

**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 PAC-WEST TELECOMM, INC.

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Pac-West Telecomm, Inc. (“Pac-West”), by and through counsel, files these Comments in response to the Public Notice¹ released May 28, 2010 in this docket. Pac-West is a competitive local exchange carrier (“CLEC”) that provides interstate and intrastate exchange access service, as well as local, long-distance and enhanced services on a wholesale basis to communication service providers. These comments address the ongoing anticompetitive practices of both CenturyTel, Inc. d/b/a CenturyLink (“CenturyLink”) and Qwest Communications International Inc. (“Qwest”) (collectively, the “Applicants”), and their related subsidiaries, that the Commission should address before approving the carriers’ applications for approval to transfer control of their various licenses and authorizations enumerated in the Public Notice.

SUMMARY

The merger of any two incumbent local exchange carriers requires close scrutiny to ensure that the increased market power of the new entity will enhance competition, not decrease it. As the Commission has recognized, “the same consequences of a proposed merger that are beneficial in one sense may be harmful in another.”² Specifically, “combining assets may allow the merged entity to reduce transaction costs and offer products, but it also may create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.”³ As both a customer and a competitor of the Applicants, Pac-West is acutely concerned that the merged entity will simply use its increased market power to further discriminate against smaller CLECs such as Pac-West unless the Commission imposes conditions

¹ *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a CenturyLink for Consent to Transfer Control* (rel. May 28, 2010).

² *In re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18290, ¶ 18 (2005) (“AT&T/SBC Merger Order”)

³ *Id.*

on the merger in order to produce benefits to consumers and to safeguard competition. These conditions should not only require the Applicants to cease their anticompetitive and unlawful behavior described below, but also ensure that the merged entity abides by its common-carrier duties going forward.

Pac-West operates primarily in a nine-state footprint⁴ that overlaps both CenturyLink's and Qwest's service territories. Because either CenturyLink or Qwest are the dominant carriers in all but a few of these states, Pac-West experiences the abuse of the Applicants' market power in several respects, some common to both carriers and some particular to Qwest. These comments by no means provide an exhaustive list of the ways in which the Applicants engage in anticompetitive conduct, but merely highlight the most egregious instances of discrimination and self-help that should be addressed by the Commission in this docket. First, Pac-West provides service to a large number of ISPs and offers virtual NXX ("VNXX") arrangements. Both carriers, however, refuse to compensate Pac-West for terminating their customers' traffic and CenturyLink even demands that Pac-West pay its originating access fees, despite the fact that ISP-bound traffic is clearly governed by reciprocal compensation. Instead of abiding by the Commission's rules and regulations concerning ISP-bound traffic, the Applicants take advantage of their market dominance by advancing frivolous legal arguments instead of simply paying their bills. This has the dual effect of depriving new entrants such as Pac-West of reliable cash flow, and saddling Pac-West with the exposure associated with their significant (albeit frivolous) compensation claims. Second, Qwest also routinely fails to meet its ongoing obligations under Section 252(i) of the Communications Act by not permitting Pac-West to opt into various interconnection agreements

⁴ Specifically, Pac-West operates primarily in the states of Arizona, California, Colorado, Idaho, Nevada, Oregon, Texas, Utah, and Washington.

and related amendments on file with the state public service commissions in Pac-West's operating territory. Third, Qwest habitually engages in self-help by refusing to pay Pac-West's tariffed access charges or simply unilaterally recalculating what it believes it should pay without any regard to the dispute resolution provisions contained in Pac-West's tariffs. As described below, this conduct is not only anticompetitive in and of itself, but is unlawful under clear and settled Commission precedent. Without curing this abusive conduct, the merger of CenturyLink and Qwest will not advance the public interest.

