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February 27, 2009

*FILED IN PDF FORMAT VIA ECFS*

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

Re: Notice of Ex Parte Presentation – WC Docket No. 08-238

Dear Ms. Dortch:

On Thursday, February 26, 2009, Ed Cadieux of NuVox, Matt Kohly of Socket, Charles McKee of Sprint, Karen Reidy of COMPTTEL and the undersigned counsel met with Nicholas Alexander of Commissioner McDowell's office to discuss the above-captioned proceeding. The attached written *ex parte* presentation was distributed at the meeting. The discussion focused on the attached materials and was consistent with comments and/or reply comments previously filed by NuVox, Socket, Sprint, DeltaCom and COMPTTEL in this docket. DeltaCom did not have a company representative at the meeting but was represented by counsel.

In accordance with the Commission's rules, this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,



John J. Heitmann

cc: Nicholas Alexander (via electronic mail)

# Competitive Carrier Opposition to the CenturyTel/Embarq Merger

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WC Docket No. 08-238

Federal Communications  
Commission  
February 26-27, 2009

# Competitors and Consumers Oppose the Merger

## □ Competitors oppose the merger

- NuVox
- Socket
- Deltacom
- CompTel
- Sprint
- Acceleration

## □ Consumer interests oppose the merger

- NASUCA
- NJ Division of Rate Counsel

# The Proposed Merger

- This is not simply the merger of two "rural LECs"
- CenturyTel and Embarq serve:
  - Major metropolitan areas (e.g., Las Vegas)
  - Fast growing suburbs (e.g., suburban St. Louis)
  - 33 states and 8 million access lines
- The combined entity begins to approach Qwest in size and resembles Qwest in service area mix
  - 80 different ILECs
  - \$319m in high cost subsidies

# For Consumers, Applicants Promise the Merger Will

□ (No promises)

# For Wholesale Customers, Applicants Promise the Merger Will

- Not impact their existing ICAs
  - This is in certain respects an empty promise
    - *E.g.*, CenturyTel can unilaterally change ICA obligations by changing its Service Guide
- (No other promises)

# The Legal Standard

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- ❑ The merger may be approved only if it is found on balance to serve the **public interest**
- ❑ The standard requires an assessment of **verifiable benefits and likely harms**
- ❑ The FCC must find that:
  - the benefits outweigh the harms, **and**
  - that approval of the transaction will over time bolster
    - ❑ **competition** and
    - ❑ **consumer welfare**
- ❑ **Conditions**
  - In nearly all large ILEC mergers, the FCC has found that the public interest standard could not be met in the absence of conditions needed to **produce benefits to consumers** and to **safeguard competition** from harms that otherwise would result from the merger

# Applicants Fail to Make their Case

- ❑ The Applicants bear the **burden of proof** and they fail to meet it
- ❑ The public interest statement offered by the Applicants includes:
  - buzzwords like “efficiencies” and “broadband”
  - popular themes like improving service to rural areas
  - **no verifiable benefits**
- ❑ Applicants’ review of the likely harms associated with the proposed transaction ignores reason and FCC precedent
  - The FCC consistently has found that mergers of this kind pose a significant danger of harm to consumers and competition
- ❑ Applicants claims of no harm cannot be squared with
  - overlapping and adjacent exchanges
  - affiliate CLEC fiber-based operations
  - affiliate competitive fiber transport subsidiary
  - **likely impact on wholesale customers/competitive carriers**

# Applicants Fail to Make their Case

(cont'd)

- ❑ Applicants' claims ignore the likely competitive impacts on wholesale customers/competitors and new entrants
- ❑ CenturyTel lacks the wholesale support infrastructure, commitment and experience necessary to serve wholesale customers and to ensure robust competition and the consumer benefits that flow from it
  - excessively long provisioning intervals
  - non-standard and largely manual OSS
  - neglectful maintenance and repair practices
  - unreliable or nonexistent information regarding customer service records and serving areas
  - obstructive section 252(i) interconnection agreement opt-in processes
  - manual and error-prone directory listings and 911 records processes
  - error-prone billing
  - a history of anticompetitive conduct with respect to number porting and wholesale ADSL transmission
- ❑ With CenturyTel management poised to take control, there is reason to believe that comparatively better practices and capabilities in place at Embarq will be replaced with those at CenturyTel

