

**VIA ECFS**

***EX PARTE***

February 27, 2009

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *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 Dkt. No. 08-238***

Dear Ms. Dortch:

Charter Communications, Inc., through its undersigned attorneys, hereby submits this letter to urge the Commission to impose conditions on its approval of the application of CenturyTel, Inc. (“CenturyTel”) and Embarq Corporation (“Embarq”) (together, “Applicants”) for transfer of control in the above-referenced proceeding. As other commenters have explained, the Commission has repeatedly imposed conditions on its approval of mergers involving incumbent LECs in order to ensure that the proposed mergers are in the public interest.<sup>1</sup> Consistent with this precedent, the Commission must condition its approval on Applicants’ compliance with requirements that mitigate the harm to local competition posed by the instant transaction.

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<sup>1</sup> See, e.g., NuVox/Socket Telecom Comments at 15-20 (explaining that the FCC imposed conditions in mergers involving Bell Atlantic and GTE, SBC and Ameritech, and AT&T and BellSouth in order to ensure that such mergers were in the public interest); see COMPTTEL Comments at 5 (“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.”). All references to “Comments” and “Reply Comments” are to those filed in WC Dkt. No. 08-238 unless otherwise noted.

**I. APPLICANTS HAVE SHOWN A PATTERN OF ANTICOMPETITIVE AND DISCRIMINATORY PRACTICES IN VIOLATION OF THE ACT AND THE FCC'S RULES.**

In making a determination of whether a proposed transfer of control will serve the public interest pursuant to Section 214 of the Act,<sup>2</sup> the Commission has held as follows:

[W]e must 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 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 potential public interest benefits.

*In re AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶ 19 (rel. Mar. 26, 2007). Thus, the Commission's public interest inquiry must include an assessment of whether the proposed transaction will result in the merged firm's failure to comply with the provisions of the Act needed to sustain local competition.

Here, it is likely that the proposed merger would result in the spread of unlawful practices throughout the merged firm.<sup>3</sup> As discussed herein and in the attached Cox-Hankins Declaration,<sup>4</sup> CenturyTel engages in a number of discriminatory and anticompetitive practices in violation of the core, market-opening provisions of the Act and the Commission's implementing rules. There is a substantial risk that the proposed transaction will result in the spread of such "worst

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<sup>2</sup> 47 U.S.C. § 214.

<sup>3</sup> As other commenters have explained, Applicants have also failed to demonstrate that the proposed transaction will result in net public interest benefits. *See, e.g.*, COMPTTEL Comments at 3-4; Sprint Nextel Reply Comments at 4. In particular, it is unclear how the merged firm will achieve purported synergies, including "more rapid deployment of advanced services," "reduction of corporate overhead, elimination of duplicate functions, . . . and achievement of increased operational efficiencies" given that "Embarq's operating subsidiaries will remain subsidiaries of Embarq, and CenturyTel's operating subsidiaries will remain subsidiaries of CenturyTel." Application for Consent to Transfer of Control, *In re 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 Dkt. No. 08-238, at 7 & 11 (filed Nov. 25, 2008) ("Public Interest Statement"). As COMPTTEL points out, the merged firm will operate approximately 80 different incumbent LECs in 33 states. COMPTTEL Comments at 7.

<sup>4</sup> Declaration of Carrie L. Cox and Amy W. Hankins on Behalf of Charter Communications, Inc. (dated Feb. 26, 2009) (attached hereto as Attachment A) ("Cox-Hankins Declaration").

practices” throughout the merged firm’s operating territory.<sup>5</sup> In addition, there is a risk that the merged firm will adopt Embarq’s practices in the few areas in which Embarq’s practices are inferior to those of CenturyTel.

**A. CenturyTel Employs Anticompetitive Number Portability Practices In Violation Of Section 251 And The Commission’s Implementing Rules.**

Section 251(b)(2) of the Act requires each local exchange carrier, including CenturyTel, to provide number portability.<sup>6</sup> As the FCC has held, this requirement promotes competition and benefits consumers by “allowing customers to respond to price and service changes without changing their telephone numbers.”<sup>7</sup> Nevertheless, in an effort to retain its dominant position in the provision of local telephone service, CenturyTel has engaged in several unlawful practices that have made it more difficult for Charter to port CenturyTel subscribers’ numbers.

*1. CenturyTel Imposes Arbitrary Port Request Limits on Charter*

Unlike Embarq and other incumbent LECs to which Charter submits port requests, CenturyTel imposes arbitrary port request limits on Charter.<sup>8</sup> Specifically, CenturyTel unilaterally limits the number of orders, including port requests, that it will process from a single competitor to an aggregate of 50 per day across CenturyTel’s territory.<sup>9</sup> As a result of this