I. BOTH CENTURYLINK AND QWEST PURSUE EXTENSIVE LITIGATION WITH RESPECT TO ISP-BOUND TRAFFIC AS AN ALTERNATIVE TO PAYING INTERCARRIER COMPENSATION INDISPUTABLY OWED TO PAC-WEST

The Commission has entered several orders addressing the issue of intercarrier compensation for ISP-bound traffic, with the latest being the November 2008 *Core ISP Order*,⁵ which resolved the Commission's statutory authority to create such a subcategory of telecommunications traffic and to subject all ISP traffic to that separate rate regime. Although the Applicants have been asserting makeweight arguments for years to justify their refusal to pay Pac-West any compensation for certain ISP traffic that they send to Pac-West to terminate, the *Core ISP Order* puts to rest any doubt that they are liable to compensate Pac-West. A brief review of the Commission's orders concerning ISP-bound traffic demonstrates that – whatever excuses the Applicants *could have made* to condone their self-help tactics – any ambiguity concerning ISP-bound traffic was settled by the *Core ISP Order*.

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 01-92, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Red. 6475, 2008 WL 4821547 (rel. Nov. 5, 2008) (“*Core ISP Order*”).

When the Commission first adopted rules implementing the 1996 Telecommunications Act, the Commission determined that reciprocal compensation obligations under Section 251(b)(5) “apply only to traffic that originates and terminates within a local area.”⁶ The Commission further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through the existing access charge regime, and that state commissions had authority to identify the geographic areas of local exchanges.⁷

The Commission subsequently addressed for the first time the nature of intercarrier compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.⁸ There the Commission determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC based upon an end-to-end analysis of an ISP-bound call.⁹ The Commission then concluded that, because ISP-bound traffic is jurisdictionally “non-local interstate traffic,” “the reciprocal compensation requirements of section 251(b)(5) and of the Commission’s rules do not govern inter-carrier compensation for this traffic.”¹⁰ Because the Commission had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.¹¹ On appeal, the D.C. Circuit Court of Appeals vacated the *Declaratory Ruling*, finding that the Commission had not explained why ISP-bound

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1034 (1996).

⁷ *Id.* ¶¶ 1034-35.

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd. 3689 (1999) (“*Declaratory Ruling*”).

⁹ *Id.* ¶ 13.

¹⁰ *Id.* ¶ 26 n.87.

¹¹ *Id.* ¶¶ 26-27.

calls being jurisdictionally interstate was relevant to whether the calls were “local” for purposes of reciprocal compensation.¹²

In 2001, the Commission released its *ISP Remand Order*¹³ following the D.C. Circuit’s *Bell Atlantic* decision. In this order, the Commission again held that ISP-bound traffic is not subject to reciprocal compensation under Section 251(b)(5), but rather determined that Section 251(g) excludes ISP-bound traffic from reciprocal compensation obligations. The Commission also modified its decision in the *First Report and Order* that only “transport and termination of local traffic” is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.¹⁴ The Commission also adopted a series of declining caps on the rates for ISP-bound traffic, a “mirroring rule,” and “growth cap” and “new markets” rules limiting the number of minutes of ISP-bound traffic for which a local exchange carrier could seek payment under the new regime.¹⁵ In 2002, however, the D.C. Circuit Court of Appeals rejected the Commission’s findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the Commission.¹⁶ The Court did not vacate the order, however, finding that there was a “non-trivial likelihood” that the Commission had authority to adopt its pricing rules for ISP-bound traffic on other grounds.¹⁷

¹² *Bell Atlantic Tel. Co. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000).

¹³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) (“*ISP Remand Order*”).

¹⁴ *Id.* ¶ 46.

¹⁵ *Id.* ¶¶ 78, 80-81.

¹⁶ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

¹⁷ *Id.* at 434.

In 2004, the Commission entered its *Core Forbearance Order*,¹⁸ in which the Commission chose to eliminate enforcement of the “growth cap” and “new markets” rules limiting the number of minutes of ISP-bound traffic for which a local exchange carrier could seek payment. The Commission, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.¹⁹ The Commission’s forbearance decision was upheld by the D.C. Circuit.²⁰ The D.C. Circuit, however, subsequently granted a petition for a writ of mandamus that was filed to compel the Commission, on remand from the court’s earlier *WorldCom* decision, “to explain the legal authority upon which [the Commission’s interim pricing] rules [for ISP-bound traffic] are based.”²¹ The Court directed the Commission to issue a final, appealable order by November 5, 2008.²²

On that date, the Commission issued its *Core ISP Order* and held that “although ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to [the Commission’s] authority under section 201 and 251(i) of the Act.”²³ Critically, however, the Commission did not distinguish between calls to an ISP from its customers in different local exchanges from traffic to an ISP from its customer in the same exchange. Indeed, any contrary result would have collided with the Commission’s long-held view that for jurisdictional purposes, ISP-bound traffic is viewed

¹⁸ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd. 20179 (2004) (“*Core Forbearance Order*”).

