Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications Filed By Qwest	)	WC Docket No. 10-110
Communications International Inc. and	)	DA 10-993
CenturyTel, Inc., d/b/a CenturyLink	)	File Nos. 0004229927,
For Consent to Transfer of Control	)	0004231340, 0004231345,
	)	0004231348, 0004232216,
	)	0004236172

COMMENTS OF COMPTEL

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SUMMARY

The Commission must determine whether, and the Applicants bear the burden of proving, the proposed transfer of control of Qwest to CenturyLink "will serve the public interest, convenience, and necessity." The Commission's public interest authority enables it, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction. In all prior merger proceedings involving incumbent LECs of some size, the Commission has imposed conditions, concluding that such conditions were necessary in order to find the proposed merger, on balance, to be in the public interest. Consequently, if the Commission were to approve this merger, it must adopt conditions to offset the harm to competition that will surely result.

In particular, *at the very least*, the Commission should adopt conditions (that would apply for at least a period of 48 months after the Merger Closing date) that reduce the transaction costs associated with interconnection agreements, keep constant or reduce special access costs, and promote UNE stability. Prior to approval of the merger, the Commission should ensure that Qwest and CenturyLink are meeting, and will continue to meet post merger, their obligations under Section 251 and 271 of the Act. These constitute the *bare minimum* of what the Commission should impose. COMPTEL is aware that some of its members and others are proposing additional conditions that are of significant importance to various sectors of the industry. Thus, COMPTEL's proposal is meant to address some of the common issues - but is not an exhaustive list of issues - that are facing COMPTEL members that need to be addressed. Nonetheless, as the application stands now –without conditions – the Applicants' request should be denied.

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COMMENTS OF COMPTEL

COMPTEL, through counsel, hereby submits its comments on the application of CenturyTel, Inc., d/b/a CenturyLink ("CenturyLink") and Qwest Communications International, Inc. ("Qwest") (collectively, the "Applicants") for consent to the transfer of control of Qwest to CenturyLink.[1] COMPTEL submits that the Commission must deny this application because the Applicants have not met their burden of proving that their proposed merger would promote the public interest. In the alternative, COMPTEL requests that the Commission, consistent with its precedent, condition grant of the Merger Application, as described below.

COMPTEL is the leading industry association representing competitive facilities-based telecommunication service providers, emerging VoIP providers, and integrated communications companies. COMPTEL members are entrepreneurial companies driving technological innovation and creating economic growth through competitive voice, video and data offerings and the deployment of next-generation, IP-based networks and services.

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[1] *See* Public Notice, *Applications Filed for By Qwest Communications International Inc. and CenturyTel,Inc., D/B/A CenturyLink for Consent to Transfer of Control,* WC Docket No. 10-110, DA 10-993 (rel. May 28, 20108); Qwest Communications International, Inc., Transferor, and CenturyTel, Inc., d/b/a CenturyLink, Transferee, Application for Transfer of Control Under Section 214 of the Communications Act, as Amended (filed May 10, 2010)(Merger Application).

Many COMPTEL members compete directly with CenturyLink and Qwest in the provision of telecommunications and information services. What is more, COMPTEL's members must interconnect with the Applicants' networks and purchase access to essential facilities from the applicant including special access services. As incumbent LECs with market power, Applicants can exercise substantial control over the prices, terms and conditions of interconnection and special access. The merger will increase the span of their market power. Because its members are both customers and competitors of CenturyLink and Qwest, COMPTEL acting on behalf of its members is a party in interest with standing to oppose this merger pursuant to Sections 214 and 310 of the Communications Act.

