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

In the Matter of	)	
	)	
Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., D/B/A/ CenturyLink	)	WC Docket No. 10-110
	)	
For Consent to Transfer of Control	)	

COMMENTS OF
COX COMMUNICATIONS
AND CHARTER COMMUNICATIONS, INC.

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TABLE OF CONTENTS

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Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Public Notice in the above-captioned proceeding,[1/] Cox Communications ("Cox") and Charter Communications, Inc. ("Charter"), by and through their counsel, file these comments on the proposed merger of Qwest Communications International, Inc. ("Qwest") and CenturyTel, Inc., d/b/a/ CenturyLink ("CenturyLink"). This merger will create the third largest incumbent local exchange carrier ("ILEC") in the country and turn CenturyLink, a company that a few years and several acquisitions ago was a relatively small, primarily rural company, into a one of the few remaining Regional Bell Operating Companies ("RBOC"). Data from CenturyLink's and Qwest's respective 2010 SEC 10-K filings indicate that the combined company will have over 17 million access lines and

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[1/] *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a/ CenturyLink for Consent to Transfer of Control; Pleading Cycle Established*, Public Notice, 25 FCC Rcd 5957 (2010).

$17 billion in combined revenue.[2/] The merger raises a number of serious competitive concerns that require the imposition of conditions. Both Cox and Charter compete head-to-head with CenturyLink and Qwest in a number of markets and have direct experience with the capabilities of each. This experience informs these comments and the proposed conditions required to mitigate the potential harms that this transaction may cause.

OVERVIEW AND SUMMARY

A primary impetus behind recent ILEC mergers has been the alleged need to increase the applicants' ability to compete against the voice, broadband and video package of services offered by cable companies. This theme was sounded in AT&T's acquisition of BellSouth,[3] in CenturyTel's acquisition of Embarq (to form CenturyLink),[4/] and now in CenturyLink's proposed acquisition of Qwest, one of the last three remaining Regional Bell Operating Companies.[5/] As stated in the parties' application: "[I]n Qwest local service territory, post-merger CenturyLink will be able to

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2/ *See* CenturyTel, Inc., SEC Form 10-K filed with the Securities and Exchange Commission, March 1, 2010, at 2, 8; *and* Qwest Corporation SEC Form 10-K filed with Securities and Exchange Commission March 1, 2010 at 3.

3/ *See, e.g., BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc*., WC Docket No. 06-74, Application for Transfer of Control, Description of Transaction, Public Interest Showing and Related Demonstration, at 6 (filed Mar. 31, 2006).

4/ *Applications of Embarq Corporation, Transferor, and CenturyTel, Inc., Transferee, for Transfer of Control of Authorizations Under Sections 214 and 310(b) of the Communications Act, as Amended,* WC Docket No. 08-238, Application for Consent to Transfer of Control at 10-11 (filed Nov. 25, 2008); *Applications of Embarq Corporation, Transferor, and CenturyTel, Inc., Transferee, for Transfer of Control of Authorizations Under Sections 214 and 310(b) of the Communications Act, as Amended,* WC Docket No. 08-238, Joint Reply Comments of CenturyTel, Inc. and Embarq Corporation, at 8-9, 14-15 (filed Jan. 23, 2009).

5/ *Application of Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Transfer of Control Under Section 214 of the Communications Act, as Amended,* WC Docket No. 10-110, Application for Consent to Transfer of Control, at 2 (filed May 10, 2010) ("*Qwest/CenturyTel Application*") ("The combination will position post-merger leverage CenturyLink's investments and experience in internet protocol television ("IPTV") deployment to compete against cable companies for the provision of multi-channel video services, and the triple play of voice, video, and broadband."[6/]

The merger will thus have a direct impact on Cox and Charter because the companies each compete in both CenturyLink and Qwest territories. Cox currently provides voice, video, and broadband services in direct competition with CenturyLink in seven states,[7/] and it competes head-to-head with Qwest in four states.[8/] In fact, Qwest has relied on the facilities-based competition provided by Cox in Omaha and Phoenix in seeking forbearance from unbundling and other ILEC obligations.[9/] Similarly, Charter currently provides voice, video, and broadband services in direct competition with CenturyLink in 11 states and it competes head-to-head with Qwest in four states.[10/] A number of the markets where Cox and Charter compete with the applicants are mid-tier or smaller and rural communities.

Cox and Charter welcome the increased competition touted by the applicants, as long as it is fair. As the Commission has repeatedly recognized, however, mergers

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CenturyLink to offer more vigorous competition to larger players in multichannel video and bundled services.").

6/ *Id.*

7/ Cox provides service in competition with CenturyLink in Arkansas, Florida, Kansas, Louisiana, Nevada, Oklahoma, and Nevada.

8/ Cox provides service in competition with Qwest in parts of Arizona, Iowa, Idaho and Nebraska.

9/ *Petition of Qwest Corporation for Forbearance, Pursuant to 47 U.S.C. Section 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, WC Docket No. 09-135, ¶¶ 16, 33 (rel. June 22, 2010); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 25-30 (2005) ("*Qwest Forbearance Order*").

