

ORIGINAL



0000136139

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

2012 APR 26 A 10: 52

GARY PIERCE  
Chairman

BOB STUMP  
Commissioner

SANDRA D. KENNEDY  
Commissioner

PAUL NEWMAN  
Commissioner

BRENDA BURNS  
Commissioner

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

APR 26 2012

DOCKETED BY	<i>[Signature]</i>
-------------	--------------------

IN THE MATTER OF THE  
APPLICATION OF QWEST  
CORPORATION D/B/A CENTURYLINK-  
QC ("CENTURYLINK") TO CLASSIFY  
AND REGULATE RETAIL LOCAL  
EXCHANGE TELECOMMUNICATIONS  
SERVICES AS COMPETITIVE, AND TO  
CLASSIFY AND DEREGULATE  
CERTAIN SERVICES AS NON-  
ESSENTIAL

DOCKET NO. T-01051B-11-0378

CENTURYLINK'S RESPONSE IN  
SUPPORT OF DEPARTMENT OF  
DEFENSE AND FEDERAL EXECUTIVE  
AGENCIES' ("DoD") REQUEST TO  
WITHDRAW  
-and-  
REPLY TO STAFF AND TW TELECOM  
OPPOSITIONS TO DoD'S REQUEST TO  
WITHDRAW

Qwest Corporation d/b/a CenturyLink-QC ("CenturyLink") supports the Request of the Department of Defense and Federal Executive Agencies ("DoD") to Withdraw (the "DoD Motion"), in connection with the Settlement Agreement ("Settlement Agreement") entered between CenturyLink and DoD in connection with this docket. CenturyLink specifically supports the DoD's request to withdraw written testimony which has been pre-filed but has not been admitted into evidence. This Response is also written in reply to the Oppositions to the DoD's Request to Withdraw filed by the Commission Staff and tw telecom, llc. CenturyLink asks the Commission to grant the DoD Motion, excuse the DoD from further participation in this proceeding, and deny requests to enter the DoD pre-filed testimony into evidence, for the reasons stated below.



1           3.       There is no reason for the Commission to do differently with respect to the DoD-  
2 CenturyLink Settlement than courts would do. CenturyLink acknowledges that the Commission  
3 is the agency established by the Arizona Constitution to regulate public service corporations in  
4 the public interest, and accordingly it is appropriate that the Commission does not merely rubber  
5 stamp any settlement of a controversy brought before it. However, even in that specialized  
6 context, settlements should not be lightly discarded. Settlements such as that reached between  
7 DoD and CenturyLink that are fairly made and do not contravene a law or policy should be  
8 encouraged and supported.

9                           THE DOD SETTLEMENT IS FAIRLY MADE, DOES NOT  
10                           CONTRAVENE A LAW OR POLICY, AND DOES NOT  
11                           DISADVANTAGE ANY PARTY OR OTHER CUSTOMERS

12           4.       At the prehearing conference the objecting parties expressed surprise by the DoD  
13 Settlement, implying somehow that they are thereby disadvantaged. That claim does not  
14 withstand scrutiny. All of the parties were notified of settlement discussions, by a notice of  
15 filing made on March 30, 2012. All of the parties were present at the first settlement conferences  
16 at which time CenturyLink and DoD informed the other parties that CenturyLink and DoD were  
17 engaged in ongoing separate settlement discussions. No party can claim unfair surprise by the  
18 DoD Settlement.

19           5.       The DoD Settlement was made by fair negotiations. No one can credibly claim  
20 that the Commission should be concerned about CenturyLink taking advantage of the United  
21 States Government by reason of unequal economic power or litigation resources.

22           6.       The prehearing conference was held before the filing deadline for all parties'  
23 rebuttal testimony. At that time, CenturyLink thought that the objecting parties' motivation is  
24 that they want to "borrow" from the DoD testimony, and essentially adopt portions of the DoD  
25

1 pre-filed testimony. As it turns out, the Staff does not rely on the DoD unsworn, untested,  
2 prefiled direct to any significant degree. The Staff states it does not disagree with DoD's  
3 analysis, but reach different conclusions about what should be done. tw telecom did not file  
4 rebuttal testimony at all. Although Staff and tw telecom have not borrowed from DoD's  
5 prefilng for their rebuttal testimony, perhaps one or both of them would like to have the DoD  
6 testimony admitted into evidence so that they can ride the coat tails of DoD's pre-settlement  
7 advocacy in briefs. But there are serious policy reasons why that should not be permitted.

