

(b) Time for filing motion to dismiss. A party that opposes a pleading must file any motion directed to the pleading no later than the time the responsive pleading is due, or within twenty days after the pleading is served, whichever time is less, unless the party shows good cause for delay. Filing a motion to dismiss a pleading, or seeking a similar remedy, does not extend the time for answering the pleading.

2. The rule clearly suggests that motions to dismiss are appropriate where the alleged defects or errors are obvious from the pleadings. For example, the rule would apply when asking for the relief under the wrong statute. In this case, Applicants requested approval of their proposed merger under RCW Chapter 80.12 and WAC Chapter 480.143. IBEW does not suggest that Applicants' failed to file for approval of the merger under the correct statute or rules. Consequently, to prevail on its Motion to Dismiss IBEW needs to establish that the Application for Approval of the Merger fails to state a claim upon which the Washington Utilities and Transportation Commission (Commission or WUTC) could grant relief.

The Application Seeks All Approvals Necessary to Consummate the Transaction

3. Applicants can only assume IBEW is alleging that it isn't possible to determine what relief Applicants are seeking from the Commission. Specifically, IBEW states:

“...the Joint Application fails to request approval for CenturyTel of Washington, Inc., CenturyTel of InterIsland, Inc., CenturyTel of Paradise, Inc., and CenturyTel of Cowiche, Inc. (collectively“CenturyTel WA ILECs”) to engage in the proposed transaction. Moreover, the direct testimony filed by Joint Applicants fails to include information about the impact of the proposed transaction on CenturyTel WA ILECs, including potential impacts on rates, capitalization, finances, and/or the quality, safety, and reliability of service.” Motion at P. 1.

Based on these allegations, IBEW insists it must have a delay and urges the Commission to start the review process from scratch.

4. Applicants are perplexed by the Motion to Dismiss since the only legitimate ground for the Motion is failure to state a claim. Even a cursory review of the Application makes clear that both companies have regulated operations in Washington and are seeking

Commission permission to consummate their union as set out in the Agreement and Plan of Merger access to which was provided by the link in footnote 2 of the Application. If it were not for the regulated companies, the Applicants would have no reason to be before the Commission. Apparently IBEW believes that certain “magic” words must be included in the Application and that every possible impact of the merger be described before the Commission can act and other parties are able to understand the case. Applicants do not believe IBEW’s perceived requirements have any basis in Washington law. First, nothing in the RCW or WAC specifies a precise format or the contents for a merger Application submitted to the Commission. Second, as a notice pleading state, a Washington pleading must only put parties on notice of the claim or relief being sought. In this case, Applicants are seeking approval of their merger from the Commission which by design must include all impacts on regulated operations.

5. In construing pleadings, the Washington Utilities and Transportation Commission (WUTC) has adopted WAC 480-07-395 which mirrors the Washington Civil Rules. That rule states in part:

(4) Liberal construction of pleadings and motions. The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties.

Furthermore, the Commission has ruled that under the rules of notice pleading, it will dismiss a claim for relief “‘only if it appears beyond a reasonable doubt that no facts exist that would justify recovery,’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” *In the Matter of the WUTC v. ATG, Inc. et. al* (February 12, 2004), citing *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Under the rule, for IBEW to prevail it must demonstrate

that there is an error or defect in the pleadings and that the alleged error or defect has affected a substantial right of IBEW in the proceeding. IBEW's Motion shows neither.

6. For obvious reasons, the primary thrust of the Application is the change of ownership of Embarq. However, the Application also makes it clear that all of the regulated affiliates will be impacted by the transaction. The first two pages of the Application explain that both CenturyTel and Embarq subsidiaries provide local service in Washington. In Paragraph 5, the Application discusses the potential impacts of the merger on both companies' regulated operations:

UTNW, ECI and the CenturyTel ILECs will continue as the certificated carriers in Washington and will continue to have the requisite managerial, technical and financial capability to provide services to their customers. Upon the completion of the Transaction, end user customers will continue to receive service from the same local operating company and at the same rates, terms and conditions as immediately prior to the Transaction. Therefore, the Transaction will be transparent to customers. Any subsequent service or price changes will be made in accordance with all applicable rules and laws. *Application, P. 3.*