10/ Charter competes with CenturyLink in Alabama, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Tennessee, Texas, Virginia, Washington and Wisconsin, and with Qwest in Minnesota, Nebraska, Oregon and Washington State.

between major incumbent carriers increase both the incentive and ability of the merged entity to discriminate against competitors. With respect to cable competitors like Cox and Charter, the ability of the merged entity – over a greatly expanded geographic footprint – to discriminate and hamper efficient competition lies in its control over critical interconnection and customer migration processes and functions, beginning with the need to negotiate, and renegotiate, interconnection agreements and continuing with the need to transfer customers seamlessly from one carrier to another. As the Commission has recognized, incumbent carriers retain market power over interconnection, and that market power is only enhanced when large ILECs merge with each other.[11/]

Indeed, CenturyLink's acquisition of Embarq highlighted a number of specific competitive concerns in the interconnection area. In reviewing that transaction, the Commission acknowledged CenturyLink's inability to provide wholesale services to competing carriers in a timely or efficient way. To address these concerns, CenturyLink committed to adopting Embarq's more advanced, automated OSS system within 15 months, a process which is still underway.[12/] This instant merger will create many of the

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11/ *Qwest Forbearance Order* ¶¶ 85-86. *See generally, Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, n. 127 (2010) ("*Frontier Transfer of Control Order*") ("As the Commission explained in the *SBC/Ameritech Merger Order*, 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.") *See SBC/Ameritech Order*, 14 FCC Rcd at 14798, ¶ 193 ("The larger the resulting incumbent LEC, the greater its ability to internalize these spillover effects.").

12/ *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.* Memorandum Opinion and Order, 24 FCC Rcd 8741, ¶ 29 (2009)("*Embarq Merger Order*"). As described in more detail below, during this integration process, Cox has experienced a host of issues as the systems are being upgraded. Moreover, CenturyLink recently indicated that it may not be able to meet the deadline for converting its OSS unless it is excused from complying with same issues. While Embarq's OSS was an improvement to CenturyTel's, Qwest's OSS is, in many respects, superior to Embarq's. The Commission must ensure that there is no degradation of Qwest's performance as a result of the merger and that, as soon as possible, the merged entity will adopt Qwest's as the uniform OSS platform across the merged entity's footprint.

The instant merger presents another market distortion that unfairly favors the ILECs. In smaller, rural markets across the country, cable companies, including Cox and Charter, have spent substantial private capital to build out and enhance their networks in order to provide competitive new telephone and broadband services. In many cases, the cable companies face competition from ILECs like CenturyLink that receive enormous federal subsidies in the form of federal Universal Service Fund ("USF") high cost support. The post-merger combination of CenturyTel and Embarq created an entity that collected $450 million from the USF and state universal service programs in 2009.[13/] According to information provided by the FCC in response to a Congressional inquiry, CenturyTel, Embarq, and Qwest are all among the top 10 recipients of high cost support, receiving collectively more than $1.34 billion between 2007 and 2009, making it collectively the single largest recipient of high-cost support, eclipsing even AT&T.[14/]

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the upcoming deadline for providing one-day number porting. *See Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability*, WC Docket No. 07-244, Petition for Waiver of Deadline (filed June 7, 2010) ("*CenturyLink Waiver Petition*").

[13/] *'We're not Santa Claus,' FCC's Levin Tells Small Telcos*, SNL KAGAN MEDIA & COMMUNICATIONS REPORT, March 9, 2010.

[14/] Chairmen Waxman, Boucher, Ranking Members Barton, Stearns Release Update to Universal Service Fund High Cost Support Program, ("USF High Cost Support Data") *available at* http://energycommerce.house.gov/index.php?option=com_content&view=article&id=2069:chairmen-waxman-boucher-ranking-members-barton-stearns-release-update-to-universal-service-fund-high-cost-support-program&catid=122:media-advisories&Itemid=55 (showing that between 2007 and 2009, AT&T collected $1.30 billion, CenturyTel collected $931 million, Qwest collected

At the same time, CenturyLink, by dividing itself into dozens of small operating companies, continues to assert the *de jure* and *de facto* protections against competition designed for small rural carriers, despite the fact that since its acquisition of Embarq it has controlled more than seven million access lines nationwide. For example, CenturyLink is currently aggressively challenging Cox's request for ETC status in one of CenturyLink's "rural" operating company areas in Louisiana. As a result of its fragmented operating structure, CenturyLink can require competitors to utilize inefficient interconnection arrangements.

With this merger, CenturyLink will more than double its size and gain control of some 17 million access lines, and by acquiring one of the three remaining regional Bell Operating Companies ("BOCs"), it will assume the statutory duties assigned to BOCs in section 271 of the 1996 Act.[15/] If the merger is consummated, CenturyLink should no longer be able to avail itself of rural company status *anywhere* and thereby avoid its obligations to comply with the competitive protections that the law provides to companies competing with large ILECs.

In light of these concerns, Cox and Charter propose that the Commission adopt several targeted conditions to mitigate the merged entities' ability to thwart or hinder

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$214 million, and Embarq collected $200 million in 2007 and 2008, before its 2009 merger with CenturyTel).

[15/] As a result of its acquisition of Qwest, and consistent with Commission precedent, CenturyLink will be a "successor or assign" of a Bell Company is therefore responsible for all of the obligations that apply to BOCs. *See, e.g.*, *Frontier Transfer of Control Order* ¶ 43; *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, ¶¶ 33-36 (2008); *Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 5376, ¶ 11 (2000).

competition. Similar conditions have been applied in previous ILEC mergers with substantial competitive benefits.

