

OPEN MEETING AGENDA ITEM
ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

1
2 **GARY PIERCE**
3 **Chairman**
4 **BOB STUMP**
5 **Commissioner**
6 **SANDRA D. KENNEDY**
7 **Commissioner**
8 **PAUL NEWMAN**
9 **Commissioner**
10 **BRENDA BURNS**
11 **Commissioner**

2011 FEB 24 P 3:49

Arizona Corporation Commission
DOCKETED

FEB 24 2011

DOCKETED BY [Signature]

8 **IN THE MATTER OF THE JOINT NOTICE AND**
9 **APPLICATION OF QWEST CORPORATION,**
10 **QWEST COMMUNICATIONS COMPANY, LLC,**
11 **QWEST LD CORP., EMBARQ**
12 **COMMUNICATIONS, INC. D/B/A**
13 **CENTURYLINK COMMUNICATIONS,**
14 **EMBARQ PAYPHONE SERVICES, INC. D/B/A**
15 **CENTURYLINK AND CENTURYTEL**
16 **SOLUTIONS, LLC, FOR APPROVAL OF THE**
17 **PROPOSED MERGER OF THEIR PARENT**
18 **CORPORATIONS, QWEST COMMUNICATIONS**
19 **INTERNATIONAL, INC., AND CENTURYTEL,**
20 **INC.**

DOCKET NO. T-01051B-10-0194
DOCKET NO. T-02811B-10-0194
DOCKET NO. T-04190A-10-0194
DOCKET NO. T-20443A-10-0194
DOCKET NO. T-03555A-10-0194
DOCKET NO. T-03902A-10-0194

JOINT APPLICANTS'
EXCEPTIONS TO
RECOMMENDED OPINION
AND ORDER

21 The Joint Applicants named above respectfully submit these exceptions to the
22 Recommended Opinion and Order (the "Recommended Order") issued by the Administrative
23 Law Judge in this proceeding on February 15, 2011.

24 **I. INTRODUCTION**

25 The Recommended Order is a comprehensive and well-considered ruling that assimilated
the extensive testimony of the parties, experts and consultants, and appropriately and correctly
evaluated the credibility of the witnesses and their positions. With one relatively minor

1 exception regarding the Recommended Order's description of how the terms for volume and
2 term commitment discount plans shall be extended, which is discussed below, the Recommended
3 Order should be adopted.

4 Most of the testimony at the hearing was generated by the extreme positions advocated
5 by a very few competitors opposed to the Application. The Joint Applicants noted in their
6 Closing Brief¹ that of the sixty-nine (69) companies listed on the Commission website as
7 competitive local exchange carriers, twelve (12) were sufficiently interested in this merger
8 proceeding to intervene. The Joint Applicants have entered into settlement agreements with all
9 but three (3) of those intervenors (the "Non-Settling CLECs").² The settlement agreements, all
10 of which are filed and part of the record of this proceeding, represent substantial concessions
11 made by the Joint Applicants and substantial benefits conferred upon all of the CLECs, including
12 the Non-Settling CLECs.³ Of the Non-Settling CLECs, Level 3 and Pac-West did not file post
13 hearing briefs, from which a reasonable inference may be drawn that the concerns raised by them
14 earlier are answered by the concessions already made, are recognized as misplaced, or are no
15 longer of sufficient importance to them.

16 The Joint Applicants' exception relates to one of the terms of their recent settlement
17 agreement with tw telecom of Arizona, llc ("TWTA"). The settlement agreement between
18 TWTA and the Joint Applicants (the "TWTA Settlement") has also been filed in this

19 _____
20 ¹ Post Hearing Brief of the Joint Applicants, Jan. 11, 2011, pp. 1-4,

21 ² The remaining three (3) Non-Settling CLECs are PAETEC, Level 3, and Pac-West Telecomm. TWTA had been a
22 Non-Settling CLEC, but as noted in the Recommended Order and discussed below, between the time of Post
23 Hearing Briefs and the issuance of the Recommended Order, TWTA entered into a settlement agreement with the
24 Joint Applicants.

25 ³ The Recommended Order states in para. 107:

In its Post-Hearing Brief, PAETEC acknowledged that the Settlement Agreement addresses many
concerns that it has regarding the merger, 'and PAETEC agrees that those commitments are necessary
to protect the public interest. Accordingly, PAETEC urges the Commission to adopt the commitments
set forth in the Integra Settlement and the Settlement Agreement as conditions to the proposed merger'.