¹⁹ *Id.* ¶ 27.

²⁰ *In re Core Commc’ns, Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

²¹ *In re Core Commc’ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008).

²² *Id.* at 862.

²³ *Core ISP Order*, ¶ 6.

without regard to “intermediate points of switching or exchanges between carriers.”²⁴ Rather, the Commission noted that Section 251(b)(5) imposes a duty on all LECs to “establish reciprocal compensation arrangements for the transport and termination of telecommunications,” with the term “telecommunications” not being “limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services....”²⁵ The Commission, and not the states, therefore has the authority to establish “just and reasonable” rates for this traffic after correctly reaffirming its consistent finding “that ISP-bound traffic is jurisdictionally interstate” because it is jurisdictionally mixed and inseverable.²⁶

The Commission thus responded to the D.C. Circuit’s *WorldCom* decision by repudiating its reliance on Section 251(g), as the court there noted that “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.”²⁷ Relying instead on Sections 201 and 251(i) to place ISP-bound traffic within the confines of Section 251(b)(5), the Commission held “that the transport and termination of *all telecommunications* exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”²⁸ The Commission thereby mandated that ISP-bound traffic is governed by reciprocal compensation, and not the mutually exclusive access charge regime.²⁹ It is therefore irrelevant whether this jurisdictionally mixed and inseverable traffic is called “local,” “toll,” or “VNXX” from a LEC’s standpoint. All

²⁴ *ISP Remand Order*, ¶ 57.

²⁵ *Core ISP Order*, ¶ 8.

²⁶ *Id.* ¶ 21.

²⁷ *WorldCom*, 288 F.3d at 433 (emphasis in original).

²⁸ *Core ISP Order*, ¶ 15 (emphasis added).

²⁹ See *PAETEC Communications, Inc. v. CommPartners, LLC*, 08-cv-00397, 2010 WL 1767193, *7 (D.D.C. Feb. 18, 2010) (“Reciprocal compensation and access charges are mutually exclusive methods of intercarrier compensation.”)

telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.³⁰ And all ISP-bound traffic is subject to the rate regulation set forth in the *Core ISP Order*. Indeed, in successfully defending challenges to the *Core ISP Order*, the Commission reiterated that the dialing pattern of a call to an ISP – whether seven or ten digits – was irrelevant to its analysis.³¹ All ISP-bound traffic must therefore be exchanged at the Commission’s separate interim rate of \$0.0007, and the imposition of countervailing access charges for such traffic is prohibited.³²

Despite this clear holding that a LEC such as Pac-West serving an ISP is entitled to be compensated for terminating another LEC’s customer’s traffic sent to the ISP, both CenturyLink and Qwest persist in not only refusing to pay Pac-West anything for what they categorize as “VNXX” ISP-bound traffic (even though no such classification exists), but also, in the case of CenturyLink, demand that Pac-West pay originating access charges on such traffic.³³ This practice violates both the *Core ISP Order* and the Commission’s regulations. *See, e.g.*, 47 C.F.R. § 51.703(b). Indeed, CenturyLink has been demanding over \$4 million dollars from Pac-West for terminating its customers’ ISP-bound traffic in Nevada alone.³⁴ Qwest, on the other hand, has refused to pay Pac-West any compensation for VNXX ISP-bound traffic since 2004. In response to orders of the state commissions in Washington and Arizona, Qwest has made payment to Pac-

³⁰ *Core ISP Order*, ¶ 15; *ISP Remand Order*, ¶ 46.