I. COMPETITIVE HARMS

The Commission has repeatedly found that ILEC mergers may substantially harm competition because an ILEC's expansion of its footprint through acquisition heightens its incentives and ability to discriminate.[16/] An ILEC's expansion into another ILEC's region via acquisition heightens its incentives to discriminate against competitive carriers that compete in multiple regions because it will directly reap all of the benefits of discrimination in both its legacy region and the region of its merger partner. This analysis is directly applicable to competition from cable companies like Cox and Charter, who compete in both the legacy and acquired territories. There are several particular ways in which the combined entity can act on its heightened incentive to discriminate: (1) by slow-rolling interconnection negotiations or demanding unreasonable terms and conditions leading to unnecessary and costly arbitrations; (2) through inadequate wholesale support systems and support centers; and (3) by engaging in anticompetitive practices that raise rivals' costs. These are discussed in turn.

16/ *Frontier Transfer of Control Order* ¶ 44 ("Consistent with the 'Big Footprint' theory that the Commission addressed in prior BOC mergers, we find that the increase in the size of Frontier's study area resulting from the transaction could, in theory, increase its incentive to engage in anticompetitive activity, although we think it is likely to have a lesser effect in the instant case than in the prior BOC mergers."); *Embarq Merger Order* ¶ 33 (same); *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 96 (2000); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 60 (1999)("*Ameritech Transfer Order")*; *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to*

A. Obtaining Interconnection Agreements

The provision of cable IP-based voice services, no less than circuit-switched voice service, depends on the ability to obtain the physical interconnection necessary for the exchange of traffic and the ability to "port" customer numbers and establish essential ancillary services, such as 911/E911 access and directory listings. As early as 1996, the Commission recognized that:

> an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers.[17/]

In the context of a proceeding in which Qwest was awarded a degree of forbearance from unbundling obligations due to the facilities-based competition provided by Cox, the Commission nevertheless refused to lift section 251 interconnection obligations because doing so "likely would give Qwest, which is the only carrier in the Omaha MSA to have a ubiquitous network, the ability to exercise market power over interconnection in this market."[18/]

As the Commission has previously recognized, one way that ILECs can leverage a competitor's need for interconnection is by slow rolling the process of negotiating interconnection agreements or by repeatedly requiring arbitration to reopen previously

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Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶¶ 101-02 (1997).

17/ *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* 11 FCC Rcd. 15499, ¶ 13 (1996) (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

18/ *Qwest Forbearance Order* ¶ 86.

settled issues in order to raise rivals' costs.[19/] This point was specifically raised in CenturyTel's acquisition of Embarq.[20] The Commission has specifically addressed this harm by imposing conditions to reduce the delay and transaction costs that ILECs can impose during the interconnection agreement process.[21/] These conditions were adopted in the AT&T/BellSouth merger and have in many cases eased the negotiation process. However, Charter's experience with these conditions suggests that the Commission should adopt certain clarifications that will help ensure that the intent of the conditions is fulfilled. The conditions, which track those adopted in the SBC/Ameritech and AT&T/BellSouth mergers, are as follows:

> 1. The CenturyLink/Qwest[22/] ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated, that a CenturyLink/Qwest ILEC entered into in any state or operating area of in the CenturyLink/Qwest operating territory, subject to commission-approved state-specific pricing and performance plans and technical feasibility, and provided, further, that a CenturyLink/Qwest ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is technically feasible and is consistent with the laws and regulatory requirements of the state for which the request is made.
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> 2. The CenturyLink/Qwest ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

19/ *See, e.g., Ameritech Transfer Order* ¶ 204 (describing Sprint's concern about "incumbent LECs' ability to discriminate against competitors or potential competitors by . . . slow-rolling competitors in negotiations for [necessary] inputs").

20/ *Embarq Merger Order* ¶ 26 (describing concerns that "CenturyTel has not always negotiated in good faith with competitors but instead 'has a history of slow rolling the interconnection agreement negotiation process.'").

21/ *BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc*., 22 FCC Rcd 5662, Appendix F at 5809-5810 (2007); *Ameritech Transfer Order* ¶¶ 373-376, 389.

22/ The references in these four proposed conditions to CenturyLink include Embarq.

> 3. The CenturyLink/Qwest ILECs shall allow a requesting telecommunications carrier to use its preexisting interconnection agreement as the starting point for negotiating a new agreement without insisting that the parties start from a CenturyLink or Qwest "new" template agreement.
>
> 4. The CenturyLink/Qwest ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years from the date of such request, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.

As noted above, it has been Charter's experience that the utility of these conditions has in some cases been undermined by AT&T actions that frustrated the very objective of the conditions – to reduce transaction costs. For these reasons, in addition to adopting these conditions, the Commission can take further steps to ensure that competitors' interconnection-related transaction costs are reduced by articulating several important principles concerning the *implementation* of these conditions.

Specifically, the Commission should clarify that the first condition, which permits competitors to "port" an agreement from one state to another, must be implemented without undue restrictions or limitations by the merged entities. Further, the Commission should re-affirm that state public utility commissions share jurisdiction with this Commission to enforce the terms of these interconnection-related conditions.