# Tangible Benefits Must Be Created through Conditions

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- ❑ Competitors/wholesale customers propose **conditions** drawing heavily from Commission precedent and operating experience with the Applicants
- ❑ FCC precedents
- ❑ CenturyTel/Embarq's attempts to distinguish these precedents are unavailing

# Conditions to Reduce Transaction Costs Associated with ICAs

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## **Extension of ICAs**

- Carriers can extend their ICAs, regardless of whether the initial term has expired, for a period of up to 36 months. During this period, the ICA may only be terminated by the CLEC.

## **ICA Portability**

- Carriers can port an entire ICA (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 ILEC to any other CenturyTel/Embarq ILEC.

# Conditions to Reduce Transaction Costs Associated with ICAs (cont'd)

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## **Negotiation of ICAs**

- Carriers can utilize existing ICAs as the basis for negotiating new or successor ICAs.

## **Opting-Into Existing ICAs**

- Carriers can opt into existing ICAs and CenturyTel/Embarq will not deny those opt-ins on the grounds that the selected ICA has not been amended to reflect current changes of law. Opt-ins shall be effective no later than 30 days after receipt of a CLEC opt-in notice.

# Conditions Related to Unbundled Network Elements

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## □ **UNE Rate Rationalization and Discount**

- Within 30 days of the Merger Closing Date, the merged CenturyTel/Embarq entity(ies) shall file with each state in its ILEC operating territory a tariff to offer section 251 network elements at a 25% discount from lowest UNE rate offered by any CenturyTel/Embarq ILEC as of January 1, 2009.
- Non industry-standard rate elements such as loop conditioning for DS1 circuits shall be waived or eliminated without any increase to standard nonrecurring charges.
- The discounted UNE rates will be available to CLECs serving any of the Applicants' markets in a state and shall stay in effect for a period of 36 months from the date such rates become effective.
- ICA amendments, to the extent required by change-of-law provisions, or otherwise, will be deemed effective as of the effective date of the tariff and the parties will true-up accordingly.

# Conditions Related to Unbundled Network Elements (cont'd)

## **UNE Availability Freeze**

- For a period of 48 months, beginning on the Merger Closing Date, the merged CenturyTel/Embarq entities shall not seek a ruling, including through the filing of a forbearance petition under section 10 of the Act or any other petition, altering the status of any facility currently offered as a loop or transport UNE under section 251(c)(3) of the Act.

## **Use of Embarq OSS**

- Within 120 days after the Merger Closing Date, the merged CenturyTel/Embarq entity shall utilize the Embarq OSS and Embarq's platforms/systems, methods and procedures for Maintenance and Repair, Directory Listings, 911 Records and Number Porting throughout the merged entity.

# Conditions Related to Unbundled Network Elements (cont'd)

## **Order Intervals**

- Within 60 days after the Merger Closing Date, and for a period of 48 months, the merged CenturyTel/Embarq entity shall adhere to the shortest ordering and provisioning intervals for wholesale service orders in place at any CenturyTel/Embarq ILEC as of January 1, 2009.

## **Dedicated Interoffice Facilities**

- Beginning 30 days after the Merger Closing Date, and for a period of 48 months, the merged CenturyTel/Embarq entities shall make available as UNEs dedicated DS1 and DS3 interoffice facilities connecting tandems, end offices and other switch locations of CenturyTel/Embarq entities with adjacent operating territories within the same LATA or with subtending end offices/switches.

# Conditions Related to Unbundled Network Elements (cont'd)

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## □ **UNE Performance Plan**

- Beginning 45 days after the Merger Closing Date and continuing for a period of 48 months, the combined CenturyTel/Embarq will prepare and file quarterly performance metrics related to their provision of unbundled network elements.

