

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of

EMBARQ CORPORATION AND  
CENTURYTEL, INC.

For Approval of Transfer of Control of  
United Telephone Company of the  
Northwest d/b/a Embarq and Embarq  
Communications, Inc.

DOCKET UT-082119

COMMISSION STAFF'S  
RESPONSE TO IBEW'S MOTION  
TO DISMISS, OR, IN THE  
ALTERNATIVE, TO SUSPEND  
PROCEDURAL SCHEDULE

1 Commission Staff submits the following response to the Motion of the International  
Brotherhood of Electrical Workers, Local 89 ("IBEW") to Dismiss or, in the Alternative,  
Motion to Suspend Procedural Schedule.

**I. INTRODUCTION**

2 Staff agrees with IBEW that by only requesting approval for the transfer of the  
Embarq operating subsidiaries, the Application contains an incomplete statement of the  
approval that is required under RCW 80.12.020 for the proposed transaction.

3 Because the proposed transaction falls not just within the "disposition clause," but  
also within the "merger clause" of RCW 80.12.020 it is not sufficient for Embarq  
Corporation and CenturyTel, Inc. ("the Applicants") to only request approval for the  
"transfer of control" of the Embarq operating subsidiaries in Washington (United Telephone  
Company of the Northwest and Embarq Communications, Inc.).

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The Commission should allow the Applicants to amend their Application to include a request for approval of the merger (or “indirect” merger) of the Embarq *and CenturyTel* public service company subsidiaries in the Washington jurisdiction. Staff anticipates that the Applicants will do so voluntarily. Staff does not believe it is necessary to suspend the procedural schedule or to require CenturyTel to file additional direct testimony, because IBEW has failed to demonstrate that it is prejudiced.

## II. ARGUMENT

**A. The transaction will at least result in an “indirect merger” of the CenturyTel and Embarq operating subsidiaries in Washington. As such, potential harm to customers of the CenturyTel subsidiaries, and not just to the Embarq subsidiaries, is at issue.**

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By only including a request for approval of the transfer of the Embarq subsidiaries<sup>1</sup> (presumably under the “otherwise dispose” language in RCW 80.12.020), the Applicants’ request for relief suggests that it is only potential harm to the Embarq operating subsidiaries that is relevant to the Commission’s review of the proposed transaction. In Staff’s view, however, Commission approval is required for each of the Embarq and CenturyTel operating subsidiaries under the “merger” clause of RCW 80.12.020. Therefore, potential harm to the CenturyTel public service companies is also at issue.

RCW 80.12.020 includes a “disposition” clause and a “merger” clause:

No public service company shall sell, lease, assign or otherwise **dispose** of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, **merge** or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do: PROVIDED, That this section shall not apply to any sale, lease, assignment or

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<sup>1</sup> Joint Application of Embarq Corporation and CenturyTel, Inc. for Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq Communications, Inc., at 1 (first paragraph) and 12 (final paragraph).

other disposal of such franchises, properties or facilities to a special purpose district as defined in RCW 36.96.010, city, county, or town. [Emphasis added.]

6 In its orders in the PacifiCorp/Scottish Power<sup>2</sup> and GTE/Bell Atlantic<sup>3</sup> merger applications, the Commission concluded that it had authority to review mergers that placed Washington public service companies under the control of new parent companies that previously had no public service company subsidiaries in Washington. In those cases, the Commission relied on the “disposition clause” of RCW 81.12.020. The reason the Commission relied on the disposition clause, and not the merger clause, is that the merger clause arguably applies only when two (or more) existing public service companies are merging (“directly or indirectly”).<sup>4</sup>

7 Having found the “disposition clause” of RCW 81.12.020 applicable to the transfer of the Washington public service companies in those cases, the Commission reviewed the transactions to assure there would be no harm to the customers of the Washington public service companies that were to be transferred to new owners.<sup>5</sup>

8 The Commission’s reasoning for “piercing the corporate veil” between the GTE parent company and its wholly-owned Washington public service company subsidiary<sup>6</sup> applies equally to the CenturyTel and Embarq companies. The Applicants apparently concede that the transaction results in the transfer of the Embarq operating subsidiaries

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<sup>2</sup> Second Supplemental Order: Commission Decision and Order Regarding Jurisdiction (“*Scottish Power Order*”), *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, Docket No. UE-981627 (March 1999).

<sup>3</sup> Fourth Supplemental Order Approving and Adopting Settlement Agreement, Granting Application, Subject to Conditions (“*Bell Atlantic Order*”), *GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the GTE Corporation—Bell Atlantic Corporation Merger*, Docket No. UT-981367 (December 1999).

<sup>4</sup> *Scottish Power Order* at 5, 9; *Bell Atlantic Order* at 16 (“We agree with Staff and Public Counsel that the focus of our inquiry should be on GTE Northwest, indisputably a public service company under RCW 80.04.010 and RCW 80.12.010.”).

<sup>5</sup> Third Supplemental Order on Prehearing Conference, *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, Docket No. UE-981627 (April 1999) at 2-3; *Bell Atlantic Order* at 25.

<sup>6</sup> *Bell Atlantic Order* at 6, 7, 16-17.

under this theory. IBEW may also be correct that the Commission’s prior interpretation of the disposition clause would encompass the change in control of the CenturyTel subsidiaries from the existing CenturyTel parent to the new parent company that is to be jointly owned by the former CenturyTel and Embarq shareholders.

