

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Joint Application of	)	DOCKET UT-082119
	)	
EMBARQ CORPORATION AND	)	ORDER 04
CENTURYTEL, INC.	)	
	)	
For Approval of Transfer of Control of	)	DENYING MOTION TO DISMISS
United Telephone Company of the	)	OR, IN THE ALTERNATIVE TO
Northwest d/b/a Embarq and Embarq	)	SUSPEND PROCEDURAL
Communications, Inc.	)	SCHEDULE
	)	
.....	)	

**MEMORANDUM**

- 1 **PROCEEDING:** On November 24, 2008, Embarq Corporation (Embarq) and CenturyTel, Inc. (CenturyTel) filed a joint application with the Washington Utilities and Transportation Commission (Commission) for approval of an indirect transfer of control of Embarq’s regulated Washington State operating subsidiaries to CenturyTel.<sup>1</sup> The Commission conducted a prehearing conference on January 5, 2009, and entered Order 01 Prehearing Conference on January 6, 2009, allowing interventions by Comcast Phone of Washington (Comcast), Level 3 Communications, LLC, (Level 3) and the International Brotherhood of Electrical Workers Local 89 (IBEW), and establishing a procedural schedule.
  
- 2 On January 29, 2009, IBEW filed a Motion To Dismiss or, in the Alternative, Motion To Suspend Procedural Schedule. IBEW contends the Joint Application should be dismissed because it is legally deficient. Specifically, IBEW says the applicants failed to request specifically approval for the change in control of CenturyTel Washington Incumbent Local Exchange Carriers (ILECs), a request necessary in IBEW’s view to effectuate the proposed transaction. IBEW states that granting its motion would not prejudice Joint Applicants because they could “file a new application, with appropriate supporting testimony and other evidence that addresses the change in control (and indirect merger) of CenturyTel WA ILECs.”

<sup>1</sup> We refer to the companies collectively as “Joint Applicants.”

- 3 IBEW requests alternatively that Joint Applicants be directed to:
- File an amended application that seeks the necessary approvals for CenturyTel WA ILECs.
  - File additional direct testimony that addresses the impact of the proposed transaction on CenturyTel WA ILECs and its customers.
  - Provide any notice that is required to customers of CenturyTel WA ILECs.
  - Update and correct any testimony and answers to data requests that were based on the incorrect assertion that there was no change in control of CenturyTel WA ILECs.
- 4 IBEW also requests under this alternative that the procedural schedule be suspended until the Joint Applicants comply. At that time, IBEW would have the Commission conduct a second prehearing conference to establish a new schedule. Thus, as a practical matter, IBEW asks for exactly the same relief under its nominally “alternative” request as under its principal request. In effect, IBEW suggests that we start this proceeding anew, one way or another.
- 5 Public Counsel filed a response stating that it “does not oppose” IBEW’s motion. Public Counsel states that “IBEW raises legitimate concerns regarding the adequacy of the filing” and suggests that either alternative proposed by IBEW would be suitable.
- 6 Staff filed a response agreeing 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.” Staff believes it is appropriate, and sufficient, to allow the Joint Applicants an opportunity to amend their application to include a request for approval of the indirect merger of the Embarq and CenturyTel public service company subsidiaries. Staff does not believe it is necessary to suspend the procedural schedule or to require additional testimony from the Joint Applicants “because IBEW has failed to demonstrate that it is prejudiced.”
- 7 CenturyTel and Embarq responded in opposition to IBEW’s motion. The Joint Applicants contest both the merits and the procedural propriety of IBEW’s motion. On the merits, they argue that their application is not legally deficient in that it makes clear that while “the primary thrust of the Application is the change of ownership of Embarq,” all of each company’s regulated subsidiaries and affiliates will be impacted

by the proposed transaction. The Joint Applicants argue that their application provides sufficient notice of the intended merger of the two companies and that they seek such authority from the Commission as is required to effectuate that merger. Hence, Joint Applicants argue, there is no basis upon which IBEW can contend its substantial rights are affected by any inadequacy in the application and, under the Commission's procedural rule by which pleadings are liberally construed (*i.e.*, WAC 480-07-395(4)), the application should be considered adequate to proceed on all questions relevant to the Commission's review of whether the proposed transaction is consistent with the public interest.

8 On the question of procedural due process, Joint Applicants point out that IBEW's motion to dismiss is untimely under WAC 480-07-380(1)(b), which requires that any such motion be filed within 20 days after Joint Applicants filed their application. Joint Applicants filed their application on November 21, 2008. The Commission issued a notice of prehearing conference on December 5, 2008, conducted a prehearing conference on January 5, 2009, and entered Order 01-Prehearing Conference on January 6, 2009. Measured from any of these dates, IBEW's motion to dismiss, filed on January 29, 2009, is untimely. Thus, at the threshold, we will not entertain IBEW's motion insofar as it requests dismissal because to do so would violate Joint Applicants' procedural rights. However, because IBEW seeks alternative relief, we must turn back to the merits to fully address IBEW's contested motion.

9 As both Public Counsel and Staff state, IBEW's motion does raise some facially legitimate concerns regarding the Joint Applicants' perspective on the law governing their proposed transaction and their perspective on critical mixed questions of fact and law, such as whether the transaction, as proposed, results in a change of control at CenturyTel. These are matters, however, that cannot be resolved and need not be addressed at this early stage in this proceeding. The factual questions must await full development of our record. The legal questions can be argued on briefs. Staff is correct that IBEW has neither asserted nor shown that it is prejudiced, or that there is any specific reason to suspend the procedural schedule. If Joint Applicants seek to amend their application or supplement their prefiled testimony,<sup>2</sup> IBEW or any other

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<sup>2</sup> IBEW asserts the Joint Applicants' testimony is lacking in necessary details. Staff does not agree with IBEW's assertion. We express no opinion here, simply noting that Joint Applicants bear the burden of proof.

party can request adjustments to the procedural schedule and the Commission will grant such a request, if warranted.<sup>3</sup>

- 10 While we determine we should deny IBEW's motion as to both alternative forms of relief requested for the reasons stated in the preceding paragraphs, we reiterate, as noted above, that Joint Applicants bear the burden of proof in this proceeding. They would be well advised to consider carefully the legal and factual questions raised by IBEW's motion, and the suggestions by Public Counsel and Staff that they see some merit in IBEW's positions on these questions. The parties might consider a voluntary technical conference to avoid unnecessary contentiousness concerning discovery or other matters as this proceeding goes forward.

**ORDER**

- 11 THE COMMISSION ORDERS that IBEW's Motion To Dismiss or, in the Alternative, Motion To Suspend Procedural Schedule is denied.

Dated at Olympia, Washington, and effective February 12, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS  
Administrative Law Judge

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<sup>3</sup> Although we have no reason to think they will do so, we caution Joint Applicants that the Commission views with disfavor the practice of "putting on" a case-in-chief at the rebuttal testimony stage.