives, and conditions conducive to efficient entry today and
12 in the future. The Joint CLECs differ from Integra in a number of important ways, and as
13 such, conditions designed to address “Integra’s concerns” – based substantially on Integra’s
14 need for conditioned loops – does not ensure that the proposed transaction will not
15 negatively impact other CLECs or competition in general.

16 **Q. PLEASE ELABORATE ON SOME OF THE DIFFERENCES BETWEEN**
17 **INTEGRA AND OTHER CLECS THAT CAUSES THEIR CONCERNS AND**
18 **PRIORITIES TO DIFFER.**

19 A. CLECs have different OSS capabilities and use different functions and interfaces of
20 Qwest’s OSS, depending on whether they purchase UNEs and the development of their
21 own systems and network. CLECs use different non-UNE commercial and wholesale
22 agreements and tariffs and rely on them to varying degrees to provide different services to

1 end user customers, and CLEC agreements have differing expiration dates. As a result, the
2 compromises made by Integra may not have been acceptable to other CLECs.

3 **Q. CAN YOU PROVIDE SOME EXAMPLES?**

4 A. Yes. For example, one of the concerns that is particularly important to Integra -- that was
5 not so important to some other CLECs due to differing business plans -- is line
6 conditioning for xDSL loops. The Integra Settlement contains condition 14 that discusses
7 an extensive line conditioning amendment and related issues, and presumably Integra was
8 willing to compromise on other issues to receive the line conditioning commitment. As
9 such, the conditions in the Integra settlement were established, in part, due to the
10 availability of the line conditioning commitment that is not overly important to some
11 CLECs and which did not make it into the proposed settlement in any event. tw telecom
12 does not offer xDSL service to Arizona customers and has no plans to do so. Therefore,
13 the concerns that led Integra to pursue line conditioning concessions and make
14 compromises to get this commitment are not shared by tw telecom because of its differing
15 business plan.

16 Another example relates to the electronic bonding capabilities of Qwest's application-to-
17 application OSS. As discussed by Mr. Haas, PAETEC has built internal interfaces and
18 back office systems in order to electronically bond with Qwest's current OSS. PAETEC
19 relies more heavily on Qwest's application-to-application OSS than does Integra.
20 Therefore, while it may have been acceptable for Integra to accept a two year extension of
21 Qwest's OSS as a compromise for the line conditioning commitment, for example, this two

1 year period is not acceptable for PAETEC who has built extensive internal systems based
2 on Qwest's existing OSS – internal systems that would need to be modified or replaced
3 when Qwest's OSS changes.

4 **Q. DO YOU AGREE WITH STAFF'S STATEMENT THAT INTEGRA'S**
5 **AGREEMENT TO MANY OF THE CONDITIONS IN THE PROPOSED**
6 **SETTLEMENT "SPEAKS VOLUMES REGARDING THE ADEQUACY OF THE**
7 **CONDITIONS AND THEIR BENEFITS TO CLECS IN ARIZONA"?**⁴

8 A. No, I disagree although the disagreement may be a matter of degree. Again, because of
9 differences between Integra and other CLECs in Arizona, what Integra may agree to or
10 accept as a compromise may have little if any relevance to the adequacy of that same
11 compromise for other CLECs such as Level 3, PAETEC or tw telecom.⁵ The Joint CLECs
12 are unable to compromise further on the remaining issues discussed in my testimony
13 because they are critical to adequately and effectively address their concerns and the public
14 interest harms posed by the proposed transaction.

15

⁴ Abinah Testimony at p. 9, lines 19-22.

⁵ Mr. Hunsucker states: "In fact, it should be noted that Integra was a member of the Joint CLEC interveners prior to Integra settling with the Joint Applicants." Hunsucker Testimony at p. 4, lines 4-5. While it is true that Integra was previously a member of the Joint CLECs in this proceeding, I strongly disagree with Mr. Hunsucker's suggestion that because one CLEC, from the numerous Joint CLECs, settled with Joint Applicants, that the settlement with that one CLEC comprehensively addresses all CLECs' concerns. Certain CLECs decided to pool their resources for participating in the merger review proceedings in order to intervene and express their concerns in the most cost-effective manner possible. This included jointly sponsoring my testimony as Joint CLECs. As I can testify to from first-hand knowledge, each of the numerous CLECs I represented in the merger review proceedings had certain unique concerns and priorities that differed from other CLECs in the coalition due to differing business plans and circumstances.

1 **Q. MR. HUNSUCKER STATES THAT “IT IS NOT REASONABLE TO EXPECT THE**
2 **JOINT APPLICANTS TO SATISFY EVERY CLEC AND TO ADDRESS EVERY**
3 **CLEC CONCERN AS PART OF THIS MERGER APPROVAL PROCEEDING.”⁶**
4 **PLEASE RESPOND.**

5 A. Given the modest additions that the Joint CLECs are seeking to the proposed settlement, it
6 is perfectly reasonable to expect the Joint Applicants to satisfy the Joint CLECs. This is
7 particularly true in light of Joint Applicants’ statements about how they “value[] CLECs
8 and recognize[] them as extremely important...”⁷ If the Joint Applicants fail to address the
9 concerns raised by Joint CLECs about the proposed settlement, the Commission should
10 address these concerns by conditioning any merger approval on the additional conditions
11 discussed in this testimony.

12 In addition, the Joint CLECs’ proposed conditions do not cover “every CLEC concern”
13 about their wholesale relationship with Qwest as Mr. Hunsucker suggests, nor do they
14 address “every CLEC concern” about the proposed transaction. The Joint CLECs’
15 proposed conditions list which contains 30 conditions (Exhibit TG-8 to my direct
16 testimony) represents a focused list of conditions to address the concerns of multiple
17 CLECs that was carefully crafted to address the specific harms posed by CenturyLink’s
18 proposed acquisition of Qwest. Indeed, about half of those initial conditions simply sought
19 to maintain the status quo by asking the Merged Company to comply with state and federal
20 law. Now, given the proposed settlement, the areas of disagreement have been narrowed to

⁶ Hunsucker Testimony at p. 7, lines 10-11.

⁷ Rebuttal Testimony of Michael Williams on behalf of Qwest, October 27, 2010 (“Williams Rebuttal”) at p. 21, lines 16-17.

1 a more limited number of particularly important areas. Adopting the limited number of
2 additional wholesale conditions would not address “every CLEC concern” and would
3 certainly not constitute an “unconditional surrender” by the Joint Applicants as Mr.
4 Hunsucker claims.⁸ Rather, the CLECs are focusing on those issues that they believe are
5 critical to their ability to effectively compete and their current list of conditions reflects a
6 number of significant concessions.

7 ***B. Joint Applicants have not made adequate commitments regarding OSS.***

8 **Q. PLEASE EXPLAIN HOW THE OSS CONDITIONS IN THE PROPOSED**
9 **SETTLEMENT ARE INADEQUATE.**

10 A. In the Qwest legacy territory, the Merged Company should use and offer to wholesale
11 customers the legacy Qwest Operational Support Systems (“OSS”) for a minimum of *three*
12 years following merger closing date (Joint CLEC Condition 19).⁹ This is the absolute
13 minimum time period associated with the three to five year integration/synergy timeframe.
14 The proposed settlement states that the Merged Company will use and offer to wholesale
15 customers the legacy Qwest OSS for at least *two* years or until July 1, 2013, whichever is
16 later (proposed settlement condition 19). The timeframe in the proposed settlement is
17 inadequate because it does not cover the minimum synergy timeframe, and as a result,
18 CLECs would face significant risk of harm related to OSS post-merger (albeit for a shorter
19 time period than would otherwise be the case absent the proposed settlement).