As to the first point of clarification, Charter's experience shows that in the AT&T/BellSouth context, competitors who attempted to port agreements from one state to another were sometimes hampered by AT&T's attempts to limit competitors' ability to effectively port agreements. AT&T did so by unilaterally revising, redrafting, and otherwise modifying significant portions of certain "to be ported" agreements. AT&T's

justification for these often significant changes was that the revisions were necessary to reflect "state specific" rates and terms. But such changes were often unnecessary and in most circumstances created an insurmountable barrier which effectively barred the competitors from porting the agreement. Indeed, AT&T's practices resulted in several competitors initiating state complaint proceedings to resolve conflicts over revisions to the ported agreements.[23/] Those problems can be avoided if the Commission affirms that the only reasonable limitations on porting of agreements from one state to another are those terms that address state-specific rates approved by the applicable state commissions, or unique terms that are mandated by state law, and no others.

In addition, the Commission should affirm that the applicable state public utility commissions retain primary jurisdiction to enforce the terms of these interconnection-related conditions. Incorporating that clarification will eliminate any disputes concerning the proper forum for resolving disputes that may arise over the enforcement of these conditions. That, in turn, would ensure that the merged entities do not attempt to dismiss enforcement proceedings initiated by competitors before the applicable state commissions. This is no idle concern, as AT&T has repeatedly argued that the state commissions are without jurisdiction to enforce merger commitments related to interconnection agreements. Although AT&T's actions have been largely

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23/ *See, e.g., Application of CoreTel Wisconsin, Inc., for Establishment of an Interconnection Agreement with Wisconsin Bell, Inc., d/b/a AT&T Wisconsin, Under Provisions of the FCC AT&T/BellSouth Merger Order*, Amended Final Decision, 2009 Wisc. PUC LEXIS 389 (Wisc. PSC 2009); *Complaint and Request to Open Docket on behalf of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. against Wisconsin Bell, Inc., d/b/a AT&T Wisconsin*, Order Denying Petition for Rehearing, 2009 Wisc. PUC LEXIS 394 (Wis PSC 2009).

unsuccessful,[24/] competitors have been forced to litigate the issue in repeated state proceedings at substantial cost and delay. Such a result is not consistent with a condition that is intended to *reduce* competitors' transaction costs.

B. Operations Support Systems (OSS)

Cox and Charter utilize CenturyLink's and Qwest's Operations Support Systems ("OSS") primarily to migrate customers who wish to leave the ILEC for Cox's or Charter's competitive voice services. To make that migration as seamless and accurate as possible for the customer, the companies must have access both to preordering functions, such as timely access to accurate Customer Service Records ("CSRs"), and to the ordering functions necessary to port the telephone numbers of customers, ensure accurate directory listings and E911 services, and order interconnection facilities. The inadequacy of CenturyTel's OSS – and its adverse impact on competitive phone offerings – was a major concern in that company's acquisition of Embarq, which was viewed as having superior, although not fully automated, OSS systems.[25/] In its order approving that transaction with a number of conditions, the FCC concluded that: "Commenters, as well as Embarq and CenturyTel, agree that CenturyTel's OSS 'are largely manual with little if any automated or interactive capabilities' and that CenturyTel's OSS 'cannot provide as rapid and efficient processing as the Embarq systems.' The problems with

[24/] State commissions in California, Kentucky Missouri, Michigan, and North Carolina have all ruled that they retain jurisdiction to enforce interconnection-related merger conditions. *See, e.g., Application of Sprint Communications Company L.P. (U-5112-C), for Commission Approval of an Amendment Extending its Existing Interconnection Agreement for Three Years with the Pacific Bell Telephone Company d/b/a AT&T California pursuant to the Merger Commitment Voluntarily Created and Accepted by AT&T, Inc. (AT&T), as a Condition of Securing Federal Communications Commission Approval of AT&T's Merger with BellSouth Corporation*, Decision Granting Applicant's Motion for Reconsideration, 10-01-008; Application 09-06-006, 2010 Cal. PUC LEXIS 17 (Cal. PUC Jan. 22, 2010).

[25/] *Embarq Merger Order* ¶¶ 22-24, 42.

CentureyTel's OSS appear to disadvantage competitors in several ways."[26/] The Commission in particular highlighted CenturyTel's inability to timely port telephone numbers as a central concern and noted that the company's systems were so constrained that it capped the number of ports it could accomplish in a day.[27/] To mitigate these harms, the FCC adopted conditions requiring CenturyLink to adopt Embarq's superior OSS within 15 months. To ensure that CenturyTel's relatively worse practices were not imported to Embarq's territory, the Commission also required CenturyLink to maintain performance at the levels achieved by Embarq.

It is Cox's and Charter's experience that Qwest's OSS is superior to the Embarq system that CenturyLink is now adopting, and is required as a condition of that merger to have in place by October. Replacing legacy CenturyTel's manual processes with Embarq's electronic processes certainly should be an improvement if properly implemented, but Qwest's e-bonding allows even faster and more accurate exchange of information and forms that facilitate local voice competition. Qwest systems and processes also reduce the transaction costs for competitors by eliminating manual errors and the attendant re-processing of orders that "fall out" of the non-bonded OSS and processes. For example, Qwest allows electronic submission of Local Service Requests ("LSRs") for porting orders and Access Service Requests ("ASRs") for interconnection trunks through e-bonding (for LSRs) and through a centralized, web-based portal (for ASRs), whereas Embarq does not have e-bonding for most LSRs and uses a more manual web-based ordering process for interconnection trunks.

