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

In the Matter of	)	
	)	
Applications Filed for the Transfer of	)	WC Docket No. 08-238
Control of Embarq Corporation to	)	DA 08-2681
CenturyTel, Inc.	)	File Nos. 0003657510,
	)	0003663154, 0003663160,
	)	0003663165, 0003663168,
	)	0003663173, 0003663174,
	)	0003663176, 0003663178,
	)	0003663179, 0003663182,
	)	0003663183, 0003663187,
	)	0003663188, 0003663190

COMMENTS OF COMPTEL

COMPTEL, through counsel, hereby submits its comments on the application of CenturyTel, Inc ("CenturyTel") and Embarq Corporation ("Embarq") (collectively, the "Applicants") for consent to the transfer of control of Embarq to CenturyTel (the "Merger Application").[1] COMPTEL submits that the Commission must deny this application because the Applicants have not met their burden of proving that their proposed merger would promote the public interest. In the alternative, COMPTEL requests that the Commission, consistent with its precedent, condition grant of the Merger Application, as described below.

COMPTEL is the leading industry association representing competitive facilities-based telecommunication service providers, emerging VoIP providers, and integrated communications companies. COMPTEL members are entrepreneurial companies driving technological innovation and creating economic growth through competitive voice, video and data offerings and the deployment of next-generation, IP-based networks and services.

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[1] *See* Public Notice, *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.,* WC Docket No. 08-238, DA 08-2681 (Dec. 9, 2008); CenturyTel and Embarq, Application for Consent to Transfer Control, WC Docket No. 08-238 (Nov. 26, 2008)("Merger Application").

Many COMPTEL members compete directly with CenturyTel and Embarq in the provision of telecommunications and information services. What is more, COMPTEL's members must interconnect with the Applicants' networks and purchase access to essential facilities from the applicant, e.g. special access services. As incumbent LECs with market power, Applicants can exercise substantial control over the prices, terms and conditions of interconnection and special access. The merger will increase the span of their market power. Because its members are both customers and competitors of CenturyTel and Embarq, COMPTEL acting on behalf of its members is a party in interest with standing to oppose this merger pursuant to Sections 214 and 310 of the Communications Act.

I. APPLICANTS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THAT THEIR MERGER IS IN THE PUBLIC INTEREST

Under Sections 214(a) and 310(d) of the Communications Act, the Commission "must determine" whether the proposed transfer of control of Embarq to CenturyTel "will serve the public interest, convenience, and necessity."[2] The "Applicants bear the burden of proving . . . that the proposed transaction, on balance, serves the public interest."[3] The Commission, in applying this public interest standard, considers whether the proposed merger "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes." In particular,

> 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 . . . .[4]

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[2] *AT&T/BellSouth Merger Order*, 22 FCC Rcd 5662, 5671-72 ¶ 19 (2007)("AT&T/BellSouth Merger Order"). *See also Sprint/Clearwire License Transfer Order*, WT Docket No. 08-94, FCC 08-259, at ¶ 19 (rel. Nov. 7, 2008)("*Sprint/Clear-wire Order*").

[3] *AT&T/BellSouth Merger Order* at ¶ 19. *See also Sprint/Clearwire Order* at ¶ 19.

[4] *AT&T/BellSouth Merger Order* at ¶¶ 19, 20. *See also Sprint/Clearwire Order* at ¶¶ 19, 20.

Thus, in determining the competitive effects of a proposed merger, the Commission is "not limited to traditional antitrust principles," but rather considers the "broader public interest."[5]

Applicants have failed to meet their burden of demonstrating that their proposed merger will ensure that the transaction will yield overall public interest benefits. Applicants claim their merger will not harm competition.[6] Yet, Applicants concede that a merger will in some areas result in a loss of existing and potential competition between them[7] – which in itself reduces competition. Moreover, the Commission has recognized that the merger of two incumbent LECs ordinarily increases the potential for harm to competition because the merger would "increase the incentives and ability of the merged entity to discriminate against rivals."[8] The Commission has explained that this increased incentive and ability to discriminate against rivals "creates a public interest harm because it may adversely affect national competitors' provision of services, and may force consumers to pay more for retail services, with reduced quality and choice."[9] Indeed, Applicants have touted to investors that their merger will result in an even "Stronger Wholesale Division," [10] which would give the merged firm even greater power and control over its competitors.

Additionally, Applicants have failed to demonstrate any valid offsetting benefit to competition as a result of the merger. Applicants point to their expectation of realizing "enhanced

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5 *AT&T/ BellSouth Merger Order* at ¶ 21.

6 Merger Application at 13. *See also id.* at 17 ("[T]he merger . . . presents no danger of anticompetitive harm.").

7 *See id.* at 13-16.

8 *Bell Atlantic/GTE Merger Order,* 15 FCC Rcd 14032, 14086 ¶ 96. [[T]he increase in the number of local calling areas controlled by Bell Atlantic as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend upon access to Bell Atlantic's inputs in order to provide services.] *Id.*

9 *Id.* at ¶ 173.