20

⁸ Hunsucker Testimony at p. 22, line 5.

⁹ The Joint CLEC proposed conditions list is attached to my direct testimony as Exhibit TG-8.

1 **Q. WHAT IS THE “SYNERGY TIMEFRAME” YOU REFER TO ABOVE?**

2 A. The “synergy timeframe” is the time period during which the Joint Applicants will be
3 integrating the two companies and making merger-related changes to achieve synergy cost
4 savings.¹⁰ CenturyLink has stated that they anticipate total synergy savings of \$625 million
5 to be “fully recognized over a three-to-five year period following closing.”¹¹ Therefore,
6 the “synergy timeframe” associated with the proposed transaction is three to five years (and
7 potentially longer if the Merged Company experiences integration problems¹²). Under the
8 Joint Applicants’ “best case scenario” assumptions, three years is the absolute minimum
9 synergy timeframe.

10 **Q. WHY IS IT IMPORTANT THAT THE TIME PERIOD FOR QWEST OSS**
11 **AVAILABILITY BE FOR AT LEAST THREE YEARS?**

12 A. The ultimate question regarding appropriate time frames for merger conditions is what time
13 period is necessary to protect the public interest.¹³ Here, the need for protection is greater
14 than in prior mergers. The Joint Applicants propose the purchase of a BOC by a non-BOC
15 ILEC that has been acting in many cases as primarily a rural carrier claiming exemption
16 from ILEC, much less BOC, obligations. Because the BOC has greater wholesale
17 obligations and more complex systems than a non-BOC ILEC, and certainly more
18 obligations and complex systems than an exempt (or, self-proclaimed exempt) rural ILEC,

¹⁰ Direct Testimony of Timothy Gates on behalf of Joint CLECs, September 27, 2010 (“Gates Direct”) at p. 113.

¹¹ Direct Testimony of Jeff Glover on behalf of CenturyLink, May 24, 2010 (“Glover Direct”) at p. 13, lines 11-16.

¹² Gates Direct at pp. 111-112.

¹³ *In the Matter of Embarq Corporation and CenturyTel, Inc. Joint Application for Approval of Merger between the Two Companies and Their Regulated Subsidiaries*, Oregon Public Utility Commission Docket No. UM1416, Order No. 09-169, May 11, 2009 (“Oregon Embarq-CenturyTel Merger Order”), 2009 Ore. PUC LEXIS 152, *11 (rejecting the Joint Applicants proposal to reduce various conditions from five years to three years, concluding that the longer five year period “serves to protect customers should a significant negative event occur with the new parent” and “is a more reasonable means to protect customers.”)

1 such ILECs lack a long history of fulfilling such commitments. Further, CenturyLink has
2 never processed the number and types of wholesale orders that Qwest routinely processes.
3 Wholesale customers therefore need protective conditions firmly in place throughout the
4 time that merger-related changes are occurring and the time during which the results of
5 those changes continue to affect customers and competition.

6 **Q. MR. HUNSUCKER SUGGESTS THAT THE JOINT CLEC OSS CONDITIONS**
7 **CONTAIN “UNREASONABLE ARTIFICIAL TIME LIMITATIONS.”¹⁴ IS THIS**
8 **AN ACCURATE CHARACTERIZATION OF THE JOINT CLEC CONDITIONS?**

9 A. No. The time period in the Joint CLECs’ proposed OSS condition 19 – “at least three
10 years” – is neither unreasonable nor artificial. Mr. Hunsucker does not explain how the
11 Merged Company offering to wholesale customers the legacy Qwest OSS for about one
12 year longer than provided for in the proposed settlement can be unreasonable. Given the
13 enormous amount of time, money and effort that has been invested over the last decade to
14 get Qwest’s OSS to where they are today and to build CLEC internal systems to interface
15 with Qwest’s OSS, the Joint CLECs’ modest request for the Merged Company to make
16 available Qwest’s OSS for one year longer than their current commitment is perfectly
17 reasonable. It took more than three years just to test and evaluate Qwest’s OSS to
18 determine if it was sufficient to meet the requirements of Section 271.¹⁵ So, if the Merged
19 Company decides to modify or replace Qwest’s OSS post-merger, it is reasonable to
20 assume that it will take at least three years (i) to decide which OSS the Merged Company
21 intends to use going forward, (ii) to make changes to Qwest’s OSS, (iii) to test and evaluate

¹⁴ Hunsucker Testimony at p. 11, line 19.

¹⁵ Exhibit TG-2 at p. 2.

1 the new OSS to ensure that it can handle the commercial volumes in Qwest's territory and
2 provide CLECs a meaningful opportunity to compete, (iv) to allow cooperative testing of
3 the systems with the CLECs to ensure that they meet the CLEC needs; and (v) for CLECs
4 to develop internal systems to interface with the new OSS systems.

5 **Q. DOES MR. HUNSUCKER'S CLAIM ABOUT THE THREE YEAR TIME PERIOD**
6 **BEING "ARTIFICIAL" FARE ANY BETTER?**

7 A. No. This claim does not square with the facts. The three year period is tied to
8 CenturyLink's own synergy timeframe. The time period in the proposed settlement
9 condition 19 ("at least two years, or until July 1, 2013, whichever is later"), on the other
10 hand, has no basis in the record and is not based on the facts associated with the proposed
11 transaction. The Joint Applicants' own synergy timeframe indicates that the Merged
12 Company's integration efforts will extend well beyond two years as well as July 1, 2013,
13 which means that the time period is too short to adequately address merger-related harms to
14 the public interest.

15 **Q. IS THE TWO-YEAR TIME PERIOD IN CONDITION 19 OF THE PROPOSED**
16 **SETTLEMENT BASED ON THE INTEGRA SETTLEMENT?**

17 A. Yes, apparently so. Both the proposed settlement and the Integra Settlement requires the
18 Merged Company to, in the Qwest ILEC service territory, use and offer to wholesale
19 customers the legacy Qwest OSS "for at least two years, or until July 1, 2013, whichever is
20 later..."

1 **Q. IS IT SAFE TO ASSUME THAT A TIME PERIOD FOR QWEST OSS**
2 **EXTENSION AGREED TO BY INTEGRA ADEQUATELY ADDRESSES**
3 **MERGER-RELATED HARM TO OTHER CLECS, OR TO COMPETITION IN**
4 **GENERAL?**

5 A. No. The two year time period in the Integra Settlement is obviously a compromise from
6 Integra's perspective,¹⁶ but it cannot be taken as an appropriate compromise for other
7 CLECs. As noted above, PAETEC has developed its own internal interfaces and back
8 office systems for electronically bonding with Qwest's application-to-application OSS. I
9 discussed some of the efficiencies and benefits brought about by PAETEC's effort to
10 develop its own systems to interface with Qwest in my direct testimony.¹⁷ As discussed by
11 Mr. Haas, PAETEC relies more heavily on internally-developed interfaces and back office
12 systems to interface with Qwest than does Integra. Therefore, while an approximate two-
13 year extension of Qwest's OSS may be an acceptable compromise for Integra based on
14 Integra's circumstances, it is not adequate for PAETEC who would need to revamp more
15 of its own internal systems and databases in response to a change to Qwest's OSS and
16 would face a greater challenge and potentially higher costs to adapt to such changes on a
17 shorter timeframe.

18

¹⁶ Integra originally proposed to require the Merged Company to maintain legacy Qwest OSS for at least three years. Joint CLEC proposed condition 19.

¹⁷ Gates Direct at pp. 52-54.