³¹ *Core Commc’ns, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), Brief for Federal Communications Commission at 29 (filed May 1, 2009) (“Nor is Core correct that this analysis is changed by the Commission’s recognition that end users sometimes dial seven digits to connect to an ISP. Jurisdictional analysis focuses on the overall communication – not the dialing pattern – and the Commission has repeatedly found that Internet communications are interstate.”) (internal citations omitted).

³² *See* 47 C.F.R. § 51.703(b) (“A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”)

³³ *See* Declaration of James Falvey on Behalf of Pac-West Telecomm, Inc., ¶ 5, attached hereto as Exhibit A, (“Falvey Declaration”).

³⁴ *Id.*

West for ISP-bound VNXX traffic in both states. But even in those circumstances, Qwest has continued to litigate exhaustively the issue of compensation for ISP-bound VNXX traffic and continues to assert claims totaling over \$3M for *repayment* of paid-out reciprocal compensation in those states.³⁵ In addition, Qwest has demanded that carriers in Colorado exchange ISP-bound traffic on a bill-and-keep basis, despite the fact that federal law requires compensation at the \$0.0007 rate.³⁶ The fact that Pac-West provides ISPs service via VNXX arrangements is a distinction without a difference, however, as ISP-bound traffic is not subject to Section 251(g), is exchanged between LECs, and is therefore subject to reciprocal compensation under Section 251(b)(5). Pac-West should not have to engage in expensive and resource-consuming litigation to get CenturyLink and Qwest to follow the Commission's orders and rules. Their willingness to flout these rules demonstrates that a merger – which would strengthen each entity – is not in the public interest.

As a common carrier, Pac-West is obligated to terminate the calls CenturyLink's and Qwest's local exchange customers make, which creates a whipsaw whereby carriers like CenturyLink and Qwest that refuse to pay their bills – and even send unlawful access charge invoices to Pac-West – can continue to force Pac-West to terminate their traffic for free. Instead of abiding by their own duties as common carriers, CenturyLink and Qwest find it more profitable to play rate games and impose litigation costs on smaller carriers such as Pac-West, forcing them to defend against patently unreasonable legal arguments. As noted above, since 2008, the law has been clear – if it was not already after the *WorldCom* decision finding there was no pre-Act obligation for ISP-bound traffic – that all ISP-bound traffic is subject to reciprocal compensation at

³⁵ *Id.*

³⁶ *Id.*

the Commission-set rate of \$0.0007. Yet CenturyLink and Qwest continue to force Pac-West to incur unnecessary legal expenses to collect the \$0.0007/minute that it is entitled to for such traffic while defending against CenturyLink's spurious claims that Pac-West is liable for originating access charges on the same traffic. Merger efficiencies should ultimately aid consumers, not provide CenturyLink and Qwest economies of scale to double-down on their self-help tactics. Clearly CenturyLink and Qwest's strategy is to force Pac-West to accept an *in terrorem* settlement value to obtain at least some resolution to these frivolous suits, and their leverage will only increase if the Commission allows the merger to proceed without first resolving this issue.

II. THE COMMISSION MUST ESTABLISH MEANINGFUL AND ENFORCEABLE SAFEGUARDS FOR COMPETITIVE LECS TO EFFICIENTLY ESTABLISH INTERCONNECTION AGREEMENTS WITH THE MERGED ENTITY

As detailed more thoroughly below, Pac-West has had extreme difficulty with Qwest as it has tried to obtain nondiscriminatory arrangements that have been offered to other carriers in publicly filed amendments to interconnection agreements. In order to prevent the Applicants from abusing their increased market power should the merger proceed, Pac-West submits that four categories of merger conditions are necessary to ensure that Applicants will not engage in further anticompetitive practices with respect to interconnection agreements: (1) the right of carriers to opt into existing interconnection agreements and amendments; (2) automatic extensions of existing interconnection agreements; (3) interconnection agreement portability; and (4) utilization of existing interconnection agreements as the basis for negotiating new or successor interconnection agreements. The four conditions proposed here, and the rationale underlying each condition, draw from Commission precedent and operating experience with the Applicants. In adopting conditions, the Commission should make clear that state commissions, in addition to the Commission itself, have the authority to enforce and ensure proper implementation of conditions

through the section 252 interconnection agreement process and standard regulatory and adjudicatory processes.