[26/] *Id.* ¶ 22.

[27/] *Id.* ¶ 25.

At a minimum, the Commission should ensure, as it did in the CenturyTel/Embarq transaction, that this proposed merger does not result in any degradation of the acquired company's (in this case Qwest's) superior systems and processes. In the Embarq merger, the Commission found that "[i]n order to address concerns that Embarq's wholesale performance might deteriorate following the merger, the Applicants commit to 'maintain substantially the service levels that Embarq has provided for wholesale operations, subject to reasonable and normal allowances for the integration of CenturyTel and Embarq systems.'"[28/] The Commission should adopt a similar condition here. Additionally, as it did in the Embarq merger with respect to Embarq's performance, the Commission should benchmark Qwest's performance for key functions, such as CSR availability, LSR processing, interconnection trunk ordering and provisioning, and number porting functions, and require that Qwest maintain those performance standards post-merger subject to monetary payments to competing carriers for compliance failures.[29/]

Further, there is the critical issue of integration of the companies' systems. In past ILEC mergers, including CenturyTel's merger with Embarq, the Commission has required applicants to integrate their OSS into a single platform over some reasonable transition period.[30/] The applicants here have not made clear whether they intend to operate separate OSS or eventually to combine CenturyLink's and Qwest's systems. In this case, given the superiority of the Qwest OSS, the FCC should require CenturyLink to adopt Qwest's OSS within a reasonable time-frame. Based on CenturyLink's

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28/ *Id.* ¶ 31.

29/ *Id.*

30/ *See, e.g. Embarq Merger Order* at 8768; *Ameritech Transfer Order* ¶ 381.

commitment in the Embarq proceeding, Cox and Charter submit that 15 months from closing would be a reasonable time period.

CenturyLink is still in the process of integrating Embarq's systems, which it is required to accomplish by October of this year. CenturyLink claims in its public interest statement accompanying this transaction that its conversion to Embarq's OSS is on track. At the same time, however, the company has filed a petition for waiver of the Commission's recently released order requiring carriers to port telephone numbers within one business day. It claims there that it cannot meet both its merger commitment deadline for adopting Embarq's OSS and the one-day porting deadline.[31/] While this is not the place to opine on the waiver request, [32/] the Commission must be assured that the Qwest transaction will not delay implementation of Embarq merger conditions or the implementation of one-day number porting, and must further require the new company to integrate and upgrade all of its OSS to the current Qwest platform in a reasonably timely manner.

Finally, the Commission should condition the merger on the assurance that CenturyLink's wholesale order support centers will maintain staff, hours, and technical capability to enable competitors such as Cox and Charter to be able to process customer requests to change to their voice service in appropriate intervals and in adequate volume. Again, this condition should apply throughout the merged entity's footprint.

31/ CenturyLink Waiver Petition at 7-8.

32/ Cox does note that NCTA has filed an objection to the request. *Local Number Portability Porting Interval*, WC Docket No. 07-244, Opposition of the National Cable & Telecommunications Association (filed June 29, 2010)

II. CENTURYLINK SHOULD NO LONGER BE TREATED AS A RURAL COMPANY

Under the Communications Act, rural companies receive a number of competitive advantages. For example, rural companies receive federal USF high-cost support based on embedded rather than forward looking costs[33/] and they may take advantage of procedures to preclude competitive entry, such as the rural exemption contained in section 251(f)[34/] and the additional requirement that a state commission find it in the public interest before designating a competing provider as an eligible telecommunications carrier ("ETC") in an area served by a rural carrier.[35/]

The Act defines a rural telephone company as a local exchange carrier operating entity that: (1) provides common carrier services in any study area that does not include either "any incorporated area with more than 10,000 inhabitants" or "an urbanized area;" (2) provides telephone exchange service to fewer than 50,000 access lines; (3) provides telephone exchange service to any study area with fewer than 100,000 lines; or (4) has less than 15% of its access lines in communities of more than 50,000.[36/] Section 251(f)(2) also defines a rural company at the holding company level as one that has fewer than two percent of country's subscriber lines in the aggregate nationwide.[37/]

33/ *See Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, ¶¶ 4-8 (2001).

34/ 47 U.S.C. §251(f) (listing exemptions for certain rural telephone companies and suspensions and modifications for rural carriers relating to interconnection and the development of competitive markets).

35/ 47 U.S.C. §214(e)(2).

36/ 47 U.S.C. §153(37).

37/ 47 U.S.C. § 251(f)(2).

Despite controlling over 7 million access lines following its merger with Embarq, CenturyLink continues to assert the protections of being a "rural telephone company" in many areas. It does so by organizing itself into dozens of small operating companies. For example, CenturyLink lists 17 operating entities in Wisconsin, 9 in Louisiana, 7 in Arkansas and 5 in Missouri.

CenturyLink utilizes these rural designations to maximize USF high cost support and to thwart competition. A prime example is CenturyLink's assertion of rural status for one of its operating entities in Louisiana that was designed to prevent Cox from also receiving universal support in that area. Cox had already obtained competitive ETC status in certain non-rural parts of Louisiana, and sought to extend that status into the area served by CenturyTel of Southeast Louisiana LLC ("CSEL"). Because Cox's franchise areas where it provides voice service over its cable plant did not completely align with CSEL's study area, Cox also asked to redefine the study area for ETC designation purposes, consistent with the 1996 Act and the applicable state and federal rules.[38/] CSEL repeatedly raised its status as a rural carrier and argued that the more stringent standard for ETC designation in rural areas should apply.[39/] Applying that test, an Administrative Law Judge has issued a Proposed Recommendation against Cox on the

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[38/] 47 U.S.C. §214(e)(5); 47 C.F.R. §54.207.

