CenturyLink has previously underestimated the length of time and the budget needed for a systems project.[146]

There is every reason to believe that if the Merged Company faces financial or operational difficulties, wholesale OSS integration and performance will be sacrificed in favor of the Merged Company's other priorities, such as preventing its likely junk credit rating from falling further, paying high dividends to maintain investor confidence, and managing and integrating the systems and services used to serve retail customers. Starving wholesale operations of investment would further benefit the Merged Company because it would allow the Merged Company to establish a competitive advantage and thereby increase its revenues. Thus, the logic of the proposed transaction poses a serious threat to wholesale service quality.

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that CenturyTel is growing too aggressively . . . . Clearly, there are concerns about management's ability to seamlessly integrate yet another acquisition so soon following Embarq."); Zacks Investment Research, *Acquisitions Aren't Slowing Down CenturyTel*, Seeking Alpha, May 5, 2010, *available at* http://seekingalpha.com/article/203209-acquisitions-aren-t-slowing-down-centurytel ("[W]e are cautious about CenturyTel's aggressive acquisition strategy considering the company's high debt level (roughly $7.7 billion). The carrier's debt increased following the assumption of $5.8 billion of Embarq debt. Acquisition of Qwest will significantly elevate CenturyTel's debt, thereby further impairing its balance sheet.").

[146] *See, e.g., Financial Watch: Integration Costs Loom Over OSS Deployments*, BILLING AND OSS WORLD, Oct. 1, 2003, *available at* http://www.billingworld.com/articles/2003/10/financial-watch-integration-costs-loom-over-oss-d.aspx ("Another example of a vendor-driven project that fell short involves CenturyTel, a Louisiana-based service provider, which in 2000 selected Amdocs for convergent billing. This project has experienced delays due to the project going over budget. According to a 10-Q that CenturyTel recently filed with the Securities and Exchange Commission, this project remains in the development stage and has required 'substantially more time and money to develop than originally anticipated.' The 10-Q filing states that CenturyTel expects to complete all phases of the new system no later than mid-2005 at a cost in excess of the previously disclosed estimate of $180 million. CenturyTel currently believes completion of the project may require it to revise its previously disclosed cost estimate by between $50 and $60 million. The company also states that 'there is no assurance that the system will be completed in accordance with this schedule or budget, or that the system will function as anticipated. If the system does not function as anticipated, the company may have to write-off part or all of its remaining costs and further explore its other billing and customer care system alternatives.'").

D. The Increased Footprint Of The Merged Company Will Increase Its Incentive To Discriminate Against Competitors.

The significant increase in the footprint of the Merged Company will likely increase its incentive to degrade wholesale service even more. As the Commission has repeatedly found, the increase in the size of the footprint of a dominant incumbent LEC through a merger will increase its incentive to discriminate against competitors throughout the Merged Company's footprint.[147] Under this so-called "Big Footprint" theory, the greater the footprint and the fewer remaining large incumbent LECs post-merger, the greater the harm.[148] Given that CenturyLink's footprint will *more than double* with its purchase of Qwest,[149] the harms arising from an enlarged footprint in this case are substantial.

1. Under The Big Footprint Theory, Mergers Of Incumbent LECs Yield An Increased Incentive To Engage In Anticompetitive Conduct.

If an incumbent LEC with market power degrades the quality of wholesalc inputs or limits the availability of such inputs through either high prices, poor wholesale performance or

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[147] *See CenturyTel-Embarq Merger Order* ¶ 33 ("We find that, as a theoretical matter, the merger may result in increased anticompetitive behavior on the part of the Applicants. Consistent with the 'Big Footprint' theory that the Commission addressed in prior BOC mergers, we find that the increase in the size of CenturyTel's study area resulting from the merger may 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. Additionally, to the extent that CenturyTel has been less willing to cooperate with competitors than Embarq—as numerous commenters allege—following the merger, CenturyTel may extend this behavior to the Embarq territories.").

[148] *See In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control et al.*, Memorandum Opinion & Order, 14 FCC Rcd. 14712, ¶ 228 (1999) ("*SBC-Ameritech Merger Order*") ("As is often the case with mergers, the increase in harm ultimately becomes big enough as the number of firms drops. . . . In addition, the scale of the merged firm resulting here will far exceed the scale of the Bell Atlantic/NYNEX combined entity.").

[149] *See* "Comparison of Incumbent LEC Annual Revenues and Access Lines" (attached hereto as "Attachment B").

refusals to deal, competitors' ability to compete will be harmed in all of the areas that the competitors currently serve *or plan to serve in the future*, both inside and outside of the dominant incumbent LEC's service area.[150] But the incumbent LEC will not be able to capture the benefits from the competitors' weakened status outside of the incumbent's own territory. It follows that, as the incumbent LEC's territory increases in size (e.g., through acquisitions of other incumbent LECs) to include more of its competitors' existing or prospective customer locations, it can capture more of the benefits of anticompetitive conduct either by raising rivals costs or by limiting the ability of competitors to expand into new geographic and product markets.[151] The incumbent LEC's incentive to engage in anticompetitive conduct increases accordingly.