A. Opting-Into Existing Interconnection Agreements and Amendments

Condition: Effective as of the Merger Closing Date, carriers will be permitted to opt into existing interconnection agreements or amendments to existing interconnection agreements and CenturyLink and Qwest will not be permitted to deny those opt-ins on the grounds that the agreement has not been amended to reflect current changes of law. A carrier opting-into an interconnection agreement must agree to negotiate in good faith, immediately after entering into the agreement, an amendment to reflect the change of law. Opt Ins shall be effective no later than sixty (60) days after receipt by the merged Qwest/CenturyLink entity of a formal notice of opt in by any competitive LEC certified to do business in the relevant state.

Rationale: Permitting carriers to opt-into existing interconnection agreements is an easy and efficient means of reducing the transaction costs associated with entering into interconnection agreements. This condition is intended to ensure that the purpose of section 252(i) is not frustrated. If CenturyLink and Qwest are permitted to refuse or delay such opt-ins the result will be to hinder the development and continued growth of competition in the relevant market. This condition was adopted in the AT&T/BellSouth merger proceeding and again is appropriate for inclusion in the instant merger proceeding. The importance of this condition is reflected in Pac-West's experience in attempting to adopt existing amendments to interconnection agreements between Qwest and other CLECs in Idaho, Utah, Colorado, Oregon and Washington, related to the mutual exchange of Voice over Internet Protocol traffic.³⁷ Pac-West has requested amendments from Qwest in each of these states to implement arrangements that Qwest has long since

³⁷ Falvey Declaration ¶ 6.

established with other CLECs. However, Qwest has refused to offer nondiscriminatory amendments to Pac-West and Pac-West has been at a distinct disadvantage vis-à-vis these other carriers.³⁸ The Opt-In condition must therefore clearly state that it applies with equal force to requests to adopt interconnection agreement amendments, as well as requests to opt into agreements themselves. These types of tactics impose unnecessary transaction costs on Pac-West, have denied Pac-West nondiscriminatory interconnection arrangements, and must be prohibited by the CenturyLink and Qwest entities before and after their merger.

B. Extension of Interconnection Agreements

Condition: Effective as of the Merger Closing Date, carriers that are parties to interconnection agreements with any of the CenturyLink or Qwest entities or subsidiaries may extend their agreements, *regardless of whether the initial term has expired*, for a period of up to thirty-six (36) months. During this period, the interconnection agreements may be terminated only via the competitive LEC's request.

Rationale: Permitting competitive LECs to extend their interconnection agreements will provide the competitive LECs with a period of stability and prevent the merged CenturyLink/Qwest entity from taking advantage of its new market power by immediately seeking to renegotiate the rates, terms and conditions of those agreements. The Commission adopted a similar condition in the AT&T/BellSouth Merger proceeding as a means of reducing transaction costs associated with interconnection agreements. Any reduction in transaction costs will benefit the competitive LECs that are attempting to compete with the combined CenturyLink/Qwest entity and, accordingly, the proposed condition is appropriate here. Yet despite the Commission's forward-looking merger conditions in the AT&T/BellSouth Merger, it has been many carriers'

³⁸ *Id.*

experience that AT&T has seized upon any perceived ambiguity to stall the interconnection process or seek to obtain additional concessions. Given the increased market power of the merged CenturyLink/Qwest entity and AT&T's post-merger conduct, the Commission should order that any ambiguity be construed in favor of the competitive LEC.

C. Interconnection Agreement Portability

Condition: Effective as of the Merger Closing Date, the merged CenturyLink/Qwest entities will permit any requesting entity to port an entire interconnection agreement (with the exception of state-commission approved rates from the port-to state) from one state to any other state within the CenturyLink/Qwest operating territory and from any CenturyLink/Qwest incumbent LEC to any other CenturyLink/Qwest incumbent LEC. The interconnection agreement may be filed by the competitive LEC with the state commission in the port-to state. CenturyLink shall have thirty (30) days to file state-commission approved rates.