[39/] *Application of Cox Louisiana Telcom, LLC for Expansion of its Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e) of the Communications Act of 1934 for the Purpose of Receiving Federal Universal Service Support in the Rural Study Area of CenturyLink of Southeast Louisiana, LLC*, LPSC Docket No U-31107, Initial Post-Hearing Brief of CenturyTel of Southeast Louisiana, LLC, pp. 5-6 (filed Mar. 5, 2010) (describing the standards to be used for ETC designation in rural areas); *Application of Cox Louisiana Telcom, LLC for Expansion of its Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e) of the Communications Act of 1934 for the Purpose of Receiving Federal Universal Service Support in the Rural Study Area of CenturyLink of Southeast Louisiana, LLC,* LPSC Docket No. U-31107, Post-Hearing Rebuttal Brief of CenturyTel of Southeast Louisiana, LLC, grounds that Cox would be providing USF-covered service only in its franchised area, which did not coincide with *all* of CSEL's study area.[40/]

If the ALJ's Proposed Recommendation is eventually accepted by the Louisiana Public Service Commission, Cox will remain at a competitive disadvantage attempting to compete in CSEL's area. CSEL obtains substantial USF assistance in this area, totaling $1.7 million in 2009 and $7.2 million since 2007.[41/] These funds can be used not only to support voice service, but to help finance CSEL's network upgrades to provide broadband or, potentially, video in this area. Cox's network upgrades to provide voice and broadband service have all come from its own resources, and it must continue to rely on those resources while CSEL expands with direct federal subsidies.

CenturyLink also uses this highly fragmented corporate structure to thwart competition vis-à-vis the interconnection arrangements it provides to competitors. Where the company has designated multiple operating companies in a state, it has sought to avoid the requirement that competitors may interconnect at a single Point of Interconnection ("POI") in a LATA by requiring POIs in each of its operating company territories. This problem is illustrated by the company's actions in an ongoing interconnection arbitration proceeding with Charter in the State of Wisconsin.

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pp. 4-5 (filed March 23, 2010) (arguing that the LPSC cannot grant ETC certification to Cox beyond the area for which Cox applied).

40/ *Application of Cox Louisiana Telcom, LLC for Expansion of its Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e) of the Communications Act of 1934 for the Purpose of Receiving Federal Universal Service Support in the Rural Study Area of CenturyLink of Southeast Louisiana, LLC*, LPSC Docket No. U-31107, Proposed Recommendation of the Administrative Law Judge, pp. 13-15 (rel. June 22, 2010).

41/ USF High Cost Support Data, note 14, *supra*; USAC High Cost Disbursement Data *available at* http://www.usac.org/hc/tools/disbursements/results.aspx.

As noted above, CenturyLink has at least 17 separate operating companies in Wisconsin that are organized as independent legal entities. Due to its expansive service territory and extended hybrid fiber coax IP-based network in Wisconsin, Charter interconnects with 13 of those companies: 9 that operate under a "rural" designation, and another 4 that operate as "non-rural" companies. In the interest of gaining network deployment efficiencies and cost savings, Charter proposed that the companies utilize a single point of interconnection ("POI") per LATA between Charter's network and the CenturyLink company networks in Wisconsin. Such an approach would minimize the need for duplicative interconnection facilities, and allow for efficient use of network resources by aggregating traffic at a single point of interconnection for the mutual exchange of traffic at such point.

But the CenturyLink companies (both rural and non-rural) refused to agree to such an arrangement. Instead, these companies demanded that Charter establish a separate POI with each of the 13 CenturyLink companies with whom Charter exchanges traffic. Refusing to acknowledge the inherent efficiencies obtained by a single POI arrangement, the CenturyLink companies have taken the position that they have no legal obligation to permit Charter to interconnect via a single POI per LATA. Although this Commission has repeatedly affirmed that Section 251 permits competitors to interconnect via a single POI in a LATA,[42/] and that such arrangements promote competitive entry by

[42/] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 209 (1996) (competitors entitled to interconnect at any technically feasible point on the ILEC network); *Application by SBC Communs. Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communs. Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommuns. Act of 1996 to Provide In-Region, InterLATA Services in Texas*; CC Docket No. 00-65; 15 FCC Rcd 18354, ¶ 78 (2000); *Petition of WorldCom, Inc., et al.*, reducing the competitors' interconnection costs, the CenturyLink companies in Wisconsin vigorously opposed the application of that principle to their interconnection arrangements with Charter. That opposition arose during contract negotiations in 2007 and 2008, and the CenturyLink companies aggressively litigated that position in a subsequent Section 252 arbitration proceeding before the Wisconsin Public Service Commission in 2009.