> 2. *The Application Of The Big Footprint Theory To The Proposed Transaction Demonstrates The Likelihood Of Substantial Public Interest Harms.*

The application of the Big Footprint theory to the proposed transaction indicates that the transaction will produce substantial public interest harms. To begin with, there can be no doubt that CenturyLink and Qwest are both dominant providers because they possess market power over last-mile connections in their respective serving territories. In the 2007 *Qwest 272 Sunset*

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[150] *See, e.g., In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, et al.*, Memorandum Opinion & Order, 15 FCC Rcd. 14032, ¶ 177 (2000) ("*Bell Atlantic-GTE Merger Order*") ("In many cases, discriminatory conduct by an incumbent LEC in its region affects competitors in areas both inside and outside the incumbents' region. The resulting . . . 'spillover' effects can directly or indirectly harm consumers, whose business the incumbent LEC is seeking to gain. Spillover effects directly harm customers when the incumbent LEC's discrimination in one region negative affects a customer's communications between that region and another region. Spillover effects indirectly harm customers when an incumbent LEC's discrimination in one region increases a nation rival's general costs, thereby indirectly impairing the ability of this rival to provide service to customers in other regions.").

[151] *See CenturyTel-Embarq Merger Order* n.106 ("As the Commission explained in the *SBC/Ameritech Order*, a merger between two incumbent LECs may increase the merged entity's incentive to engage in anticompetitive behavior by allowing it to capture or internalize a higher proportion of the benefits of such anticompetitive strategies against regional or national competitors.") (citing *SBC-Ameritech Order* ¶ 193).

Order, the Commission held that Qwest retains "market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network."[152] Qwest's market power over last-mile connections was recently confirmed by the Commission in the *Qwest Phoenix Forbearance Order*.[153] Qwest apparently sought forbearance in the Phoenix Metropolitan Statistical Area ("MSA") because that market is more competitive than other parts of Qwest's region. However, the Commission found that Qwest still retains market power over last-mile facilities throughout the Phoenix MSA.[154]

The Joint Commenters' own experience confirms that Qwest retains market power over last-mile facilities. Integra and Cbeyond each has no choice but to buy the vast majority of its wholesale loop inputs in Qwest's region from Qwest. Cbeyond uses Qwest's facilities to reach **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** of its customer locations in Qwest's region. Similarly, Integra relies on Qwest's facilities to reach **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** of its customer locations in Qwest's service territory. tw telecom is similarly reliant on Qwest's last-mile facilities to reach its customers in Qwest's region. In Qwest's region, tw telecom relies on off-net facilities to reach approximately **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** of its customer locations. The **[***BEGIN**

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[152] *Qwest 272 Sunset Forbearance Order* ¶ 47.

[153] *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 10-113 (rel. June 22, 2010) ("*Qwest Phoenix Forbearance Order*").

[154] *See id.* ¶ 34 ("[T]he Commission has long recognized that a vertically integrated firm with market power in one market—here upstream wholesale markets where, as discussed below, Qwest remains dominant—may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs.").

CONFIDENTIAL*]** **[***END CONFIDENTIAL***]** of those off-net facilities are provided by Qwest.

It is likely that CenturyLink's market power is even greater than Qwest's because its region contains fewer large metropolitan areas in which competitive entry is most likely. Indeed, CenturyLink's market power is confirmed by the fact that, in CenturyLink's territory, tw telecom relies on off-net facilities to reach approximately **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** of its customer locations and the **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** of those off-net facilities are provided by CenturyLink.

The Merged Company is likely to target its discriminatory conduct, where possible, at companies that compete in both the legacy Qwest and the legacy CenturyLink territories. This would be true of tw telecom, which has **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** customers in CenturyLink's incumbent LEC territory as well as a large presence in the Qwest territory, including the Minneapolis, Seattle, Denver and Phoenix markets. Moreover, many of the tw telecom customers with locations in CenturyLink territory also have locations in Qwest territory. Post-transaction, CenturyLink will be able to internalize the benefits of discrimination against tw telecom's customers located in the legacy Qwest region, thereby increasing CenturyLink's incentive to discriminate against tw telecom.

In addition, the Merged Company's increased footprint will inhibit future competitive entry. Many competitors are considering expanding further into the Applicants' territory. For example, **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** Additionally, **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]** Any increase in discrimination due to an enlarged footprint will make such entry more difficult and less likely. The Merged Company will thus consider this "benefit" when determining whether to engage in discriminatory conduct.

The risk of discriminatory conduct is particularly high in this case because CenturyLink's senior executives will take over management of the Merged Company.[155] This makes it more likely that the Merged Company will adopt CenturyLink's anticompetitive practices and its attitude that wholesale customers are a problem to be dealt with, not a business opportunity. As Charter Communications explained in its opposition to the CenturyTel-Embarq merger, "It is well established in mergers and acquisitions literature and in the field of organizational behavior that an acquiring firm is likely to impose its business practices and organizational culture on the acquired firm."[156] CenturyLink is the acquiring company, its top management, including its CEO and its director of Wholesale Operations, will retain those positions in the Merged Company, and few former Qwest executives will remain with the Merged Company.[157] As a result, CenturyLink's culture and practices will likely dominate the Merged Company.

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[155] *See* Kelly Teal, *Only 4 Senior-Level Qwest Execs to Keep Jobs After CenturyLink Merger*, BILLING & OSS WORLD, June 2010, *available at* http://www.billingworld.com/news/2010/06/only-4-senior-level-qwest-execs-to-keep-jobs-after-centurylink-merger.aspx.