1 proceeding.⁴ TWTA claimed during the proceeding that it especially depends on special access
2 circuits⁵ purchased from Qwest Corporation to serve its customers. Because of that alleged
3 dependency and the fact its volume and term plan is expiring shortly, TWTA sought certainty
4 that it can operate under its existing special access volume and term commitment discount plan
5 for a reasonable period of time post-Closing. TWTA's desired term extension may be longer
6 than the extension that has already been provided for under the Settlement Agreement between
7 the Joint Applicants, the Commission Staff, and RUCO (the "Settlement Agreement"). TWTA
8 and the Joint Applicants were able to reach a compromise that met both of their needs in the
9 TWTA Settlement. TWTA agreed to the terms of the Integra Settlement, and also negotiated
10 certain other clarifications, modifications, and additional commitments that address the concerns
11 TWTA had regarding rate stability under their existing Regional Commitment Plan ("RCP") for
12 special access. When the Joint Applicants filed the TWTA Settlement they stated that they
13 understood and agreed, "[T]he clarifications, modifications and additional commitments set forth
14 in the Agreement will be available to other carriers that are similarly situated to Integra and tw
15 telecom, regardless of whether a similarly situated carrier has participated in these consolidated
16 dockets or entered into a settlement agreement with the Joint Applicants."⁶

17 The Recommended Order expands the Joint Applicant's commitment to TWTA for RCP
18 rate stability to now encompass "all term and volume discount plans offered by Qwest under
19 Condition No. 23, (d)(i)" of the Settlement Agreement. The Joint Applicants do not object to

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21 ⁴ The TWTA Settlement is Exhibit J to the Recommended Order. It was filed by Notice of Filing Settlement
22 Agreement Between and Among TW Telecom, CenturyLink, and Qwest, February 8, 2011.

23 ⁵ TWTA describes its use of special access as follows: "To serve its customers, TWTA purchases special access
24 circuits from Qwest. These circuits are dedicated telecommunications lines that connect carriers to customers. The
25 circuits allow the high-speed, high capacity transmission of voice and data between physically separate locations."
(TWTA Initial Brief, 6:12-15.)

⁶ Notice of Filing Settlement Agreement Between and Among TW Telecom, CenturyLink, and Qwest, February 8,
2011, 1:26-2:3.

1 that expansion, in principle. However, the Joint Applicants take exception to the manner in
2 which it has been written in the Recommended Order because the wording used could extend
3 some volume term plans much farther into the future than is reasonable, and thus results in
4 widely disparate termination dates for the extended plans, contrary to the objective of providing
5 like terms for similarly situated CLECs.

6 II. DISCUSSION

7 TWTA purchases special access under Qwest's RCP, which is a volume and term
8 discount plan under the federal tariffs.⁷ TWTA's RCP is currently set to expire on June 1, 2011,
9 and TWTA views the replacement terms offered by Qwest as less favorable.⁸ To address its
10 concern, TWTA asked that the contract extension period in Condition 23(d)(i) of Attachment 1
11 to the Settlement Agreement⁹ be amended to provide for a longer period of time. The resolution
12 reached in the TWTA Settlement provides:

13 [T]he Merged Company shall extend the Qwest Regional Commitment Plan (RCP)
14 currently opted into by tw telecom through the Merger Closing Date, including its
15 currently effective term, volume, and rate stability commitments, and for another twelve
16 months beyond the expiration of the then existing term or May 31, 2013, whichever is
17 later[.]¹⁰

18 The TWTA Settlement extends the term of the TWTA RCP through the Merger Closing
19 Date to ensure that the TWTA RCP does not expire between now and Merger Closing Date and
20 then for 12 months or May 31, 2013, whichever is later. The 12 month extension beyond the
21 term is entirely consistent with the Integra Settlement and the Settlement Agreement with Staff
22 and RUCO. The TWTA modification simply adds a date certain through which any such RCP
23 agreement would extend, similar to other provisions in the settlements that provide for a

24 ⁷ TWTA Initial Brief, 9:1.

25 ⁸ *Id.*, 9:2—10:4.

⁹ TWTA Initial Brief, 11:15-16.

¹⁰ TWTA Settlement Agreement, ¶ 4, p. 2.