As a result, Charter is now required to establish up to 13 separate POIs with each of the separate CenturyLink operating companies with which it exchanges traffic in Wisconsin.[43/] This obligation exists even though evidence unveiled in the Section 252 arbitration proceeding showed "that CenturyTel's interexchange network would make it technically feasible to use a single POI to serve the exchanges where [Charter] intends to compete, even if there are other isolated CenturyTel exchanges." [44/]

Despite this finding, and the Commission's own well established rulings on this issue, CenturyLink continues to thwart competition by forcing competitors to engage in inefficient, and costly, interconnection arrangements with multiple CenturyLink rural (and non-rural) entities operating in the same state. There is no reasoned basis for this

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Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n, Wireline Competition Bureau, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶ 52 (2002) (right to single POI per LATA). The Fourth Circuit has affirmed that the Wireline Competition Bureau's decision is entitled to the same deference that would normally be granted to a decision of the full Commission. *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872, n. 8 (4th Cir. 2003).

[43/] The only exception to this harsh and incomprehensible mandate is that Charter may use a single POI where CenturyTel has extended area service between its local exchanges.

[44/] *See Petition of Charter Fiberlink, LLC for Arbitration of an Interconnection Agreement Between the CenturyTel Non-Rural Telephone Companies of Wisconsin and Charter Fiberlink, LLC*, Arbitration Award at 90, Docket 5-MA-148, 149 (Wisc. PSC 2009), *affirmed* Order Determining Disputed Issues Regarding Arbitration Award, 2010 Wis. PUC LEXIS 131 (Wisc. PSC 2010).

outcome, and the only way to avoid this result in other jurisdictions is for the Commission to eliminate the merged entities' ability to continue to use "rural" company status as a shield against network interconnection practices which promote competition.

If CenturyLink's proposed merger with Qwest is finalized, CenturyLink will be the third largest ILEC in the country with, as noted above, more than 17 million access lines. Its operating territory will span 37 states and it will be a Bell Operating Company in 14 Qwest states. Although Cox and Charter have competed successfully in the video, voice, and broadband marketplaces in numerous states around the country, each is a much smaller company, serving far fewer than the 17 million access lines that the combined CenturyLink/Qwest will control. Given both its absolute and its relative size, it is well past time that CenturyLink cease wrapping itself in the protective cloak of the small rural carrier.[45/]

As a condition of this transaction, therefore, the Commission should find that CenturyLink may no longer assert the rural exemption under Section 251 or the protections from competition from ETCs seeking to serve in one of the CenturyLink's "rural telephone company" areas or any other rule or regulation that applies solely to a "rural telephone company" as referenced in section 252 of the Act. There is clear precedent for such a condition. In Frontier's acquisition of Verizon lines, for example, the Commission adopted a condition that "in the areas transferred from Verizon that are rural telephone companies," Frontier will "not assert that it is exempt from Section 251(c)

[45/] It should qualify neither as a rural carrier under 251(f)(1) nor under 251(f)(2), which applies to carriers with less than 2% if the nation's subscriber lines in the aggregate. CenturyLink will have well in excess of 2% of the nation's access lines following the merger.

obligations pursuant to Section 251(f)(1)."[46/] The FCC should adopt a similar condition in this transaction.

III. CENTURYLINK'S CURRENT WHOLESALE PRACTICES UNDERMINE COMPETITION AND SHOULD BE DISCONTINUED BY THE MERGED ENTITIES

Although the joint applicants assert that the merger will pose "no risk of harm to competition,"[47/] the potential expansion of certain CenturyLink wholesale practices to the merged entities' expanded service areas will pose a substantial risk of harm to competitors. As direct competitors to CenturyLink in numerous markets, Cox and Charter can attest to the fact that current CenturyLink wholesale policies and procedures are anticompetitive because they increase competitors' costs of acquiring and migrating subscribers from CenturyLink. In addition, CenturyLink failed to implement certain wholesale practices that are required of all incumbent LECs under Section 251 of the Act.

The Commission previously recognized that the merger of two large ILECs could lead to a sharing of worst practices.[48/] In the instant case, in addition to CenturyLink's utilizing OSS and related operations that are inferior to Qwest's, CenturyLink engages in various anticompetitive, costly, and discriminatory wholesale practices that Qwest does not. Therefore, any Commission approval of this transaction should require the merged entity to abandon the anticompetitive "worst practices" of CenturyLink in favor of the more reasonable, and preferred, practices of Qwest.

The majority of CenturyLink's anticompetitive wholesale "worst practices" stem from the assessment of interconnection-based fees and surcharges upon competitors

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46/ *Frontier Transfer of Control Order* ¶40.

47/ *Qwest/CenturyTel Application* at 22.

48/ *See, e.g., SBC/Ameritech Merger Order* ¶ 209.

during the subscriber acquisition and migration process. The first surcharge occurs at the point of subscriber acquisition, when facilities-based competitors are initially provisioning service. Specifically, facilities-based competitors will sometimes access the customer side of a network interface device ("NID") box or enclosure for the purpose of connecting the competitor's network to the subscriber's inside wire. When that happens, CenturyLink attempts to impose "access" or "use" surcharges on those competitors. In other words, CenturyLink attempts to charge facilities-based competitors for every new subscriber installation that occurs on the customer side of the CenturyLink NID enclosures – what amounts to a new subscriber surcharge. Qwest does not assess these types of NID access surcharges.

CenturyLink assesses a second type of subscriber acquisition surcharge when competitors attempt to port telephone numbers from CenturyLink. Each time that a competitor obtains a new customer that is a former CenturyLink subscriber, and that subscriber wishes to port their telephone number away from CenturyLink, the competitor must pay a surcharge to CenturyLink to effectuate the number port. This surcharge, which ranges from $13 to over $20 (depending upon the state), is imposed upon every number port request submitted by competitors.

