

October 7, 2010

**VIA ECFS**

***EX PARTE***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

**Re: *Applications Filed By Qwest Communications International Inc. And CenturyTel, Inc., d/b/a CenturyLink For Consent To Transfer Of Control, WC Dkt. No. 10-110***

Dear Ms. Dortch:

Cbeyond, Inc. (“Cbeyond”), Integra Telecom, Inc. (“Integra”) and Socket Telecom, LLC (“Socket Telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby respond to the Applicants’ September 29th Letter in the above-referenced proceeding.<sup>1</sup>

In their September 29th Letter, the Applicants state that a settlement agreement (“Iowa Settlement”)<sup>2</sup> reached in the Iowa Utilities Board (“IUB”) proceeding regarding CenturyLink’s proposed acquisition of Qwest addresses the issues raised by the Joint Commenters in the instant proceeding.<sup>3</sup> That is regrettably not the case. To begin with, because none of the Joint Commenters provides service in Iowa, none was a party to the IUB proceeding or to the Iowa Settlement.<sup>4</sup> The

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<sup>1</sup> See generally Letter from Karen Brinkmann, Counsel for CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-110 (filed Sept. 29, 2010) (“September 29th Letter” or “Applicants’ September 29th Letter”).

<sup>2</sup> See *id.*, Attachment, Joint Motion for Approval of Settlement Agreement And Certain Intervenors’ Motion to be Excused from the Hearing, IUB Docket No. SPU-2010-0006 (filed Sept. 27, 2010) (“Iowa Settlement”).

<sup>3</sup> See Applicants’ September 29th Letter at 2 (“The Iowa settlement thus addresses and resolves the same major categories of concerns as raised by the CLECs in their recent ex parte filings.”).

<sup>4</sup> The competitive LECs that are party to the Iowa Settlement are Sprint, PAETEC, MCC Telephony/MediaCom, Cox, and 360 Networks. See Iowa Settlement at 1.

Iowa Settlement is not a remotely suitable “model,” as the Applicants suggest,<sup>5</sup> for addressing the issues raised in other state commission review proceedings or in the instant FCC proceeding. As PAETEC, one of the parties to the Iowa Settlement has explained, the IUB proceeding suffered from several serious limitations, including a very short statutory timeframe for review that precluded sufficient discovery.<sup>6</sup> These limitations apparently left the competitive LECs in Iowa little choice but to accept a settlement that does not address, or addresses inadequately, the numerous problems that must be cured in order for the proposed transaction to be consistent with the public interest.<sup>7</sup> For example, the Iowa Settlement does not (1) require that the Merged Company provide at least the same level of wholesale service quality as legacy Qwest or subject the Merged Company to remedy payments for merger-related service quality degradation;<sup>8</sup> (2) require that the Merged Company provide competitive LECs with conditioned copper loops in compliance with applicable interconnection agreements as well as state and federal law;<sup>9</sup> or (3) preclude the Merged Company from increasing special access rates or discontinuing special access term and volume discount plans.<sup>10</sup> Indeed, it is unfortunate that the Applicants have seized upon an obviously limited settlement agreement as their proposed basis for a comprehensive settlement of the concerns raised by the Joint

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<sup>5</sup> Applicants’ September 29th Letter at 1.

<sup>6</sup> See PAETEC’s Motion to Enforce Settlement, IUB Docket No. SPU-2010-0006, at 3-4 (filed Oct. 1, 2010) (“PAETEC IUB Motion”); see also *id.* (discussing the IUB’s history of approving transactions without imposing any conditions).

<sup>7</sup> See *id.* (explaining that the unique circumstances in Iowa factored into PAETEC’s willingness to make certain compromises that it would not necessarily have made in other jurisdictions).

<sup>8</sup> See Letter from Thomas Jones, Counsel for Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-110, Attachment, at 4-6 & nn. 8-10 (filed Sept. 24, 2010) (“Joint Commenters’ September 24th Ex Parte Presentation”) (explaining that, in order to ensure compliance with its obligations under Section 271 as well as its obligations to provide just, reasonable, and nondiscriminatory service under Sections 201, 202 and 251 of the Act, the Merged Company must be subject to performance metrics and related financial remedy regimes, and that current performance assurance plans must be supplemented to remedy merger-related service problems).