[156] *See* Letter from Thomas Jones, Counsel, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 08-238, at 2-3 (filed May 4, 2009); *see also id.* at 3 ("As one scholar has stated, in mergers and acquisitions, there will often be 'considerable pressure on top managers at acquired firms to conform to the management practices of the buyer.' Moreover, given that 'it is among the most well accepted organizational notions' that 'chief executives have a fundamental role in shaping and guiding their organizations,' and the merged entity will be managed by CenturyTel's CEO and other top CenturyTel executives, it is likely that CenturyTel's business practices and organizational culture will dominate the merged firm.").

[157] *See* Teal, *supra* note 155 ("Only four senior-level Qwest Communications International Inc. executives will keep their jobs once the CenturyLink Inc. takeover closes.").

Indeed, Socket Telecom's experience is that the merged CenturyLink is adopting anticompetitive practices of legacy CenturyTel. For instance, legacy Embarq provided competitors with a description of the geographic area served by a central office. This information enables a competitor to both determine the size and scope of the area it can serve and target its collocations to central offices that serve customers that are suitable for the competitor's business plan. In Socket Telecom's experience, CenturyLink is not currently providing this information in the legacy Embarq territory,[158] thereby undermining the growth of competition.

In addition, Socket Telecom has experienced a decline in wholesale service in the legacy Embarq territory for, among other things, provisioning of unbundled loops. For example, Socket Telecom's experience is that loop provisioning has slowed and that on-time provisioning has declined in the legacy Embarq territory.

3. The Applicants Have Already Demonstrated A Willingness To Slow-Roll Competition By Engaging In Unreasonable And Discriminatory Conduct.

Even without the effects of an increased footprint, the Applicants' past conduct has shown that they are willing to engage in unreasonable and discriminatory conduct in order to slow-roll competition. For example, Integra and other competitors provide xDSL over unbundled conditioned copper loops. Qwest discriminates against competitors seeking to provide innovative forms of xDSL service over copper loops. When installing and repairing loops, for instance, Qwest refuses to test copper loops to digital levels despite the Commission's

[158] By contrast, Qwest provides data regarding the geographic areas served by its central offices in its ICONN database.

requirement that testing not be limited to voice levels.[159] Qwest has failed to provide CLECs with conditioned copper loops in compliance with applicable interconnection agreements and state and federal law.[160] This conduct already impedes the ability of CLECs to deliver xDSL services to their small and medium-sized business customers. An increased footprint will increase this incentive to discriminate against competitors.

In addition, as explained in detail in the CenturyTel-Embarq merger proceeding, legacy CenturyTel has in the past taken the position that it could require an end-user customer's personal identification number or passcode as a required field for all LSRs for porting submitted by CLECs to CenturyTel, thereby giving CenturyTel the opportunity to engage in retention marketing activities.[161] The Commission has recently held that such a practice is unlawful.[162]

There is a substantial risk that the Merged Company will intensify its pursuit of this kind of anticompetitive conduct as a result of the increased size of its footprint. Therefore, the

[159] *See* 47 C.F.R. § 51.319(a)(1)(iii)(C) ("Insofar as it is technically feasible, the incumbent LEC shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.").

[160] *See, e.g.*, Joint CLEC Initial Comments, *In the Matter of a Commission Investigation into Qwest Corporation's Provision of Network Elements to CLECs and into Related Marketing Practices Targeting CLEC Customers*, Minnesota PUC Dkt. Nos. P-421/CI-09-1066, at 12-49 (filed Nov. 24, 2009) (describing Qwest's practices throughout its 14-state territory regarding the provision of xDSL-capable copper loops).

[161] *See, e.g.*, *CenturyTel-Embarq Merger Order* ¶ 25 & n.80 (citing Letter from Thomas Jones, Counsel for Charter Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 08-238 (filed Feb. 27, 2009), Attachment A, Declaration Of Carrie L. Cox and Amy W. Hankins On Behalf Of Charter Communications, Inc., ¶¶ 9-10).

[162] *See In re Local Number Portability Porting Interval and Validation Requirements*, Report and Order, 25 FCC Rcd. 6953, ¶ 16 (2010) (adopting the NANC's recommendation that "a passcode not be required unless the passcode has been requested and assigned by the end user rather than the service provider" in order to prevent "anticompetitive effects").

Commission cannot approve the proposed transaction without ensuring that such prior unlawful practices are discontinued.

4. *The Proposed Transaction Will Result In Increased Harms With Respect To The Inputs Required By Competitors To Provide Advanced Services.*

The Commission has held that an incumbent possesses an elevated incentive and opportunity to "deny special accommodations required by competitive LECs seeking to offer innovative advanced services."[163] The Commission has also found that an increased footprint will increase this incentive to discriminate against competitors seeking inputs and "accommodations" needed to provide innovative services.[164]

In particular, incumbents "have an incentive to discriminate against companies that depend on the incumbents for evolving types of interconnection and access arrangements necessary to provide new services to consumers."[165] According to the Commission, "[Incumbent LECs] also have the incentive to limit or control the development of new services, to the extent that new services compete with their current offerings."[166] Furthermore, the Commission has found that it is often not capable of detecting and preventing such discrimination because "it is

[163] *SBC-Ameritech Merger Order* ¶ 107.