I. APPLICANTS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THAT THEIR MERGER IS IN THE PUBLIC INTEREST

Under Sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the proposed transfer of control of Qwest to CenturyLink "will serve the public interest, convenience, and necessity."[2] The Applicants bear the burden of proving that the proposed transaction, on balance, serves the public interest.[3] The Commission, in applying this public interest standard, considers whether the proposed merger could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. In particular,

> Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets . . . .[4]

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[2] *AT&T/BellSouth Merger Order*, 22 FCC Rcd 5662, 5671-72 ¶ 19 (2007)("AT&T/BellSouth Merger Order"). *See also Sprint/Clear-wire License Transfer Order*, WT Docket No. 08-94, FCC 08-259, at ¶ 19 (rel. Nov. 7, 2008)("Sprint/Clear-wire Order").

[3] *Id.*

[4] *AT&T/BellSouth Merger Order* at ¶ 20. *See also Sprint/Clearwire Order* at ¶ 20.

Thus, in determining the competitive effects of a proposed merger, the Commission is "not limited to traditional antitrust principles," but rather considers the "broader public interest."[5]

Applicants have failed to meet their burden of demonstrating that their proposed merger will ensure that the transaction will yield overall public interest benefits. Applicants claim their merger poses no risk of harm to competition or consumers.[6] Yet, Applicants concede that there is overlap in areas where CenturyLink and Qwest own or lease facilities used to provide interstate access and special access services in four markets[7] and CenturyLink and Qwest out-of-region metro fiber facilities overlap in two areas.[8] So the merger necessarily results in a direct reduction in competition.

Moreover, the merger negatively impacts competition as a result of the increased geographic footprint it will produce. The Commission has recognized that the merger of two incumbent LECs ordinarily increases the potential for harm to competition because the merger would "increase the incentives and ability of the merged entity to discriminate against rivals."[9] The Commission has explained that this increased incentive and ability to discriminate against rivals "creates a public interest harm because it may adversely affect national competitors' provision of services, and may force consumers to pay more for retail services, with reduced quality and choice."[10] Indeed in its recent decision on the transfer of control of access lines

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5 *AT&T/ BellSouth Merger Order* at ¶ 21.

6 Merger Application at 22.

7 Merger Application at 23.

8 Merger Application at 26.

9 *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14032, 14086 ¶ 96. [[T]he increase in the number of local calling areas controlled by Bell Atlantic as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend upon access to Bell Atlantic's inputs in order to provide services.] *Id.*

10 *Id.* at 14114 ¶ 173.

between Verizon and Frontier, the Commission again acknowledged the "Big Footprint" theory which, as explained the *SBC/Ameritech Order*, recognizes that a "merger between two incumbent LECs may increase the merged entity's incentive to engage in anticompetitive behavior by allowing the resulting entity to capture or internalize a higher proportion of the benefits of such anticompetitive strategies against regional or national competitors."[11]

A merger between CenturyLink and Qwest is not just a merger between two ILECs, it's a merger between the third and fourth largest telephone exchange carriers. As of December 31, 2009, CenturyLink and Qwest served local markets in 37 states with approximately 5 million broadband customers, 17 million access lines, 1,415,000 video subscribers and 850,000 wireless consumers[12] and the parties have adjacent local exchange footprints in 10 states.[13]

Therefore, as the Commission previously concluded, while combining assets may allow a firm to reduce transaction costs and offer new products, it may also "create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways."[14] The Commission's public interest authority enables it, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.[15] In all prior merger proceedings involving

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[11] Memorandum Opinion and Order, *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, FCC 10-87, ¶ 44, n. 127 (2010)("Verizon/Frontier Transaction Order").

[12] http://news.qwest.com/centurylinkqwestmerger

[13] Merger Application at 28.

[14] Memorandum Opinion and Order, *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, FCC 09-54, ¶12 (2009). *See, e.g., Verizon Wireless/Alltel Order*, 23 FCC Rcd. at 17462, ¶29; *XM/Sirius Order*, 23 FCC Rcd at 12366, ¶33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, ¶21.