1 **Q. MR. HUNSUCKER STATES THAT THE TWO YEAR OSS EXTENSION IS**
2 **SUFFICIENT BECAUSE THERE WILL BE NO OVERLAP BETWEEN THE OSS**
3 **INTEGRATION EFFORTS ASSOCIATED WITH THE PROPOSED**
4 **TRANSACTION AND THE ONGOING INTEGRATION OF EMBARQ.¹⁸ DOES**
5 **THE LACK OF OVERLAP IN INTEGRATION ACTIVITIES WARRANT A**
6 **SHORTER OSS EXTENSION?**

7 A. No. Whether or not the integration of Embarq is ongoing at the time CenturyLink begins
8 integrating Qwest, the undisputed facts in this case support an OSS extension no less than
9 three years. The time period during which Qwest's existing OSS should continue to be
10 available should be tied to the synergy timeframe because it is that time period that defines
11 when CLECs are at the greatest risk of merger-related harm due to OSS integration.

12 This three to five year time period is indicative of the complexity involved in integrating
13 Qwest – a BOC with complex systems and regulatory obligations with which CenturyLink
14 has no experience. In other words, the more complex merger integration will be, the longer
15 it takes to integrate the companies to produce synergy savings. By way of example, for the
16 acquisition of Embarq, CenturyLink estimated that it would fully recognize its estimated
17 synergy savings “within the first three years of operation.”¹⁹ However, because integrating
18 Qwest will be more complex than integrating Embarq, CenturyLink has estimated that it
19 would fully recognize its estimated synergy savings from the proposed transaction over a

¹⁸ Hunsucker Testimony at p. 11.

¹⁹ *In the Matter of Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, WC Docket No. 08-239, FCC 09-54, June 25, 2009 (“FCC CenturyTel/Embarq Merger Order”), ¶ 7 and Declaration of R. Stewart Ewing, Jr. on behalf of CenturyTel, WC Docket No. 08-238, ¶ 2.

1 longer period: three-to-five years following the merger. While a time period shorter than
2 three years may have been appropriate for conditions related to the CenturyTel/Embarq
3 merger due to the shorter synergy timeframe for that merger, a time period of less than a
4 minimum three years for OSS conditions associated with the proposed transaction is
5 inadequate because of proposed transaction's longer synergy timeframe.

6 **Q. BESIDES THE DURATION OF QWEST'S OSS EXTENSION, ARE THERE**
7 **OTHER SIGNIFICANT SHORTCOMINGS IN THE JOINT APPLICANTS'**
8 **COMMITMENTS REGARDING OSS?**

9 A. Yes. Absent from the proposed settlement is any requirement for third-party OSS testing.
10 This is a serious omission. The Merged Company should be required to conduct
11 independent third-party testing similar to that used in the Regional Oversight Committee
12 process during the Qwest 271 proceedings for any OSS that replaces a Qwest OSS that has
13 undergone third-party testing.²⁰ As explained at pages 118-119 of my surrebuttal
14 testimony, the FCC has determined that the most probative evidence that OSS are
15 operationally ready is actual commercial usage. Since CenturyLink and Qwest use
16 different OSS today, there is no commercial usage data indicating whether and to what
17 extent CenturyLink's OSS could handle commercial volumes if integrated into Qwest's
18 legacy territory. Absent actual commercial usage, the FCC said that the second best option
19 is an independent, blind, third-party OSS test. Despite the importance of third-party
20 testing, it is not a requirement of the proposed settlement and CenturyLink has clearly
21 stated that it does not intend to conduct third-party testing of replacement OSS on its own

²⁰ Gates Direct at pp. 121-123; Surrebuttal Testimony of Timothy Gates on behalf of Joint CLECs, November 10, 2010 ("Gates Surrebuttal") at pp. 117-122 and Exhibit TG-2.

1 volition.²¹ This should be rectified by adopting the provisions of Joint CLEC Condition
2 19(b).

3 **C. *Joint Applicants have not made adequate commitments regarding the continued***
4 ***provision of non-UNE wholesale services.***

5 **Q. ARE QWEST'S WHOLESALE SERVICES ESSENTIAL TO THE ABILITY OF**
6 **CLECS TO CONTINUE PROVIDING ARIZONA CONSUMERS WITH**
7 **COMPETITIVE LOCAL SERVICE ALTERNATIVES?**

8 A. Yes. This is evident from the FCC's order denying Qwest's petition for forbearance in the
9 Phoenix Arizona Metropolitan Statistical Area ("MSA"), which I discussed at pages 86-89
10 of my surrebuttal testimony. In this order, issued less than six months ago, the FCC
11 explains that "Qwest remains dominant" in "wholesale markets" and refers to Qwest as the
12 "sole provider of wholesale facilities and services[.]"²² The FCC also concluded that
13 CLECs relied on Qwest's wholesale services to compete with Qwest for mass market and
14 enterprise end user customers.²³

²¹ Hearing Transcript Vol. 2B (public), Minnesota Docket No. P421, et al./PA-10-456, October 6, 2010, at pp. 88-89.

²² Gates Surrebuttal at pp. 86-87, quoting *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113, released June 22, 2010 ("Qwest Phoenix Forbearance Order") at ¶ 34.

²³ Qwest Phoenix Forbearance Order, ¶ 80 ("Although there are several other providers that serve some mass market customers in the Phoenix MSA, they are 'fringe' competitors that are able to compete only by relying extensively on UNEs and other Qwest wholesale services.") and ¶ 87 ("Based on the record evidence, we find competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest's wholesale services...")

1 **Q. IS THIS DEPENDENCE ON QWEST'S WHOLESALE SERVICES LIMITED TO**
2 **UNBUNDLED NETWORK ELEMENTS ("UNES") PROVIDED UNDER SECTION**
3 **251 OF THE ACT?**

4 A. No. Many CLECs rely significantly on non-UNEs purchased from Qwest under
5 commercial and wholesale agreements and tariffs. These non-UNEs are typically the exact
6 same facilities as their UNE counterparts – the only difference is in the terms and rates
7 under which those facilities are provided.²⁴ Therefore, it is essential for protections against
8 merger-related harm to cover the breadth and diversity of local competition as it relates to
9 the availability of wholesale services on which CLECs rely to provide competitive local
10 service.

11 **Q. PLEASE ELABORATE ON THE EXTENT TO WHICH CLECS IN ARIZONA**
12 **RELY ON NON-UNES PURCHASED FROM QWEST UNDER COMMERCIAL**
13 **OR WHOLESALE AGREEMENTS?**

14 A. CLECs continue to rely upon Qwest's Local Service Platform ("QLSP") products for
15 provisioning of services in Arizona. These products are commercial offerings that are
16 comparable to Qwest's retail products. For instance, PAETEC provides services to a
17 significant number of its customers in Arizona over QLSP services, while it continues to

²⁴ Accordingly, I disagree with Mr. Hunsucker's claim that "[c]omparing Section 251 ICA and non-Section 251 agreements is like comparing apples and oranges." Hunsucker Testimony at p. 14, lines 11-12. To the contrary, facilities provided under non-UNE (or non-Section 251) agreements are the very same facilities as provided under UNE (or Section 251) agreements, the only difference is the price paid by the CLEC for the facility. The non-UNE prices are significantly higher than UNE prices. Whether or not the facility is provided under a Section 251 agreement or non-Section 251 agreement, the availability of that facility at just and reasonable rates (and cost-based rates in the case of UNEs) is critical for CLECs to be able to compete in the local telecommunications market. Indeed, that is the underpinning of Section 271 of the Telecommunications Act, which requires BOCs like Qwest to continue to make available certain wholesale services even if those wholesale services are no longer required under Section 251 of the Act.