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<sup>5</sup> For example, as other commenters have described in detail, the operations support systems (“OSS”) of the acquiring firm are markedly inferior to those of the target firm. *See, e.g.*, NuVox/Socket Telecom Comments, Attachment B, Declaration of R. Matthew Kohly on behalf of Socket Telecom, LLC, ¶ 7 (“Socket Declaration”) (CenturyTel generally has the most anticompetitive practices and least automated OSS. Given that they are the acquiring entity, Socket is especially concerned.”); Deltacom Reply Comments at 4 (“Deltacom also agrees with NuVox and Socket that Embarq’s OSS is superior in almost every respect to that of CenturyTel and that the grant of the merger should be conditioned upon the use of Embarq’s OSS throughout the Applicants’ combined operating territory, post-merger.”). Applicants themselves admit that “CenturyTel . . . has old, more manual systems” and “cannot provide as rapid and efficient processing as the Embarq systems.” Joint Reply Comments of CenturyTel, Inc. and Embarq Corporation at 10 (“Applicants’ Joint Reply Comments”). Indeed, in Charter’s experience, CenturyTel’s lack of fully automated OSS has resulted in frequent delays in the porting process and costly billing errors. *See* Cox-Hankins Declaration ¶¶ 11-12.

<sup>6</sup> 47 U.S.C. § 251(b)(2).

<sup>7</sup> *In re Telephone Number Portability*, First Report and Order, 11 FCC Rcd. 8352, ¶ 30 (1996).

<sup>8</sup> Cox-Hankins Declaration ¶ 7.

<sup>9</sup> *Id.* As Socket Telecom has explained in its comments in this proceeding, CenturyTel imposes other “ad hoc” limitations on porting that are not standard industry practices. *See* Socket Declaration ¶ 36 (explaining that “CenturyTel recently rejected one of Socket’s number port requests because . . . [of] a new [CenturyTel] policy that limited the quantity of numbers that could be ported for a single customer in a single day to one hundred numbers.”).

policy, CenturyTel rejects numerous port requests from Charter on a daily basis.<sup>10</sup> Each of these rejections results in a direct violation of CenturyTel's duty to provide number portability under Section 251(b)(2). Each rejection also results in a violation of the FCC's rules. Specifically, Section 52.26 of the Commission's rules requires wireline carriers to respond to port requests by issuing a Firm Order Commitment ("FOC") within 24 hours of receiving the request and to port the requested number within three business days of the issuance of the FOC.<sup>11</sup> For each Charter port request that CenturyTel rejects for exceeding the 50 transaction-per-day limit, CenturyTel fails to issue an FOC within 24 hours and fails to port the relevant number within three business days of the issuance of the FOC,<sup>12</sup> thereby violating Rule 52.26. Moreover, each CenturyTel rejection of a Charter port request results in a delay of the date on which Charter will be able to serve the prospective customer, and as a result, increases the likelihood that the prospective customer will cancel his or her request to switch to Charter.<sup>13</sup>

2. *CenturyTel Has Attempted To Impose Onerous Port Validation Requirements on Charter*

CenturyTel has also attempted to obstruct the porting process, and thereby impede competition, by instituting unreasonable port validation requirements on Charter. Specifically, CenturyTel recently announced that it would require competitors to submit a CenturyTel subscriber's Personal Identification Number ("PID") as one of the four fields required for all port requests submitted to CenturyTel.<sup>14</sup> The only way that Charter can obtain a PID is by requesting it directly from the potential new subscriber. But it is unlikely that an existing CenturyTel subscriber seeking to switch to Charter will know his or her PID because the PID is a randomly generated, 11-digit number that appears only on the subscriber's first CenturyTel bill and that can be changed only by contacting CenturyTel.<sup>15</sup> The delay and inconvenience associated with obtaining a new PID from CenturyTel increases the likelihood that a potential new subscriber will cancel his or her request for Charter service.<sup>16</sup> It also provides CenturyTel with an

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<sup>10</sup> See Cox-Hankins Declaration ¶ 7.

<sup>11</sup> See 47 C.F.R. § 52.26 (incorporating by reference the local number portability recommendations of the North American Numbering Council Local Number Portability Selection Working Group Final Report and Recommendation to the FCC, Appendix E (rel. April 25, 2007), including the recommendation that wireline carriers complete the Local Service Request/FOC exchange within 24 hours and complete the port within three business days thereafter).

<sup>12</sup> Cox-Hankins Declaration ¶ 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 9.

<sup>15</sup> *Id.* ¶ 10.

<sup>16</sup> *Id.*

opportunity to engage, lawfully or otherwise, in retention marketing as a result of this contact when it otherwise could not have.<sup>17</sup> While CenturyTel suspended its requirement that PIDs be included on all port requests before the requirement went into effect, CenturyTel has not indicated that it intends to eliminate this requirement permanently.<sup>18</sup>

The FCC has expressly held that “no entities obligated to provide [local number portability] may obstruct or delay the porting process by demanding from the porting-in entity information in excess of the minimum information needed to validate the customer’s request.”<sup>19</sup> CenturyTel’s requirement that requesting carriers include PIDs on all port requests is a blatant violation of this prohibition. Moreover, the Commission has further held that “onerous port validation procedures are inconsistent with the Act”<sup>20</sup> because Congress has defined the “number portability” that LECs must provide under Section 251(b)(2) as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers *without impairment of . . . convenience when switching from one telecommunications carrier to another.*”<sup>21</sup> Given that CenturyTel’s PID requirement makes it inconvenient for its subscribers to switch to Charter for telephone service, CenturyTel cannot impose such a requirement and still comply with its Section 251 obligation to provide number portability. Notably, to Charter’s knowledge, Embarq has not attempted to require competitors to submit PIDs as part of the porting process.<sup>22</sup>

