

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 COMCAST'S
MOTION FOR PERMISSION TO
WITHDRAW

1 Commission Staff submits the following response to Comcast Phone of Washington,
LLC's (Comcast's) motion to withdraw.

2 Staff does not oppose Comcast's withdrawal from the proceeding so long as
Comcast Phone first discloses on the record the agreement it has reached with the applicants
that satisfies "its concerns about the proposed merger."

3 Staff requests that the Commission issue a bench request to Comcast, requiring the
company to provide a copy of the agreement and an explanation its terms. Comcast's
withdrawal should be conditioned on its full response to the bench request.

4 When the Commission reviewed the proposed merger of US WEST and Qwest in
Docket UT-991358, a number of competitive local exchange companies (CLECs)
intervened, as Level 3 and Comcast have in this proceeding. After the filing of testimony

and cross-examination hearings in the US WEST/Qwest merger proceeding, the CLECs began seeking leave to withdraw on the grounds that they had reached private side-agreements with the merging companies. The Commission denied the requests, stating strong concerns about the inconsistency between first seeking leave to intervene in the proceeding to advance the public interest, and then asking to withdraw based on private side-agreements.¹

Corporations are expected to be good citizens as well as good companies. When corporations elect to participate in proceedings such as this one, we expect them to fulfill their good citizenship obligation by bringing forth evidence and making sound argument that will assist us to make a reasoned decision in the public interest. As a corollary, the Intervenor is encouraged to engage with other parties in settlement discussions that may produce negotiated results to be presented to the Commission as a means to resolve *in the public interest the previously contested issues in the case*.

Here, the Intervenor purported to enter the proceedings to further public interest considerations, but now they seek to withdraw from the proceedings based on their private interests. They have abdicated their broader responsibility to be good citizens in favor of pursuing their own narrower commercial interests. This threatens to undermine the integrity and credibility of the Commission's adjudicatory process. With respect to the arrangements between Joint Applicants and AT&T, between U S WEST and MetroNet, and between U S WEST and McLeodUSA, these Intervenor to have asked our leave to intervene in the public interest and then agreed privately to withdraw under a veil of confidentiality when offered a concession in what they characterize as a private dispute that is wholly unrelated to the matters before us. Although Level 3 Communications ultimately waived its initial claim of confidentiality, we regard its agreement to withdraw in exchange for a cash payment in the same light.

The side-agreements between U S WEST and the remaining Intervenor who seek to withdraw pursuant to their agreements (i.e., Rhythms Links, Covad Communications, NEXTLINK, and SBC), do touch on some of the issues raised in the merger proceeding. But these private agreements are not intended to, and do not, assist the Commission in its duty to ensure the

¹ Eighth Supp. Order, In Re Application of US WEST, Inc. and Qwest Communications International, Inc., Docket UT-991358, ¶¶57-66 (June 19, 2000).

merger between U S WEST and Qwest is consistent with the public interest. Instead, these agreements promote the narrower commercial ends of those who entered into them. Indeed, the agreements arguably raise the question whether they are contrary to the public interest, to the extent an individual corporate participant in the telecommunications sector gains advantages for itself relative to other corporate participants in the same industry.

5 It is also noteworthy that the Commission later initiated a penalty proceeding against Qwest and numerous CLECs for failing to file certain agreements with the Commission pursuant to 47 U.S.C. § 252, including agreements that Qwest had made with CLECs in return for those companies' agreement to drop their opposition in the Commission proceeding to review the proposed merger between Qwest and US WEST. The companies involved agreed to pay penalties totaling millions of dollars to resolve that complaint.²

6 Staff is not privy to the agreement Comcast has reached to address its concerns about the proposed merger. Public Counsel and Staff have obtained, through data requests, a copy of an agreement between Embarq and Level 3 pertaining to Level 3's earlier withdrawal from this proceeding. A copy of that agreement (****Confidential Per Protective Order****) is enclosed as an exhibit to this response.

7 While Staff does not believe that any purpose would be served by requiring Comcast to remain in the case at this early stage,³ Staff believes that a withdrawing intervenor at least has an obligation to inform the record by providing any agreement it has reached with the

² See Order No. 21, Order Adopting and Approving Settlement Agreement; Closing Docket, Docket UT-033011 (Feb. 28, 2005).

³ In UT-991358, the Commission stated "as a general matter, intervenors who participate to nearly the last day of the proceeding should not be allowed to depart at the last minute and avoid being bound directly by the Commission's final order in the case. While there may be sound reasons in future cases for late withdrawal by an intervenor, such reasons have not been presented here." *Id.* at ¶ 66. Staff is not concerned about Comcast avoiding the terms of a final order in this case because any conditions the Commission might require for approval of the merger would apply to the applicants, not to third parties. Also, to the extent that the agreements concern terms of interconnection, the companies must file them with the Commission pursuant to 47 U.S.C. § 252. If the agreements are discriminatory, the Commission may reject them pursuant to 47 U.S.C. § 252(e)(2)(A). If accepted, the agreements should be available for any CLEC to opt-in. 47 U.S.C. § 252(i).

applicants. If the parties had genuine, competition-related concerns about the proposed merger and those concerns have been addressed by an agreement with the Applicants, that agreement should be made a part of the record.

DATED this 24th day of February, 2009.

Respectfully submitted,

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