<sup>9</sup> See *id.* at 6.

<sup>10</sup> See *id.* at 9-10. There are of course many other issues associated with the legacy Qwest incumbent LEC territory that must be addressed for the proposed transaction to be deemed consistent with the public interest. See generally Comments of Cbeyond, Integra Telecom, Socket Telecom, and tw telecom, WC Dkt. No. 10-110 (filed July 12, 2010). In addition, a comprehensive settlement must address the concerns of competitive LECs operating in the legacy CenturyLink territory. See, e.g., Joint Commenters’ September 24th Ex Parte Presentation, at 7-9 (discussing the numerous problems experienced by competitive LECs in CenturyLink territory since the CenturyTel-Embarq merger). CenturyLink has not responded to concerns associated with the legacy CenturyLink territory and the Iowa Settlement does nothing to address those concerns.

Commenters in this proceeding. This is particularly true given that the parties to the Iowa Settlement, including CenturyLink itself, expressly agreed that the circumstances in Iowa are “unique.”<sup>11</sup> According to PAETEC, the Applicants’ reliance on the Iowa Settlement violates the terms and purpose of the Iowa Settlement.<sup>12</sup> Although this sort of conduct discourages settlement, as it calls into question whether a settlement agreement may indeed be relied upon, the Joint Commenters will nonetheless continue to pursue resolution of their concerns with the Applicants.

In their September 29th Letter, the Applicants also suggest that Integra has engaged in needless delay tactics by “postpon[ing] meeting with CenturyLink [to negotiate a settlement] for several weeks, even while [Integra] has filed multiple *ex partes* with this Commission.”<sup>13</sup> That is not the case. Integra has eagerly sought to engage in settlement negotiations with CenturyLink while Integra, a much smaller company, simultaneously accommodates the expedited procedural schedules that multiple state commissions have adopted at the Applicants’ urging. As Integra has communicated to CenturyLink, Integra has no choice but to participate in regulatory review proceedings while it engages in business negotiations with CenturyLink until the parties have agreed upon an executed and filed settlement agreement, to the extent such an agreement can be reached. Given CenturyLink’s aggressive and exhaustive regulatory and political advocacy for premature merger approval, it is unreasonable for CenturyLink to expect Integra to limit or forgo its right to advance its position in the FCC and state commission merger review proceedings.

Integra had proposed to CenturyLink that the hearing in the Minnesota Public Utilities Commission (“PUC”) review proceeding be rescheduled from October 5th through 7th to the first week of November 2010 so that Integra and CenturyLink could hold settlement discussions on October 4th and 5th. Adjustment of the schedule in Minnesota had already been under consideration because CenturyLink had failed to produce documents requested in discovery in a timely manner. Under the schedule proposed by Integra, the Minnesota PUC hearing would still have taken place before the hearings scheduled in Colorado, Arizona, and Washington, and the change in the Minnesota PUC hearing date would not therefore have affected the overall timeline for review of the transaction. Moreover, if settlement had been reached as a result of early October discussions, the costs associated with participating further in the Minnesota PUC review proceeding would have been reduced.

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<sup>11</sup> The Iowa Settlement states that “[t]he parties agree that the schedule, governing law and the market conditions in Iowa are unique.” Iowa Settlement at 1. The Iowa Settlement states further that the parties “agree that this settlement resolves only the Iowa proceedings” and that the parties to the settlement “shall not use th[e] agreement in any other proceeding as evidence of any other Party’s position in that proceeding.” *Id.* at 2. From this language alone, it is obvious that the competitive LECs in Iowa did not believe that the Iowa Settlement could form the basis of comprehensive conditions for the merger.

<sup>12</sup> See PAETEC IUB Motion at 1 (arguing that “CenturyLink and Qwest violated both the letter and the spirit of Paragraph 1” of the Iowa Settlement, which provides that the parties “shall not use this agreement in any other proceeding as evidence of any other Party’s position in that proceeding”).

<sup>13</sup> Applicants’ September 29th Letter at 2.