8       7.       The Commission should recognize that each of the objecting parties is a capable  
9 organization, regularly appearing and participating in proceedings before the Commission, with  
10 one or more knowledgeable expert witnesses and experienced counsel. Parties who undertake to  
11 intervene in proceedings such as this should be prepared to bear the burden of making their own  
12 record. It cannot be said that the dismissal of the DoD and the withdrawal of its pre-filed,  
13 unsworn advocacy will unfairly prejudice or harm any other intervenor.

14       8.       Nor can there be a concern that the dismissal of the DoD and its pre-filed,  
15 unsworn advocacy will unfairly prejudice any particular customer or class of customers not  
16 directly represented in the proceeding. The DoD intervention, and its professed interest in this  
17 proceeding, arises solely out of its position as a large buyer of telecommunications services.  
18 While DoD represents the executive arm of our national government, its appearance in this  
19 docket is not as a representative of the public. Nor does DoD represent or even purport to be a  
20 party representative of a class of customers. The DoD intervened in the case solely to look out  
21 for its own unique economic interests. Its dismissal will not result in the loss of any perspective  
22 necessary for the public interest; it will only result in the loss of a perspective to a single, unique  
23 large customer. No other large retail customers intervened, a fact from which the Commission  
24 may properly draw the inference that such customers are not worried about the outcome of  
25

1 CenturyLink's Application. As will be discussed below, such customers typically purchase from  
2 all carriers under individual case basis contracts, not directly out of tariffs.

3 THE PUBLIC INTEREST IS SATISFIED

4 9. The Administrative Law Judge asked at the prehearing conference to hear from  
5 DoD (and we presume from CenturyLink) about why the Settlement Agreement is in the public  
6 interest, and whether it has any effect on other customers. CenturyLink respectfully submits that  
7 the DoD Settlement, entered into fairly and in good faith to settle the controversy as it relates  
8 solely to the DoD and CenturyLink, should be assumed to be in the public interest under the  
9 policy favoring settlements, unless determined to contravene law or policy. CenturyLink is  
10 confident that the legitimate purpose and intent of the DoD Settlement will be clear upon the  
11 examination of DoD and CenturyLink witnesses.

12 10. CenturyLink submits that the fact it filed the DoD Settlement within hours of  
13 signing demonstrates candor and openness with the Commission and the other parties.

14 11. CenturyLink respectfully submits that litigants often settle before hearing because  
15 of the inherent risk of unsatisfactory results that is present in any contested adjudication, and  
16 they prefer to fashion an outcome that provides certainty. An agreed-upon outcome that  
17 disadvantages no one cannot be said to be contrary to the public interest.

18 12. As discussed above, the DoD's intervention is motivated by a relatively narrow,  
19 singular economic interest. CenturyLink submits that the DoD's litigation style in administrative  
20 law proceedings such as this, is to mount a "scorched earth" case, hiring professional witnesses  
21 who turn on their word processors to churn out lengthy written testimony.<sup>1</sup> CenturyLink will be  
22 fully prepared to respond to that testimony. However, in these circumstances CenturyLink's  
23 motivation for settlement includes the perfectly legitimate objective of streamlining the hearing

24 <sup>1</sup> The DoD Direct Testimony, without exhibits in this docket is 71 pages. By comparison, the total of the two Staff  
25 witnesses Direct testimony, without exhibits, is 53 pages, the RUCO direct is 19 pages, and the tw telecom  
testimony is 6 pages.

1 by settling with the DoD, with the agreement that its professional witness, and his overblown  
2 testimony, would be excused from the case.