In Paragraph 7, the benefits of the merger for the regulated operations of both companies are discussed:

These evolving market dynamics place unique pressures on companies such as Embarq and CenturyTel, whose operating subsidiaries predominantly serve smaller, rural service areas. The economies of scale and efficiencies produced by this combination will allow the combined company to better focus on delivering new products and services to their customers in their predominantly rural service areas. *Application, P. 4.*

While Applicants could provide additional quotes from Paragraphs 18, 19, 22, etc., it seems incredible that anyone who has read the Application and the Agreement and Plan of Merger does not understand the scope of what is being requested of the Commission. Applicants specifically provided Exhibit 1 as part of the Application to ensure the changes in corporate structure were

easily and readily understood. Furthermore, at the conclusion of the Application, Applicants specifically request: “(3) any other relief or approvals required by Washington law.” For the Commission to grant the Motion, it would have to find that the Petition is so vague that the Commission does not understand why Applicants are before it.

Factual Disputes are Not Proper Grounds for Motions

7. With respect to the allegations that Applicants’ testimony is insufficient and its discovery responses incorrect, IBEW should well know that there is no evidence that has yet been admitted in the record in this case. No motion with respect to the sufficiency of the record can properly be entertained by the Commission at this juncture. Most of IBEW’s Motion addresses what it believes is some sort of “gotcha” based on its assertion that CenturyTel will undergo a change of control at the shareholder level. While it is not appropriate to litigate disputed facts in Motions, the Commission should know that CenturyTel does dispute IBEW’s claim of a change in shareholder control at the parent level as evidenced by CenturyTel’s response to IBEW Data Request 24 which is attached as Exhibit B to IBEW’s Motion. Frankly, even if IBEW is correct about a change of control at the holding company level, its relevance to the transaction and this proceeding is questionable. To Applicants’ knowledge, the WUTC does not generally regulate the make-up of shareholders of publically traded companies.

The Motion to Dismiss Was Not Timely Filed

8. Applicants have demonstrated in the previous section that the Motion to Dismiss is not well taken. However, it was also not timely filed. WAC 480-07-380(b) requires a Motion to Dismiss be filed within 20 days of the pleading moved against unless good cause for delay can be established. Although IBEW does not reference the WAC anywhere in its Motion, Applicants assume IBEW will attempt to excuse the delay by relying on its earlier argument that the

Application is so vague it couldn't understand what relief Applicants seek. Applicants will not reiterate the arguments it made in previous sections of this Response. Instead, Applicants ask the Commission to keep in mind the following question: Can IBEW credibly claim it does not understand the relief sought by Applicants in their Application? If not, the Motion to Dismiss must doubly fail the time limit requirements of the rule.

The Alternate Motion Has No Basis in Law or Fact

9. As an alternative to its Motion to Dismiss, IBEW urges the Commission to require Applicants to (1) amend their Application to request approval for the regulated companies to engage in the transaction; (2) require amended testimony from Applicants; (3) provide notice to customers of the regulated companies; and (4) update and correct Applicants' Testimony and responses to Data Requests. Once again, IBEW provides no authority supporting the requirement or need for the Motion to Amend. Applicants have previously addressed the issue of whether the Application properly requests the relief necessary for the Commission to approve the merger. Applicants have also pointed out that with respect to IBEW's other items of requested relief, the Commission would need to make inappropriate factual determinations within the context of the Motion(s) in order to rule on IBEW's requested delay. In fact, IBEW and the other parties have engaged in substantial discovery of Embarq and CenturyTel, and all parties will yet file testimony in the case. Whether Applicants' testimony is sufficient to demonstrate that the transaction is consistent with the public interest can only be decided after the Commission has heard all testimony in the case. There is simply no basis for the Commission to start the review process anew as requested in IBEW's alternate Motion to Amend.

Conclusion

The Commission should deny IBEW's Motion in all particulars. The Motion to Dismiss and Amend are not supported by Washington law or administrative rules. The attempt to litigate contested facts in the context of the Motions is inappropriate and would put the Commission and Administrative Law Judge in an untenable position at this point in the proceeding. The delay in the proceeding sought by IBEW should be seen for what it is and rejected.

Respectfully submitted this 9th day of February, 2009.

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