

[Service Date April 8, 2009]

April 8, 2009

**NOTICE CONCERNING AGENDA FOR HEARING  
(April 15, 2009)**

*RE: 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*

TO ALL PARTIES:

In addition to the principal matter set for hearing in this docket, there are pending two requests from intervenors for leave to withdraw; one from Comcast Phone of Washington, LLC (Comcast) and one from the International Brotherhood of Electrical Workers Local 89 (IBEW). Previously, the Commission granted in Order 03 a similar request from the only other intervenor in this proceeding, Level 3 Communications (Level 3).

Subsequent to the Commission's entry of Order 03, granting Level 3's request for leave to withdraw, Staff brought to the Commission's attention the fact that Level 3 had entered into an undisclosed, written side-agreement with the applicants in this proceeding, Embarq Corporation (Embarq) and CenturyTel, Inc. (CenturyTel). Staff provided the Commission a "confidential" copy of the side-agreement that it had obtained during discovery under the protective order in this proceeding. Upon examination, the Commission learned that the applicants made certain concessions concerning interconnection agreements as *quid pro quo* for Level 3's withdrawal.

Staff noted in response to Comcast's request for leave to withdraw that the company referred to an agreement it had reached with the applicants. Staff requested that the Commission issue a bench request to Comcast, requiring the company to provide a copy of the agreement. The Commission issued Bench Request No. 1 on March 3, 2009, requiring applicants to provide any such agreements with any of the intervenors. In the meantime, on February 27, 2009, Comcast supplemented its request for leave to withdraw, providing a copy of its settlement agreement with applicants under a claim of confidentiality. Upon examination, the Commission learned that the applicants again made certain concessions concerning interconnection as *quid pro quo* for Comcast's withdrawal.

Applicants provided in response to Bench Request No. 1 copies of side-agreements entered into with Level 3, Comcast and IBEW<sup>1</sup> as *quid pro quo* for the agreement by each of these intervenors to withdraw from this proceeding. Applicants declined to respond to the inquiry in Bench Request No. 1 asking whether the provisions of these agreements “provide guarantees or assurances, confer rights, or impose obligations that will not be generally available or applicable to competitive local exchange companies or customers.” With respect to this question, applicants stated they had “not yet determined” the answer. Applicants have not supplemented their response in this regard as of this date. Applicants did supplement their response to Bench Request No. 1 to the extent of re-filing their agreements with Level 3 and Comcast, no longer designating them as confidential.

In its response to Comcast’s request for leave to withdraw from this proceeding, Staff discussed Commission precedent on the subject of side-agreements between intervenors and applicants for approval of a merger. Staff quoted from the Commission’s Eighth Supplemental Order in Docket UT-991358, the Qwest/US West merger proceeding, as follows:

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 Intervenors are 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 Intervenors 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 Intervenors 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.

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<sup>1</sup> Applicant’s side-agreement with IBEW involves the companies making labor-related concessions to IBEW in exchange for IBEW’s agreement to withdraw. IBEW acknowledged at prehearing its understanding that labor relations issues have no place in this proceeding. IBEW committed to limit its participation in this proceeding to issues appropriate to it and within the Commission’s jurisdiction to determine.

The side-agreements between U S WEST and the remaining Intervenors 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 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.<sup>2</sup>

Staff also pointed out 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.<sup>3</sup>

The Commission's concerns with "unfiled" or "private" side-agreements entered into by applicants in exchange for the agreement of the intervenors to withdraw from a proceeding are as vital and serious a matter today as in 2000 and 2005. This practice by parties is particularly troubling when, as here, the intervenors entering into the agreements do not disclose their agreements and provide them as part of their requests for leave to withdraw. While the Commission understands a party's interest in seeking to address and resolve issues relevant to a matter pending before us in a particular proceeding, we expect that any resolution of such issues will be done in a manner that is transparent and fully consistent with our obligation to protect the public interest. Agreements affecting the rights of parties and, possibly, a broader set of interests that are not filed with a request for Commission review and approval in accordance with the Commission's procedural rules and, in some cases, state and federal statutes, run afoul of this fundamental Commission responsibility.

Accordingly, in light of the seriousness of this matter, the Commission has kept the pending requests of Comcast and IBEW for leave to withdraw under advisement and may reconsider its prior order giving leave to Level 3 to withdraw. Discussion concerning these matters will be part of the Commission's agenda to be taken up at the outset of the evidentiary hearing in this proceeding, which is scheduled to begin on April 15, 2009, at 9:30 a.m. The Commissioners will sit at this hearing.

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<sup>2</sup> In Re Application of US WEST, Inc. and Qwest Communications International, Inc., Docket UT-991358, Eighth Supp. Order ¶¶57-66 (June 19, 2000).

<sup>3</sup> See Order No. 21, Order Adopting and Approving Settlement Agreement; Closing Docket, Docket UT-033011 (Feb. 28, 2005).

**THE COMMISSION GIVES NOTICE** that its agenda for hearing beginning on April 15, 2009, at 9:30 a.m., will include discussion concerning what action(s) the Commission should take with respect to the pending requests of Comcast and IBEW for leave to withdraw, the side-agreements upon which those requests are predicated, and whether the Commission should rescind or take other action with respect to Order 03, which granted Level 3 leave to withdraw at a time when the Commission had not been informed of the existence of a side-agreement between Level 3 and the applicants. Participation in the hearing by Comcast, IBEW and Level 3 will be limited to these subjects. Their participation in development of the record in this proceeding does not otherwise appear to be in the public interest.

Sincerely,

DENNIS J. MOSS  
SENIOR REVIEW JUDGE