[15] *See, e.g., Verizon Wireless/Alltel Order*, 23 FCC Rcd. at 17463, ¶ 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, ¶33; *AT&T/BellSouth Order* at ¶ 22.

incumbent LECs of some size, the Commission has imposed conditions to "bolster the benefits of [the] proposed merger," concluding that such conditions were necessary in order to find the proposed merger, on balance, to be in the public interest. [16] Consequently, if the Commission were to approve this merger, it must adopt conditions to offset the harm to competition that will surely result. Nonetheless, as the application stands now –without conditions – the Applicants' request should be denied.

II. IF IT APPROVES THE MERGER, THE COMMISSION, AT THE VERY LEAST, MUST ADOPT CONDITIONS

The Commission has the authority to impose conditions that ensure that the public interest is served by the transaction:

> Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions *to ensure that the transaction will yield overall public interest benefits*.[17]

As discussed above, the Commission has recognized that the merger of two incumbent LECs increases, rather than diminishes, the merged entity's market power by "increasing the merged entity's incentives and ability to discriminate against entrants into the local markets of the merging firms."[18] The merger will substantially increase the size of the merged entity's geographic footprint and, as a result, substantially increase the merged entity's incentive and ability to raise rivals' costs.

In order to mitigate the resulting harm, the Commission has adopted in prior incumbent LEC merger orders numerous conditions to facilitate market entry and to reduce transaction

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16 *Bell Atlantic/GTE Merger Order* at ¶ 248.

17 *Sprint/Clearwire Order* at ¶ 22 (emphasis added). *See also AT&T/BellSouth Merger Order* at ¶ 22.

18 *Bell Atlantic/GTE Merger Order* at ¶ 3.

costs. Consistent with its precedent the Commission should, if it approves this merger, adopt such conditions. In particular, *at the very least*, the Commission should adopt the following conditions that would apply for at least a period of 48 months after the Merger Closing date. These constitute the *bare minimum* of what the Commission should impose. COMPTEL is aware that some of its members and others are proposing additional conditions that are of significant importance to various sectors of the industry. Thus, COMPTEL's proposal is meant to address some of the common issues - but is not an exhaustive list of issues - that are facing COMPTEL members that need to be addressed.

A. THE COMMISSION SHOULD ADOPT FOUR INTERCONNECTION AGREEMENT CONDITIONS AS IMPOSED IN THE AT&T/BELLSOUTH ORDER

In prior incumbent LEC merger proceedings, such as the AT&T/BellSouth merger, the Commission has conditioned its approval on the merging carriers' agreement to permit most-favored nation agreements, whereby competitive carriers may port any interconnection agreement with any of the merging carrier's ILECs in any State to any other State served by either ILEC – subject to State-specific pricing and performance measures.[19] The Commission has recognized that such a most-favored nation condition both "facilitate[s] market entry,"[20] and reduces transaction costs for all carriers. As Commissioner Adelstein has correctly observed:

> This condition also responds to concerns about incentives for discrimination – whether through the terms of access offered to competitors or through raising competitors' costs – long recognized by Commission precedent.[21]

Nonetheless, the specific provision provided in the AT&T/BellSouth merger needs to be strengthened to eliminate any of the shortcomings that became apparent over the ensuring years.

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[19] *See, e.g., Bell Atlantic/GTE Merger Order* at ¶ 301.

[20] *Id.* at ¶ 300.

[21] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5838 (Concurring Statement of Commissioner Adelstein).

Additionally, in the AT&T/BellSouth merger, the Commission also imposed three additional interconnection agreement-related provisions to further reduce transaction costs:

- The merged incumbent LEC will not refuse an "opt in" request on the ground that the agreement has not been negotiated to reflect changes in law (so long as the requesting carrier agrees to negotiate such changes in good faith);
- The merged incumbent LEC will allow carriers to use its preexisting agreement as the starting point for a new agreement; and
- The merged incumbent LEC will permit a carrier to extend its current agreement for up to three years, regardless of whether the initial term has expired.[22]

These types of conditions should be imposed on the merged entity here, but likewise need to be strengthened from those imposed in the AT&T/BellSouth merger. These supplemental conditions, if implemented appropriately, will reduce costs for all carriers, including the incumbent LEC.