Putting aside the anticompetitive effect of charging competitors for porting telephone numbers, the most troubling aspect of this practice is that it violates the Commission's clear precedent established in early number portability cost recovery orders. Specifically, in a 2002 Number Portability Cost Reconsideration Order the FCC ruled that:

> [I]ncumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their

> carrier "customers," nor may they recover carrier-specific costs through interconnection charges to other carriers where no number portability functionality is provided.[49]

This language clearly prohibits interconnection-based surcharges on number porting actions like those imposed by CenturyLink. The statement leaves no doubt that the Commission does not permit incumbent LECs to assess charges upon other carriers for submitting number porting requests. Further, to date, assessing surcharges on number port requests is only a CenturyLink practice, and has not been implemented in the Qwest or former Embarq territories.

A third anticompetitive surcharge arises when competitors submit directory listing requests on behalf of their subscribers. This surcharge, assessed by the former Embarq companies (now controlled by CenturyLink), is imposed upon each subscriber listing that certain competitors submit to Embarq. Embarq generally attempts to force some competitors to pay a monthly recurring "storage" charge of between $.40 and $3.00 for each subscriber listing. These surcharges lack any legal or cost justification, and do nothing more than increase competitors' costs of doing business.

Significantly, however, Embarq does not assess the charge upon its own customers, or other competitors that purchase Embarq's last-mile access facilities (*i.e.*, UNE-based and resale CLECs). Like the other anti-competitive surcharges discussed above, Qwest does not engage in the practice of assessing "storage" charges on competitors' directory listing information.

In addition to its anticompetitive wholesale practices, CenturyLink has not implemented certain wholesale practices that are required of all incumbent LECs under

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49 *Telephone Number Portability*, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578, ¶ 62 (2002).

Section 251 of the Act. Its failure to implement wholesale procedures required by Section 251 leaves competitors without certain wholesale services, thereby forcing the competitors to assume the costs of such arrangements.

For example, with respect to certain directory listing and directory assistance functions, CenturyLink has failed to implement wholesale practices required under Section 251(b)(3). More specifically, CenturyLink shifts its obligations under Section 251(b)(3) of the Act to third-party vendors by refusing to incorporate terms in its interconnection agreements which establish CenturyLink's basic directory listing and directory assistance obligations. In contrast, Qwest's practices are more consistent with the nondiscrimination obligations set forth under the statute, in that listings are generally published without improper surcharges and directory listing and assistance functions are properly fulfilled (even when Qwest uses a third party vendor).

Finally, in 2005, this Commission re-affirmed that incumbent LECs have the obligation under Section 251(c)(2) to provide interconnection facilities to competitors at cost-based rates.[50] Federal appellate courts in the Seventh, Eighth, and Ninth Circuits have affirmed state commission decisions requiring other incumbent LECs to provide such facilities at cost-based rates.[51] That Section 251(c)(2) requires CenturyLink to lease interconnection facilities at cost-based rates is settled law. Nevertheless, some five years after the Commission's order mandating the application of cost-based rates for these facilities, the CenturyLink rates for interconnection facilities are those that are set forth in

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[50] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 140 (2005).

[51] *See Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 684 (8th Cir. 2008); and *Pacific Bell Tel. Co., dba AT&T California v. California Pub. Util. Comm'n*, 597 F.3d 958 (9th Cir. 2010).

the company's special access tariffs (which are much higher than TELRIC rates).[52] In contrast, Qwest generally provides interconnection facilities at TELRIC rates that were developed thru cost proceedings at the respective state commissions.

In summary, the Commission should require that the merged entities remedy the anticompetitive issues explained above by conditioning approval of the transaction upon the merged entities' agreement to abandon CenturyLink's worst practices in favor of Qwest's practices.

IV. CENTURYLINK SHOULD USE ANY FUTURE USF BROADBAND FUNDS TO DEPLOY FACILITIES ONLY IN COMPLETELY UNSERVED AREAS

Finally, as noted in the overview, the combined CenturyLink and Qwest companies collectively received more than $1.34 billion in USF subsidies between 2007 and 2009. These subsidies should have helped these companies enhance their networks so as to better compete with cable companies or others in the provision of voice, video, and broadband services. This tilts the playing field against cable companies that must rely on private capital. As the Commission marches toward revamping the USF program to directly and explicitly subsidize broadband deployment, the FCC should require that CenturyLink utilize such funds only to deploy broadband in currently unserved areas. The Frontier transaction again provides a precedent. There, the Commission adopted a

[52] While it is true that Charter recently agreed with Embarq and CenturyTel to adopt TELRIC rates for its renegotiated and/or arbitrated agreements, such rates are still not incorporated into the agreements. Nor, to the commenters' knowledge, has there been any state cost proceeding to establish such TELRIC rates for CenturyLink's entities as of the date of this filing.

requirement, that Frontier not use any new Universal Service funds to bring broadband to areas already served by competitors.[53/]

CONCLUSION

For the reasons set forth above, Cox and Charter urge the Commission to impose the conditions identified above in order to mitigate the competitive harms that the transaction would otherwise create.

Respectfully submitted,

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53/ *Frontier Order*, ¶53.