[164] *See Bell Atlantic-GTE Merger Order* ¶¶ 183-184 ("[T]here are spillover effects to discrimination against national providers of advanced services, and [ ] post-merger, the combined entity would internalize external effects to some extent, thus increasing its incentive to act in one area in a manner that produces effects in another area. . . . By capitalizing on its monopoly control over loops, for instance, the combined entity can discriminate against an advanced services provider entering an area in the combined region. This will reduce the customer base and revenues of the advanced services provider, thereby reducing its ability to enter another region.").

[165] *Id.* ¶ 181.

[166] *Id.*

impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies."[167]

Denial of access to wholesale inputs needed to provide advanced services is not a mere theoretical concern. For example, Integra is in the early stages of deploying fiber to remote terminals and collocating electronics in incumbent LEC remote terminals in order to obtain access to copper subloops. Integra plans to rely on these arrangements to provide Ethernet-over-first mile service to small and medium-sized businesses throughout the Merged Company's territory. Integra has not yet sought collocation in many remote terminals, but it is concerned that such arrangements are not well-developed and that they offer an incumbent LEC a host of possible excuses for denying, delaying or degrading a competitor's access requests.[168] For example, the incumbent LEC can (1) deny access based on the claim that there is not enough space in a cabinet to support collocation; (2) insist on inefficient access arrangements; and (3) slow roll the collocation process by arguing that it lacks a system for determining whether there is sufficient space in any particular remote terminal to support collocation. These claims can be difficult and expensive for competitors to refute or for regulators to assess.

The incentive for the Applicants to deny, delay and degrade access to inputs necessary for competitors to provide advanced services is further heightened by CenturyLink's limited knowledge and experience in providing such inputs to competitors. For example, CenturyLink's wholesale Ethernet offering is relatively new, and CenturyLink has little experience and few

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[167] *SBC-Ameritech Merger Order* ¶ 254.

[168] For example, one competitor, FiberNet has encountered substantial difficulties establishing collocation arrangements in remote terminals in the Verizon region. *See, e.g.,* Letter from Thomas Jones, Counsel, One Communications, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51, Attachment E, Declaration of David R. Armentrout, On Behalf Of FiberNet, LLC (filed Nov. 17, 2009).

established practices for providing wholesale Ethernet service or for establishing Ethernet traffic exchange. Without an established practice of providing advanced inputs, and with the increased incentive to discriminate arising from an increased footprint, the Merged Company is more likely to exploit opportunities to engage in anticompetitive conduct and prevent competitors from offering innovative services to small and medium-sized business customers.

5. *Legacy BellSouth's Declining Wholesale Performance Following Its Merger With AT&T Demonstrates That An Increased Footprint Will In Fact Lead to Increased Discrimination Post-Transaction.*

In a departure from its other decisions, the Commission determined in the *AT&T-BellSouth Merger Order* that while the Big Footprint theory is "theoretically valid," it does not have a practical effect on firms' conduct.[169] In so finding, the Commission asserted that there was no evidence that past mergers have resulted in heightened discrimination as a result of an increased footprint.[170]

But the behavior of AT&T-BellSouth post-merger supports the contrary conclusion. In tw telecom's experience, prior to the AT&T-BellSouth merger, legacy BellSouth's special access performance commitments and execution in meeting those commitments was superior to all of the BOCs as well as legacy Embarq. **[***BEGIN CONFIDENTIAL***]**

[169] *In re AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶ 185 (2007) ("*AT&T-BellSouth Merger Order*").

[170] *See id.*

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Following its merger with AT&T, legacy BellSouth's special access performance commitments and execution on those commitments declined markedly. Legacy BellSouth now provides special access performance execution that is worse than the execution levels of Verizon, Qwest and Embarq. Prior to its merger with AT&T, **[***BEGIN CONFIDENTIAL***]**

171 **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]**

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BellSouth's (and AT&T's) poor performance has a substantial negative effect on tw telecom and other CLECs' businesses. As a general matter, customers will blame the CLEC for poor service quality even if the CLEC's poor service quality is caused by the incumbent LEC's conduct. Indeed, these problems make it difficult for a CLEC to live up to its commitments to and expectations of its retail customers. BellSouth's poor wholesale performance can result in (1) a CLEC paying a penalty to its own retail customers for failing to meet its contractual performance commitments and/or (2) the customer dropping the CLEC's service entirely. In sum, legacy BellSouth's poor wholesale performance places its competitors' retail businesses in jeopardy.

Of course, if a customer is not satisfied with a CLEC's retail performance in the legacy BellSouth region, the customer can always switch to a legacy BellSouth retail product. Legacy BellSouth's incentive to provide poor performance is obvious and, as the foregoing evidence has shown, that incentive has increased since its merger with AT&T. As explained, even legacy AT&T's (already limited) willingness to meet service quality benchmarks has deteriorated since the merger with BellSouth. The effects of an increased incumbent LEC footprint are therefore far from merely theoretical.