B. THE COMMISSION SHOULD ADOPT CONDITIONS RELATED TO SPECIAL ACCESS SERVICES

COMPTEL's members must purchase from Applicants essential inputs, such as special access facilities, in order to serve their own customers. In many instances its members have no alternative to Applicants' facilities. As COMPTEL has repeatedly stated, under the current regulatory regime the RBOCs, such as Qwest, are able to "lock up" the market demand for special access via their exclusionary volume and term commitments, offered as part of their discount plans. One of the key factors enabling the RBOCs to do this is the expanse and ubiquity of their network and their practice of pricing their service on a wider basis than an individual building, causing the customer to buy from the RBOC – even at excessive rates – where there is competition to avoid even higher rates on the monopoly portion of their demand.

[22] *See AT&T/BellSouth Merger Order,* Appendix F, 2007 FCC LEXIS 2363 at *417-18 (Reducing Transaction Costs Associated with Interconnection Agreements).

Qwest has already demonstrated its ability to charge excessive special access rates. In particular, a comparison of special access rates to the rates of analogous UNEs found special access rates to be drastically higher.[23] For example, a comparison done by McLeodUSA found a DS1 special access circuit priced at 152% more than the UNE rate.[24] Even if the carrier availed itself of the discounts provided through Qwest's exclusionary contract offering (which requires that the customer purchase 90% of its entire demand throughout the Qwest 14-state region from Qwest), the discounted prices were 91% to 111% higher than the UNE rates.[25] Even if one were to suggest that special access rates should not equal the corresponding UNE rates, the extreme deviation from the cost-based rates demonstrates the excessiveness of the special access rates.

The geographic scope of the proposed merger magnifies this problem. The merged entity will control an even greater portion of competitors' cost of doing business. The combination of CenturyLink and Qwest, by further expanding the reach of their network, will increase the merged entity's ability to engage in, as well as the impact of, exclusionary contracts. The merged entity would also have powerful incentives to maintain – and even increase – its currently excessive special access rate levels in order to impose undue costs of doing business upon its would-be competitors and constrain those rivals' activities within the newly-expanded footprint.

As in prior mergers, the Commission should ensure that the merger does not result in rate increases for these critical services, which are already extraordinarily overpriced. As such, the

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[23] Petition for Modification of McLeodUSA Telecommunications Services, Inc., *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, pp. 4-5 (filed Jul. 23, 2007)("McLeod Petition").

[24] McLeod Petition, *Eben Declaration* at ¶8; *See also, id.* Exhibit 1.

[25] *Id* at ¶¶ 10-13.

Commission should, at a minimum, adopt conditions that are similar to two of the eleven of the special access conditions adopted in the *AT&T/BellSouth Merger Order* that prevent the merged entity from increasing rates, as well as, requiring them to offer rates in areas where they have Phase II pricing flexibility that are no higher than the rates they offer in areas where they have not obtained Phase II pricing flexibility.[26]

Specifically, the Commission should adopt the following conditions:

No CenturyLink/Qwest ILEC may increase the rates in its interstate tariffs, including contract tariffs, for special access services that it provides in the CenturyLink/Qwest in-region territory, as set forth in the tariffs on file at the Commission on the Merger Closing Date, and as set forth in tariffs amended subsequently in order to comply with the provisions of these commitments;

and

In areas within the CenturyLink/Qwest in-region territory where a CenturyLink/Qwest incumbent LEC has obtained Phase II pricing flexibility for price cap services ("Phase II areas"), such incumbent LEC will offer DS1 and DS3 channel termination services and DS1 and DS3 mileage services that currently are offered pursuant to the Phase II Pricing Flexibility Provisions of its special access tariffs, at rates that are no higher than, and on the same terms and conditions as, its tariffed rates, terms, and conditions as of the Merger Closing Date for such services in areas within its in-region territory where it has not obtained Phase II pricing flexibility. The CenturyLink/Qwest incumbent LECs will file all tariff revisions necessary to effectuate this commitment within 90 days from the Merger Closing Date. This Commitment shall remain in effect until 45 months after the day the CenturyLink/Qwest incumbent LECs file with the Commission the final tariff revisions necessary to effectuate this commitment.

