Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Embarq Corporation, Transferor, and CenturyTel, Inc., Transferee, Application for Transfer of Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended	)))))	WC Docket No. 08-238

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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I. INTRODUCTION

On October 27, 2008, CenturyTel, Inc. ("CenturyTel") and Embarq Corporation ("Embarq") (jointly, "Applicants") announced their intent to merge.[1] CenturyTel and Embarq submitted their application to the Federal Communications Commission ("FCC" or "Commission") for transfer of control on November 26, 2008.[2] The New Jersey Division of Rate Counsel ("Rate Counsel") submits these comments in response to the FCC's notice of its pleading cycle.[3]

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[1] / CenturyTel, Inc. and EMBARQ Corporation Press Release, "CenturyTel and EMBARQ Agree to Merge," October 27, 2008 ("CenturyTel/Embarq Press Release").

[2] / Embarq Corporation, Transferor, and CenturyTel, Inc., Transferee, Application for Transfer of Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended, WC Docket No. 08-238 (filed Nov. 26, 2008); ITC-T/C-20081126-00516, Embarq Communications, Inc. (ITC-214-20050816-00337); ITC-T/C-20081126-00517, Embarq Communications of Virginia, Inc. (ITC-214-20050816-00336); United Telephone Company of Indiana, File No. 0003657510; United Telephone Company of the Northwest, File No. 0003663154; Central Telephone Company of Texas, File No. 0003663160; United Telephone Southeast LLC, File No. 0003663165; United Telephone Company of the Carolinas LLC, File No. 0003663168; Embarq Florida, Inc., File No. 0003663173; Carolina Telephone and Telegraph Company LLC, File No. 0003663174; Embarq Missouri, Inc., File No. 0003663176; United Telephone Company of Kansas, File No. 0003663178; Central Telephone Company, File No. 0003663179; United Telephone Company of the West, File No. 0003663182; Embarq Minnesota, Inc., File No. 0003663183; United Telephone Company of Ohio, File No. 0003663187; The United Telephone Company of Pennsylvania LLC, File No. 0003663188; and Central Telephone Company of Virginia, File No. 0003663190 ("Application").

[3] / "Applications filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc," WC Docket No. 08-238, "Pleading Cycle Established," DA 08-2681, released December 9, 2008.

A. INTEREST OF RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities.[4] Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.[5]

B. OVERVIEW OF TRANSACTION

Embarq, CenturyTel, and Cajun Acquisition Company ("CAC") entered into an Agreement and Plan of Merger ("Merger Agreement") as of October 26, 2008. CAC, a Delaware corporation, is a direct wholly-owned subsidiary of CenturyTel that was created to implement the proposed transaction. Under the terms of the transaction, Embarq and CAC would merge, with Embarq becoming the surviving corporation and CAC ceasing to exist.[6] The Applicants describe the proposed combination as a tax-free, stock-for-stock transaction in which Embarq would become a wholly-owned subsidiary of CenturyTel.[7]

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4 / Embarq provides local exchange service in New Jersey as United Telephone of New Jersey.

5 / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

6 / Application, at 3-4.

7 / CenturyTel SEC Form 425, "A Win for Customers, Employees, and Communities – Merger of CenturyTel and EMBARQ," filed November 13, 2008 ("CenturyTel Briefing Document"), at 8.

Embarq stockholders would receive 1.37 shares of CenturyTel stock for each Embarq share.[8] Based on the respective stock prices for CenturyTel and Embarq as of October 24, 2008, the last trading day before the merger announcement, this stock-for-stock arrangement represents a premium for Embarq shares of 36% over market price, and an 11% premium over the average price over the 30 calendar days previous to October 27.[9] Following the transaction, current Embarq stockholders would own approximately 66% of the combined company and current CenturyTel stockholders would own 34% of the combined company.

According to the Applicants, the proposed transaction would benefit shareholders and customers because of the "highly complementary assets and geographic coverage of the two companies."[10] In addition to the FCC's approval, the merger requires the approval of shareholders of both companies, state regulators, the Department of Justice, and the Securities and Exchange Commission. The Applicants expect the merger to be completed in the second quarter of 2009.[11]

II. PROPOSED TRANSACTION

Description of CenturyTel

CenturyTel describes itself as "a leading provider of communications, high-speed Internet and entertainment services in small-to-mid-size cities through its broadband and fiber transport networks."[12] CenturyTel serves 25 states,[13] with 68% of its lines located

[8] / The ratio is fixed as of October 24, 2008, and will not adjust based on relative share prices at the completion of the merger.

[9] / CenturyTel/Embarq Press Release.

[10] / Transcript of CenturyTel/Embarq Conference Call with Investment Analysts, October 27, 2008, filed as SEC Form 425, October 28, 2008 ("Conference Call Transcript"), at 11.

[11] / CenturyTel Briefing Document, at 10.

[12] / CenturyTel/Embarq Press Release.

in Alabama, Arkansas, Missouri,Washington, and Wisconsin,. A member of the S&P 500 Index, [14] CenturyTel is the seventh largest local exchange telephone company in the United States, based on the number of access lines served.[15] For the year ending December 31, 2007, CenturyTel had operating revenues of $2.7 billion, net income of $418 million, 2.1 million access lines, and 560,000 high-speed Internet customers.[16]

Description of Embarq

Embarq is a Fortune 500 company operating in 18 states.[17] The company offers local and long-distance calling, high-speed Internet, wireless, and satellite TV (with DISH Network) to residential consumers. Embarq offers business customers local voice and data services, long distance voice service, high speed Internet access, wireless, satellite TV (from DirecTV), enhanced data network services, voice and data communication equipment, and managed network services.[18] In addition, through its subsidiary Embarq Payphone Services, Inc., Embarq offers pay phone services in various parts of the United States.[19] For the year ending December 31, 2007, Embarq had operating revenues of $6.4 billion, net income of $683 million, 6.3 million access lines, and 1.3 million high-speed Internet customers.[20]

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13 / These 25 states are: Alabama, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, Washington, Wisconsin, and Wyoming. Application, at 2, note 3.

14 / CenturyTel/Embarq Press Release.

15 / CenturyTel SEC Form S-4, filed November 20, 2008 ("November 20, 2008 S-4"), at 1.

16 / November 20, 2008 S-4, at 9.