Rationale: The Commission repeatedly has recognized that competitive LECs incur significant transaction costs — in both time and money — when negotiating interconnection agreements and adopted conditions, similar to the condition proposed above, in the AT&T/BellSouth, Bell Atlantic/GTE and SBC/Ameritech merger proceedings. Permitting requesting entities to port entire interconnection agreements to different states within the combined CenturyLink/Qwest operating territory will promote market entry by reducing the ability and incentive of the merged entity to impose these costs on entities seeking to enter the market.

D. Negotiation of Interconnection Agreements

Condition: Effective as of the Merger Closing Date, CenturyLink and Qwest will permit carriers to utilize existing interconnection agreements as the basis for negotiating new or successor interconnection agreements.

Rationale: As noted above, carriers incur significant costs when negotiating or entering into interconnection agreements. Permitting carriers to utilize their current existing interconnection agreements as a starting point for negotiating new or successor agreements will eliminate or drastically reduce these transaction costs. The Commission adopted a similar condition in the AT&T/BellSouth merger proceeding and a similar condition is appropriate here.

III. QWEST ROUTINELY ENGAGES IN UNLAWFUL SELF-HELP BY REFUSING TO PAY PAC-WEST'S TARIFFED ACCESS CHARGES

As Qwest itself has admitted to the Commission, “[w]hen an IXC uses LEC local exchange switching facilities to originate or terminate an interstate interexchange call, that carrier *must compensate* the LEC for the provision of switched access services.”³⁹ Qwest’s representations to the Commission and its actual business practices, however, are two entirely different things. In Pac-West’s experience, Qwest engages in self-help as a matter of course, refusing to pay for the access services it takes from Pac-West or unilaterally recalculating what it believes is a “fair” payment, which is the very essence of self-help.⁴⁰ Not surprisingly, Pac-West’s switched access tariffs do not permit an IXC to independently name its own price or pay when it is most convenient; rather, it must pay Pac-West’s Commission-approved switched access rates within the time permitted by Pac-West’s tariffs.

The right of a CLEC such as Pac-West to collect its tariffed access charges has been settled for nearly a decade. The regulatory structure that governs CLEC access charges was established by the Commission in its 2001 *Seventh Report and Order*. In that Order, the Commission struck a compromise. It strictly regulated CLEC access rates to ensure that they were set at reasonable

³⁹ Comments of Qwest Communications, WC Docket No. 09-8, at 10 (filed March 12, 2009) (emphasis added).

⁴⁰ Falvey Declaration ¶ 6.

levels, and it deemed those tariffed rates to be conclusively reasonable, to ensure that IXCs could not refuse payment. In establishing this system, the Commission expressly noted its concerns over the IXCs' repeated use of self-help by simply refusing to pay tariffed access charges:

Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.⁴¹

Past is now prologue, yet this holding is consistent with decades of Commission precedent prohibiting self-help. The Commission's position on this matter has been stated repeatedly and unequivocally: "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...."⁴² Particularly relevant to Pac-West's ongoing disputes with Qwest, the Commission has stated that

a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was

⁴¹ *Seventh Report and Order*, 16 FCC Rcd at 9932, ¶ 23 (citations omitted).

⁴² *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd 8338, 8339, ¶ 9 (1989) (*Tel-Central*). See also *Communique Telecommunications, Inc. DBA Logically*, 10 FCC Rcd 10399, 10405, ¶ 36 (1995).

not proper under the carrier's applicable tariffed charges and regulations.⁴³

The Commission has found that self-help refusals to pay access charges violate two sections of the Communications Act. Both the Commission and the courts have found that self-help constitutes a violation of Section 201(b) of the Communications Act, which prohibits “unreasonable practices.”⁴⁴ In *MCI Telecommunications Corp.*, the Commission found that MCI's “self-help approach” violates Section 203 of the Act and “existing case law.”⁴⁵ The Commission explained:

Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. Withdrawal from this position would invite unlawful discrimination. **** We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered service.⁴⁶

The Commission noted that its “finding that self-help is not an acceptable remedy does not leave MCI without recourse.”⁴⁷ It directed MCI to Sections 206 – 209 of the Act “which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act.”⁴⁸

⁴³ *Business WATS, Inc., v. AT&T Co.*, 7 FCC Rcd 7942, ¶ 2 (1989), citing *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 FCC 2d 703, ¶ 6 (1976) (*MCI Telecommunications Corp.*); see also, *National Communications Ass'n. v. AT&T Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001) (citing both cases).