### 3. CenturyTel Charges Charter For Porting

Unlike Embarq, CenturyTel charges for porting.<sup>23</sup> In particular, each time Charter submits a request (known as a Local Service Request (“LSR”)) for porting in Texas or Wisconsin, CenturyTel assesses a porting charge on Charter.<sup>24</sup> CenturyTel’s ongoing assessment of such charges is a violation of the FCC’s rules and precedent.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *In re Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd. 19531, ¶ 16 (rel. Nov. 8, 2007) (emphasis added).

<sup>20</sup> *Id.* ¶ 42.

<sup>21</sup> 47 U.S.C. § 153(30); 47 C.F.R. § 52.21(1) (emphasis added).

<sup>22</sup> Cox-Hankins Declaration ¶ 10.

<sup>23</sup> *Id.* ¶ 8.

<sup>24</sup> *Id.* CenturyTel no longer charges Charter for porting in Missouri because the Missouri Public Service Commission (“PSC”) held in a 2008 *Order* that CenturyTel’s interconnection agreement with Charter did not provide for a charge for porting telephone numbers. *See In re Complaint of*

Under Section 52.33 of the Commission's rules and the Commission's number portability cost recovery decisions, incumbent LECs are generally permitted to recover "carrier-specific costs directly related to providing number portability" only via tariffed *end-user* charges, not via assessments on requesting carriers such as Charter.<sup>25</sup> CenturyTel has claimed that the charges it assesses on Charter when Charter submits port requests are not governed by Rule 52.33 because they are not charges for porting *per se*, but for recovery of the costs of administrative services it performs in processing LSRs for porting.<sup>26</sup> But the FCC has expressly defined carrier-specific costs directly related to providing number portability (and thus, governed by Rule 52.33) as "costs carriers incur specifically in the provision of number portability services, such as . . . *the*

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*Charter Fiberlink-Missouri, LLC, Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC*, Report and Order, Case No. LC-2008-0049, 2008 Mo. PSC LEXIS 1105, at \*18 (rel. Oct. 21, 2008). However, during recent negotiations undertaken for the purposes of establishing a replacement interconnection agreement in Missouri between the parties, CenturyTel has again asserted that it should be permitted to charge for port requests. Cox-Hankins Declaration ¶ 8.

<sup>25</sup> See 47 C.F.R. § 52.33(a) & (a)(1)(i) (providing that "[i]ncumbent local exchange carriers may recover their carrier-specific costs directly related to providing long-term number portability by establishing in tariffs filed with the [FCC] a monthly number-portability charge" that "[a]n incumbent local exchange carrier may assess [on] each end user it serves . . ."); *In re Telephone Number Portability*, Memorandum Opinion and Order and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd. 2578, ¶ 62 (rel. Feb. 15, 2002) (clarifying that ILECs are permitted "to assess number portability charges in limited circumstances and only where the incumbent LEC provides number portability functionality: (1) on resellers of the incumbent LEC's local service; (2) on purchasers of switching ports as unbundled network elements under section 251; and (3) on other carriers for whom the LEC provides query services.") None of these three exceptions to the general rule that ILECs cannot recover number portability costs from other carriers applies to Charter because: (1) Charter does not resell CenturyTel service; (2) Charter does not purchase UNEs; and (3) Charter performs its own query functions.

<sup>26</sup> See, e.g., Direct Testimony of Guy E. Miller, III on Behalf of CenturyTel of Missouri, LLC, *In re Complaint of Charter Fiberlink-Missouri, LLC, Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC*, Case No. LC-2008-0049, at 14 (lines 18-21) & 16 (lines 1-6) (filed Apr. 23, 2008) (arguing that CenturyTel may lawfully assess "administrative costs associated with processing an LSR" for porting on Charter because such charges are not directly related to providing number portability); see also CenturyTel Service Guide at 35 (revised 7/31/08), <http://business.centurytel.com/business/Wholesale/InterconnectionServices/Library/CenturyTelServiceGuide.pdf> (last visited Feb. 25, 2009) ("A service order charge will be applicable when submitting a Local Service Request (LSR) for porting. The Service Ordering Charge covers the administrative order processing costs and is not associated with the recovery of any technical or materials costs . . .").