17 / The 18 states are: Florida, Indiana, Kansas, Minnesota, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wyoming. Application, at 3, note 4.

18 / CenturyTel/Embarq Press Release.

19 / Application, at 3.

20 / November 20, 2008 S-4, at 10.

Description of the combined company

According to the Applicants, the combined company would operate in rural and urban communities in 33 states, serving approximately 8 million access lines, 2 million broadband customers, and 400,000 video customers.[21] In addition, the combined company would provide IPTV (CenturyTel already offers IPTV service in 2 markets), wireless service, IP solutions for business, and various wholesale services.[22] The Applicants propose to locate headquarters in Monroe, Louisiana, CenturyTel's current headquarters, and to retain a significant presence in Overland Park, Kansas, Embarq's current headquarters.[23]

Proposed governance of combined company

The plan of merger specifies some of the executive makeup of the combined company. According to CenturyTel, it will "use its reasonable best efforts to ensure that Mr. Post, III, CenturyTel's Chairman and Chief Executive Officer, remains the Chief Executive Officer of CenturyTel at the time of the consummation of the merger" and states further that "Mr. Post, in consultation with Mr. Gerke will determine persons to be recommended as the executive officers of CenturyTel after the consummation of the merger."[24] Tom Gerke, currently the CEO of Embarq, would become the Executive Vice-Chairman of the combined company. Other CenturyTel executives slated to retain executive positions in the combined company are Karen Pucket, CenturyTel's Chief Operating Officer, Stewart Ewing, CenturyTel's Chief Financial Officer, and Stacey W.

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[21] / CenturyTel SEC Form 425, "Employee Facts," October 30, 2008, at 3.

[22] / Briefing Document, at 5.

[23] / *Id.*, at 6.

[24] / November 20, 2008 S-4, at 73.

Goff, General Counsel of CenturyTel. Dennis G. Huber, currently Chief Technology Officer of Embarq, would serve as the executive responsible for Network and Information Technology. [25] Additionally, the Applicants state that Bill Cheek would be responsible for the combined company's wholesale operations, and Chris Mangum would continue to lead the strategic planning function for the combined company.[26] The Applicants propose a Board of Directors composed of eight directors chosen by CenturyTel, and seven directors chosen by Embarq.[27]

Applicants' description of anticipated consumer benefits.

According to Glen F. Post, CenturyTel expects "that bringing Embarq and CenturyTel together will accelerate both companies' strategic plans, diversify our revenues and provide us with the expanded networks, expertise and financial resources to build long-term value for shareholders."[28] The Applicants describe the benefits of the transaction as follows:

- *Enhanced competitive position.* The Applicants refer to the "significantly increased scale" of the combined company.[29]
- *Significant synergy opportunities.* The Applicants estimate synergies of approximately $400 million annually within the first three years of operation and state that: "Key drivers of these synergies include reduction of corporate overhead, elimination of duplicate functions, enhanced revenue opportunities and increased operational efficiencies through the adoption of best practices and capabilities from each company."[30]
- *Financial strength and flexibility.* "CenturyTel expects the transaction to be accretive to its 2010 free cash flow per share, the first full year following the expected closing. ... [The transaction] should allow ample

[25] / CenturyTel SEC Form 424(b)(3) of December 22, 2008.

[26] / CenturyTel SEC 425 filing, "CenturyTel Employee Update," December 22, 2008.

[27] / *Id.*

[28] / CenturyTel/Embarq Press Release.

[29] / *Id.*

[30] / *Id.*

> funding for the business and the capacity to continue returning substantial capital to shareholders going forward."[31]

Embarq also cites the benefits of CenturyTel's investments, especially its 700 MHz spectrum assets, the expected improved capital structure, market capitalization, and strengthened balance sheet of the combined company, and the increased ability to participate further in industry consolidation and other strategic opportunities.[32]

Although CenturyTel and Embarq detail several positive effects of the synergies expected to result from the merger (in particular, several financial ratios), these effects are based on the assumption that the synergies are fully recognized immediately. As the Applicants pointed out to investment analysts, however, "a good part of the synergies will come as we do the systems conversions, which again we expect to take 24 months to possibly 36 months."[33] The Applicants describe the public interest as follows:

> The proposed transaction is in the public interest because it will provide benefits to consumers of both companies without any countervailing harms. It combines two leading broadband-focused communications companies with strong customer-centric histories. CenturyTel has a rich history in local telecommunications service and a proven track record for customer service and provisioning high-quality telecommunications and advanced services. CenturyTel serves customers in predominantly rural and small-to-mid-size city service areas. Its primary role has been as a communications provider focused on providing superior telecommunications, broadband, and other advanced services in its existing certificated areas.
>
> Since its separation from Sprint Nextel Corp. ("Sprint"), Embarq has delivered on its promise to serve the public interest by adopting a single-minded focus of becoming the preferred hometown communications company in the local service areas in which it operates. Though its name has changed, Embarq has a rich

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31 / *Id.*

32 / November 20, 2008 S-4, at 39.

33 / Conference Call Transcript, at 21, Comment by Stewart Ewing, Embarq CFO.

> history of providing communications services to local communities that dates back more than a hundred years, and since its separation from Sprint it has strengthened its local community roots.
>
> Thus, the merger will bring together two companies whose businesses are built upon serving local customers in predominantly rural areas and smaller markets and creating a variety of products and services that more directly address the preferences of those customers.[34]

The Applicants also anticipate that Embarq's customers would benefit from the more expeditious deployment of IPTV than would otherwise occur,[35] and further assert that "[t]he public interest will be served by the transaction because the new company will bring to bear the combined resources of CenturyTel and Embarq to focus on delivering a full portfolio of communications services targeted to meet the needs of customers in predominantly rural and smaller markets."[36]

Applicants' description of anticipated consumer harm.

The Form S-4 filed by CenturyTel discusses several risks which may impair the combined company. The most obvious of these risks is the increased indebtedness that CenturyTel will incur to complete the transaction. CenturyTel states, "Although CenturyTel's indebtedness relative to its size is expected to decrease following the merger, the dollar amount of such indebtedness will increase and remain substantial, which could have material adverse consequences for CenturyTel."[37] It is unclear whether the increased debt service would harm the combined company's credit rating.

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[34] / Application, at 5.

[35] / *Id.*, at 9.