3 13. In its Opposition, the Staff states that the Settlement Agreement “appears to give  
4 DoD/FEA some preferential rate treatment for a period of five years.” CenturyLink will happily  
5 defend that claim through testimony if required. The essence of the response, to be borne out by  
6 testimony, is as follows:

7 a. The Settlement Agreement rate protection commitment is quite similar to  
8 the settlement agreement entered into between CenturyLink and DoD for the purpose of  
9 concluding the DoD’s intervention in the docket regarding the merger of CenturyLink and  
10 Qwest. (Docket No. T-01051B-10-0194). Staff was fully advised of that settlement agreement,  
11 which was included in the Commission’s order approving the merger, as Attachment G. With  
12 respect to the merger docket settlement agreement with DoD, the Commission held: “No party  
13 to this proceeding objected to any of these settlement agreements. To the extent necessary or  
14 requested, these settlement agreements are hereby approved.” (Decision No. 72232, p. 56,  
15 para. 215.). The DoD merger docket settlement agreement provided a three year rate stabilizer:  
16 “The post-merger company will not increase current (as of the execution date of this agreement)  
17 pricing on retail Business Lines with or without Qwest Packages (single or multi-line), Centrex,  
18 Qwest Utility Line<sup>TM</sup>, and PBX trunks for three years after the execution of this agreement.”  
19 (Settlement Agreement and Stipulation, Attachment G to Decision No. 72232.) As noted, the  
20 three year commitment to not increase rates in the DoD settlement in the merger docket was not  
21 questioned by the Staff—and was approved by the Commission (if necessary or requested to be  
22 approved). The Settlement Agreement in this docket essentially extends the previous  
23 commitment for DoD’s most commonly purchased local services for three years longer than the  
24  
25

1 remaining term in the previous commitment, since the term of the merger settlement and the five  
2 year term of the Settlement Agreement under consideration here run concurrently. The Staff's  
3 perspective on the Settlement Agreement in this docket is wholly inconsistent with the quite  
4 similar resolution DoD and CenturyLink reached in the merger docket. There are no  
5 distinguishing differences to merit such disparate regulatory examination. The earlier settlement  
6 approval by the Commission is precedential for this Settlement Agreement.

7           b. DoD/FEA procures telecommunications services through competitive  
8 bidding. Under the authority of CenturyLink's approved tariffs which provide for volume and  
9 term commitment pricing and individual case basis ("ICB") pricing offers to business customers  
10 in competitive situations, CenturyLink has been awarded a number of DoD contracts. The  
11 Settlement Agreement provides that when those contracts are put out for re-bid, CenturyLink  
12 commits to bid at rates, terms and conditions no less favorable than its current contracts provide.  
13 No one has suggested that the current contracts are not "in the public interest" or constitute  
14 unlawful "preferential" treatment. Re-bidding at the same prices cannot be any less acceptable.

15           c. Staff ignores the commitment in the Settlement Agreement which  
16 specifically addresses the filing of contracts entered into under the Settlement Agreement if  
17 required by the Commission's rules. Should Staff believe it is warranted, it could investigate  
18 actual contracts when they are made in the future.

19           d. DoD/FEA is a large purchaser of telecommunications services, and as  
20 such comes under the "enterprise" market segment. The Staff's own analysis shows that the  
21 enterprise segment is fully competitive. As noted above, CenturyLink tariffs envision and permit  
22 ICB pricing. Contract pricing is consistent with the public interest in competitive situations, as is  
23 evident from Commission Rule R14-2-1115.C.3, which expressly contemplates competitive  
24 contracts.

1 e. It is not unusual for telecommunications carriers in Arizona to enter into  
2 contracts with business customers providing for rate discounts. Cox describes its ICB pricing as  
3 follows: "Under its tariff, from time to time Cox enters into ICB agreements with a business  
4 customer. The reasons for doing so could be to offer better pricing dues [*sic*] to a volume or bulk  
5 purchase of telecommunications services. This flexibility in offering ICBs to potential  
6 customers has worked well over the last thirteen years, and to Cox's knowledge, has never  
7 resulted in any discriminatory pricing complaint filed against Cox with the ACC. No carrier has  
8 raised a dispute over ICBs conducted with Cox's business customers and most business CLECs  
9 offer such contractual arrangements to prospective customers." (Application of Cox Arizona  
10 Telcom, LLC for an Exemption From Commission Rule A.A.C. R14-2-1115.C.3, Arizona  
11 Corporation Commission Docket No. T-03471A-11-0256, at page 3, lines 6-13.) CenturyLink  
12 can state that it has experienced similar favorable results when it has been allowed to offer ICB  
13 pricing to business customers.