*porting of telephone numbers from one carrier to another.*<sup>27</sup> The FCC's Common Carrier Bureau further explained that the "porting of telephone numbers from one carrier to another" *specifically includes* the act of "transmitting porting orders between carriers."<sup>28</sup> Thus, the "administrative" costs for which CenturyTel seeks recovery are undoubtedly carrier-specific costs directly related to providing number portability and cannot be recovered from other carriers under the Commission's rules. CenturyTel's continued assessment of porting charges on Charter in the face of this prohibition violates Section 251(e)(2)'s requirement that the costs of implementing number portability "be borne by all telecommunications carriers on a competitively neutral basis *as determined by the Commission.*"<sup>29</sup>

**B. Applicants Engage In Discriminatory And Unreasonable Directory Assistance And Directory Listings Practices In Violation Of Sections 251(b)(3) and 201(b) And The Commission's Implementing Rules.**

Section 251(b)(3) of the Act requires LECs, such as Applicants, to provide "competing providers" with "nondiscriminatory access to . . . directory assistance, and directory listing."<sup>30</sup> The Applicants, however, have engaged in several discriminatory directory assistance and directory listings practices that violate this duty and have impeded Charter's ability to compete with them.<sup>31</sup>

*First*, CenturyTel does not accept Charter customer directory listing information for inclusion in CenturyTel's directory assistance database(s) (or database(s) maintained by CenturyTel's third-party directory assistance vendor), such as that used when a caller dials "411," or for publication in white pages and in other directories.<sup>32</sup> Instead, CenturyTel requires that Charter (1) make its own arrangements to provide Charter customer listings to CenturyTel's third-party directory assistance vendor for inclusion in a national database accessible to CenturyTel; and (2) submit Charter customer listing information directly to CenturyTel's directory publisher at one time via a single data file that cannot be readily updated and is not required by other incumbent LECs such as Embarq.<sup>33</sup> Other incumbent LECs generally accept Charter's submission of directory listings for inclusion in the incumbent LEC's white pages and

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<sup>27</sup> *In re Telephone Number Portability*, Third Report and Order, 13 FCC Rcd. 11701, ¶ 72 (rel. May 12, 1998) (emphasis added).

<sup>28</sup> *In re Telephone Number Portability Cost Classification Proceeding*, Memorandum Opinion and Order, 13 FCC Rcd. 24495, ¶ 14 (rel. Dec. 14, 1998) (Chief, CCB).

<sup>29</sup> 47 U.S.C. § 251(e)(2) (emphasis added).

<sup>30</sup> *Id.* § 251(b)(3).

<sup>31</sup> Cox-Hankins Declaration ¶ 13.

<sup>32</sup> *See id.* ¶¶ 13-15.

<sup>33</sup> *Id.* ¶¶ 14-16.

other directories.<sup>34</sup> CenturyTel's refusal to follow this approach creates a number of risks for Charter, such as publication of listing information for Charter customers who have requested that such information not be published.<sup>35</sup> CenturyTel maintains such practices despite the fact that it includes its own subscribers' listing information in its directory assistance database(s) and its published directories.

These practices are a violation of CenturyTel's duty to provide competitors with nondiscriminatory access to directory assistance and the directory listing function under Section 251(b)(3). The FCC has clearly defined the actions that LECs must undertake to comply with this statutory obligation:

The Section 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by the suggestion . . . that *directory listing be defined as a verb that refers to the act of placing a customer's listing information in a directory assistance database or in a directory compilation for external use (such as white pages).*

*Directory Listing Third Report and Order* ¶ 160 (emphasis added).<sup>36</sup> The Commission has further defined *how* LECs must fulfill this obligation. Under the Commission's rules, "nondiscriminatory access" to directory listing under Section 251(b)(3) is defined as follows:

"Nondiscriminatory access" refers to access to telephone numbers, operator services, directory assistance and directory listings that is *at least equal to the access that the providing local exchange carrier (LEC) itself receives.*" Nondiscriminatory access includes, but is not limited to:

- (i) Nondiscrimination between and among carriers in *the rates, terms, and conditions of the access provided;* and
- (ii) *The ability of the competing provider to obtain access that is at least equal in quality to that of the providing LEC.*

47 C.F.R. § 51.217(a)(2) (emphasis added).<sup>37</sup> Thus, under Section 51.217(a)(2) of the Commission's rules, CenturyTel must accept and place *Charter* customer directory listing information for inclusion in its directory assistance database(s) and directories *on the same rates,*

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<sup>34</sup> *Id.* ¶ 15.

<sup>35</sup> *Id.* ¶ 16.

<sup>36</sup> *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd. 15550 (rel. Sept. 9, 1999) ("*Directory Listing Third Report and Order*").

<sup>37</sup> *See also Implementation of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, ¶ 101 (rel. Aug. 8, 1996) (promulgating the definition of "'nondiscriminatory access' as used in section 251(b)(3)").

*terms, and conditions, and with the same level of quality*, as CenturyTel provides *its own* customers when CenturyTel is placing *its own* customer listing information in its directory assistance database(s) and its directories. As at least two courts have held, an incumbent LEC must comply with this duty even if it outsources directory publishing to a third-party publisher.<sup>38</sup> The logic of those decisions applies ineluctably to incumbent LECs that rely on third-party directory assistance providers.<sup>39</sup> In both cases, the incumbent LEC must accept the listing information of competitors' customers and provide it to the incumbent LEC's directory publisher or provider of directory assistance. CenturyTel fails to comply with this obligation.