E. The Commission And State Regulators Will Have A Diminished Ability To Detect And Punish Anticompetitive Conduct.

While consolidation among incumbent LECs can increase the Merged Company's incentive to discriminate, it can also diminish regulators' ability to detect and regulate such conduct. Although legacy Qwest (a BOC) and legacy CenturyLink (a non-BOC) have been subject to dramatically different levels of regulatory oversight, they are similar in important respects (i.e., size and mix of rural and urban areas), and no other incumbent LEC shares their profile. The elimination of Qwest through the proposed transaction will therefore eliminate the number of similarly-situated, mid-size incumbent LECs from two to one. As a result, the Commission will lose entirely the ability to determine reasonable practices for incumbent LECs that resemble the Applicants. This is particularly significant because the Commission will lose the ability to rely on Qwest's wholesale service (compared to CenturyLink's) as a basis for requiring that CenturyLink provide at least that level of service.

1. The Commission Has Correctly Relied Upon Benchmarking Theory To Gauge The Harm From Past Mergers In The Wireline And Cable Industries.

There are two basic means of determining whether an incumbent LEC is overpricing or degrading competitors' access to bottleneck facilities. *First*, an incumbent LEC sometimes charges a price or performs a service for its own retail customers as well as for wholesale customers. When this is the case, it is possible to compare the incumbent LEC's retail service with its wholesale service to determine whether it has engaged in unreasonable discrimination against wholesale customers.[173] *Second*, an incumbent LEC often performs functions for wholesale customers that do not have a retail analogue. When this is the case, regulators must determine whether the incumbent LEC's conduct is "just and reasonable."[174] This is a difficult inquiry because regulators may conclude that they lack the information to assess the incumbent LEC's conduct. This is especially likely with respect to wholesale inputs and performance necessary to provide advanced and innovative services because there is often no established mode of providing such services against which to compare the incumbent LEC's conduct.[175]

The most effective means of assessing wholesale conduct for which there is no retail analogue is to "benchmark" the conduct of one incumbent LEC against another. The Commission has held that benchmarking is more likely to be reliable when two companies share similar attributes, such as similar size and similar service territories.[176] Moreover, when the practices of two similarly-situated entities can be compared, the regulator can be more confident in defining the standard for just and reasonable conduct. For example, if one incumbent LEC

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[173] *See SBC-Ameritech Merger Order* ¶ 175 ("We certainly agree with the notion that an incumbent LEC's treatment of its retail operations or its affiliates as compared with its treatment of competitors can provide useful benchmarks for regulators and competitors."); *Bell Atlantic-GTE Merger Order* ¶ 165 (same).

[174] *See* 47 U.S.C. §§ 201(b), 202(a), & 251(c)(3).

[175] *See SBC-Ameritech Merger Order* ¶ 177 ("[I]f a competitive LEC seeks the provision of properly conditioned loops in order to provide xDSL service, an incumbent LEC which is not ready to provide xDSL service itself would have the incentive to deny this competitor the properly conditioned loops. In this circumstance, parity rules would provide no remedy for the competitive LEC, for the incumbent LEC would not be providing to its retail arm anything that it was denying its competitor."); *Bell Atlantic-GTE Merger Order* ¶ 166 ("Moreover, parity rules will not always suffice for innovative entrants. Exclusive reliance on parity rules, for example, could slow the provision of innovative services to the public.").

[176] *See Bell Atlantic-GTE Merger Order* ¶ 153 ("Comparative practices analyses are most effective when the firms under observation are similarly situated, including the size of the firms relative to the size of the market.").

has, for whatever reason (e.g., compliance with Section 271), performed a function that others refuse to perform, the Commission may be able to define such conduct as the standard for reasonable conduct to which all similarly-situated incumbents are bound.

But such benchmarking becomes more and more difficult for regulators to rely upon as the number of similarly-situated incumbent LECs diminishes through mergers. With fewer and fewer incumbent LECs, the chances that the remaining incumbent LECs will engage in outlier (i.e., more cooperative) behavior diminishes. The Commission's ability to detect and punish unreasonable conduct diminishes accordingly.[177]

The Commission has applied the benchmarking theory in a number of merger contexts. Benchmarking was a central basis for the Commission's assessments of harm in the SBC-Ameritech and Bell Atlantic-GTE mergers.[178] The Commission recently extended its benchmarking analysis to the cable industry in the *Adelphia Merger Order*. In that *Order*, the Commission recognized that the reduction in the number of large cable company benchmarks limits its ability to detect unreasonable conduct in the provision of essential upstream regional sports network ("RSN") inputs to other cable operators.[179] The Commission relied on the

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[177] *See SBC-Ameritech Order Merger* ¶ 145 ("Moreover, by reducing the number of major incumbent LECs, the merger makes it less likely that deviations from the average benchmark will be identified confidently as unreasonable and punishable."); *Bell Atlantic-GTE Merger Order* ¶ 142 ("[F]urther consolidation among the major incumbent LECs could severely curtail regulators' abilities to constrain any tacit or explicit coordination by these incumbents to impede comparative practices analyses, especially as regulators seek to open the incumbents' markets to competition."); *id.* ¶ 151 ("By reducing the number of major incumbent LEC benchmark firms to four, each firm has more incentive to cooperate and less unilateral incentive to break an implicit or explicit agreement to impede benchmarking.").