10 *See* CenturyTel Briefing Document, *A Win for Customers, Employees and Communities: Merger of CenturyTel and Embarq,* at 5, *available at* http://www.centurytelembarqmerger.com/merger_key_materials/Briefing_Document.pdf.

revenue opportunities and achievement of increased operational efficiencies."[11] But these types of synergy claims, as the Commission has observed in the past, are "extremely speculative and difficult to verify."[12] What is more, Applicants here have not demonstrated that these anticipated cost savings would be passed through to consumers in the form of lower prices or new or improved services. As the Commission recognized in previous mergers, "the absence of explicit pass-throughs committed to by the Applicants renders it difficult to evaluate the extent to which actual cost savings would benefit the public interest."[13]

Other benefits alleged are likewise speculative and, even if achieved, would not necessarily be the result of the combination of the companies. For example, Applicants do not commit to bringing IPTV services to Embarq customers by a certain date. Rather, they claim that they can use CenturyTel's substantial investments to deploy IPTV services to current Embarq customers more quickly "than is otherwise *likely* to be the case." [14] They further hedge on their actual ability to do so by stating that "significant investment required to deploy IPTV services in a given market requires individual, market-level analysis…"[15]

Finally, in all prior merger proceedings involving incumbent LECs of some size, the Commission has concluded that the applicants had "not carried their burden of demonstrating that the proposed merger will create verifiable merger-specific public interest benefits that offset

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11 Merger *Application* at 7.

12 *Bell Atlantic/GTE Merger Order* at ¶ 244. *See also id.* at ¶ 242 ("[Applicants] provide little detail regarding their claimed efficiencies. Although the Applicants have indicated the various sources of the claimed savings, the record nonetheless lacks sufficient evidence to support those claimed cost savings. As a result, we find it difficult to evaluate the Applicants' claims and find them unpersuasive.").

13 *Id.* at ¶ 242.

14 Merger *Application* at 8 (emphasis added).

15 *Id.*

the merger's likely public interest harms."[16] Accordingly, in all prior incumbent LEC merger proceedings, the Commission has imposed conditions to "bolster the benefits of [the] proposed merger," concluding that such conditions were necessary in order to find the proposed merger, on balance, to be in the public interest. [17]

Consequently, if the Commission were to approve this merger, it must adopt conditions to offset the harm to competition that will surely result.

II. IF IT APPROVES THE MERGER, THE COMMISSION, AT THE VERY LEAST, MUST ADOPT CONDITIONS

The Commission has the authority to impose conditions that ensure that the public interest is served by the transaction:

> Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions *to ensure that the transaction <u>will</u> yield overall public interest benefits*.[18]

As discussed above, the Commission has recognized that the merger of two incumbent LECs increases, rather than diminishes, the merged firm's market power by "increasing the merged entity's incentives and ability to discriminate against entrants into the local markets of the merging firms."[19] In order to mitigate the resulting harm, the Commission has adopted in prior incumbent LEC merger orders numerous conditions to facilitate market entry and to reduce transaction costs. Consistent with its precedent the Commission should, if it approves this merger, adopt such conditions. In particular, at the very least, the Commission should adopt the following conditions that address interconnection agreements and special access services. The specific conditions COMPTEL proposes are set forth in Appendix A.

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16 *Id.* at ¶ 213.

17 *Id.* at ¶ 248 and ¶ 349.

18 *Sprint/Clearwire Order* at ¶ 22 (emphasis added). *See also AT&T/BellSouth Merger Order* at ¶ 22.

19 *Bell Atlantic/GTE Merger Order* at ¶ 3.

A. THE COMMISSION SHOULD ADOPT FOUR INTERCONNECTION AGREEMENT CONDITIONS AS IMPOSED IN THE AT&T/BELLSOUTH ORDER

In prior incumbent LEC merger proceedings, the Commission has conditioned its approval on the merging carriers' agreement to permit most-favored nation agreements, whereby competitive carriers may port any interconnection agreement with any of the merging carrier's ILECs in any State to any other State served by either ILEC – subject to State-specific pricing and performance measures.[20] The Commission has recognized that such a most-favored nation condition both "facilitate[s] market entry,"[21] and reduces transaction costs for all carriers. As Commissioner Adelstein has correctly observed:

> This condition also responds to concerns about incentives for discrimination – whether through the terms of access offered to competitors or through raising competitors' costs – long recognized by Commission precedent.[22]

In the most recent AT&T/BellSouth merger, the Commission also imposed three additional interconnection agreement-related provisions to further reduce transaction costs:

- The merged incumbent LEC will not refuse an "opt in" request on the ground that the agreement has not been negotiated to reflect changes in law (so long as the requesting carrier agrees to negotiate such changes in good faith);
- The merged incumbent LEC will allow carriers to use its preexisting agreement as the starting point for a new agreement; and
- The merged incumbent LEC will permit a carrier to extend its current agreement for up to three years, regardless of whether the initial term has expired.[23]

These conditions should be imposed on the merged entity here. These supplemental conditions, if implemented appropriately, will reduce costs for all carriers, including the incumbent LEC.