*Second*, while CenturyTel ensures that its own customers' listing information is available to those who dial directory assistance, Charter customers' directory listing information has not always been available to CenturyTel customers who dial 411.<sup>40</sup> Often, customers mistakenly ascribe this problem to Charter, leaving Charter at a competitive disadvantage in CenturyTel's service areas.<sup>41</sup> When Charter notified CenturyTel of this problem, CenturyTel maintained that Charter was responsible for contracting with CenturyTel's third-party directory assistance vendor

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<sup>38</sup> In *MCI Telecomms. Corp. v. Mich. Bell Tel. Co.*, 79 F. Supp. 2d 768, (E.D. Mich. 1999), the court held that, because Section 51.5 of the Commission's rules defines "directory listings" as information "that the telecommunications carrier or an affiliate has published" or "caused to be published," the obligations under Section 251(b)(3) "extend[] to incumbent carriers who have caused their customer listings to be published" by a third party publisher. *Id.* at 802 (quoting 47 C.F.R. § 51.5) (emphasis omitted). Accordingly, because the incumbent LEC "caused" its listings to be published in the third party's directories, the court held that the incumbent LEC must provide its competitors with nondiscriminatory access to the same directories. *Id.* The court further held that, because the FCC broadly defined "directory listings" to "include those that an incumbent carrier has 'caused to be published,'" whether the third-party publisher is an affiliate of the incumbent LEC is irrelevant. *Id.* In *U.S. West Comms., Inc. v. Hix*, 93 F. Supp. 2d 1115, 1133 (D. Colo. 2000), the court similarly rejected the incumbent LEC's argument that, because it was not "the one that actually publishes the directories," it was not required to place CLEC customers' directory listings in its directories on equal terms, rates and conditions as the incumbent LEC provided to its own customers.

<sup>39</sup> While these cases involved incumbent LECs' use of third-party directory publishers, the same rationale applies to incumbent LECs' use of third-party directory assistance providers. Just as the FCC broadly defined "directory listings" in Rule 51.5 as those that a LEC "caused to be published," the Commission broadly defined "directory assistance service" in Rule 51.5 as that which "includes, but is not limited to, *making available to customers, upon request, information contained in directory listings.*"<sup>39</sup> 47 C.F.R. § 51.5. As the *Michigan Bell* court held, in the *Directory Listing Third Report and Order*, the "FCC did not indicate that 'the act of placing a customer's listing [in a directory assistance database or in a directory compilation for external use] must be performed directly by the incumbent carrier itself.'"<sup>39</sup> *Michigan Bell*, 79 F. Supp. 2d at 802.

<sup>40</sup> Cox Hankins Declaration ¶ 17.

<sup>41</sup> *Id.*

to ensure that the vendor performed the required database queries to find Charter customer information and make it available to subscribers who call directory assistance.<sup>42</sup> But under the nondiscrimination requirement of Section 251(b)(3), as defined in Rule 51.217(a), CenturyTel is required to ensure that *Charter* customers' directory listing information is provided to CenturyTel customers who dial 411 because CenturyTel ensures that *its own* customers' directory listing information is available to other CenturyTel customers who dial 411. Moreover, as explained, CenturyTel's reliance on a third-party provider of directory assistance does not diminish or alter CenturyTel's obligation to provide Charter customers' listing information to parties that dial directory assistance.

*Third*, apparently in an effort to replace lost wireline customer revenues, Embarq has attempted to impose charges on Charter for electronic storage and maintenance of directory listings in Embarq's directory assistance database.<sup>43</sup> Charter is unaware of any cost support for the rates in question, and they likely far exceed Embarq's actual costs.<sup>44</sup> Neither CenturyTel nor any of the other incumbent LECs with which Charter has interconnection agreements charges Charter for electronic storage and maintenance of directory listings.<sup>45</sup> In addition, Embarq has charged Charter, at rates that also likely exceed Embarq's actual costs and without actual cost support, for processing Directory Service Requests ("DSRs") for purposes of placing Charter customer listings into Embarq directories.<sup>46</sup> Neither CenturyTel nor most other incumbent LECs with which Charter has interconnection agreements imposes such charges on Charter.<sup>47</sup> In order to avoid paying these various charges, Charter has been forced to establish "work-arounds" such that Charter deals directly with Embarq's third-party directory assistance vendor and third-party directory publisher to have Charter customer listing information included in Embarq's directory assistance database and in Embarq's directories.<sup>48</sup>

Embarq's attempt to impose listing charges is unlawful for numerous reasons. To begin with, Embarq has not made any attempt to demonstrate that the electronic storage and maintenance and DSR processing charges it imposes on Charter are nondiscriminatory vis-à-vis charges, if any, that Embarq imposes on its own end-user customers.

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<sup>42</sup> *Id.* ¶ 18. In Missouri and Wisconsin, CenturyTel eventually retained a new third-party vendor that performed the required database queries. *Id.* ¶ 19. However, CenturyTel customers in Texas are still often unable to obtain directory listing information for Charter customers who dial 411. *Id.*

<sup>43</sup> *Id.* ¶ 20.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* ¶ 21.