C. THE COMMISSION SHOULD ADOPT CONDITIONS THAT PROMOTE UNE STABILITY

In order to promote a competitive market, despite the combination of two of the largest incumbent carriers, it is essential to have a period of certainty established with regard to the availability of unbundled network elements (pursuant to Section 251 of the Act), as was provided

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26 *AT&T/BellSouth Merger Order*, Appendix F, Special Access Conditions nos. 5 and 6.

for in the AT&T/BellSouth merger.[27] "UNE certainty" entails UNE rate stability and the assurance that critical unbundled facilities are not simply removed from the market through the forbearance process. UNEs are an essential, albeit incomplete, step toward fostering competition by competitive LECs. Therefore UNE certainty is an indispensable factor in any merger that impacts such a vast geographic span.

In particular, the Commission should adopt the following conditions:

The Merged Entity shall continue to offer and shall not seek any increase in state-approved rates for UNEs or collocation that are in effect as of the Merger Closing Date. For purposes of this commitment, an increase includes an increased existing surcharge or a new surcharge unless such new or increased surcharge is authorized by (i) the applicable interconnection agreement or tariff, as applicable, and (ii) by the relevant state commission. This commitment does not limit the ability of the Merged Entity and any other telecommunications carrier to agree voluntarily to any different UNE or collocation rates;

and,

The Merged Entity will not seek or give effect to a ruling, including, through a forbearance petition under section 10 of the Communications Act (the "Act") 47 U.S.C. 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.

D. THE COMMISSION SHOULD ENSURE THE QWEST AND CENTURYLINK ARE MEETING (AND WILL CONTINUE TO MEET) THEIR OBLIGATIONS UNDER SECTIONS 251 AND 271 OF THE ACT PRIOR TO ITS APPROVAL OF THE MERGER

Prior to approving the merger, the Commission should ensure that Applicants are complying with their existing obligations, especially the ones that impact competitors' ability to enter and survive in the market. In particular, the Commission should ensure that the Applicants are complying with their resale, 271, interconnection, number portability, and OSS obligations. If the Applicants are failing to meet their current obligations under the Act, and thereby

[27] *Id.*, UNEs Condition no. 1 and Forbearance Condition no. 2.

thwarting competition, they should not be allowed to merge and further frustrate other carriers' efforts to compete.

Resale. As incumbent LECs, both Qwest and CenturyLink have an obligation to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[28] While the Commission rules on this resale obligation exclude exchange access services from the definition of "telecommunications services" for the purposes of this provision,[29] the rules also state that notwithstanding this restriction on the definition, "advanced telecommunications services that are classified as exchange access services are subject to the [resale obligations] if such services are sold on a retail-basis to residential and business end-users that are not telecommunications carriers."[30]

In the *Qwest Title II and Computer Inquiry Forbearance Order,* the Commission specifically declined to forbear from Qwest's resale obligations as they pertain to non-TDM-based packet switched broadband services and non-TDM-based optical transmission services.[31] Thus, prior to approving the merger the Commission should seek evidence that the Applicants are offering – and assurance that they will continue to offer - at wholesale (discounted) rates, their advanced telecommunications exchange access services, such as Ethernet, that they offer on a retail basis to non-telecommunications end-users.

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[28] 47 U.S.C 251(c)(4)(A).

[29] 47 CFR § 51.605(b).