14 f. From the foregoing, it is evident that discounted rates provided to  
15 enterprise customers such as DoD/FEA are not prohibited. If a current CenturyLink ICB rate  
16 offer to the DoD/FEA is not contrary to the public interest, there is no basis upon which to argue  
17 that a commitment to keep that offer continually refreshed for 5 years is contrary to the public  
18 interest.

19 g. This Settlement Agreement has no adverse effects on other customers.  
20 Other large business customers typically negotiate their own ICB arrangements, just as Cox  
21 described. Similarly situated customers of the same services and same volumes are not treated  
22 disparately, however. Like Cox (see above), CenturyLink's business customer ICB contracts  
23 have never resulted in any discriminatory pricing complaint filed against CenturyLink with the  
24 ACC.

25

1           14.     The Staff asks for a determination of whether the Settlement Agreement is in the  
2 public interest because it “appears to affect rates.” For the reasons stated above, CenturyLink  
3 submits that the provisions of the Settlement Agreement easily meet the public interest. More to  
4 the point, however, is the fact that regardless of whether the Settlement Agreement meets the  
5 public interest with respect to its intrinsic terms and conditions relating to rates, that analysis has  
6 nothing to do with whether CenturyLink’s services are competitive under Rule 1108.  
7 CenturyLink respectfully suggests that the examination Staff seeks can be conducted separately,  
8 and should not impede the core issues in this Docket. Furthermore, the examination of whether  
9 the Settlement Agreement is in the public interest is a different question from whether DoD  
10 should be excused from the Docket. As CenturyLink has shown in this response, DoD’s  
11 departure will not adversely prejudice any remaining party, will not slow the case, and will not  
12 deprive the Commission of any especially useful information.

13                   ENTERING THE DoD PRE-FILED, PRE-SETTLEMENT TESTIMONY INTO  
14                   EVIDENCE SERIOUSLY WOUNDS THE SETTLEMENT AGREEMENT AND  
                    WILL HAVE A CHILLING EFFECT ON SUCH SETTLEMENTS IN THE FUTURE

15           15.     The DoD Settlement Agreement fulfills CenturyLink’s legitimate purposes of  
16 streamlining the hearing and mitigating litigation risk by calling for DoD to exit from the  
17 proceeding, and to withdraw the testimony of its professional witness. While CenturyLink will  
18 rebut the DoD advocacy if necessary, CenturyLink’s view is that it is hyperbolic and overblown,  
19 and in many respects off-point. If the witness’s testimony is entered into evidence, a primary  
20 benefit of the Settlement is lost, and the contractual consideration of the Settlement Agreement  
21 fails.

22           16.     CenturyLink opposes admitting the DoD pre-filed testimony into evidence.  
23 CenturyLink recognizes that the testimony has been filed with Docket Control, and it is included  
24 in the administrative record of this Docket. CenturyLink does not ask that the filing be  
25

1 expunged. It could be left in the administrative records for the docket, but CenturyLink asks that  
2 it not be cited by other parties in their briefs, and that it not be used or considered in the  
3 Commission's deliberation on the merits of CenturyLink's application.

4 17. The DoD has determined that the CenturyLink commitments in the Settlement  
5 Agreement achieve their objectives in intervening in this Docket. The DoD entered the  
6 Settlement Agreement by its own volition. By its own volition, DoD asks that its pre-filed,  
7 unsworn testimony be withdrawn. CenturyLink submits that admitting the DoD written  
8 testimony into the record—a writing that currently has no legal standing or significance—is  
9 tantamount to making the DoD testify against its will.