In addition, such charges are not “just and reasonable” as required by Section 201(b) of the Act.<sup>49</sup> As mentioned, Embarq has provided no cost support for its monthly recurring electronic storage and maintenance charge of between \$0.40 and more than \$3.00 per directory listing and that rate likely far exceeds the actual cost of electronically storing a listing in Embarq’s directory assistance database.<sup>50</sup> Indeed, the fact that no other incumbent LEC with which Charter has interconnection agreements imposes such a charge<sup>51</sup> should be considered *prima facie* evidence of its unreasonableness. The fact that most other incumbent LECs with which Charter has interconnection agreements do not impose DSR processing charges should also be *prima facie* evidence that Embarq’s non-recurring charge of between \$6.95 and \$9.41 for placing directory listings in directories<sup>52</sup> is unreasonable. Moreover, the Commission has held that, for purposes of Section 222(e) of the Act,<sup>53</sup> a “presumptively reasonable” rate for incumbent LECs to charge directory publishers for providing their subscriber list information to such publishers is \$0.04 per primary subscriber listing and \$0.06 per updated subscriber listing.<sup>54</sup> These rates were designed to enable incumbent LECs recover the incremental costs of providing subscriber list information to directory publishers,<sup>55</sup> including costs incurred in responding to individual requests for subscriber list information,<sup>56</sup> and the common costs “the carrier incurs in creating and maintaining its subscriber list information database.”<sup>57</sup> These appear to be the very costs that Embarq seeks to recover from Charter with the proposed charges of between \$6.95 and \$9.41 for processing DSRs for purposes of placing Charter subscriber listing information in Embarq’s directories. These charges are therefore unreasonable.

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<sup>49</sup> 47 U.S.C. § 201(b). The charges for listings are unquestionably “charges” imposed “in connection with” a “communication service,” *i.e.*, a telephone service, that is both interstate and intrastate in nature. These charges are therefore subject to Section 201(b) of the Act. *Id.*

<sup>50</sup> Cox-Hankins Declaration ¶ 20.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 47 U.S.C. § 222(e).

<sup>54</sup> *See Directory Listing Third Report and Order* ¶ 72. While the Commission expressly held that it was “not preclud[ing] a carrier from charging subscriber list information rates different than the presumptively reasonable rates,” it also held that “any carrier whose rates exceeded either of these rates should be prepared to provide . . . credible and verifiable data showing that the carrier’s costs, including a reasonable profit, exceed the applicable presumptively reasonable rate.” *Id.* ¶ 73. Embarq has not proffered any such basis for its proposed rates.

<sup>55</sup> *Id.* ¶ 92.

<sup>56</sup> *Id.* ¶ 76.

<sup>57</sup> *Id.* ¶ 106.

Furthermore, as explained, Embarq is obligated under Section 251(b)(3) to accept Charter customer directory listing information and place it in Embarq's directory assistance database and in Embarq's directories, and it must do so on the same rates, terms, and conditions, and with the same level of quality, as Embarq provides to its own customers. As also explained, Embarq may not avoid this obligation by relying on a third-party directory assistance provider or directory publisher. By compelling Charter to establish "workarounds" in order to have Charter customer listing information included in Embarq's directory assistance database and directories, Embarq has failed to fulfill its obligation to provide nondiscriminatory access to directory listing under Section 251(b)(3).

**C. CenturyTel Engages In Practices That Are Inconsistent With Its Duties To Negotiate In Good Faith The Terms And Conditions Of Interconnection Agreements And To Provide Interconnection At Any Technically Feasible Point Under Section 251(c) Of The Act.**

Section 251(c)(1) of the Act<sup>58</sup> provides that an incumbent LEC must "negotiate in good faith . . . the particular terms and conditions of agreements to fulfill [its] duties" to provide, among other things, interconnection under Section 251(c)(2).<sup>59</sup> CenturyTel engages in several practices that are inconsistent with its duty.

To begin with, because of its highly decentralized operations, CenturyTel requires Charter to maintain separate interconnection agreements with multiple CenturyTel incumbent LECs within a state.<sup>60</sup> For example, CenturyTel has rural incumbent LECs and non-rural incumbent LECs in Wisconsin, and CenturyTel requires that Charter maintain separate interconnection agreements with each type of incumbent LEC.<sup>61</sup> This practice imposes substantial unnecessary costs on Charter,<sup>62</sup> and it appears that the practice will continue post-merger. Indeed, the Applicants have stated that they do not intend to consolidate operating companies within each state.<sup>63</sup> Accordingly, as COMPTTEL points out, the merged firm will operate at least 80 different incumbent LECs in 33 states.<sup>64</sup> The Commission has held that

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<sup>58</sup> 47 U.S.C. § 251(c)(1).

<sup>59</sup> *Id.* § 251(c)(2).

<sup>60</sup> Cox-Hankins Declaration ¶ 22.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* ¶ 23.