[36] / *Id.*

[37] / November 20, 2008 S-4, at 21.

CenturyTel also states that proposed reforms to the Universal Service Fund and intercarrier compensation could hinder CenturyTel's finances because the company currently receives a substantial part of its revenues from these sources.[38] CenturyTel indicates that it is "very concerned" about the Chairman's Draft Proposal,[39] specifically that "if the current proposal were to pass it would have a significant impact on local rates for customers in rural markets and smaller cities across the country."[40]

However, CenturyTel states that "the merger will reduce CenturyTel's reliance on revenues subject to reduction by regulatory initiatives currently under consideration"[41] because the union with Embarq would provide a steady stream of revenues not based on intercarrier compensation and universal service support. Thus, according to CenturyTel, a combination with Embarq would reduce the risk of revenue shock from potential changes in these programs.

CenturyTel also states that it would incur "substantial expenses" to integrate Embarq. Specific areas that would require integration include: management information systems, purchasing, accounting and finance, sales, billing, payroll and benefits, fixed asset and lease administration systems, and regulatory compliance. CenturyTel notes that there are "a number of factors beyond its control that could affect the timing of all expected integration expenses" and that "the expenses could, particularly in the near

[38] / November 20, 2008 S-4, at 20.

[39] / *See In the Matter of High-Cost Universal Service Support, WC Docket No. 05-337, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Lifeline and Link Up, WC Docket No. 03-109, Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, *Order On Remand And Report And Order And Further Notice Of Proposed Rulemaking*, November 5, 2008, Appendix A.

[40] / Conference Call, at 19 (comment of Glen Post, CenturyTel CEO).

[41] / November 20, 2008 S-4, at 39.

term, exceed the savings that CenturyTel expects to achieve from the elimination of duplicative expenses and the realization of economies of scale and cost savings and revenue synergies related to the integration of the businesses."[42]

CenturyTel discloses numerous other factors that may inhibit its ability to perform successfully after its integration with Embarq. The merged company may have difficulty integrating because of the complexities associated with managing the combined business.[43] It may also have difficulty integrating personnel while maintaining focus on providing consistent, high quality products and customer service.[44] Operational factors that may impair the company include: the Applicants may be unable to retain key employees; revenues, earnings, and cash flows may be affected by continuing line losses; competition may reduce market share and lower profits; the combined company could be harmed by rapid changes in technology; CenturyTel's diversification efforts may not be successful; the combined company may have difficulty effectively managing operations; rebranding will be expensive and may not be favorably received by customers; and financial difficulties of other carriers with which CenturyTel does business may harm CenturyTel.[45]

The costs arising from state regulation and regulatory compliance generally may affect the combined company's ability to perform satisfactorily. CenturyTel may be required to raise additional capital for the development of its 700 MHz products. The success of this fund-raising depends on market conditions and other factors beyond the

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42 / CenturyTel SEC Form S4-A, filed December 22, 2008, at 16.

43 / *Id.*, at 17.

44 / *Id.*

45 / *Id.*, at 17-20.

company's control.[46] Rate Counsel urges the Commission to consider these factors, the impacts they may have on the Applicants' operations, and the impacts they may ultimately have on consumers.

III. STANDARD OF REVIEW

The Commission has reviewed numerous mergers among telecommunications and cable companies.[47] In its order issued a year ago, approving the transfer of control from Verizon Communications Inc. ("Verizon") to FairPoint Communications, Inc. ("FairPoint") of Verizon's operations in the northern three New England states, the FCC described its standard of review as follows:

> Pursuant to sections 214(a) and 310(d) of the Act, the Commission must determine whether the proposed transfer of control to FairPoint of certain licenses and authorizations held and controlled by Verizon will serve the public interest, convenience, and necessity. In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially

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46 / *Id.*, at 21-22.

47 / Rate Counsel has participated in many of these proceedings. *See, e.g.,* In the Matter of Transfer of Control Filed by SBC Communications Inc. and AT&T Corp., WC Docket No. 05-65, Initial and Reply Comments of Rate Counsel, April 25, 2005, and May 10, 2005, respectively; In the Matter of Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, Federal Communications Commission WC Docket No. 05-75, Initial Comments, May 9, 2005 (including affidavit of Susan M. Baldwin and Sarah M. Bosley), Reply Comments, May 24, 2005; In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, Federal Communications Commission WC Docket No. 06-74, Initial Comments, June 5, 2006 (including declaration of Susan M. Baldwin and Sarah M. Bosley), Reply Comments, October 3, 2006 (including declaration of Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington). Rate Counsel has also participated in the investigation by the Board of Public Utilities of various mergers and transactions, including the spin-off of Sprint's local operations. In the Matter of Joint Petition of United Telephone Company of New Jersey, Inc. d/b/a Sprint and LTD Holding Company for Approval Pursuant to *N.J.S.A.* 48:2-51 and *N.J.S.A.* 48:3-10 of a change in Ownership and Control, New Jersey Board of Public Utilities Docket No. TM05080739, Testimony of Susan M. Baldwin on behalf of Rate Counsel, November 29, 2005.

frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the proposed public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we may designate the application for hearing.

Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest. Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers. In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.

In determining the competitive effects of the merger, our analysis is informed by, but not limited to, traditional antitrust principles. The Commission is charged with determining whether the transfer of control serves the broader public interest. In the communications industry, competition is shaped not only by antitrust principles, but also by the regulatory policies that govern the interaction of industry players. In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition. We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.

The Commission has the authority to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the transaction serves the public interest. Indeed, our public interest authority enables us to impose and enforce conditions based upon our extensive regulatory and enforcement experience to ensure that the merger, overall, will serve the public interest. Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the

> transaction (*i.e.*, transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes.[48]

Furthermore, the Applicants bear the burden of demonstrating to the FCC that the benefits of the proposed transaction outweigh the potential harm.[49]

IV. ANALYSIS OF PUBLIC INTEREST OF PROPOSED TRANSACTION

A. OVERVIEW

The proposed transaction raises numerous economic and policy issues that bear directly on consumers in New Jersey and throughout the country. These initial comments provide a preliminary analysis and discussion of the public interest aspects of the proposed transaction, including the probability of the purported consumer benefits occurring, the scope of the benefits, and whether the anticipated benefits offset any potential harm that could result from the transaction. Based on a review of the Applicants' submission of additional information and data to the Commission, Rate Counsel may supplement its analysis and recommendations in future filings with the FCC.