1 purchase UNEs. PAETEC's offerings are discussed in the testimony of Mr. Haas. CLECs
2 also continue to rely extensively on Qwest special access services – frequently through
3 Qwest's Regional Commitment Program or "RCP" -- to gain access to customers. tw
4 telecom's reliance upon special access under a RCP is described later in this testimony.

5 As noted in the FCC's Qwest Forbearance Order regarding the Phoenix MSA, "...there is
6 no record evidence of significant competition for the wholesale products used to serve
7 either mass market or enterprise customers."²⁵ The pricing and quality of wholesale
8 services, such as QLSP, dark fiber, special access, etc. are critical to the CLECs'
9 provisioning of services to consumers in Arizona. This continued dependence supports the
10 Joint CLECs' need for an extension of the non-UNE commercial and wholesale agreements
11 for at least three years.

12 **Q. WHAT CONCERNS DO YOU HAVE ABOUT THE PROPOSED SETTLEMENT'S**
13 **CONDITION RELATING TO COMMERCIAL AND WHOLESALE**
14 **AGREEMENTS AND TARIFFS?**

15 A. The biggest problem is the Applicable Time Periods associated with the non-UNE
16 commercial and wholesale agreements and tariffs. The Applicable Time Period represents
17 the length of time by which the wholesale agreement will be made available without
18 termination/grandparenting, changes to terms and conditions, or increases in rates.²⁶ The

²⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113, released June 22, 2010 ("Qwest Phoenix Forbearance Order") at ¶ 96.

²⁶ The proposed settlement defines the "Extended Time Period" as the unexpired term or for at least the Applicable Time Period, whichever occurs later. Proposed settlement condition 23.

1 Applicable Time Periods in the proposed settlement for the non-UNE offerings are as
2 follows:

- 3 • Commercial Agreements: at least eighteen months (proposed settlement condition
4 23b)
- 5 • Wholesale Agreements: at least eighteen months (proposed settlement condition
6 23c)
- 7 • Tariffs: at least twelve months (proposed settlement condition 23d)

8 These time periods are significantly shorter than the minimum three-year synergy
9 timeframe, and are also significantly shorter than the minimum three-year Applicable Time
10 Period associated with interconnection agreement extensions (proposed settlement
11 condition 23a). These shorter timeframes for non-UNE wholesale agreements place
12 CLECs who rely on them at a competitive disadvantage relative to other CLECs who
13 purchase wholesale services as UNEs, and therefore, receive a longer three-year period of
14 service and rate stability. CLECs should not be discriminated against or penalized because
15 of their mode of entry. Instead, the commitments related to wholesale service availability
16 and rate stability should be consistent for all wholesale agreements, whether
17 interconnection agreements, commercial agreements, wholesale agreements, or tariffed
18 products.

19 The fact that Joint Applicants have not committed to leave in place commercial and
20 wholesale agreements and tariffs as long as the agreed-upon three-year interconnection
21 agreement extension shows that CenturyLink does not intend to provide the needed
22 stability regarding these non-UNE wholesale services on its own post-merger. It also
23 confirms that additional commitments are needed, as it signals intent by CenturyLink to

1 eliminate or raise prices for these wholesale services early in the three-to-five year synergy
2 timeframe.

3 **Q. HOW CAN THE COMMISSION SUPPLEMENT THE CONDITIONS IN THE**
4 **PROPOSED SETTLEMENT TO ENSURE STABILITY FOR THE NUMEROUS**
5 **CLECS THAT RELY ON WHOLESALE INPUTS PROVIDED UNDER NON-UNE**
6 **WHOLESALE COMMERCIAL AND WHOLESALE AGREEMENTS AND**
7 **TARIFFS?**

8 A. The Commission should condition merger approval on an extension of those agreements
9 and tariffs, at current prices, for a period that corresponds to the synergy timeframe (see,
10 Exhibit TG-8, Joint CLEC Conditions 6(a), 7 and 7(a) and definition of “Defined Time
11 Period”). At an absolute minimum, these agreements and tariffs should be extended for at
12 least three years following merger closing to match the minimum three-year synergy
13 timeframe as well as the three-year Applicable Time Period for interconnection
14 agreements.

15 **Q. MS. STEWART ARGUES THAT DIFFERENT TIME PERIODS ARE**
16 **REFLECTIVE OF THE RELATIVE AVAILABILITY OF THE UNDERLYING**
17 **SERVICES, AND MORE COMPETITIVE WHOLESALE SERVICES WARRANT**
18 **SHORTER EXTENSIONS.²⁷ IS SHE CORRECT?**

19 A. No. Ms. Stewart provides no support for her claims about the competition for Qwest’s
20 wholesale services. Just as importantly, she fails to demonstrate how this purported

²⁷ Testimony of Karen Stewart in Support of Settlement Agreement on behalf of Qwest, December 1, 2010 (“Stewart Testimony”) at pp. 11-12.

1 competition for non-UNE wholesale agreements warrants an extension only half (or, in the
2 case of tariffs, one-third) as long as the extension for interconnection agreements. Her
3 conclusions and assertions have no basis in fact or good public policy.

4 **Q. DID THE FCC REJECT THE SAME ARGUMENT?**

5 A. Yes. Ms. Stewart's argument was recently rejected by the FCC in its order denying
6 Qwest's petition for forbearance in the Phoenix Arizona MSA. The FCC found: "the
7 record reveals that no carrier besides Qwest provides meaningful wholesale services
8 throughout the Phoenix marketplace, and that competitors offering business services
9 largely must rely on inputs purchased from Qwest itself to provide service."²⁸ The FCC
10 also stated: "there is no record evidence of significant competition for the wholesale
11 products used to serve either mass market or enterprise customers."²⁹ The "wholesale
12 services" and "wholesale products" referred to by the FCC include both UNE and non-
13 UNE wholesale services and products.³⁰

14 In addition, the FCC expressly rejected the notion that "incumbent LECs, even if not
15 required to offer UNEs, would have an incentive 'to make attractive wholesale
16 offerings.'"³¹ In doing so, the FCC concluded that (i) Qwest was still dominant in
17 wholesale markets and had the incentive and ability to discriminate against CLECs in retail
18 markets, (ii) Qwest, as a profit-maximizing firm, had the incentive "to exploit its monopoly

²⁸ Qwest Phoenix Forbearance Order, ¶ 2. See also, ¶ 49 ("Although Qwest maintains that 'there are numerous options for carriers to purchase 'last mile' wholesale services that allow them to bypass Qwest's network entirely,' we disagree and find instead that, however evaluated, the record in this proceeding reveals a lack of significant wholesale competitors to Qwest in the Phoenix MSA.")

²⁹ Qwest Phoenix Forbearance Order, ¶ 96.

³⁰ See, e.g., Qwest Phoenix Forbearance Order, ¶ 68 ("These competitors...rely predominantly upon Qwest facilities, including UNEs *and other wholesale services*, to provide their services.") (emphasis added)

³¹ Qwest Phoenix Forbearance Order, ¶ 34.

1 position as a wholesaler and charge supracompetitive rates”; and (iii) there is little if any
2 evidence that ILECs/BOCs have voluntarily offered wholesale services at competitive
3 prices once regulatory requirements governing wholesale prices were eliminated.³² Given
4 this Qwest dominance as a wholesaler, including dominance over non-UNE wholesale
5 services, market forces cannot be relied upon to provide the post-merger stability that
6 CLECs need.