[30] 47 CFR § 51.605(d).

[31] *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, FCC 08-168, ¶¶ 66-67 (2008)["[S]ection 251(c) of the Act imposes …resale obligations on Qwest as an incumbent LEC…[w]e conclude that the record before us does not show that forbearance from these and other economic regulations that apply generally to incumbent LECs or BOCs would meet the statutory forbearance criteria."

271. Qwest, as a Bell operating company that has obtained authority to offer interLATA services throughout its region, is subject to specific additional unbundling obligations in Section 271 of the Act. The Commission should require Qwest to demonstrate that it meets these wholesale obligations by identifying where to find their Section 271 offerings and details on prices, terms and conditions of service for each state in which they have been granted Section 271 relief and by explaining how the rates meet the just and reasonable and nondiscriminatory standard for a wholesale offering pursuant to Section 271(c)(2)(B).

Interconnection. The Commission should seek verification from the Applicants that they comply with their Section 251 interconnection obligations in a technology-neutral manner, for example, by not forcing a requesting carrier to convert its IP traffic to TDM before delivering it to the ILEC only to have the ILEC convert it back to IP before delivering it to the customer.

OSS. As the Commission recognized in the *CenturyTel/Embarq Merger Order*, use of manual OSS by incumbents puts "competitors at a disadvantage in the marketplace in competing for time-sensitive business customers."[32] In order to gain approval of that merger, Applicants committed to improve the processing of wholesale orders, yet COMPTEL members have been experiencing increased problems and delays.

This demonstrates that commitments of future upgrades are not necessarily sufficient to ensure the public interest in a merger. The Commission should evaluate the OSS of the Applicants and ensure that the OSS functionality of the Applicants is up to par *prior* to the merger and require assurance that, as a merged entity, such OSS functionally standards will continue to be maintained. As guidance on the requisite OSS functionality, the Commission should consider what was required of the Bell operating companies to obtain Section 271

[32] *CenturyTel/Embarq Merger Order*, WC Docket No. 08-238, FCC 09-54, ¶ 24 (2009).

authority. In the very least, the merger should be conditioned on the merged entity's commitment to maintain the Qwest OSS throughout the Qwest in-region territory.

Ensuring that compliance with key competitive principles is occurring prior to approval of the merger is critical. As example, one only needs to look at the outcome of the merger between CenturyLink and Embarq with regard to OSS and number portability. On May 13, 2009 the Commission released an Order that adopted rules including one that states: "Nine months after the NANC submits its port provisioning process flows to the Commission as provided in the *2009 LNP Porting Interval Order*, all telecommunications carriers required by the Commission to port telephone numbers must complete a simple wireline-to-wireline or simple intermodal port request within one business day unless a longer period is requested by the new provider or by the customer."[33] The deadline is August 2, 2010. Since this Order was released in May 2009, CenturyLink was certainly aware of this obligation when its merger was approved with a condition - agreed to by CenturyLink - that it integrate its OSS systems in June 2009. Yet CenturyLink is now using this merger condition as a reason not to comply with its number porting obligations by seeking a waiver of the August 2, 2010 deadline.[34]

Finally, albeit not a condition as it is already statutorily required,[35] if approving the merger, the Commission should emphasize the merged entity shall be classified as a Bell Operating Company, and shall assume all obligations of a BOC, in the legacy Qwest territory.

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[33] 47 CFR § 52.35(a).

[34] Petition for Waiver of Deadline, In the Matter of Local Number Portability Porting Interval and Validation Requirements, WC Docket No. 07-244, Telephone Number Portability, CC Docket No. 95-116, filed June 7, 2010, by CenturyLink.

[35] 47 U.S.C. 153(4)(B).

IV. CONCLUSION

For the foregoing reasons, COMPTEL respectfully requests that the Commission either deny the application for merger or approve the merger subject to conditions as discussed above.

Respectfully submitted,

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