B. FINANCIAL ASPECTS OF TRANSACTION

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48 / *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, WC Docket No. 07-22, *Memorandum Opinion and Order*, released January 9, 2008 ("FCC FairPoint/Verizon Order"), at paras. 11-14 (cites omitted).

49 / The FCC has stated: "Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms." *FCC FairPoint Verizon Order*, at para. 26 citing AT&T/BellSouth Order, 22 FCC Rcd at 5761, para. 201; SBC/AT&T Order, 20 FCC Rcd at 18384, para. 183; Verizon/MCI Order, 20 FCC Rcd 18530, para. 194; Echostar/DirecTV Order, 17 FCC Rcd at 20630, para. 188; SBC/Ameritech Order, 14 FCC Rcd at 14825, para. 256; see also Bell Atlantic/NYNEX Order, 12 FCC Rcd at 20063, para. 157. *See FCC FairPoint/Verizon Order*, at paras. 26-28 for general discussion of the FCC's approach to conducting this analysis.

The FCC should examine the impact of the financial structure of the proposed merged entity on the Applicants' ability to provide quality service at just and reasonable rates.

According to the Applicants, the transaction is valued at $11.6 billion, which includes CenturyTel's assumption of approximately $5.8 billion of Embarq debt.[50] CenturyTel would acquire up to "$800 million in debt financing to refinance certain existing indebtedness of Embarq in connection to the merger."[51]

The Applicants project that the combined company would have revenue in excess of $8.8 billion, pro forma EBITDA of approximately $4.2 billion, pro forma leverage of 2.1 times EBITDA and pro forma free cash flow of approximately $1.8 billion, based on anticipated full run-rate synergies and operating results for the twelve months ended September 30, 2008.[52] According to CenturyTel, "the transaction [will] be accretive to CenturyTel's free cash flow per share in 2010, the first full year following the expected closing."[53]

The transaction would have an immediate effect on CenturyTel's stock policy. Although each company proposes to continue its current dividend policy through the close of the transaction, CenturyTel "has suspended its current share repurchase program pending completion of this transaction" and the Applicants also indicate that "[p]ost closing, subject to its intention to maintain an investment grade credit rating, CenturyTel expects to continue its current dividend policy and to return a substantial portion of the combined company's free cash flow to shareholders through opportunistic share

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[50] / Briefing Document, at 9.

[51] / November 20, 2008 S-4, at 80.

[52] / CenturyTel/Embarq Press Release (but note the conference call comment by Mr. Ewing (referenced above) to the effect that synergies will not be fully recognized until 24 to 36 months after completion of the merger.)

[53] / CenturyTel/Embarq Press Release.

repurchase programs."[54] Furthermore, CenturyTel expects to issue approximately 195 million common shares to complete the transaction.[55] The Applicants expect rating agencies to assign the combined company an investment-grade rating.[56]

Rate Counsel urges the Commission to explore several issues that may affect the success of this transaction and the transaction's effects on consumers:

- How would the transaction affect the financial viability of Embarq?
- How would the assumption of Embarq's existing debt combined with $800 million of new debt affect the Applicants' ability to provide adequate service at reasonable rates?
- Would the capital structure be in consumers' best interest and would it enable the Applicants to invest adequately in infrastructure?

Rate Counsel recommends that the Commission make the future payment of dividends and the repurchase of shares by the combined company dependent on meeting specific service quality and broadband commitments. The combined company should not be allowed to return cash to investors until all consumers in the company's geographic area have benefited from the anticipated synergies. All consumers in the company's service area should have access to affordable broadband service, and consistently high service quality.

Analysis of the proposed capital structure.

One indicator of financial viability is the ratio of a company's debt to equity. A company that finances its operations with a great deal of debt relative to equity must use relatively more of its earnings to pay interest on the debt, a cost that cannot be easily delayed if the company experiences a poor period financially. All other things equal, a

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54 / *Id.*

55 / Briefing Document, at 8-9

56 / *Id.* (Both companies currently enjoy investment-grade ratings.)

company with a larger debt burden faces larger risks than a company not so encumbered. In this respect, CenturyTel is among the most conservative of the large telecommunications companies: its debt to equity ratio is relatively low, approximately 1.6 as of the third quarter of 2008.[57] While this represents an increase from 1.3 at the end of 2004, it is still at the low end of the range among the large telecommunications companies. In comparison, as Table 1 shows, AT&T's debt to equity ratio was 1.5 in the third quarter of 2008; Iowa Telecom's was 2.9; and Verizon's was 3.0.[58] Embarq's debt to equity ratio rose from 32.7 at the end of 2007 to 126.9 in the third quarter of 2008, making it the most highly leveraged of the large telecommunications companies.[59] According to the S-4A filed December 22, 2008, the pro forma debt to equity ratio for the combined company would be 1.7.[60]

Table 1

Selected Debt / Equity Ratios, 2004 – Q3 2008[61]

	2004	2005	2006	2007	Q3 2008
Cincinnati Bell	-4.1	-3.5	-3.5	-4.0	-4.1
AT&T	1.7	1.7	1.3	1.4	1.5
CenturyTel	1.3	1.1	1.3	1.4	1.6
Iowa Telecom	2.1	2.1	2.2	2.4	2.9
Verizon	3.4	3.2	2.9	2.7	3.0
Frontier	3.9	5.2	5.4	6.3	8.6
Windstream	303.7	0.4	16.1	10.8	13.9
FairPoint	-5.7	2.7	2.9	0.7	15.3
Qwest	-10.3	-7.7	-15.7	39.0	60.4
Embarq	0.9	0.9	-20.5	32.7	126.9
Combined Company Pro Forma					1.7

57 / http://money.cnn.com.

58 / *Id.*

59 / *Id.*

60 / CenturyTel SEC Form S-4A, filed December 22, 2008 ("December 22, 2008 S-4A"), at 93

61 / http://money.cnn.com.