[178] *See id.*

[179] *See In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd. 8203, ¶ 83 (2006) ("*Adelphia Merger Order*") ("We recognized in the *SBC-Ameritech Order* that regulatory efficacy is enhanced when there

reduction in the number of benchmarks as one of the bases (in addition to the Big Footprint theory)[180] for adopting regulations governing the RSN market.[181] More recently, while the Commission did not directly refer to its traditional benchmarking analysis in its evaluation of the CenturyTel-Embarq merger, its finding that the transaction would be in the public interest was predicated upon conditions which were designed to assure that the Merged Company would adopt the best practices of both CenturyTel and Embarq.[182] The very existence of each company's best practices demonstrated that it would be reasonable for the combined company to adopt these practices post-merger.[183]

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are a 'sufficient number of independent sources of observation available for comparison.' We believe that not only regulators, but also consumers, can benefit from the ability to observe how different cable operators are serving proximate areas.").

[180] *See id.* ¶ 141 ("In the MVPD market, a vertically integrated cable operator will likely charge the highest price that its DBS rivals are willing to pay for a vertically-integrated RSN. DBS operators' willingness to pay such prices increases as the footprint of the vertically integrated cable operator increases, because DBS operators know that if they fail to carry the RSN, more of their subscribers will switch to cable to gain access to such programming.").

[181] *See id.* ¶ 156 ("To mitigate potential harms from uniform price increases, as well as other strategies discussed below, we impose a remedy based on commercial arbitration such as that imposed in the *News Corp.-Hughes Order*. The arbitration remedy, as set forth in Appendix B, will constrain Comcast's and Time Warner's ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive strategies.").

[182] *See CenturyTel-Embarq Merger Order* ¶ 46 ("[W]e also find . . . that the proposed transaction poses certain potential anticompetitive risks. In response to these concerns, the Applicants offered several voluntary commitments."); *see id.* ¶ 45 ("[W]e find that one of the major benefits of the proposed merger is that the Applicants can adopt each other's best practices. In particular, we find that that, by adopting CenturyTel's billing software and Embarq's wholesale OSS, the Applicants will be better able to serve both retail and wholesale customers, and that local competitors will be able to compete. In this regard, we are further encouraged by the Applicants' commitment to implement Embarq's wholesale OSS within 15 months.").

[183] *See id.* ¶ 45.

2. *Because Qwest And CenturyLink Are Similarly Situated In Terms Of Size And Service Territories, Each Can Serve As A Benchmark Of The Other's Conduct.*

Qwest and CenturyLink are similarly situated in many respects. For example, both companies have a similar number of access lines while other mid-sized incumbent LECs (i.e., Frontier, FairPoint and Windstream) are smaller than both Qwest and CenturyLink.[184] In addition, Qwest's[185] and CenturyLink's[186] service areas cover a similar mix of rural and non-rural areas combined with urban areas (e.g., Denver, Phoenix, Seattle and Minneapolis for Qwest and Las Vegas for CenturyLink). The other mid-sized incumbent LECs' service territories are almost exclusively rural and do not include major cities.

As a result of their similarities, there is a sound basis for comparing Qwest's and CenturyLink's behavior and performance. Again, because Qwest has undergone extensive testing and obtained Section 271 approval, and established wholesale service levels required of a BOC, Qwest's performance can be used a benchmark against to which to assess the

[184] As of March 31, 2010, Qwest had approximately 9.66 million access lines and CenturyLink had approximately 6.9 million access lines. *See* Attachment B. By contrast, as of March 31, 2010, Frontier had approximately 6.36 million access lines (including the lines it would acquire from Verizon), Windstream had approximately 3.1 million access lines and FairPoint had approximately 1.5 million access lines. *See id.*

[185] For example, Qwest recently argued that is should receive a higher level of universal service support than is currently the case given its substantial rural market presence. *See* Comments of Qwest, WC Dkt. No. 05-337 & CC Dkt. No. 96-45, at 2 (filed May 8, 2009) ("Qwest's ILEC territory is diverse. . . . It includes many rural communities and areas of low household density. In many cases the low density areas served by Qwest are also an extended distance from the nearest town. Qwest has 1,310 local switching wire centers. Of these wire centers, 553 – 42% – are located outside of metropolitan areas. These 553 wire centers serve 2.2 million access lines. Qwest serves many areas with low population density.").

[186] *See CenturyLink to Buy Qwest in $10.3 Billion Stock Swap*, TheDenverChannel.com, Apr. 23, 2010, *available at* http://www.thedenverchannel.com/money/23230095/detail.html ("Last year, [CenturyLink] bought Embarq Inc., the landline service company once part of Sprint, giving it an urban presence as well.").

reasonableness of CenturyLink's conduct. Furthermore, because no other mid-sized incumbent LEC resembles either Qwest or CenturyLink, the proposed transaction will essentially eliminate any basis for benchmarking among mid-sized incumbent LECs similar to the Applicants.[187] As a result, both state regulators and the FCC will have a diminished ability to detect and punish unreasonable conduct, especially on the part of CenturyLink, as a result of the proposed transaction.

III. THE APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THE PROPOSED TRANSACTION WILL YIELD NET PUBLIC INTEREST BENEFITS.