1 reasonable minimum period, thereby establishing the certainty that the CLECs seek immediately
2 upon merger closing.¹¹

3 Even-handed treatment does not require that every RCP, or every term and volume
4 discount plan for that matter, be extended for 24 more months beyond its existing term,
5 regardless of how far into the future the current term extends, as the Recommended Order
6 provides. Rather, equal treatment should constitute applying the same rule to every other carrier.
7 For example, if some other CLEC's RCP is set to expire May 1, 2012, applying the clause as
8 written in the TWTA Settlement (12 more months beyond the expiration of the current term or
9 May 31, 2013, whichever is later) would result in the same termination date as TWTA bargained
10 for—May 31, 2013. However, using the language from the Recommended Order (adding 24
11 months to the term regardless of when the term expires) would result in an extension to May 1,
12 2014. This difference is magnified the further out the existing term extends. For example, if a
13 current RCP expires May 1, 2014, the language from the Recommended Order would extend that
14 term to May 1, 2016. As these examples show, the potential exists for the language proposed by
15 the Recommended Order to result in already long terms being extended two more years, far
16 beyond what was contemplated in the various settlements or is necessary for the CLEC-desired
17 post-closing certainty. An extension like that bears no relation to protection from merger-related
18 pressures to amend plans, and would be unwarranted and unreasonably limiting on the merged
19 company.

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21 _____
22 ¹¹ See, for example, the commercial and wholesale agreement provisions which provide for a minimum extension of
23 18 months from the Closing Date (a date certain that can be calculated upon closing) or the unexpired term,
24 whichever is later, or the OSS provision that provides for two years or the date certain of July 1, 2013, whichever is
25 later. Similarly, the date certain for this provision under the TWTA Settlement is May 31, 2013, subject to
renegotiation if the Transaction is not closed by May 31, 2011, which the parties do not expect. In the event this date
is renegotiated, the new date certain would be equally applicable to other carriers.

1 TWTA, the entity most concerned with the adequacy of Condition 23(d)(i), has accepted
2 that the provision adding 12 months to the current RCP term or May 31, 2013, puts a reasonable
3 limit on the exposure to merger-related changes and provides the acceptable level of certainty
4 that the CLECs want.

5 Accordingly, the Joint Applicants ask that the wording of the Recommended Order be
6 modified, with the objective being to confer upon all carriers under existing volume and term
7 price discount plans under the Qwest federal tariff, the option to extend their plans in a manner
8 which follows the same approach that TWTA achieved in its settlement; that is, an extension
9 through the Merger Closing Date to ensure that an RCP does not expire between now and
10 closing, and 12 months beyond the expiration or May 31, 2013, whichever is later. The Joint
11 Applicants respectfully ask that the Commission adopt the following amendment to the
12 Recommended Order:

13 Amend page 54, lines 7-8, by deleting the words "The Applicable Time
14 Period is extended from 12 months to 24 months," and inserting in lieu thereof the
following:

15 "Regarding term and volume discount plans, such plans offered by
16 Qwest as of the Closing date will be extended by twelve months beyond the
17 expiration of the then existing term, or until May 31, 2013, whichever is
18 later, unless CLEC indicates it opts out of this extension. Term and volume
discount plans that would otherwise expire between the Order date and the
Closing Date shall be extended through the Closing Date such that the
additional 12 months provided under this provision will run from the
Closing Date."

19 And,

20 Amend page 58, lines 4, by deleting the period (.) and inserting the
21 following: "as provided for in Paragraph 207, *supra*."

22 The Joint Applicants' purpose, like the Recommended Order's purpose, is to provide that
23 similarly situated carriers will be able to receive the same terms as the TWTA Settlement. The
24
25

1 language proposed is not intended to modify the TWTA Settlement.

2 **III. CONCLUSION**

3 The Joint Applicants appreciate the swift and sure processing of their Joint Application,
4 and the well-considered Recommended Order. The relatively minor modifications the Joint
5 Applicants seek to the Recommended Order are offered in the same spirit that all of the
6 numerous settlement agreements were entered. Our objective is to clarify commitments and
7 obligations assumed by the merged company, avoid unintended consequences, treat all
8 stakeholders fairly and evenhandedly, and to promptly achieve the beneficial objectives of this
9 merger. Accordingly the Joint Applicants ask that the Recommended Order be adopted, with the
10 modifications requested in these Exceptions.

11 Respectfully submitted, this 24th day of February, 2011.

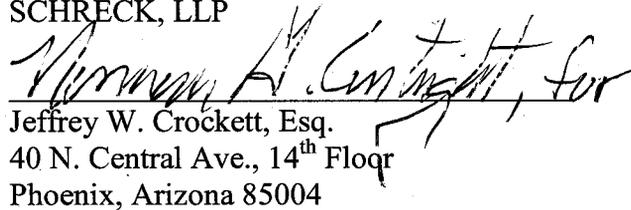
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