<sup>63</sup> *See* Public Interest Statement at 11-12 ("Under the terms of the Merger Agreement, Embarq's operating subsidiaries will remain subsidiaries of Embarq, and CenturyTel's operating subsidiaries will remain subsidiaries of CenturyTel."); *see also id.* at 4-5.

<sup>64</sup> *See* COMPTTEL Comments at 7.

“[n]egotiating a separate interconnection agreement between the same parties in *multiple states* can impose substantial unnecessary costs and delays on competitors and provides incumbent LECs with an incentive to game the process.”<sup>65</sup> It follows that CenturyTel’s requirement that Charter negotiate separate interconnection agreements even *within the same state* imposes unnecessary costs on Charter.

This problem is compounded by the fact that CenturyTel has a history of slow rolling the negotiation of interconnection agreements with Charter in Missouri, Texas, and Wisconsin.<sup>66</sup> For example, CenturyTel has sometimes objected to proposed contract provisions, such as general billing provisions, that are standard in Charter’s interconnection agreements with other incumbent LECs.<sup>67</sup> Charter has also been forced to seek resolution of disputed issues via state arbitrations or formal complaints to a far greater extent than has been the case with other incumbent LECs.<sup>68</sup> For instance, Charter had to seek resolution of approximately 30 to 40 issues each with CenturyTel’s non-rural incumbent LECs in Wisconsin, CenturyTel’s rural incumbent LECs in Wisconsin, CenturyTel’s incumbent LECs in Missouri, and CenturyTel’s incumbent LECs in Texas.<sup>69</sup>

In addition, Section 251(c)(2)(B) of the Act provides that an incumbent LEC must provide interconnection “at any technically feasible point within the carrier’s network.”<sup>70</sup> However, CenturyTel requires Charter to establish separate points of interconnection (“POIs”) for multiple CenturyTel incumbent LECs, even when two CenturyTel incumbent LECs operate within a LATA.<sup>71</sup> This practice causes Charter to incur substantial expenses associated with obtaining and maintaining multiple redundant POIs within two different LATAs in Wisconsin.<sup>72</sup> Moreover, this practice is a direct violation of CenturyTel’s duty to provide interconnection at any technically feasible point within its network under the Act and the Commission’s

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<sup>65</sup> *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 389 (rel. Oct. 8, 1999).

<sup>66</sup> Cox-Hankins Declaration ¶ 26.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 47 U.S.C. § 251(c)(2)(B).

<sup>71</sup> Cox-Hankins Declaration ¶ 24.

<sup>72</sup> *Id.* ¶ 25.

implementing rule.<sup>73</sup> Notably, CenturyTel has no apparent basis for claiming that a single POI for all of its incumbent LEC operations in a LATA is not technically feasible.<sup>74</sup>

**II. IF THE COMMISSION APPROVES THE PROPOSED TRANSACTION, IT MUST IMPOSE CONDITIONS TO PREVENT THE SPREAD OF “WORST PRACTICES” AND MITIGATE THE OTHER PUBLIC INTEREST HARMS POSED BY THE TRANSACTION.**

Given that CenturyTel, and in certain cases Embarq, have shown a pattern of violating the Act and the Commission’s rules, the FCC must impose conditions to prevent the spread of “worst practices” and mitigate the public interest harms posed by the transaction. The Applicants have opposed many of the conditions proposed thus far in this proceeding on the basis that “there is no history of competitive abuse” and that “the merger is likely to improve provisioning in [CenturyTel service] areas.”<sup>75</sup> If that is the case, then the Applicants should have no objection to Charter’s proposed conditions, which seek to ensure that the merged firm complies with existing law. Therefore, Charter urges the Commission to impose the following conditions,<sup>76</sup> some of which are similar to those proposed by NuVox/Socket.<sup>77</sup>

**Use of Embarq OSS**

Within 120 days after the Merger Closing Date, the merged CenturyTel/Embarq entity shall, subject to the exceptions described below, utilize the Embarq OSS and Embarq’s platforms/systems, methods and procedures for Maintenance and Repair, Directory Assistance, Directory Listings, 911 Records, and Billing throughout the merged entity.

It should be noted that the Applicants have stated that they plan to use Embarq’s OSS post-merger.<sup>78</sup> If that is the case, there is no reason for the Applicants to object to this proposed condition.

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<sup>73</sup> 47 C.F.R. § 51.305(a)(2).

<sup>74</sup> Cox-Hankins Declaration ¶ 24.

<sup>75</sup> Applicants’ Joint Reply Comments at 20.

<sup>76</sup> For purposes of the conditions listed above, the term “carrier” includes any competing provider of telephone service, including any cable operator that provides telephone service in competition with the merged CenturyTel/Embarq entity, regardless of whether such telephone service is classified as a telecommunications service. The phrase “merged CenturyTel/Embarq entity” is defined as the combined CenturyTel/Embarq entity and all of its affiliates as defined in Section 3(1) of the Communications Act. *See* 47 U.S.C. § 153(1).

<sup>77</sup> *See* NuVox/Socket Comments at 22-24, 27, 36-38.