7 **Q. MR. HUNSUCKER STATES THAT NON-UNE AGREEMENTS “ARE SUBJECT**
8 **TO PRICING BASED ON MARKET FORCES RATHER THAN THE**
9 **REQUIREMENTS OF SECTION 251.”³³ DOES THIS WARRANT A SHORTER**
10 **APPLICABLE TIME PERIOD FOR NON-UNE AGREEMENTS COMPARED TO**
11 **INTERCONNECTION AGREEMENTS?**

12 A. No. As noted above, the FCC has found that market forces are insufficient to control
13 Qwest’s incentive and ability to discriminate against CLECs. Further, this Commission has
14 confirmed the FCC’s findings in its comments to the FCC in that same proceeding.³⁴ What
15 Mr. Hunsucker is essentially arguing is that the Merged Company should be permitted to
16 seek rate increases for non-UNE wholesale services before it can seek rate increases for
17 UNE wholesale services because market forces are supposed to govern non-UNE
18 wholesale services (as opposed to the FCC’s TELRIC pricing rules that govern UNE
19 wholesale services). Mr. Hunsucker’s reasoning makes no sense. If market forces were
20 actually disciplining Qwest’s ability to raise rates for non-UNE wholesale services, then

³² Qwest Phoenix Forbearance Order, ¶ 34.

³³ Hunsucker Testimony at p. 16, lines 4-5.

³⁴ See, LATE FILED REPLY COMMENTS OF THE ARIZONA CORPORATION COMMISSION, dated March 2, 2010, at pp. 9-11.

1 prices for these services would be driven *closer to* their underlying cost, and there would be
2 no need for Qwest to seek increases in these rates which already greatly exceed underlying
3 cost. Nothing in the Joint CLEC proposed conditions would prevent the Merged Company
4 from seeking rate reductions for these non-UNE wholesale services in response to
5 competitive pressures.³⁵ The fact that Joint Applicants have signaled a desire to raise rates
6 for these non-UNE wholesale services after 18 months shows that market forces are not
7 sufficiently disciplining these prices and that the conditions in the proposed settlement need
8 supplemented to lengthen the Applicable Time Periods for non-UNE wholesale
9 agreements.

10 **Q. MR. HUNSUCKER STATES THAT SERVICES PROVIDED UNDER NON-UNE**
11 **AGREEMENTS “ARE CONSIDERED AVAILABLE FROM MULTIPLE**
12 **SOURCES...”³⁶ DO YOU AGREE?**

13 A. No. Mr. Hunsucker apparently assumes that when a “non impairment” finding is made and
14 a particular wholesale input is no longer required to be provided as an UNE pursuant to
15 Section 251 of the Act, alternative sources for these wholesale inputs besides Qwest are
16 reasonably available to CLECs. This is not the case. Non-impairment designations are
17 based on *inferences of actual or potential* competition, not on a finding that CLECs

³⁵ Mr. Hunsucker states that “...CLECs do have competitive alternatives in the market place, and as a result the post-merger company will need to be able to respond quickly to changes in the market place. These changes include competitive price changes, the types of services being purchased...and the need to respond more quickly to a new competitor in the market place.” Hunsucker Testimony at pp. 17-18. There is nothing in the Joint CLECs’ proposed conditions that would restrict the Merged Company’s ability to decrease prices or introduce new wholesale services in response to competition. The only conclusion that can be drawn from this is that the Joint Applicants opposition to the Joint CLECs’ proposed conditions stems from the limitations on increasing rates and eliminating wholesale services. However, increased competition should result in lower prices and more options, not higher prices and fewer options. As such, Mr. Hunsucker’s suggestion that the Joint CLECs’ proposed conditions would somehow harm Qwest’s ability to compete makes no sense.

³⁶ Hunsucker Testimony at p. 16, lines 2-3.

1 actually have adequate alternatives to Qwest for essential wholesale facilities.³⁷ By way of
2 example, there are currently two wire centers in Phoenix in which DS3 loops have been
3 deemed “non-impaired” since March 2005.³⁸ However, after conducting a thorough fact-
4 finding analysis in the Phoenix Arizona MSA, the FCC concluded in June 2010 (more than
5 five years after the DS3 loop non-impairment determination) that no other carrier besides
6 Qwest provides meaningful wholesale services.

7 **Q. DO YOU HAVE OTHER CONCERNS ABOUT THE SHORTER APPLICABLE**
8 **TIME PERIODS FOR NON-UNE OFFERINGS?**

9 A. Yes. I have concerns about impacts to CLECs who operate under a Regional Commitment
10 Program (“RCP”). The RCP is an optional pricing plan that allows DS1 and/or DS3
11 customers to receive discounted rates for committing to a minimum monthly recurring
12 revenue on DS1 and/or DS3 circuits for a 48-month term. On June 1, 2010 (after the
13 proposed transaction was announced), Qwest grandfathered its then-existing RCP
14 (effective May 31, 2010) and introduced a new RCP that substantially reduced the
15 discounts previously available under the RCP, and in turn, increased the cost for CLECs
16 who purchase special access facilities under the RCP. Tw telecom currently purchases
17 special access facilities from Qwest under a RCP Agreement, and has estimated that its

³⁷ *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290, February 4, 2005 (“Triennial Review Remand Order”) at ¶¶ 41-45 and 88. As the FCC stated, non-impairment rests on the FCC’s “exercise of discretion to use *reasonable inferences* instead of fact-specific proceedings...” (Emphasis added).

³⁸ <http://www.qwest.com/wholesale/clecs/nta.html>

1 special access costs will increase 22% absent the extension of non-UNE wholesale
2 agreements it is requesting as part of the Joint CLEC merger conditions.³⁹

3 Under the proposed settlement, the Joint Applicants have agreed to extend RCP
4 Agreements in effect on the merger closing date by 12 months beyond the expiration of the
5 then existing term. This condition is apparently based on the identical condition 3(d)(i)
6 from the Integra Settlement. The twelve month extension may provide sufficient price
7 stability for a CLEC such as Integra and others that have RCP Agreements set to expire in
8 2013 or later. That is, by extending their RCP Agreements by an additional year as
9 provided in the Integra Settlement, those CLECs will effectively cap the rates they pay for
10 their special access services for at least the minimum three-year synergy period. However,
11 CLECs such as tw telecom with RCP Agreements that expire sooner,⁴⁰ will be at a
12 disadvantage since they will be forced onto the higher effective RCP rates well before other
13 CLECs. The result of the Joint Applicants' commitment is that some CLECs will receive
14 less rate stability than others, and some CLECs will be forced to pay higher prices than
15 others depending on when their RCP Agreements are due to expire. Such disparate
16 treatment of CLECs by operation of the proposed settlement will harm the efficient
17 operation of the market by systematically identifying winners and losers based on an
18 expiration date in an agreement instead of on a company's ability to efficiently compete in
19 the market.

³⁹ Affidavit of Pamela Sherwood on behalf of tw telecom, Minnesota Docket No. P-421, et al./PA-10-456, November 24, 2010, p. 4.

⁴⁰ tw telecom has a RCP Agreement with Qwest that is set to expire in June 2011.

1 **Q. DO YOU HAVE OTHER CONCERNS ABOUT THE PROPOSED SETTLEMENT**
2 **AS IT RELATES TO RCP AGREEMENTS?**

3 A. Yes. Proposed settlement condition 23(d)(i) states that term and volume discount plans
4 “offered by Qwest as of the Closing Date” will be extended by twelve months beyond the
5 expiration date of the then existing term (unless the CLEC opts out). The phrase “offered
6 by Qwest as of the Closing Date” presents a problem for CLECs who rely on RCP
7 Agreements. As explained above, Qwest grandfathered RCP in June 2010, and replaced it
8 with a new RCP that would result in significantly higher costs for CLECs. Qwest is now
9 arguing that the existing RCP Agreements with CLECs (which are based on the now-
10 grandfathered RCP) are no longer “offered by Qwest as of the Closing Date,” so the
11 CLECs’ current RCP Agreements are not eligible for extension.⁴¹ Based on Qwest’s
12 position, there would be absolutely no extension for CLECs’ existing RCP Agreements
13 under the merger conditions of the proposed settlement.