There are several methods to measure the ability of a company to service its debt. One measure, the "times interest earned" ratio compares the total income available to pay interest, or EBIT, to the interest expense in each period. In the third quarter of 2008, CenturyTel's "times interest earned" ratio was 3.7, meaning that the company had 3.7 times as much the available income as was needed to service its debt.[62] In this period, as Table 2 shows, only Verizon and AT&T had higher ratios. Verizon's "times interest earned" ratio was 10.2; AT&T's was 6.8. Embarq's ratio for this period was 3.5. In contrast, FairPoint's ratio for the third quarter was 0.1, indicating a lack of financial "cushion."[63] The Applicants anticipate having a "times interest earned" ratio of 3.0.[64]

Table 2 Set Forth Below

Selected Telecommunications Companies' "Time Interest Earned" Ratios, 2004-2007[65]

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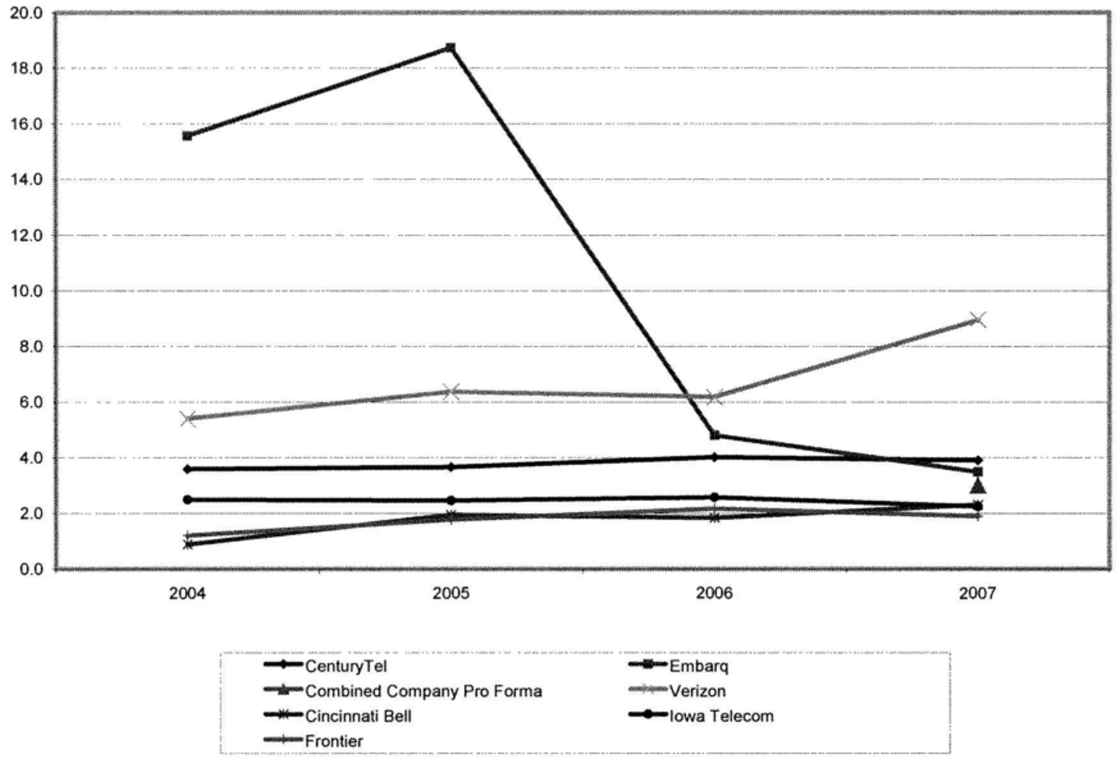
[62] / http://money.cnn.com.

[63] / *Id.*

[64] / December 22, 2008 S-4A, at 94.

[65] / http://money.cnn.com.



Analysts also evaluate a company's ability to meet expenses by considering the relationship between current assets (cash and assets easily converted to cash) and current liabilities (expenses that must be met relatively soon). This ratio, the "current" ratio, is another measure of a company's financial cushion. CenturyTel's current ratio in the third quarter of 2008 was 1.1.[66] In comparison, Frontier's ratio was 1.0; Cincinnati Bell's was 1.0; and Verizon's was 0.7.[67] The pro forma current ratio for the combined company is estimated to be about 0.9.[68] Figure 1 compares the current ratios for several telecommunications companies.

Figure 1 Set Forth Below
Selected Telecommunications Companies' "Current" Ratios, 2004-2007[69]

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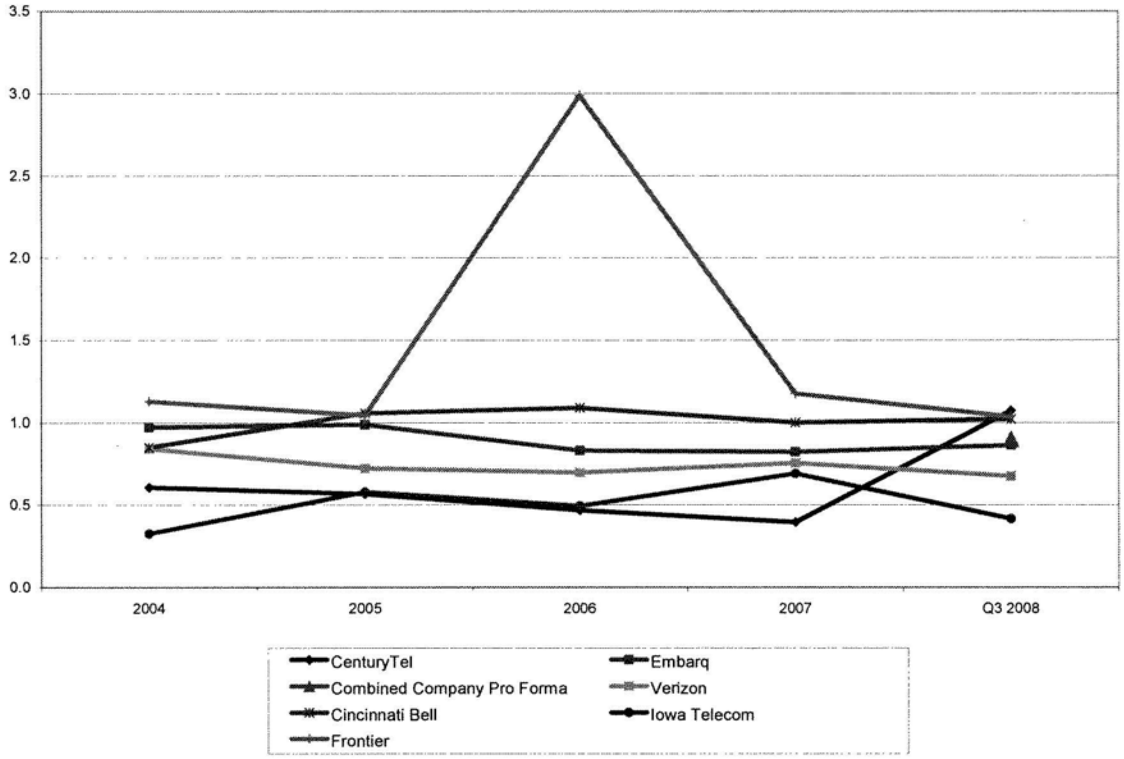
66 / http://money.cnn.com.