<sup>78</sup> Applicants’ Joint Reply Comments at 10.

### **Number Portability**

Beginning 30 days after the Merger Closing Date, the merged CenturyTel/Embarq entity:

Shall comply with the requirements set forth in the North American Numbering Council Local Number Portability Administration Selection Working Group's reports and recommendations except as such reports and recommendations have been or shall in the future be modified by the FCC.

Shall not limit the number of simple port requests that the merged CenturyTel/Embarq entity shall process from any individual carrier or group of carriers.

Shall not demand from a requesting carrier information, such as a customer's Personal Identification Number, in excess of the minimum information needed to validate the customer's port request.

Shall not assess charges of any kind on other carriers for the recovery in whole or in part of any "carrier-specific costs directly related to providing number portability" as that phrase is defined in *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd. 11701 (rel. May 12, 1998), including but not limited to administrative costs associated with processing port requests or Local Service Requests submitted for the purpose of porting telephone numbers.

Because Applicants argue that the FCC's local number portability "orders should govern CenturyTel's obligations" post-merger,<sup>79</sup> there is no reason for Applicants to oppose the proposed conditions, which merely require the merged firm to comply with the Act and the rules promulgated by the Commission in those orders.

### **Directory Listings and Directory Assistance**

Beginning 30 days after the Merger Closing Date, the merged CenturyTel/Embarq entity:

Shall treat carriers' submission of carriers' customer listing information and updates to such information in a manner that is nondiscriminatory as compared to submission and updates of the merged CenturyTel/Embarq entity's customers' listing information. In order to comply with this condition, the merged CenturyTel/Embarq entity must, among other things, accept and place carriers' customer listing information and updates to such information, including information submitted via directory service requests ("DSRs"), in the merged

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<sup>79</sup> *Id.* at 28.

CenturyTel/Embarq entity's directory assistance database(s) and published directories. In addition, the merged entity shall provide carriers' customer listing information and updates to such information to third-party directory assistance vendor(s) and third-party directory publishers in the same manner as it provides its own customers' listing information to such third parties.

Shall not charge carriers for electronic storage or maintenance of carriers' customer listing information.

Shall not charge carriers for processing of DSRs.

Shall not list or publish the telephone numbers or other directory listing information of carriers' customers that have requested non-listed and/or non-published status.

Shall ensure that customers of the merged CenturyTel/Embarq entity that dial 411 are provided access to carriers' customer listing information on a nondiscriminatory basis as compared to the customer listing information of the merged CenturyTel/Embarq entity's customers. In order to comply with this condition, the merged CenturyTel/Embarq entity or its third-party directory assistance vendor(s) must, among other things, query all databases in which carriers' customer listing information resides.

### **Extension of Interconnection Agreements ("ICAs")**

Effective as of the Merger Closing Date, carriers that are parties to interconnection agreements with any of the CenturyTel or Embarq entities or subsidiaries may extend their agreements, regardless of whether the initial term has expired, for a period of up to thirty-six (36 months). During this period, the interconnection agreements may be terminated only via the carrier's request.

### **ICA Portability**

Effective as of the Merger Closing Date, and for a period of thirty-six (36) months, the merged CenturyTel/Embarq entities will permit any requesting entity to port an entire interconnection agreement (with the exception of state-specific rates) from one state to any other state within the CenturyTel/Embarq operating territory and from any CenturyTel/Embarq incumbent LEC to any other CenturyTel/Embarq incumbent LEC.

### **Negotiation of ICAs**

Effective as of the Merger Closing Date, CenturyTel and Embarq will permit carriers to utilize existing interconnection agreements as the basis for negotiating new or successor interconnection agreements.

**Opting-Into Existing ICAs**

Effective as of the Merger Closing Date, carriers will be permitted to opt into existing interconnection agreements and CenturyTel and Embarq will not be permitted to deny those opt-ins on the grounds that the agreement has not been amended to reflect current changes in the law. A carrier opting-into an interconnection agreement must agree to negotiate in good faith, immediately after entering into the agreement, an amendment to reflect the change of law. Opt-ins shall be effective no later than thirty (30) days after receipt by the merged CenturyTel/Embarq entity of a formal notice of opt-in by any carrier certified to do business in the relevant state.

It should be noted that while Applicants have claimed that “none of the parties [in this proceeding] have alleged any facts” justifying the imposition of conditions relating to interconnection agreements,<sup>80</sup> the attached Cox-Hankins Declaration is evidence to the contrary.

**Single Point of Interconnection (“POI”)**

Beginning thirty (30) days after the Merger Closing Date, and for a period of forty-eight (48) months from the Merger Closing Date, the merged CenturyTel/Embarq entities shall permit requesting carriers to establish a single POI per LATA and that POI shall serve as the POI for all interconnection between the requesting carrier and any CenturyTel/Embarq entities operating in the LATA.

**III. CONCLUSION**

For the foregoing reasons, the Commission should condition its approval of the proposed transfer of control on compliance with the requirements listed above.

Respectfully submitted,

/s/ Thomas Jones

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<sup>80</sup> *Id.* at 24.

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