10 18. The Staff asserts that the Commission requires the pre-filed testimony of parties  
11 who settle pre-hearing to be entered into the body of evidence the Commission considers to  
12 either approve the settlement or to rule on the merits of the underlying proceeding. Whether that  
13 is true or not, and Staff has only provided anecdotal evidence in that regard, it is not a  
14 requirement embodied in the rules of practice and procedure before the Commission.  
15 CenturyLink respectfully asks the Commission to consider that in dockets like this one,  
16 compelling the entry of settling parties testimony into evidence has a substantially chilling effect  
17 on future settlements for the reasons stated above.

18 19. tw telecom proposes that the DoD prefiled testimony must be entered into  
19 evidence, because without it, "the Commission cannot independently consider and evaluate the  
20 merits and context of the DoD/FEA settlement." That claim is incorrect. The pre-filed  
21 testimony is a document already in the Commission's administrative files, and it may be referred  
22 to in the examination of witnesses testifying in support to the settlement, without being made  
23 part of the evidentiary record. But, however that may be, using the pre-filed testimony for the  
24 purpose of considering the public interest of the Settlement Agreement does not justify admitting  
25

1 the testimony into evidence for the altogether different purpose of deliberating on whether  
2 CenturyLink's services are competitive.

3       20.     tw telecom goes on to argue that the Commission will have difficulty evaluating  
4 the merits of testimony filed in response to DoD/FEA without the DoD/FEA testimony also in  
5 the record. CenturyLink respectfully submits that the Commission can simply decline to  
6 consider testimony filed in response to DoD/FEA. The purpose of this docket is to deliberate on  
7 whether CenturyLink's services are competitive. The purpose is not to evaluate DoD advocacy,  
8 which is in unsworn testimony that they now seek to withdraw. In any event, tw telecom's  
9 argument doesn't track. A quick examination of the Staff and intervenors' testimony reveals that  
10 they provide only cursory comment on the DoD advocacy. tw telecom's comment rings  
11 particularly hollow since it did not file rebuttal testimony at all.

12       21.     tw telecom points to a settlement agreement in a different docket, (Docket No.  
13 T—01051B-10-0194) regarding approval of the merger between Qwest and CenturyLink. In  
14 that settlement agreement, the merging companies and the Commission Staff stipulated that all  
15 pre-filed testimony would be admitted into evidence, and all parties to that settlement agreement  
16 would provide testimony in support of the settlement. However, the situation in this case is not  
17 analogous. What was stipulated to by the applicant in order to reach a settlement with the Staff  
18 cannot constitute a precedent that must be adhered to when the applicant and the Staff have not  
19 reached settlement. Furthermore, the stipulation tw telecom points to from the merger docket  
20 was not signed by the DoD. The merger docket settlement agreement between CenturyLink and  
21 Staff simply provides no controlling guidance or precedent here.

22       22.     CenturyLink respectfully asks the Commission to consider whether the policy  
23 reasons behind compelling parties who settle before the hearing to submit their pre-hearing  
24 written testimony into evidence, should be applied to each and every situation. This situation is  
25

1 different from many others, in significant ways CenturyLink submits that as a consumer of  
2 telecommunications services in Arizona, the United States Government is unique in many  
3 respects—so unique that it could easily be considered a class of customer unto itself.<sup>2</sup> The  
4 DoD's intervention was made for its own economic interest, not on behalf of the public, and not  
5 on behalf of competitors. Those other interests are ably represented in the Docket by others.  
6 Dismissal of the DoD, without entering its pre-filed unsworn litigation position into evidence,  
7 prejudices no one.

8 ENTERING THE DoD PRE-FILED WRITTEN TESTIMONY INTO EVIDENCE  
9 WOULD WORK A SUBSTANTIAL INJUSTICE TO CENTURYLINK

10 23. It bears repeating that as it stands now, the DoD written testimony filed in  
11 advance of the hearing, is unsworn. It currently has no evidentiary or other legal significance.  
12 The settlement between the DoD and CenturyLink was reached before CenturyLink's rebuttal  
13 testimony was due. Because of the settlement, CenturyLink very understandably did not file  
14 written rebuttal to the DoD testimony. This unique circumstance presents another important  
15 reason why the Commission should refrain from ordering the DoD pre-filed testimony be  
16 included in evidence.