In evaluating whether the proposed transaction will result in public interest benefits, the Commission considers "whether [the Merged Company] will be able and is likely to pursue business strategies resulting in demonstrable and verifiable benefits that would not be pursued but for the transaction."[188] The Commission has further held that:

> The Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed [transaction] outweigh the potential public interest harms. As such, the Commission applies a "sliding scale approach" to evaluating benefit claims. Under this sliding scale approach, where potential harms appear "both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.[189]

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[187] The Applicants may argue that CenturyLink and Frontier are similarly situated because they are of comparable size, measured by access lines. *See* Attachment B. Yet, as explained, because these two companies serve a different mix of geographic areas, they are not valid benchmarks for each other. Furthermore, even if they were to constitute valid benchmarks for each other, the loss of Qwest through the proposed transaction would result in the reduction in the number of similarly-situated incumbent LECs from three to two. As the Commission has found, even a merger from four to three similarly-situated incumbent LECs "would so severely diminish the Commission's ability to benchmark that *it is difficult to imagine that any potential public interest benefit could outweigh such a harm.*" *Bell Atlantic/GTE Merger Order* ¶ 170 (emphasis added).

[188] *Frontier-Verizon Merger Order* ¶ 46.

[189] *Id.* ¶ 48.

As discussed herein, the Applicants have failed to make such a demonstration.

First, the Applicants assert that the proposed transaction will result in increased broadband deployment,[190] but they fail to demonstrate how this will happen. Legacy CenturyLink has deployed broadband to 89 percent of its customers while Qwest has done so for 86 percent of its customers.[191] Therefore, it is difficult to see how the proposed transaction will significantly improve on Qwest's performance or otherwise "allow the companies to support even larger-scale broadband deployment."[192] Moreover, in the relevant Oregon and Washington state commission review proceedings, CenturyLink has stated that it has not yet developed "any specific plans" or "[p]rojections" for post-transaction broadband deployment in those states.[193]

Second, the Applicants offer scant evidence to support their claim that the proposed transaction will result in increased deployment of IPTV services in Qwest territory.[194] In fact, CenturyLink has no successful track record of deploying video services. Instead, it relies primarily on the fact that it has introduced IPTV services to three trial markets: Columbia, Missouri, Jefferson City, Missouri, and La Crosse, Wisconsin.[195] These markets are small,[196]

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[190] *See* Application at 13-15.

[191] *See id.* at 13.

[192] *Id.*

[193] *See* Attachment A, at 3-4.

[194] *See* Application at 15 ("The transaction will enable CenturyLink to leverage its expertise, investments, and experience in IPTV deployment to the benefit of Qwest's customers.").

[195] *Id.*

[196] The La Crosse, Wisconsin and Columbia-Jefferson City, Missouri markets are ranked 127th and 137th out of 210 markets, respectively, in terms of numbers of households in the United States. *See* Television Bureau of Advertising, DMA Rankings - US TV Households by Market, *available at* http://www.tvb.org/rcentral/markettrack/us_hh_by_dma.asp.

however, and CenturyLink does not offer any analysis of how successful these trials have been. At its current rate of deployment, it is also difficult to discern how CenturyLink will deploy IPTV services on any significant scale in the Qwest territory in the near term. It is not even clear that the Merged Company will pursue this strategy in the legacy Qwest markets at all. Indeed, on this issue, Qwest's CEO, Ed Mueller, who will have a seat on the Merged Company's board, has been reluctant to commit to significant IPTV deployment, saying only that "*over time we will look at the potential of rolling out IPTV . . . .*"[197] As the Commission has held, "'benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.'"[198] Thus, this purported benefit is not cognizable under the Commission's analytical framework.

Third, the Applicants claim that the Merged Company will be able to "leverage Qwest's strength in providing complex communications services to large businesses and government entities" to serve such entities in the legacy CenturyLink territory.[199] But there are relatively few large business or government customers in CenturyLink's territory. It is therefore hard to see how adding Qwest's expertise in serving such customers will make a difference.

Fourth, as discussed above, the Applicants claim that the proposed transaction will create annual operating synergies of approximately $575 million within three to five years of closing.[200]

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[197] CenturyLink-Qwest April 22, 2010 Conference Call Transcript at 8 (emphasis added).

[198] *Frontier-Verizon Merger Order* ¶ 47 (quoting *EchoStar-DirecTV Order* ¶ 190).

[199] *See* Application at 18-19.

[200] *See supra* note 135 & accompanying text.

As the Commission has recognized in the past, such synergies are impossible to verify.[201] The situation is no different here as the Applicants have failed to provide sufficient evidence to support their claim.[202] In fact, as illustrated by the following exchange during the Applicants' April 22, 2010 conference call with investment analysts, CenturyLink has been reluctant to discuss the rationale for its anticipated synergies in any detail:

> <u>[Bank of America analyst]</u>
> [C]ould you divide those synergies into buckets and kind of help us think about how they stage in through this three to five-year process?
>
> <u>Glen Post</u>
> We really are not ready to talk about that today. I am sure over time we will be able to more granularly discuss that with you but not today.[203]

What CenturyLink *has* disclosed is that integration problems could prevent *any* merger benefits from being realized. As CenturyLink reported in a recent SEC filing, the inability to successfully combine the two companies could prevent the Merged Company "from achiev[ing] the cost savings anticipated to result from the merger, which would result in the anticipated benefits of the merger not being realized in the time frame currently anticipated or at all."[204]

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[201] *See, e.g., Frontier-Verizon Merger Order* ¶ 57 ("Based on the record evidence, we do not fully accept the Applicants' claim of $500 million in cost savings."); *CenturyTel-Embarq Merger Order* ¶ 44 (stating that "we do not fully accept the Applicants' claim of $400 million in cost savings"); *AT&T-BellSouth Merger Order* ¶ 217 ("After careful examination of the Applicants' synergy model, we find that we cannot credit the $16 billion savings in its entirety.").

