CONCURRING STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER

Re*:* *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent To Transfer Control,* WC Docket No. 10-110

I support this transaction, and believe that a combined CenturyLink/Qwest will create a stronger company with a clear rural focus to the benefit of consumers across their 37 state footprint. I have serious reservations, however, with the length of this review and some of the conditions imposed on this transaction.

I recently expressed my concerns with our merger review process,[1] and, unfortunately, I believe this transaction is further evidence we need to take a hard look at how we review transactions. Our current process does not serve the public interest, and it should be overhauled before we conduct another major merger review.

I acknowledge that the conditions and timing of this merger are consistent with our practice over the past decade, and likely met the expectations of the Applicants. That does not mean we are doing the job the public interest or our economy demands. We need to do better. This Commission is quick to point out that regulatory "red tape" can act as a "significant obstacle" to "businesses ability to invest in new technologies and hire new workers." Yet the Commission has done nothing to address how its merger review process is one of the clearest examples of the "red tape" problem that is within our discretion to fix.

The Review Took Longer Than Necessary.

Our review took over 300 days. The Department of Justice cleared this transaction over 240 days ago. While a number of state commissions just recently completed their reviews, I believe our lack of urgency may have contributed to a longer process at the state level. Regardless, we could—and should—have conducted our statutory review of this transaction in a thorough manner in the allotted 180 days. There are 49,000 employees of the combined company that have experienced a year of professional uncertainty, and two companies have been unable to move forward to better serve rural communities. Given the very limited set of public interest harms identified in the Order, we should have been able to conclude this review in a much more timely manner.

The Conditions Addressing Alleged Public Interest Harms Are Not Sufficiently Supported.

The Commission has become too comfortable with imposing conditions on merging parties. Prior to imposing any condition, we should establish a clear evidentiary record demonstrating the existence of a merger-specific harm. We should then make an explicit finding that the harm necessitates a condition, and provide a clear description of that condition and how it mitigates against the harm in a directly proportional manner. With some limited exceptions, the Order fails to provide the detail necessary to properly evaluate the conditions imposed on the merging parties.

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[1] Remarks of Commissioner Meredith Attwell Baker, *Towards a More Targeted and Predictable Merger Review Process,* IPI Third Annual Communications Summit (Mar. 2, 2011).

Specifically, conditions are imposed to address four sets of asserted merger harms. One set of conditions addresses Qwest's Operations Support Systems (OSS). These conditions relate to concerns about CenturyLink's operation of—and potential modification to—the Qwest ordering system. These conditions are certainly merger-specific, but based on the limited record outlined in the Order, I do not think we have demonstrated a documented public interest harm to cure. Simply stating that commenters expressed OSS concerns is not a basis to impose a condition. The Commission needs to make a clear finding of its own and document the harm with far greater specificity. We also need to consider more comprehensively other existing remedies available to those parties concerned with OSS issues. To that end, there is an inadequate explanation as to why existing statutory protections under section 271, and the corresponding state processes and procedures, are not sufficient to check against any these potential harms. Nor is there an analysis of state-imposed conditions or commercial settlement agreements that may also address these concerns sufficiently. We acknowledge these additional protections without detailing why we find them lacking. I do not rule out the need for OSS-specific conditions, but it is far from clear on the record before us that there is a merger-specific harm that is inadequately addressed by protections already in place. It is similarly not possible on this record to evaluate whether the imposed conditions are narrowly tailored or proportional to the harm.

The next two set of conditions address interconnection agreements and wholesale competition issues. These conditions suffer the same basic infirmity. The cursory discussion of these alleged harms, relevant existing protections, and the related conditions similarly forecloses a proper evaluation. One condition in particular bears highlighting: CenturyLink is prohibited from asserting some of its rights under section 251. A regulatory agency requiring companies to waive their statutory rights in order to gain regulatory approval raises red flags in and of itself. Further, the Order fails to develop any merger-specific, let alone merger-harm-specific, basis to impose the condition. CenturyLink's ability to claim the rural exemption existed prior to this transaction, and has nothing to do with Qwest or CenturyLink's acquisition of Qwest. There is also no evidence in the Order that CenturyLink asserts these rights today in an anti-competitive manner.[1]

In contrast, I believe that Commission has crafted a narrowly tailored condition to address the risk of lost competition in 40 specific buildings in the special access market. I support our refusal to address broader special access pricing issues that the Order properly notes are "better addressed in the special access rulemaking." With respect to the condition itself, I would have preferred some analysis as to why "at least two other, unaffiliated fiber-based

[1] This condition is also clearly distinguishable from one imposed in the Verizon/Frontier deal. In that instance, the condition was limited to the properties Frontier was acquiring from Verizon. The Commission did not want a relatively large company using an acquisition as a basis to establish new statutory rights intended for small carriers. *Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control,* Memorandum Opinion and Order, FCC 10-87, ¶ 40 (2010) (explaining that "Frontier has committed not to assert that is exempt from section 251(c) obligations pursuant to section 251(f)(1) in the areas transferred from Verizon that are rural telephone companies outside of West Virginia, or 'to move or reclassify any exchanges or wire centers currently located in Verizon West Virginia's legacy service areas so as to … take advantage of the rural exemption under Section 251(f)(1).'"). There is no analogous concern here, and this condition is far broader. The Commission must be careful to avoid reflexively applying merger conditions from prior transactions on future deals; each transaction must be evaluated based on the evidentiary record of the immediate proceeding.

carriers" is the criteria used to determine the applicable buildings, and why a single unaffiliated provider would not be sufficient to check against any potential harm. An explanation is also warranted as to why this condition needs to be in place for seven years. I believe there needs to be a documented basis for any condition imposed on parties that lasts longer than the default three years, yet no explanation is given here.

The Need for Additional Commitments is Unproven.

Two companies with complementary businesses and footprints with a record of serving rural America assert that together they will be able to provide a better platform to serve consumers, compete with cable and wireless competition, and expand new offerings. We have adopted a series of conditions to address the limited harms identified by commenters. It is unclear on this record why additional conditions are warranted.

Even if additional conditions were appropriate, a number of these conditions bear no relation to any harm associated with the underlying transaction. I fully support the efforts of the Applicants to invest in more broadband infrastructure and to expand efforts to increase broadband adoption. This is great corporate citizenship, but I do not think they should be extracted as merger conditions. In particular, I have concerns with government mandating broadband investments for seven years. Seven years is an eternity in this dynamic space, and the market conditions and consumer demands of 2018 are not known today by the companies or the Commission. With respect to broadband deployment, we should have explained why the significant conditions at the state level on the same issue are insufficient: Arizona required $70 million in broadband investment, Colorado $70 million, Utah $25 million, Minnesota $50 million and so on.

One last condition to highlight is the commitment of the companies to surrender some universal service support. This type of condition is representative of how our process is broken. There is no nexus between the relinquishment of universal service funding and this transaction, and none is claimed in the Order. We require CenturyLink to forego universal service funding it is entitled to prior to—and after this—transaction. Whether a company the size of CenturyLink and Qwest, separate or apart, should be entitled to universal service support intended for small carriers is an important policy question, and a question directly under review in a rulemaking proceeding.[2] I do not believe the Commission should use merging parties as a test case for a new policy or a mechanism to signal future policy to industry at large.

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I ultimately support this transaction. The Applicants determined that as conditioned, this transaction still makes economic and competitive sense. I have no basis to second guess their decision, but concur in the result because of the infirmities in the process used by the Commission to approve transactions.

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[2] *Connect America Fund,* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, ¶¶ 182-193 (2011).