67 / *Id.*

68 / December 22, 2008 S-4A, at 93.

69 / http://money.cnn.com.



Based on the historical financial ratios and the Applicants' pro forma, the combined company would be situated favorably to other large telecommunications companies, and even better than several large companies. Based on this anticipated level of financial health, and CenturyTel's stated goal of becoming the leading broadband provider in its territories,[70] Rate Counsel urges the Commission to hold the Applicants to this goal. The Applicants are at least as financially healthy as other large telecommunications companies, and therefore the merged entity should be held accountable to the important goals of deploying affordable broadband service ubiquitously, and providing excellent quality of service to all of its customers.

70 / CenturyTel Briefing Document, at 5.

The possibility of future acquisitions underscores the importance of establishing clear accountability by the Applicants to consumers for tangible benefits and for protection from potential consumer harm.

CenturyTel's Form S-4 describes several potential business combinations that failed to materialize in the months preceding the announcement of the current merger. According to the S-4, however, one of the potential combinations, with "Company D," may still be feasible and desirable.[71] During the conference call with investment analysts, one analyst asked when CenturyTel would be "back on the acquisition train" following the merger with Embarq. CenturyTel's CEO, Glen Post, responded "I think within a year or so, we'd be ready to look at possibilities of other acquisition opportunities."[72] CenturyTel does not specify how the changes and transitions associated with multiple mergers might affect the quality of service received by consumers. Rate Counsel urges the Commission to consider the risks borne by CenturyTel, its shareholders, and its customers, if CenturyTel embarks on a string of acquisitions. Rapid expansion could lead to inadequate management and a deterioration in the quality of service provided to consumers. Therefore specific, measurable commitments are essential to ensure accountability by the Applicants to consumers.

C. BROADBAND DEPLOYMENT

General promises to deploy broadband should be translated into specific commitments with measurable milestones.

Among other things, the Applicants point to increased broadband deployment as a benefit of the proposed merger:

> The combined network will place more Embarq and CenturyTel customers within economically feasible reach of the backbone

[71] / November 20, 2008 S-4, at 33.

[72] / Conference Call, at 26.

> network accommodating next-generation broadband applications. This means that more customers in more areas should have an opportunity to receive next-generation broadband network services as a result of this transaction.[73]

In a conference presentation, CenturyTel CFO Stewart Ewing reiterated the company's emphasis on becoming a broadband leader,[74] and stated the company's goal to "own the broadband position in our markets."[75] As evidence of CenturyTel's commitment to broadband, Mr. Ewing showed that as of the third quarter of 2008, approximately 88% of CenturyTel's access lines are equipped for broadband, and approximately 57% are ready for broadband access at speeds up to 10 Mbps.[76] Furthermore, CenturyTel has achieved a broadband penetration rate of about 40%.[77] Mr. Ewing also touts CenturyTel's "high-quality broadband networks capable of meeting growing bandwidth demand and delivering emerging services."[78]

Rate Counsel is encouraged by CenturyTel's apparent commitment to broadband deployment, but the Applicants have not provided any indication of plans to complete broadband rollout in their territories. Rate Counsel urges the Commission to probe deeper into this issue, with the goal of eliciting a concrete plan to reach all consumers in the Applicants' combined territories by the end of the first year following completion of the merger.

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73 / FCC Application, at 8, cites omitted.

74 / CenturyTel SEC Form 425, "Gabelli Best Ideas Conference – December 4, 2008," filed December 4, 2008, at 5.

75 / *Id.*, at 12.

76 / *Id.*, at 13.

77 / *Id.*, at 14.

78 / *Id.*, at 31.

One of the conditions of the Commission's approval of AT&T's acquisition of BellSouth was the requirement that the company offer broadband service to 100 percent of the residential living units in the AT&T/BellSouth territory within nine months of the release of the FCC's Order. Additionally, the company was required to provide digital subscriber line ("DSL") modems without charge (except for shipping and handling) to those residing within the "Wireline Buildout Area" who switched from dial-up Internet service to broadband service. Finally, AT&T was required to offer broadband service to residents of the "Wireline Buildout Area" who had not previously subscribed to broadband service at the rate of $10 per month.[79] Rate Counsel encourages the Commission similarly to adopt specific conditions to encourage the deployment of affordable broadband service throughout the Applicants' territory.

Furthermore, the Commission could require the Applicants to provide detailed maps showing where in their territories broadband service is presently available. These maps should be provided in standard GIS format that can be used by state and federal regulators to pinpoint areas that require further attention. This requirement would provide an essential starting point for the Commission's efforts to catalogue served and unserved areas.[80] Rate Counsel also recommends that the Applicants commit to offering broadband service at discounted rates to Lifeline customers.

D. SERVICE QUALITY

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[79] / *In that Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and Order*, rel. March 26, 2007, at Appendix F.

[80] / *See also* Broadband Data Improvement Act of 2008, Act of the 110th Congress, S. 1492. President Bush signed the legislation into law on October 10, 2008. http://www.govtrack.us/congress/billtext.xpd?bill=s110-1492; *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, Released: June 12, 2008.

The FCC should probe the impact of proposed synergies on the Applicants' ability and willingness to deliver basic local exchange service at acceptable levels of service quality.