17 24. CenturyLink's understanding of settlement situations at the Commission is that  
18 the settling parties have typically completed their direct and rebuttal testimony filings; and in  
19 those circumstances they may be willing to stipulate all settling parties' testimony into evidence,  
20 and rely on their own rebuttals to defend against the others' testimony. Here, due to the way  
21 events unfolded, CenturyLink has not had the opportunity to rebut the testimony that Staff seeks  
22 to have entered into evidence. It would be fundamentally unfair to CenturyLink for the

---

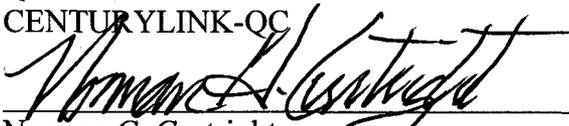
23 <sup>2</sup> The United States Government has a substantial presence in the state through military bases and numerous other  
24 facilities. It constitutes an important part of the state's economy and comprises a significant part of communities of  
25 the state. Some of the military bases that are critical to our national defense, such as Fort Huachuca and the Yuma  
Proving Grounds, are located in relatively remote areas, and their telecommunications needs in those circumstances  
are unlike any other customers' circumstances. Last, because it is our government, it is not unreasonable to give the  
DoD/FEA a certain amount of deference.

1 unrebutted DoD testimony to become evidence in this case, open to be argued in briefs by Staff  
2 or intervenors, and open to be considered by the Commission in its deliberation of CenturyLink's  
3 Application.

4 CONCLUSION

5 25. For the reasons stated above, CenturyLink submits that ample reasons exist in  
6 these unique circumstances, for the Commission to grant the DoD Request to Withdraw, and to  
7 deny the requests of other parties to enter the unsworn, un-rebutted pre-filed testimony of the  
8 DoD into evidence. Entering that information, which at this time has no legal significance, into  
9 the body of evidence before the Commission will not enhance the evidentiary record or aid the  
10 Commission in the discharge of its duty. Such action would, however, seriously undercut the  
11 settlement agreement struck in good faith between DoD and CenturyLink. There is no  
12 compelling reason for the Commission to do that

13 RESPECTFULLY SUBMITTED, this 26<sup>th</sup> day of April, 2012.

14 QWEST CORPORATION d/b/a  
15 CENTURYLINK-QC  
16   
17 Norman G. Curtright  
18 Associate General Counsel  
19 20 E. Thomas Road, 1st Floor  
20 Phoenix, Arizona 85012  
21 Telephone: (602) 630-2187  
22  
23  
24  
25

1 ORIGINAL and thirteen (13) copies filed  
this 26<sup>th</sup> day of April, 2012, with:

2 Docket Control  
3 ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
4 Phoenix, Arizona 85007

5 Copy of the foregoing sent via e-mail and  
U.S. Mail this 26<sup>th</sup> day of April, 2012, to:

6 Steve M. Olea, Director  
7 Utilities Division  
ARIZONA CORPORATION COMMISSION  
8 1200 West Washington Street  
Phoenix, Arizona 85007

Janice Alward, Chief Counsel  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

9 Maureen A. Scott, Senior Staff Counsel  
10 Legal Division  
ARIZONA CORPORATION COMMISSION  
11 1200 West Washington Street  
Phoenix, Arizona 85007

Daniel Pozefsky  
RUCO  
1110 West Washington, Suite 220  
Phoenix, AZ 85007

12 Lyn Farmer  
13 Utilities Division  
ARIZONA CORPORATION COMMISSION  
14 1200 West Washington Street  
Phoenix, Arizona 85007

Stephen S. Melnikoff  
General Attorney  
Regulatory Law Office (JALS-RL/IP)  
Office of the Judge Advocate General  
U. S. Army Legal Services Agency  
9275 Gunston Road  
Fort Belvoir, VA 22060-5546

16 Joan Burke  
17 1650 North First Avenue  
Phoenix, AZ 85003

Gary Yaquinto  
Arizona Utility Investors Association  
2100 North Central Avenue, Suite 210  
Phoenix, AZ 85004

19 Michael Grant  
20 Gallagher and Kennedy  
2575 East Camelback Road  
21 Phoenix, AZ 85016-9225

Jane Rodda  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

23   
24 \_\_\_\_\_