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20 *See, e.g., Bell Atlantic/GTE Merger Order* at ¶ 301.

21 *Id.* at 300.

22 *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5838 (Concurring Statement of Commissioner Adelstein).

23 *See AT&T/BellSouth Merger Order*, Appendix F, 2007 FCC LEXIS 2363 at *417-18 (Reducing Transaction Costs Associated with Interconnection Agreements).

B. THE COMMISSION SHOULD REQUIRE APPLICANTS TO NEGOTIATE MULTI-STATE AGREEMENTS UPON REQUEST

The Commission has recognized that negotiating a separate interconnection agreement between the same parties in multiple states can impose "substantial unnecessary costs and delays on competitors and provide incumbent LECs with an incentive to game the process."[24] To "neutralize" a merged incumbent LEC's "incentive and ability to impose unnecessary negotiation costs on its competitors," the Commission has adopted a condition whereby the merged firm would agree, upon request, to negotiate an interconnection agreement covering some or all of the States where the merged firm operates – subject to technical feasibility, State-specific pricing and the provisions in applicable collective bargaining agreements.[25]

The Commission imposed this multi-State agreement condition in the SBC/Ameritech merger proceeding and in the Bell Atlantic/GTE merger proceeding.[26] The Applicants here state that following a merger, they collectively will operate approximately 80 different ILECs in 33 States.[27] Thus, the need for a multi-State agreement condition here is even more compelling.

C. THE COMMISSION SHOULD REQUIRE APPLICANTS, UPON REQUEST, TO OFFER ONE PRICE IN EACH STATE FOR THE SAME FUNCTION

Most incumbent LEC holding companies have only one operating company in each State. The Applicants here follow a very different practice. From what COMPTEL can ascertain, following the merger, CenturyTel will operate at least 80 different ILECs in 33 different States. This unusual situation poses special challenges for competitive carriers and requires a unique

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[24] *Bell Atlantic/GTE Merger Order,* at ¶ 306.

[25] *See id.* The FCC further held that either the merged firm could develop a generic agreement, or competitive carriers may elect instead to negotiate a different multi-state agreement. *Id.*

[26] While this condition was not included in the recent AT&T/BellSouth order, AT&T's historic practice has been to negotiate multi-State agreements upon request.

[27] Applicants make clear they do not intend to consolidate operating companies in a State and that separate interconnection agreements with each operating company will be required. *See* Merger Application at 4-5 and 11-12.

condition – one not imposed in prior incumbent LEC merger orders. Specifically, it is not uncommon for Applicants' affiliates in the same State to have different prices for the same function. As such, the Commission should adopt as a condition an arrangement whereby in applying a "State specific price," a competitive carrier may choose any price imposed by any of Applicants' affiliated ILECs in the State, and that thereafter, all affiliated ILECs in that State will make that same rate available to the competitor.

While many of the problems with dealing with multiple affiliated ILECs in a State would be addressed by the porting and multi-State agreement conditions discussed above - for example, with such conditions, a competitive carrier would no longer have to negotiate a separate interconnection agreement with each of up to 16 different Applicant ILECs in Wisconsin or nine different ILECs in Louisiana - the porting and multi-State agreement conditions have an exception for State-specific pricing. While prices may vary by state, competitive carriers and consumers should not be penalized by Applicants' decision to maintain an archaic and redundant corporate structure which results in price variations within many States.

D. THE COMMISSION SHOULD ADOPT THE FOLLOWING CONDITIONS RELATED TO SPECIAL ACCESS SERVICES

COMPTEL's members must purchase from Applicants essential inputs, such as special access facilities, in order to serve their own customers. In many instances its members have no alternative to Applicants' facilities. As Embarq recently recognized, the use of these essential inputs by competitive carriers is growing[28] – thereby permitting Applicants to extend their dominance over their competitors. As in prior mergers, the Commission should ensure that the merger does not result in rate increases for these critical services, which are already extraordinar-

[28] *See, e.g.*, Embarq 2007 Form 10K, at 8 (Feb. 29, 2008).

ily overpriced. As such, the Commission should, at a minimum, adopt conditions that are similar to two of the eleven special access conditions adopted in the *AT&T/BellSouth Merger Order.*[29]

IV. CONCLUSION

For the foregoing reasons, COMPTEL respectfully requests that the Commission either deny the application for merger or approve the merger subject to the conditions discussed in above.

Respectfully submitted,

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[29] *AT&T/BellSouth Merger Order*, Appendix F, Special Access conditions nos. 3 and 5.