14 Likewise, if a CLEC’s existing RCP Agreement expires before the Closing Date, the CLEC
15 would be unable to extend its existing RCP Agreement with Qwest and be forced on to the
16 new RCP that increases the CLEC’s costs and negatively impacts its ability to compete.
17 Because tw telecom’s RCP Agreement with Qwest expires in June 2011, it would not be
18 eligible for extension if the transaction closes after that date.

19 The bottom line is that Qwest should not be allowed to eliminate and raise prices for
20 wholesales services while the proposed transaction is being reviewed, and then tie critical

⁴¹ Stewart Testimony at p. 12, lines 17-21. Ms. Stewart’s argument is flawed because so long as a CLEC’s existing RCP Agreement expires after the Closing Date, the now-grandfathered RCP would be “offered by Qwest as of the Closing Date” via existing RCP Agreements.

1 merger commitments to the merger closing date in order to lock in the higher prices and
2 fewer services going-forward. Such an outcome undermines the effectiveness of the
3 merger commitments as well as the public interest.

4 **Q. HOW CAN THE PROPOSED SETTLEMENT BE SUPPLEMENTED TO**
5 **ADDRESS THE PROBLEM ABOUT EXTENDING RCP AGREEMENTS?**

6 A. In addition to extending them for a minimum period of three years, the extension should
7 apply to the agreements in place as of the merger filing,⁴² or at least the agreements in
8 effect at the end of the current year to provide the price stability that CLECs need.

9 **Q. DO THE JOINT CLECS' PROPOSED ADDITIONAL CONDITIONS REQUIRE**
10 **AN ARIZONA SPECIFIC BREAKOUT, MODIFICATIONS TO QWEST'S**
11 **FEDERAL TARIFF TO MEET THE NEEDS OF A SPECIFIC CLEC, OR**
12 **MODIFICATIONS TO THE CLEC'S EXISTING RCP PLANS, AS MS. STEWART**
13 **SUGGESTS?⁴³**

14 A. No. It simply requires the extension of a CLEC's existing RCP Agreement – an offering
15 that was still tariffed when the merger was announced and will still be available (at least to
16 some CLECs) on the merger closing date if approved.

17

⁴² Joint CLEC proposed condition 1 states that “[a]ny wholesale service offered to competitive carriers at any time between the Merger Filing Date up to and including the Closing Date will be made available and will not be discontinued for at least the Defined Time Period, except as approved by the Commission.”

⁴³ Stewart Testimony at p. 13.

1 **Q. MS. STEWART STATES THAT ADDRESSING THE “GAP AGREEMENTS” – OR**
2 **AGREEMENTS THAT WILL EXPIRE IN THE TIME PERIOD BEFORE**
3 **MERGER CLOSING – IN THE PROPOSED SETTLEMENT IS**
4 **INAPPROPRIATE.⁴⁴ PLEASE RESPOND.**

5 A. Ms. Stewart states that addressing so-called “gap agreements” would “leverage merger
6 conditions – not forward onto the new owner – but backwards onto Qwest...” and “dictate
7 the rates, terms and conditions that Qwest offers now, before the merger closes.”⁴⁵ Ms.
8 Stewart also states that proposed merger has no relationship to the gap agreements because
9 expiration and renewal of the wholesale agreements will occur independent of the
10 merger.⁴⁶ Following Ms. Stewart’s argument to its logical conclusion, some CLECs are
11 entitled to no protection (or less protection than other CLECs) from merger-related harm
12 just depending on whether the arbitrary expiration date in the CLEC’s agreement with
13 Qwest is before or after the arbitrary (and unknown) merger closing date. This is patently
14 unfair, produces unreasonable results, significantly reduces the effectiveness of the
15 commitments in the proposed settlement and provides competitive advantages to some
16 CLECs over others. All CLECs should be entitled to the protections of merger
17 commitments regardless of when they executed their wholesale services agreement with
18 Qwest and regardless of the date on which the merger may close.

19 In addition, Ms. Stewart’s claim that addressing the so-called “gap agreements” would
20 leverage merger conditions backwards onto Qwest is false and misleading. Qwest is

⁴⁴ Stewart Testimony at pp. 9-10.

⁴⁵ Stewart Testimony at p. 10, lines 12-17.

⁴⁶ Stewart Testimony at p. 10, lines 3-10.

1 required to fulfill the obligations under these agreements today (or at least were when
2 Qwest decided to merge with CenturyLink) and extending those agreements as a
3 commitment of merger approval does not confer any new or different obligations on
4 Qwest. Instead, this would extend those existing obligations to provide a degree of
5 certainty and stability to wholesale customers while Qwest and CenturyLink are focused on
6 combining their companies and achieving synergy savings. And contrary to Ms. Stewart's
7 claim, none of the merger commitments apply to pre-merger Qwest or dictate the rates,
8 terms and conditions Qwest offers before the merger closes. In fact, the merger
9 commitments would not go into effect unless and until the merger is closed and Qwest is
10 acquired by CenturyLink.⁴⁷

11 To Ms. Stewart's point that "gap agreements" should not be addressed by the merger
12 commitments because expiration and renewal of the wholesale agreements will occur
13 independent of the merger, the same could be said for any other wholesale agreement
14 between Qwest and a CLEC. The only difference is that the so-called "gap agreements"
15 coincidentally expire during the window between the date the Joint Applicants decided to
16 announce the proposed merger and the date the Joint Applicants decide to close the merger
17 (assuming it is approved). CLECs have no control over these timeframes and should not be
18 penalized for the unfortunate coincidence of their agreement expiring during this window
19 of time.

⁴⁷ Proposed settlement at p. 2 ("the conditions contained in Attachment 1 of the Agreement shall not become effective unless and until the transaction closes. If the transaction does not close, this Agreement is null and void.")

1 **Q. PROPOSED SETTLEMENT CONDITIONS 23(b)(ii) AND 23(c)(ii) STATE THAT**
2 **IF THE MERGED COMPANY WITHDRAWS A NON-UNE AGREEMENT**
3 **AFTER THE 18 MONTH APPLICABLE TIME PERIOD, THE AGREEMENT**
4 **WILL REMAIN AVAILABLE FOR AN ADDITIONAL 18 MONTH PERIOD ON A**
5 **GRANDPARENTED BASIS TO SERVE EMBEDDED BASE CUSTOMERS**
6 **CURRENTLY SERVED BY THE AGREEMENT AND SUBJECT TO RATE**
7 **CHANGES. DOES THIS ADDITIONAL 18 MONTH TIME PERIOD PROVIDE**
8 **ANY DEGREE OF CERTAINTY OR STABILITY?**

9 A. No. These provisions are inadequate for numerous reasons. First, the lack of a price cap
10 for the additional 18 month time period fails to provide any stability about the price CLECs
11 will pay for these wholesale services. This renders the commitment essentially
12 meaningless because Qwest could simply price the wholesale service at a level that makes
13 using it uneconomic for CLECs. It is irrelevant that the wholesale service is “offered” if
14 the Merged Company sets the price so high that CLECs cannot use it to serve retail
15 customers as they do today. The FCC concluded in the *Qwest Phoenix Forbearance*
16 *Order*: “there is little evidence, either in the record or of which we otherwise are aware,
17 that the BOCs or incumbent LECs have voluntarily offered wholesale services at
18 competitive prices once regulatory requirements governing wholesale prices are
19 eliminated.”⁴⁸ Based on this conclusion, it is likely that the Merged Company will seek
20 rate increases for these wholesale services immediately following the initial 18 month time
21 frame as part of its merger integration efforts.