Nonetheless, CenturyLink opposed the proposed schedule change, and the hearing before the Minnesota PUC was not rescheduled at that time.<sup>14</sup> Integra lacked the resources to participate in settlement negotiations on October 4th and 5th while simultaneously preparing for and participating in the Minnesota PUC hearing. Rather than accusing Integra of delay tactics, the Applicants should understand the predicament that the expedited schedules in the state commission review proceedings create for competitors like Integra. Indeed, CenturyLink has now conceded that it faces the same problem. A CenturyLink representative recently testified<sup>15</sup> that the company still has not reached out to, or discussed settlement with, a number of competitive LECs because CenturyLink's schedule cannot accommodate both settlement discussions and the merger review proceedings, including discovery.<sup>16</sup>

In any event, after CenturyLink refused to reschedule the October 5th to 7th Minnesota PUC hearing, Integra's President proposed to CenturyLink's President of Wholesale Operations that the parties meet during the week after the hearing, and both parties are now scheduled to meet in Portland, Oregon on October 14th to discuss a potential settlement. In addition, Integra will participate in the October 12th settlement conference in the Oregon Public Utility Commission merger review proceeding, just as it participated in previous settlement conferences in that proceeding. Integra is hopeful that those discussions will yield an agreement.

Finally, Integra and Cbeyond have also sought to engage CenturyLink in comprehensive, multi-state negotiations as part of a broader coalition of competitive LECs that have participated in the state commission review proceedings. Unfortunately, CenturyLink recently chose not to participate in such

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<sup>14</sup> On October 6, 2010, the Administrative Law Judge ("ALJ") presiding over the Minnesota PUC review proceeding heard arguments regarding competitive LECs' claims that CenturyLink had failed to produce documents in a timely manner. The ALJ ruled in the competitive LECs' favor and held that due process requires an additional round of testimony and at least one additional hearing date, scheduled for November 1st. CenturyLink had not produced all of the documents at issue when it proposed to hold settlement discussions with Integra on October 4th and 5th. Had CenturyLink agreed to Integra's proposal to postpone the hearing scheduled for October 5th through 7th, the parties could have held negotiations on October 4th and 5th and the scheduling of the additional hearing—and the additional expense of returning to Minnesota to participate in the continued hearing—could have been avoided. Thus, contrary to the Applicants' assertions, it is CenturyLink, not Integra, that made settlement discussions in early October impossible and prolonged potential bilateral resolution of the issues raised by Integra.

<sup>15</sup> CenturyLink's Director of CLEC Management, Michael Hunsucker, who will be Vice President of Wholesale Services and Support for the Merged Company, made this representation during his testimony at the Minnesota PUC hearing on October 6, 2010. A transcript of the hearing is not yet available.

<sup>16</sup> Several Minnesota competitive LEC intervenors were identified as among the competitive LECs with whom CenturyLink has had no settlement discussions. Therefore, even assuming a settlement had been reached with Integra, the Minnesota PUC review proceeding would have moved forward because CenturyLink is not taking a more inclusive approach to settlement discussions.

discussions. As a result, competitive LECs have no choice but to engage in separate bilateral discussions and actively participate in testimony, discovery and hearings pursuant to the expedited schedules in each of those proceedings. This approach is more costly and less inclusive than multi-party, multi-state, comprehensive negotiations. CenturyLink recently stated that competitive LECs placed unacceptable conditions on multi-state negotiations.<sup>17</sup> But in explaining this position to the competitive LECs, CenturyLink's Executive Vice Chairman identified only one aspect of the competitive LECs' proposal as objectionable to CenturyLink: the request that the result of multi-state negotiations apply at least in all of the Qwest states. The competitive LECs continue to believe that this is a reasonable request, particularly as CenturyLink has recently stated that it generally prefers uniform conditions.<sup>18</sup> In any event, CenturyLink made no counter-proposal and instead simply refused to engage in multi-CLEC, multi-state negotiations. CenturyLink's refusal to engage in such negotiations highlights the importance of the FCC's review of this transaction because only the FCC can establish merger conditions that are binding throughout the Applicants' combined incumbent LEC footprints.

Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Nirali Patel

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<sup>17</sup> See *supra* note 15.

<sup>18</sup> See *id.*