⁴⁴ *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007); *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999); *Tel-Central*, 4 FCC Rcd. 8338 (1989).

⁴⁵ *MCI Telecommunications Corp.*, 62 F.C.C. 2d at 705-6.

⁴⁶ *Id.* at 706, ¶ 6.

⁴⁷ *Id.*

⁴⁸ *Id.*

Qwest is therefore prohibited from taking self-help actions to avoid terminating access charges.⁴⁹ Pac-West's interstate tariff was filed in accordance with 47 C.F.R. § 61.26 and mirrors applicable ILEC rates. Under the Commission's rules, Pac-West's rates are "conclusively deemed reasonable" and are not subject to retroactive challenge or refunds.⁵⁰ If Qwest could make a prima facie case that Pac-West's access service charges were unlawful when Pac-West filed its FCC tariff, it was incumbent on Qwest to have filed either a suit under Section 206 of the Act or initiate a complaint at the Commission pursuant to Section 208(a).⁵¹ Qwest has done neither. Lacking a legal basis to withhold payment of Pac-West's charges, Qwest simply refuses to pay Pac-West's charges or pays them sporadically at best.

By refusing to pay billed charges in accordance with Pac-West's tariff, Qwest engages in prohibited self help, the gravamen of which is the carrier's "unilateral determination" that tariffed charges need not be paid.⁵² Qwest currently has an unpaid balance of nearly two-hundred thousand dollars to Pac-West.⁵³ To smaller LECs such as Pac-West, this is a substantial sum. Lest CenturyLink adopt Qwest's "worst-practices," the Commission should remind the Applicants of their obligations under the Commission's access charge regime and condition approval on Qwest paying amounts past due to Pac-West and not withholding payment for properly invoiced charges

⁴⁹ See *Seventh Report and Order*, 16 FCC Rcd. at 9960, ¶ 94 ("an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a)"); *Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd. 11629, 11630 (2007) ("Declaratory Ruling").

⁵⁰ *Seventh Report and Order*, 16 FCC Rcd. at 9948, ¶ 60.

⁵¹ See generally *Declaratory Ruling*, 22 FCC Rcd. at 11629 & nn.3, 4.

⁵² See *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, 16 FCC Rcd. 19158, 19164 (2001).

⁵³ Falvey Declaration ¶ 6.

in the future. If Qwest will not stay current with its bills while it is under intense Commission scrutiny, it never will.

CONCLUSION

For all the foregoing reasons, the Commission should deny the applications seeking to transfer control over Qwest to CenturyLink unless the Applicants cease abusing their market power and commit to abide by the Commission's rules and regulations. Commission approval of the proposed transaction could not be lawful absent the imposition of a robust set of conditions designed to mitigate public interest harms and to ensure that consumers realize fully the benefits of competition, and competitors who actually abide by the Commission's rules can be assured of a level playing field.

Dated: July 12, 2010

Respectfully submitted,

By: s/ Michael B. Hazzard
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Counsel to Pac-West Telecomm, Inc.

**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

**DECLARATION OF JAMES C. FALVEY
ON BEHALF OF PAC-WEST TELECOMM, INC.**

1. My name is James C. Falvey and I am employed by Pac-West Telecomm, Inc. (“Pac-West”) as its Senior Regulatory Counsel. My primary job responsibilities include managing all matters that affect Pac-West before federal and state regulatory agencies and legislative bodies. I am responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, including interconnection negotiations and arbitrations. I am also responsible for negotiating and maintaining Pac-West’s interconnection agreements with incumbent local exchange carriers as well as contracts with other telecommunications carriers and service providers. I also perform other duties for Pac-West as assigned.