⁴⁸ Qwest Phoenix Forbearance Order, ¶ 34.

1 Second, limiting the availability of wholesale services to a CLEC's embedded base being
2 served by the agreement prevents CLECs from using the non-UNE wholesale services to
3 expand their business and add new customers. This would have a chilling effect on the
4 ability of CLECs to compete with Qwest using these wholesale services going forward.

5 Third, limiting the availability of wholesale services to a CLEC's embedded base being
6 served by the agreement effectively eliminates these wholesale services as a replacement to
7 UNEs if/when UNEs are no longer available due to non-impairment designations.

8 **Q. WOULD THE JOINT APPLICANTS BE HARMED BY EXTENDING THE**
9 **COMMERCIAL AND WHOLESALE AGREEMENTS AND TARIFFS AT**
10 **CURRENT RATES FOR THE TIME PERIOD PROPOSED BY THE JOINT**
11 **CLECS?**

12 A. No. The rates under the non-UNE wholesale agreements are already substantially higher
13 than the UNE rates set by the Commission for those same wholesale facilities. For
14 instance, for dark fiber the commercial rate is generally 15 to 20 times higher than the UNE
15 dark fiber rate set by the state commissions. Likewise, the most heavily discounted special
16 access rate for a DS1 loop under Qwest's RCP is about 130% higher than the UNE price
17 for the same facility. In addition, these wholesale rates were set by Qwest unilaterally
18 without any negotiation or input from CLECs. The Joint Applicants have provided no
19 reason why the rates for non-UNE wholesale services should be increased even higher
20 above their underlying cost, particularly at the same time the Merged Company will be
21 pursuing merger-related synergy savings.

1 **Q. PLEASE SUMMARIZE YOUR POSITION ON THE INADEQUACIES OF THE**
2 **PROPOSED SETTLEMENT REGARDING NON-UNE COMMERCIAL AND**
3 **WHOLESALE AGREEMENTS AND TARIFFS.**

4 A. To avoid the unreasonable and discriminatory effects described above, the proposed merger
5 requires additional conditions under which the Joint Applicants are required to extend
6 current commercial and wholesale agreements and tariffs, at current prices for the time
7 period proposed in the Joint CLECs' proposed conditions (and under no circumstance less
8 than at least three years following merger closing). To keep Qwest from watering down
9 these commitments while the merger is being reviewed, the commitments should also make
10 clear that the extension should apply to the agreements in place as of the merger filing (or
11 at least the agreements in effect at the end of the current year).

12 *D. Joint Applicants have not made sufficient commitments to overcome concerns*
13 *about merger-related harm to wholesale service quality.*

14 **Q. PROPOSED SETTLEMENT CONDITION 20 ADDRESSES WHOLESALE**
15 **SERVICE QUALITY. DOES THIS CONDITION PROVIDE ADEQUATE**
16 **INCENTIVES TO THE MERGED COMPANY TO MAINTAIN WHOLESALE**
17 **SERVICE QUALITY POST-MERGER AND NOT ALLOW IT TO DEGRADE AS**
18 **A RESULT OF INTEGRATION EFFORTS?**

19 A. No. The most important shortcoming in this regard is that the proposed settlement fails to
20 include the Joint CLECs' proposed Condition 4(a) under which an "Additional PAP" or
21 "APAP" would apply if the Merged Company failed to provide wholesale service quality at
22 levels Qwest provided prior to the merger. The APAP is a minimum five year performance

1 assurance plan applicable to the legacy Qwest ILEC territory which would compare the
2 Merged Company's monthly performance with the Qwest performance that existed in the
3 twelve months prior to the merger filing date. This comparison would be made using the
4 current Arizona Performance Indicators ("PIDs"), products and disaggregation, as well as
5 the same statistical methodology that exists in the Qwest Arizona Performance Assurance
6 ("QPAP") to determine whether a statistically significant deterioration in performance
7 exists. Whereas the current QPAP compares wholesale service quality to retail service
8 quality to determine whether Qwest is providing nondiscriminatory access, the APAP
9 compares pre-merger wholesale service quality to post-merger wholesale service quality to
10 determine whether there has been merger-related deterioration in wholesale service quality.
11 The APAP is intended to provide the proper incentives to the Merged Company not to
12 pursue synergy savings at the expense of its wholesale customers.

13 **Q. IS THE PURPOSE OF THE APAP TO INCREASE SERVICE QUALITY POST**
14 **MERGER?**

15 A. No. The purpose of the APAP is to simply maintain the service quality that existed prior to
16 the merger. In other words, the APAP exists only to provide the proper incentives for the
17 merged company to not degrade service post merger – a function that the current QPAP
18 does not provide. The fact that the Joint Applicant's are so adamantly opposed to the
19 APAP signals their apparent belief that wholesale service quality will be degraded post
20 merger. The Commission should create proper incentives regardless of the Merged
21 Company's opposition to this reasonable approach.

1 **Q. THE PROPOSED SETTLEMENT WOULD PREVENT THE MERGED COMPANY**
2 **FROM ELIMINATING OR WITHDRAWING THE QPAP FOR AT LEAST**
3 **THREE YEARS AFTER THE MERGER CLOSING DATE.⁴⁹ WHY IS THIS**
4 **INADEQUATE?**

5 A. The QPAP does not (and would not) identify or rectify merger-related harm to wholesale
6 service quality. The QPAP was designed to capture discriminatory treatment, not merger-
7 related service quality deterioration, and as such, the QPAP compares *wholesale* service
8 quality to *retail* service quality. This comparison would not capture or address
9 deterioration in wholesale service quality related to the merger, particularly if both retail
10 and wholesale service quality deteriorated post-merger. To properly capture merger-
11 related deterioration in wholesale service quality, pre-merger wholesale service quality
12 must be compared to post-merger wholesale service quality, as the APAP does. Moreover,
13 the APAP provides financial incentives in the form of APAP remedy payments for merger-
14 related wholesale service quality deterioration. These remedies would provide the
15 necessary incentives to the Merged Company to not pursue merger savings at the expense
16 of wholesale service quality or pay current QPAP remedies as a cost of doing business.⁵⁰
17 These remedies would also provide incentives to the Merged Company to move quickly to
18 resolve wholesale service quality problems if/when they occur during integration so as to
19 limit the resulting harmful effects on CLECs and end user customers.

⁴⁹ Proposed settlement condition 20a.

⁵⁰ Qwest has testified that its total QPAP remedy payment for Arizona in 2009 was about \$100,000. Williams Rebuttal at p. 20, lines 3-5. This amounts to 0.016% of the \$625 million in annual synergy savings anticipated by the Joint Applicants.