[202] *See* Application at 21 (stating merely that the $575 million in cost savings within three to five years will result from "reduce[d] interconnection fees," "reduced corporate overhead, elimination of duplicate functions, enhanced revenue opportunities, and increased operational efficiencies through the adoption of each company's most effective practices").

[203] CenturyLink-Qwest April 22, 2010 Conference Call Transcript at 9.

[204] CenturyLink Form S-4 at 17.

Moreover, to the extent that the expected synergies concern only fixed costs, they do not benefit consumer welfare. The Commission has consistently held that it "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost because reductions in marginal cost are more likely to result in lower prices for consumers."[205] Furthermore, as explained above, to the extent that the promised synergies are realized, they may well yield net consumer harm if they result in diminished investment in wholesale service.

IV. THE COMMISSION MUST IMPOSE CONDITIONS IN ORDER TO MITIGATE THE HARMS POSED BY THE TRANSACTION AND TO FIND THAT THE TRANSACTION YIELDS NET PUBLIC INTEREST BENEFITS.

As shown, the competitive harms posed by the proposed transaction far outweigh any purported benefits. In order to ensure that, "by a preponderance of the evidence, th[e] the proposed transaction, on balance, serves the public interest," the Commission must impose enforceable conditions to mitigate the harms described herein. To begin with, conditions should be imposed to prevent the Merged Company from degrading wholesale service quality and to provide meaningful remedies in the event of service degradation. In addition, to ensure that harm is avoided and not merely delayed, the Commission must establish, before closing, procedures regarding how systems and operational changes will occur, whenever they occur. For instance, as discussed above, for any Qwest system that was subject to third-party testing (e.g., as part of a Section 271 process), robust, transparent third-party testing should be conducted for any CenturyLink replacement system to ensure that it provides the needed functionality, can appropriately handle commercial volumes, and satisfies the Merged Company's Section 271 obligations.

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[205] *See, e.g., Frontier-Verizon Merger Order* ¶ 47 (internal quotations omitted); *CenturyTel-Embarq Merger Order* ¶ 35 (same).

Even if the Commission imposes conditions to remedy the public interest harms, however, the proposed transaction will not yield net public interest benefits. With respect to processes and procedures, the Commission must also require that the Applicants adopt the best practices between them throughout the Merged Company's territory. In the *CenturyTel-Embarq Merger Order*, the Commission determined that conditions resulting in this outcome were necessary to ensure that the transaction was in the public interest.[206] The Commission must do the same here.

The Joint Commenters will submit a comprehensive list of proposed conditions after the Applicants have addressed the concerns discussed herein in their Reply Comments. As explained above, the Applicants have provided no information about the OSS that will be used by the Merged Company, the Applicants' OSS integration plans, and other critical issues. The Reply Comment period for the instant proceeding offers the Applicants an opportunity to address those issues in a comprehensive manner. In the meantime, the Joint Commenters submit into the record the preliminary lists of proposed merger conditions submitted by Integra and tw telecom in response to data requests by the Arizona Corporation Commission ("ACC") in the ACC's CenturyLink-Qwest merger review proceeding (attached hereto as "Attachment C" and "Attachment D").[207] These proposals reflect issues that are critical to the Joint Commenters and

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[206] *See CenturyTel-Embarq Merger Order* ¶ 45 ("[W]e find that one of the major benefits of the proposed merger is that the Applicants can adopt each other's best practices. In particular, we find that, by adopting CenturyTel's billing software and Embarq's wholesale OSS, the Applicants will be better able to serve both retail and wholesale customers, and that local competitors will be better able to compete. . . . We find that these benefits will affirmatively advance competition, thereby benefiting the public interest.").

[207] *See* Integra's Response to Staff's First Set of Data Requests, ACC Dkt. Nos. T-01051B-10-0194 *et al.*, at 4-10 (dated June 18, 2010) (attached hereto as "Attachment C") (listing Integra's preliminary proposed conditions); *see also* tw telecom of arizona llc Response to Arizona Corporation Commission Staff's First Set of Data Requests, ACC Dkt. Nos. T-01051B-10-0194

their end-user customers. As wholesale customers of the Applicants, the Joint Commenters request that the Applicants review, seriously consider, and respond to the proposals reflected in Attachments C and D in their Reply Comments. The Joint Commenters reserve their right to modify, expand, or otherwise change these proposals as the record in this proceeding develops.

V. CONCLUSION.

For the foregoing reasons, the Commission cannot grant the instant Application unless it conditions its approval on compliance with conditions that address the public interest harms described herein.

Respectfully submitted,

Thomas Jones
Jonathan Lechter
Nirali Patel
Shea Wynn*
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, D.C. 20006
(202) 303-1000

*Admitted only to the NY Bar.

Attorneys for Cbeyond, Inc., Integra Telecom, Inc., Socket Telecom, LLC, and tw telecom inc.

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et al., at 2-10 (dated June 29, 2010) (attached hereto as "Attachment D") (listing tw telecom's preliminary proposed conditions).

ATTACHMENT A