The Applicants state that the "proposed transaction will result in a combined enterprise that can achieve greater economies of scale and scope than could the two companies operating independently."[81] They further predict:

> The transaction is expected to generate synergies of approximately $400 million annually within the first three years of operations. Key drivers of these synergies include reduction of corporate overhead, elimination of duplicate functions, realization of enhanced revenue opportunities, and achievement of increased operational efficiencies through the adoption of best practices and capabilities from each company. Consumers will benefit from these efficiencies in the form of improved services at competitive prices. The Commission has previously recognized the important public benefits of similar merger-specific efficiency gains.[82]

These predicted synergies raise diverse concerns:

- Will the Applicants flow through the synergies to consumers in the form of lower rates or increased infrastructure commitments?
- Will the synergies be a result of employee layoffs in the operational units in various states, which in turn could jeopardize service quality, in turn necessitating specific service quality commitments and measures for accountability for service quality?

Rate Counsel urges the Commission to investigate the Applicants' ability to complete the proposed transaction, integrate their back office system, and provide seamless service to all customers, all the while maintaining high quality of service, servicing their network, and continuing to invest in broadband infrastructure.

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81 / FCC Application, at 6.

82 / *Id.*, at 7, cites omitted. See also Declaration of R. Stewart Ewing, Jr.

The Commission should condition any approval of the transaction on commitments by the Applicants to adopt best practices, and specifically to raise the quality of service offered in Embarq's territories to the level offered in CenturyTel's territories.

The Applicants describe their intention to meet the telecommunications needs of local communities. They state:

> To that end, the Applicants will continue to employ experienced and dedicated service personnel. The customer service, network, and operations functions that are critical to each company's success today will continue when the transaction is complete, and the post transaction company will be staffed to ensure that continuity of expertise. The local operations of the Applicants will continue to be managed by employees with extensive knowledge of the local telephone business and with a commitment to meeting the telecommunications needs of the local communities they serve.[83]

In reviewing the Applicants' commitments to serve local communities, the Commission should consider the actual service quality performance of the Applicants in their footprints. Based on its analysis of data submitted by the Applicants to the FCC through the Automated Reporting Information System ("ARMIS"),[84] Rate Counsel observes that CenturyTel and Embarq have each improved service quality in recent years, in some cases, reversing previous trends of deterioration. However, CenturyTel installs and repairs basic local service more expeditiously than does Embarq. For example, companywide, CenturyTel reduced the average installation time from 3.3 days for residential customers in 2003 to 0.6 days in 2007,[85] and reduced the average installation

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83 / Application, at 12.

84 / The FCC is investigating the ARMIS service quality data gathering requirements in a separate proceeding. *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, et al.*, WC Docket Nos. 08-190, et al., *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 23 FCC Rcd 13647 (2008) ("Order and NPRM"). Rate Counsel submitted reply comments December 15, 2008, and, in those comments, demonstrated the importance of ARMIS data. The analysis of the Applicants' service quality that Rate Counsel conducted for the instant proceeding provides yet further evidence of the importance of having access to a public national data base of service quality information.

85 / FCC, ARMIS Report 43-05, Table II. Installation and Repair Intervals (Local Service).

interval for business customers from 4.6 days in 2003 to 1.5 days in 2007.[86] Embarq's average installation interval for residential customers remained fairly consistent in the range of 1.4 to 1.8 days over this period.[87] For business customers, Embarq's performance showed a slight improvement, from 2.6 days in 2003 to 2.3 days in 2007.[88]

Embarq also reversed the deteriorating trend of longer repair intervals prior to 2005. Initial out-of-service residential repair intervals have decreased from 23.8 hours in 2005 to 18 hours in 2007.[89] Repair times for business customers have followed a similar pattern, declining from 22.2 hours in 2005 to 17.8 hours in 2007. Although CenturyTel's repair times increased in 2007 (relative to 2006), over the period 2002 to 2007, they were actually consistently lower than Embarq's repair times (that is, CenturyTel repaired service more quickly than did Embarq).[90]

Rate Counsel urges the Commission not to allow the improvements that have been made in service quality to be sacrificed for the sake of a strategic partnership. If the Commission approves the merger, then it should condition its approval on guarantees that service quality will not suffer due to the "elimination of redundancies" such as technicians and installers. Furthermore, the transaction should be conditioned on the Applicants' commitment to meet specific Commission-established service quality standards, based at least in part on the adoption of best practices, that is, the relatively

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[86] / *Id.*

[87] / *Id.*

[88] / *Id.*

[89] / *Id.*

[90] / CenturyTel's average repair intervals for residential customers declined from 14.9 hours in 2003 to 9.5 hours in 2006, before rising to 17.5 hours in 2007. For business customers, the average repair intervals were 13.5 hours in 2003, and 15.8 hours in 2007. In each year under analysis, CenturyTel completed out of service repairs faster, on average, than did Embarq. *Id.*

better performance provided by CenturyTel during CenturyTel's period of highest performance.

E. IMPACT OF PROPOSED TRANSACTION ON RATES

In a letter to its customers, Embarq states: "There are no rate increases associated with this announcement."[91] However, this statement may be at odds with CenturyTel's statement to the effect that changes in the intercarrier compensation regime may lead to increases in rates. It is unclear if, in a combined company, former Embarq customers would face rate increases due to CenturyTel's exposure to "ICC reform shock," an indirect consequence of the merger. The Commission should demand more specific guarantees from the companies about rate increases before it approves this transaction.

F. COMPETITIVE IMPACT

According to the Applicants, out of the 4,341 incumbent local exchanges served by Centur yTel or Embarq, CenturyTel competitive local exchange carrier ("CLEC") service areas overlap with only three Embarq ILEC exchanges, and only 54 Embarq ILEC exchanges are adjacent to 59 CenturyTel ILEC exchanges, which is less than 3% of the total exchanges. The Applicants indicate that these adjacencies affect only 281,000 out of the more than 7.3 million customer access lines served by the Applicants (i.e., less than 4% of the access lines). The Applicants state: "Additionally, an examination of the particular exchanges involved in this merger makes clear that there is no anti-competitive danger. In fact, the adjacencies could be expected to improve operational efficiencies and quality of service as networks and workforces are combined."[92] The Applicants identify CLECs that offer service in those adjacent exchanges serving more than 5,000 access

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[91] / Embarq Letter to Customers, filed as SEC Form 425, October 27, 2008, at 2.