9 In Staff’s view, however, the Commission need not decide whether the disposition clause applies to the CenturyTel subsidiaries. That is because the proposal to bring together two families of Washington public service companies under a common parent clearly falls within the merger clause, with its broad “by any means whatsoever, directly or indirectly” language. As such, potential harm to both Embarq and the CenturyTel’s public service companies in Washington is at issue.<sup>7</sup>

10 Staff does not anticipate that the Applicants will dispute this point. If they do dispute this point, Staff would ask that the question be reserved for the final briefs, or until there is some practical reason—such as a dispute over the proper scope of discovery—to address the issue.

**B. Dismissal is not warranted if the Applicants agree to clarify the relief they request to include approval of the transaction with respect to the CenturyTel operating subsidiaries that are under the Commission’s jurisdiction.**

11 The Applicant’s failure to request approval of the transaction with respect to CenturyTel’s operating subsidiaries is not, by itself, grounds for dismissal. In Washington, pleadings are to be construed liberally; if a complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called.<sup>8</sup> A plaintiff should be

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<sup>7</sup> See Order No. 06, Order Regarding Text and Publication of Notice, *In the Matter of the Joint Application of Verizon Communications, Inc. for Approval of Agreement and Plan of Merger*, UT-050814 (November 2005) at 2 (“The affected entities, whose relationship to the merger renders them part and parcel of its consummation, include both Verizon and MCI subsidiary operating entities that are subject to regulation as public service companies. Jurisdiction over the affected entities requires jurisdiction over the transaction to ensure that its effect on the public of the state of Washington is not adverse.”).

<sup>8</sup> *Simpson v. State*, 26 Wash. App. 687, 615 P.2d 1297 (1980).

allowed to amend a deficient pleading rather than face dismissal.<sup>9</sup> Therefore, Staff agrees with IBEW that, as an alternative to dismissal, the Applicants should be allowed to amend their Joint Application to request approval for CenturyTel’s Washington operating subsidiaries to engage in the transaction.

**C. Suspension of the procedural schedule is not warranted because IBEW has not demonstrated that it has been prejudiced.**

12 Staff does not agree with IBEW’s request to require the Applicants to provide additional direct testimony that addresses the impacts of the proposed transaction on CenturyTel Washington ILECs and customers, or to suspend the procedural schedule.

13 Embarq and CenturyTel filed the Application jointly, and both companies are participating as parties in the case. Neither company has asserted that the Commission lacks jurisdiction over the transaction. The Application does not display any attempt to evade the question of impact on the CenturyTel operating companies through the use of the stated legal theory. The applicants could easily amend the Application to request approval for the indirect merger of the CenturyTel and Embarq public service companies. Staff understands that the Applicants intend to send notice of the transaction, as required by Commission rule,<sup>10</sup> to the Washington customers of both the Embarq and the CenturyTel companies.

14 IBEW asserts that “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.”<sup>11</sup> Although Staff agrees that the Applicant’s direct testimony is very cursory, both Applicants have at least sponsored direct testimony by company

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<sup>9</sup> See *State v. Adams*, 107 Wn.2d 611 (1987).

<sup>10</sup> WAC 480-143-210.

<sup>11</sup> IBEW Motion, p. 1.

representatives explaining why they believe the merger is in the public interest with respect to both companies' Washington operating companies. Staff does not believe the testimony is deficient for failing to address impacts of the transaction on the CenturyTel entities in Washington.

CenturyTel witness Clay Bailey<sup>12</sup> states, for example, that:

- the “combined company” will be stronger (p. 3), and the “transaction will create a post-Transaction CenturyTel with greater financial resources and access to capital to invest in networks, systems, and employees” (p. 5)
- “post-Transaction CenturyTel is expected to receive investment grade rating” (p. 8)
- “the post-Transaction CenturyTel including UTNW and the CenturyTel ILECs will have a combined pool of technical expertise from which to draw” (p. 9)
- the “combined company” will have “improved economies of scope and scale” (p. 11)
- “the two companies do not serve any of the same markets in Washington” (p. 12)
- “increases to economies of scope and scale will also allow the combined company to have a stronger wholesale division” (p. 13)
- “the Transaction will occur at the holding company level and therefore will not itself have any impact on the fundamental operations of UTNW or the CenturyTel ILECs” (p. 13)
- “the services provided by Embarq and CenturyTel, and the rates and services under which they are offered, will not change as a result of the transaction” (p. 14)

15 Even if one doubted the candor or analytical rigor of these statements, they clearly are intended to apply not just to the Embarq subsidiaries, but also to the CenturyTel subsidiaries in Washington for whom Mr. Bailey is offered as a speaking agent. Mr. Bailey’s testimony does address the impact of the transaction on the CenturyTel subsidiaries. As such, IBEW has a witness to whom it may address data requests and cross examination questions. If the Applicants have resisted answering data requests that inquire into impacts on CenturyTel (for example, on the grounds that any such impacts are

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<sup>12</sup> Exhibit No. \_\_\_\_\_ (GCB-DT).

irrelevant), that is the place for IBEW to focus its efforts with motions to compel and for adjustment of the procedural schedule if necessary.

16           Thus, Staff does not believe that IBEW has demonstrated the need to require the applicants to file additional direct testimony or prejudice requiring suspension of the procedural schedule.

### III. CONCLUSION

17           For the foregoing reasons, the Commission should afford the Applicants an opportunity to amend their Application to request approval for the proposed merger transaction not only with respect to the Embarq operating subsidiaries in Washington, but also with respect to the CenturyTel operating subsidiaries in Washington. The Commission need not require the Applicants to file additional direct testimony. The Commission need not suspend the procedural schedule at this time.

DATED this 9<sup>th</sup> day of February, 2009.

Respectfully submitted,

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