## □ **UNE Loop Hot Cuts**

- Within 120 days after the Merger Closing Date, the merged CenturyTel/Embarq entity will implement and make available to CLECs TELRIC-compliant coordinated loop and bulk loop Hot Cut processes throughout the merged entity for use with UNE loops, UNE subloops, xDSL-capable UNE loops and xDSL-capable UNE subloops.

# Conditions Related to Special Access and Other Wholesale Services

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## **Affiliate Transactions**

- With regard to the provision of special access services, and for a period of 48 months from the Merger Closing Date, no CenturyTel/Embarq entity or affiliate shall (i) provide any of its affiliates with rates, terms and conditions that are not available to other entities; (ii) favor itself or its affiliates in the provisioning, maintenance, customer care, OSS functionalities and grooming of special access circuits.

## **Special Access Rate Cap**

- For a period of 48 months after the Merger Closing Date, the merged CenturyTel/Embarq entities shall continue to offer and provide all special access services at rates no higher than those in effect, whether by application of a tariff or contract, as of January 1, 2009.

# Conditions Related to Special Access and Other Wholesale Services (cont'd)

## **Special Access Circuit and Plan Portability**

- The merged CenturyTel/Embarq entities shall permit a requesting telecommunications provider to port the entirety of an existing special access plan or commercial agreement (except for state specific rates) from one CenturyTel/Embarq ILEC to another and from a state where it currently is effective to another state in its territory. Parties with these plans should be able to replace existing plans and move or port circuits within and between plans and CenturyTel/Embarq ILECs without penalty or additional cost.

## **Special Access/Enterprise Broadband Forbearance Freeze**

- For a period of 48 months, beginning on the Merger Closing Date, the merged CenturyTel/Embarq entities shall not seek a ruling, including through the filing of a forbearance petition under section 10 of the Act or any other petition, seeking further deregulation of any special access services, including "enterprise broadband" services.

## **Special Access Service Performance Plan**

- Beginning within 45 days after the Merger Closing Date and continuing for a period of forty-eight (48) months, the combined CenturyTel/Embarq will prepare and file quarterly performance metrics related to their provision of special access services.

# Other Conditions

## **Number Portability**

- Beginning 30 days after the Merger Closing Date, the merged CenturyTel/Embarq entities shall comply with industry best practices regarding number portability, including the Local Number Portability Administration – Working Group’s Industry Best Practices.

## **Single Point of Interconnection**

- Beginning 30 days after the Merger Closing Date, the merged CenturyTel/Embarq entities shall permit requesting entities to establish a single point of interconnection (“POI”) per LATA and that POI shall serve as the POI for all interconnection between the requesting entity and any CenturyTel/Embarq entities operating in the LATA.

# Other Conditions (cont'd)

## **Cap on Transit Service Rates**

- Beginning 30 days after the Merger Closing Date, and continuing for a period of 48 months from the Merger Closing Date, neither CenturyTel nor Embarq will increase the rates paid by competitive LECs as of January 1, 2009 for transit tandem services provided by CenturyTel or Embarq in the combined CenturyTel/Embarq region.

## **ADSL Transmission Service**

- CenturyTel/Embarq will offer to Internet service providers ("ISPs"), for their provision of broadband Internet access service to ADSL-capable retail customer premises, ADSL transmission service in the combined CenturyTel/Embarq territory that is functionally the same as any retail ADSL service offered by CenturyTel/Embarq to the same retail customer premises. Such wholesale offering shall be at a price not greater than the retail price in a state for ADSL service that is purchased by customers who also subscribe to CenturyTel/Embarq local telephone service whether purchased separately or in bundled service offerings.

# Other Conditions (cont'd)

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## **Use of Most Advanced Billing Platform**

- Within 120 days after the Merger Closing Date, the merged CenturyTel/Embarq entity will utilize the most advanced and reliable platforms/systems, methods and procedures for Billing wholesale services throughout the merged entity.

## **Forbearance Freeze**

- For a period of 48 months, beginning on the Merger Closing Date, the merged CenturyTel/Embarq entities shall not file any forbearance petition under section 10 of the Act.