1 **Q. DOES THE PROPOSED SETTLEMENT CONTAIN SUFFICIENT PROVISIONS**
2 **FOR IDENTIFYING MERGER-RELATED WHOLESALE SERVICE QUALITY**
3 **DETERIORATION?**

4 A. No. Proposed settlement condition 20(a)(i) contains a provision that would track the
5 Merged Company's post-merger wholesale service quality to CLECs. However, unlike
6 Joint CLEC condition 4(b) that requires the Merged Company to maintain the average
7 wholesale service quality provided by Qwest to CLEC for 12 months prior to the merger
8 filing date, the proposed settlement agreement established the benchmark on a rolling
9 average tied to the merger closing date. Due to the rolling average relied upon by the
10 proposed settlement, over time the Merged Company will no longer be comparing pre-
11 merger wholesale service quality to post-merger wholesale service quality (which is the
12 relevant comparison for identifying merger-related harm to wholesale service quality). For
13 example, after the first three months following merger closing date, each successive month
14 of Qwest's *post-merger* performance will be added to the average performance, and
15 beginning one year after the closing date Qwest's performance will be measured by a
16 rolling twelve month average of Qwest's *post-merger* performance. Therefore, the only
17 time period during which this commitment would compare Qwest's pre-merger wholesale
18 service quality to Qwest's post-merger wholesale service quality is the first three months
19 following the closing date.

20

1 **Q. DOES THE PROPOSED SETTLEMENT CONTAIN SUFFICIENT INCENTIVES**
2 **FOR THE MERGED COMPANY TO QUICKLY AND EFFICIENTLY RESOLVE**
3 **WHOLESALE SERVICE QUALITY DETERIORATION IF/WHEN IT OCCURS**
4 **POST-MERGER?**

5 A. No. Proposed settlement condition 20(b) contains a provision that would require the
6 Merged Company to perform a root cause analysis of a post-merger wholesale service
7 quality deterioration and propose a plan for resolving each deficiency with thirty days.
8 This condition also allows CLECs to invoke the root cause procedures and to seek
9 resolution at the state commission if the problem is not resolved (subject to a potential
10 opposition from the Merged Company). This is insufficient. Because deteriorating
11 wholesale service quality post-merger will negatively impact CLECs and their end user
12 customers, it is imperative that proper incentives be in place for the Merged Company not
13 to allow this deterioration *before* the proposed transaction is approved so that the Merged
14 Company is aware of its obligations as it begins to integrate the two companies and
15 eliminate duplicative functions and systems. In addition, the incentives should be self-
16 effectuating so that if/when post-merger wholesale service quality deterioration occurs, the
17 Merged Company's incentives to resolve these problems are triggered immediately and
18 without the need for additional litigation and disputes. The root cause provision that
19 requires the Merged Company to determine why service quality problems are occurring
20 and to develop a plan to rectify them is little comfort to CLECs and their end users who
21 will be experiencing service-affecting problems and disruptions. And because the
22 provision would give the Merged Company thirty days to develop a root cause analysis and
23 would allow the Merged Company to oppose a CLEC request to resolve wholesale service

1 quality problems before the state commission, it will likely lead to future disputes between
2 the Merged Company and CLECs, as well as extend the duration of wholesale service
3 quality problems.

4 It is not in the public interest to approve the merger based on a commitment from the Joint
5 Applicants to simply look into merger-related wholesale service quality problems as they
6 occur and propose a plan to fix them; rather, the proposed transaction should not be
7 approved unless there are sufficient assurances that wholesale service quality deterioration
8 does not occur in the first place. The Joint Applicants' commitments in the proposed
9 settlement are inadequate, and should be bolstered by adopting the APAP.

10 *E. Joint Applicants' have not made sufficient commitments regarding non-*
11 *impairment and forbearance filings.*

12 **Q. IN PROPOSED SETTLEMENT CONDITION 30, THE JOINT APPLICANTS**
13 **HAVE AGREED NOT TO SEEK TO RECLASSIFY AS "NON-IMPAIRED" ANY**
14 **QWEST WIRE CENTERS AND NOT TO FILE NEW PETITIONS FOR**
15 **FORBEARANCE FROM ANY SECTION 251 OR 271 OBLIGATION IN ANY**
16 **QWEST WIRE CENTERS BEFORE JUNE 1, 2012. IS THE TIME PERIOD OF**
17 **THIS COMMITMENT ADEQUATE?**

18 **A.** No. While the Joint CLECs agree with moratoriums on non-impairment filings and
19 petitions for forbearance to address merger-related harm, the time period of proposed
20 settlement condition 30 is too short and arbitrary. If the proposed transaction is ultimately
21 approved in the first quarter of 2011 as the Joint Applicants are hoping, the June 1, 2012
22 expiration date results in an effective moratorium of about 15 months. This falls far short

1 of the three-to-five year time period during which the Joint Applicants will be integrating
2 the two companies and pursuing merger-related synergy savings. This also falls far short
3 of the 42 month moratorium adopted by the FCC for the AT&T/BellSouth merger.⁵¹ Also,
4 to my knowledge, neither Staff nor Joint Applicants have explained any basis for the June
5 1, 2012, expiration date.

6 Joint CLECs have proposed in Condition 14 that such moratoriums should remain in effect
7 for the Defined Time Period that corresponds to the synergy timeframe. This time period is
8 sufficient in length because it covers the synergy timeframe, and is objective because it is
9 based on the Joint Applicants' own synergy plans.

10 **III. CONCLUSION**

11 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

12 A. The wholesale conditions in the proposed settlement are inadequate to address the merger-
13 related harm posed by the proposed transaction to Joint CLECs, the competitive
14 marketplace and the public interest. To address these harms, I recommend that the
15 proposed transaction be denied unless approval is conditioned on each of the Joint CLECs'
16 proposed conditions set forth in Exhibit TG-8 to my direct testimony. However, if the
17 Commission is not inclined to require each and every condition proposed by Joint CLECs,
18 it should, at the very least, require the Joint Applicants to supplement the conditions in the
19 proposed settlement to resolve its primary shortcomings. Specifically, at a minimum, the

⁵¹ Exhibit TG-9 at footnote 31.

1 proposed merger should not be approved unless such approval is subject to the following
2 additions to the proposed settlement:

- 3 1. The Merged Company will use and offer to wholesale customers
4 the legacy Qwest OSS for at least three years (Joint CLEC
5 condition 19).
- 6 2. Robust, transparent third party testing will be conducted for any
7 replacement OSS that replaces a Qwest system that was subject to
8 third party testing (Joint CLEC condition 19b).
- 9 3. The Applicable Time Periods for non-UNE commercial and
10 wholesale agreements and tariffs should be the Defined Time
11 Period initially proposed by Joint CLECs, or at a minimum, three
12 years.
- 13 4. The extension of non-UNE commercial and wholesale agreements
14 and tariffs, including term and volume discount plans, should
15 apply to wholesale agreements in place as of the merger filing date,
16 or at least in effect as of the end of 2010. As noted in (3) above,
17 the minimum time period for these agreements should be three
18 years.
- 19 5. The Additional PAP should apply in addition to the QPAP (Joint
20 CLEC condition 4a).]
- 21 6. The moratorium on Qwest requests to reclassify as “non-impaired”
22 wire centers and for forbearance should apply for the Defined
23 Time Period initially proposed by Joint CLECs (Joint CLEC
24 condition 14).

25 These remaining issues are merger-related, have not been sufficiently addressed in the
26 proposed settlement (or the Integra Settlement on which it is based), and are not currently
27 pending in separate litigation either in the courts or before the Commission.⁵² The need for
28 these additional commitments is supported by the record and critical to the public interest.

⁵² Mr. Campbell states: “At the end of the process, the only items remaining are issues specific to certain CLECs that are either non-merger related, are merger related but have been either (i) addressed in the Integra settlement as well as the Settlement or (ii) these are currently pending in separate litigation either in the courts or before the Commission.” Campbell Testimony at 5, lines 2-6. Mr. Campbell’s claim is not accurate as it relates to the remaining concerns of Joint CLECs.

1 **Q. DOES THIS CONCLUDE YOUR TESTIMONY REGARDING THE PROPOSED**
2 **SETTLEMENT?**

3 **A. Yes, it does.**