[92] / Application, at 13. See also Declaration of Gary L. Kepley (Embarq) ("Kepling Declaration), at para. 2.

lines.[93] However, the analysis does not separately identify service offered to residential customers from that offered to business customers, and, therefore, this aspect of the Applicants' competitive analysis is of limited significance. According to the Applicants, the proposed transaction would "have no impact on the terms of any existing interconnection agreements or obligations under state and federal laws regarding interconnection."[94]

G. EMPLOYMENT/PENSION

Two effects on employees are immediately clear from the documents available at this time. First, Embarq's Employee Stock Purchase Plan is suspended, with contributions for the current period due to be returned to participants. The Plan terminates upon completion of the merger.[95] This change may provide reduced incentives for employees to stay with the company, or perform high-quality work.

In a document prepared to explain the merger to its employees, Embarq asks the question, "Will there be layoffs?" and then states, "Given the fact that this combination involves the joining together of two complete corporations in our industry, we believe that there will likely be some level of redundancy in combining the two companies."[96] This indirect answer should be taken to mean that some of the "synergies" will derive from layoffs. Rate Counsel urges the Commission to elicit specific information about potential lay-offs and restructurings due to the proposed merger. In particular, in order to ensure high service quality, the Commission should condition its approval of the

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93 / Kepling Declaration, at para. 2.

94 . Application, at 12.

95 / November 20, 2008 S-4, at 2.

96 / Embarq Employee FAQ, filed as SEC Form 425, October 30, 2008, at 3.

transaction upon a guarantee that the number of employees devoted to network maintenance, line repair, installations, and customer service will not be diminished due to the merger.

H. COMMITMENTS AND CONDITIONS

Rate Counsel recommends that the Commission assess the Applicants' follow-through on prior commitments and assess the merits of extending similar commitments throughout the merged entity's serving territory.

> In order to ensure that consumers benefit from the proposed transaction and are protected from any harm that the transaction could cause, the Commission should require specific, measurable commitments on the part of the Applicants that can be tracked and monitored. In an FCC investigation of a different transaction, after discussing the concerns raised by consumer advocates in New Hampshire, Maine, and Vermont, Commissioner Adelstein questioned the absence of tangible commitments and conditions for the transfer of control from Verizon to FairPoint.[97]

Rate Counsel is hopeful that the Commission will require meaningful conditions and commitments as part of any approval of the transaction under consideration in this proceeding.

The Commission could, among other things, consider the conditions associated with the approval by the New Jersey Board of Public Utilities ("New Jersey Board") in 2006 of the spin-off of Embarq from Sprint. As part of the approval process of its spin-off from Sprint in 2006, Embarq (as United New Jersey) agreed with the New Jersey Board and Rate Counsel to abide by several conditions, described in a Stipulation of Settlement. These conditions include:

- United New Jersey agreed to freeze its regulated intrastate tariff service rates until January 1, 2009;

97 / FCC FairPoint/Verizon Order, Statement of Commission Jonathan S. Adelstein, Dissenting, at 34 (cite omitted).

- United New Jersey agreed to expand its existing Lifeline credit program to include a $3.50 credit to all current and future United New Jersey Lifeline customers, and to promote consumer education about the Lifeline program in twice-yearly bill inserts;
- United New Jersey agreed to continue broadband deployment throughout New Jersey, based on bona fide requests for broadband service. Specifically, the company is required to provide DSL or equivalent service to all areas where at least 50 bona fide requests for service are received, within 12 months of receiving these requests; and
- United New Jersey agreed to provide quarterly enhanced service quality reports to the Board and Rate Counsel from July 1, 2006 until December 31, 2008.[98]

V. CONCLUSION

In summary, Rate Counsel urges the Commission to seek additional information and commitments from the Applicants so that the Commission can maximize the likelihood that the potential benefits from the proposed transaction will outweigh the potential harm from the transaction. Among the information that the Commission should seek from the Applicants:

- Detailed information about the status of broadband prices, speed, and deployment in their territories;
- Plans, if any, for future acquisitions;
- Detailed supporting documentation for the projected synergies; and

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[98] / In The Matter of United Telephone Company of New Jersey, Inc. D/B/A Sprint And Ltd Holding Company for Approval Pursuant to N.J.S.A.. 48:2-51.1 And N.J.S.A. 48:3-10 of A Change in Ownership And Control, Docket No. TM05080739, Order and Stipulation of Settlement, February 22, 2006, at Attachment A.

- ARMIS service quality data for 2008 separately for Embarq and CenturyTel in advance of the April 1, 2009 filing date to enable the Commission to assess the quality of service offered in the states in which the Applicants operate.[99]

Among the conditions that the Commission should consider are the following:

- Independent boards of directors for the two operating areas;
- Separate records for the two operating entities;
- A commitment on and the reporting of affiliate transactions consistent with 47 *C. F. R.* § 32.27 (i.e., the FCC's cost accounting safeguards).
- Deployment of affordable broadband service throughout the Applicants' operating territory with specific milestones specified;
- Subsidized broadband service for Lifeline participants;
- Providing state regulators and consumer advocates with detailed maps of broadband availability, using standard GIS formats by a date certain;
- Raising the quality of service offered in each of the Embarq operating territories to the level offered in the best-served CenturyTel territory;
- A commitment to continue ARMIS reporting for at least five years after the merger occurs; and

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[99] / Carriers submit ARMIS data on April 1 of each year. http://www.fcc.gov/wcb/armis/filereqt.html. The FCC granted AT&T's petition for forbearance from ARMIS service quality and infrastructure reporting, with some exceptions and subject to certain conditions. *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, et al.*, WC Docket Nos. 08-190, *et al.*, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 23 FCC Rcd 13647 (2008). The FCC also extended the conditional forbearance from these ARMIS reports to all carriers that otherwise would be required to file them. *Id.*, at para. 7. The service quality and infrastructure reports include ARMIS Reports 43-05, 43-06, 43-07, and 43-08. The carriers that submit ARMIS reports 43-05 through 43-08 have committed to continue filing these reports for 24 months. *Id.*, at paras. 12, 21.

- Maintaining service quality at FCC-established standards with a financial consequence should the Applicants fail to meet these minimum service quality standards.
- Ensure that service, maintenance, customer service and other operation personnel in the operating units are not reduced.

Rate Counsel will supplement its analysis and recommendations based on its review of additional information provided by the Applicants.

Respectfully submitted,

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