2. Pac-West is a privately held company headquartered in Oakland, CA. Pac-West provides communications services primarily in the states of Arizona, California, Colorado, Idaho, Nevada, Oregon, Texas, Utah, and Washington. In these states, Pac-West provides wholesale communications services to, among other communications service providers, Internet Service Providers (“ISPs”), Voice-over-Internet Protocol (“VoIP”) providers, and Commercial Mobile Radio Service (“CMRS”) providers via Pac-West’s facilities-based telecommunications

services. Pac-West combines its own facilities with those leased from incumbent local exchange carriers (“ILECs”).

3. A significant portion of Pac-West’s customers are ISPs, which are frequently served via Virtual NXX (“VNXX”) arrangements by which the ISPs are able to serve a broader calling area by assigning numbers at a single location that allows callers from beyond the local calling area to reach the ISP through a local call. Such arrangements are extremely common in the telecommunications industry.

4. Pac-West has been engaged in protracted disputes with both CenturyLink and Qwest in relation to ISP-bound traffic, both formally in complaint proceedings before state public service commissions and informally in carrier-to-carrier negotiations. Both CenturyLink and Qwest have taken an unreasonable and untenable negotiating position with regard to the legal classification of VNXX ISP-bound traffic. The D.C. Circuit Court of Appeals held in 2002 that there was no pre-1996 Act obligation for ISP-bound traffic and the Commission’s 2008 decision places ISP-bound traffic squarely within the Section 251(b)(5) reciprocal compensation framework. Despite this, or perhaps because of this, both carriers have dug in their heels and have been asserting that such traffic is either noncompensable or, in the case of CenturyLink, subject to intrastate or interstate originating access charges, despite the Commission’s pronouncements that any traffic not excluded by Section 251(g) – which ISP-bound traffic is not – falls within the scope of 251(b)(5).

5. Given CenturyLink and Qwest’s unreasonable position on VNXX ISP-bound traffic, negotiations with the carriers are currently at an impasse and state public service commission proceedings have been ongoing for more than four years in some states. In Washington, for instance, Qwest has not compensated Pac-West for VNXX ISP-bound traffic

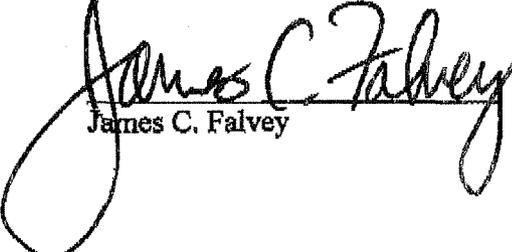
since 2004 and is asserting a claim that it may be entitled to repayment of approximately \$2 million in reciprocal compensation for VNXX traffic. In Arizona, Qwest is pressing claims against Pac-West for \$1 million under the same frivolous theory, while in Colorado Qwest asserts that ISP-bound traffic should be exchanged on a bill-and-keep basis. CenturyLink meanwhile has been demanding that Pac-West compensate it approximately \$4 million in originating access fees in Nevada, while also refusing to pay the Commission-set rate of \$0.0007/minute for this traffic.

6. Qwest also routinely fails to abide by Pac-West's access tariffs by either unilaterally recalculating what it believes it owes or paying late. Qwest's past due amounts significantly fluctuate as a result of its sporadic payments and decisions to pay what it chooses, ranging from several hundred thousand dollars to an unpaid amount of nearly two-hundred thousand dollars at the time of these comments. At no point, however, does Qwest ever follow the dispute resolution procedures contained in Pac-West's tariffs or otherwise supply any valid rationale for its self-help tactics.

7. In terms of interconnection agreements, Pac-West has experienced significant roadblocks in attempting to negotiate routine amendments to its interconnection agreements in five Qwest states. As a recent example, Qwest has so far stonewalled Pac-West's requests to opt into existing amendments to interconnection agreements in the states of Idaho, Utah, Colorado, Oregon and Washington, related to the mutual exchange of Voice over Internet Protocol traffic. Pac-West has still not been able to negotiate or execute nondiscriminatory interconnection amendments with Qwest, despite the fact that Pac-West competitors have been offered more favorable, publicly filed amendments.

I assert under penalty of perjury that the foregoing is true and correct to the best of my information and belief. This concludes my declaration.

Dated: July 12, 2010


James C. Falvey