

**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)
CenturyTel, Inc.)
)

OPPOSITION OF CENTURYLINK

I. INTRODUCTION

The New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates (“NJDRRC” and “NASUCA,” respectively) jointly filed a Petition for Reconsideration¹ of the Commission’s June 25, 2009 Order approving the applications for transfer of control of Embarq Corporation to CenturyTel, Inc.² Embarq and CenturyTel (together, “CenturyLink”)³ oppose the Petition.

In the Order, the Commission found that “several significant public interest benefits are likely to result from the proposed transaction.” It concluded that, in light of

¹ Joint Petition for Reconsideration or Clarification by New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates (filed July 17, 2009) (“the Petition”).

² *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, FCC 09-54 (rel. June 25, 2009) (“the Order”).

³ The Applicants announced that the combined, reorganized company will adopt the name CenturyLink, subject to shareholder approval and appropriate securities and regulatory filings.

those benefits and the voluntary “commitments made by the Applicants, the potential public interest benefits from the proposed merger, taken as a whole, outweigh any potential public interest harms.”⁴ With Commission approval in hand, and having already received all applicable state approvals, the Applicants closed their merger on July 1, 2009.

In their Petition, NJDRC and NASUCA ask the Commission to “modify” the Applicants’ voluntary commitments.⁵ They ask the Commission to change the Order to require (1) that CenturyLink report to state commissions and state consumer advocates the CLEC-specific wholesale performance level data for the Embarq companies, and (2) that CenturyLink provide quarterly updates to all state commissions and state consumer advocates on the status of its broadband deployment.⁶

NJDRC and NASUCA have not met the standards for reconsideration. They have failed to identify any “a material error or omission in the original order or raise[d] additional facts not known or not existing until after the petitioner’s last opportunity to

4 Order at ¶¶ 46-47. The Applicants explained that such conditions were wholly unrelated to any alleged harms potentially caused by the merger. Nevertheless, the Applicants offered voluntary commitments on June 19, 2009, and subsequently clarified and expanded those commitments on June 22, 2009. Letter from Gregory Vogt and Samuel Feder (counsel for the Applicants) to Marlene Dortch (FCC), WC Docket No. 08-238 (filed June 19, 2009); Letter from Gregory Vogt and Samuel Feder (counsel for the Applicants) to Marlene Dortch (FCC), WC Docket No. 08-238 (filed June 22, 2009).

5 Petition at 3.

6 *Id.*

present such matters.”⁷ Modifying the commitments, after the fact, is also unnecessary and entirely inappropriate. Accordingly, the Commission should deny the Petition.

II. ANALYSIS

With respect to wholesale performance metrics, the Commission addressed parties “concerns that Embarq’s wholesale performance might deteriorate following the merger.”⁸ The Order includes the Applicants’ two-year commitment that wholesale service levels at Embarq local companies will not deteriorate, and the company agreed to make available to CLECs detailed, company-specific service performance metrics.⁹ With respect to broadband deployment, the Order incorporates the Applicants’ commitment to “make substantial additional investment in broadband services.”¹⁰

NJDRC’s and NASUCA’s Petition, however, suggests that it would be “better” if the voluntary commitments were changed (1) to require CenturyLink to report CLECs’ company-specific performance data to each of eighteen state commissions and their state consumer advocates for nineteen Embarq local operating companies, and (2) to require CenturyLink to provide all Embarq and CenturyTel state commissions and state consumer advocates quarterly reports on their broadband deployment.

⁷ See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

⁸ See Order ¶¶ 31, 33 & App. C, p. 28.

⁹ *Id.* at ¶ 40 & App. C, p.31. The Commission emphasized the particular public interest benefits of that commitment in approving the order. Acting Chairman Copps and Commissioner Adelstein also noted the broadband deployment commitments in their statements accompanying the Order.

Under the Commission's rules, "Reconsideration is appropriate only where the petition shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.¹¹ Here, the only basis NJDRC and NASUCA offer for their proposed changes to the commitments is the assertion that "[i]t is in the public interest that State Commissions and State Advocates receive their respective service reports and implementation updates in order to better ensure all commitments are met and customers receive the protections contemplated by the merger approval."¹²

There is no claim that the Commission made any error, let alone a material one. The Petition does not challenge the merger approval, nor contest any of the Commission's findings or analysis in the Order. The Petition raises no new facts. It does not dispute the agency's review of the record, and offers no information that was not already in the record. Accordingly, the Petition falls far short of the Commission's reconsideration standard and must be denied.

Moreover, the conditions NJDRC and NASUCA seek, however well intentioned,

¹¹ *WWIZ, Inc.*, 37 FCC at 686; *National Ass'n of Broadcasters*, 18 FCC Rcd 24414, 24415 (2003). See also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees; Adelphia Communications, Corp. (and Subsidiaries, Debtors-in-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee*, 23 FCC Rcd 14241, 14242 (2008).

¹² Petition at 3.

¹³ The Order provides that the voluntary commitments are "enforceable conditions of [FCC] approval." Order at ¶ 2.

are unnecessary. Given the procedures and metrics the Applicants committed to develop, CLECs are more than capable of monitoring the wholesale performance they receive to ensure the merger does not cause deterioration in their service.¹³ With respect to broadband deployment, the Commission is already under a statutory obligation to develop a comprehensive system for providing broadband data to state commissions under the Broadband Data Improvement Act, and the Commission is conducting a proceeding to determine how to implement the statute.¹⁴ There is no justification for imposing a further obligation with respect to an individual company.

Finally, the Commission should be very reluctant, absent truly compelling grounds, to revisit voluntary commitments tendered in good faith. Absent an independent legal justification for new conditions tied to some merger-specific harm -- which the Petition has not even suggested -- the Commission has no authority to “modify” voluntary commitments. Moreover, if voluntary commitments adopted within an order can be casually changed through reconsideration, perhaps long after the fact, parties in a wide range of Commission proceedings will be less willing to negotiate voluntary commitments.¹⁵ Granting NJDRC’s and NASUCA’s Petition could thus make resolving

¹⁴ Public Notice, *Dates Established For Comment on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act*, WC Docket No. 07-38, GN Docket Nos. 09-47, 09-51, DA 09-1598 (rel. July 24, 2009); Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-04).

¹⁵ It is no answer to claim that parties should wait until petitions for reconsideration are resolved before closing a transaction. It often takes the Commission considerable time to resolve such petitions, and business realities prevent companies from delaying for such lengths of time. For example, reconsideration petitions with respect to the Sirius-XM

issues with the Commission staff or with other interested parties (state commissions and consumer advocates, among them) more difficult in the future. Fortunately, the circumstances of this case, and of this Petition, make such a drastic step plainly unnecessary.

III. CONCLUSION

NJDRC's and NASUCA's Petition asks the Commission to change its Order to modify voluntary commitments adopted as conditions to the merger approval Order. The changes they request are unnecessary and unwarranted, and their Petition falls short of the stringent standards for reconsideration. The Petition should be denied.¹⁵

Respectfully submitted,



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merger and Verizon-ALLTEL merger remain pending, more than nine months after the transactions received Commission approval.

¹⁵ NJDRC and NASUCA also failed to serve the parties to this transaction as required by the Commission's rules. See 47 C.F.R. § 1.106(f). The Petition may be denied on that ground alone.

CERTIFICATE OF SERVICE

I, Sharron V. Turner hereby certify that a copy of the foregoing Opposition of CenturyLink was served on August 6, 2009 by first-class United States mail, postage prepaid or, where indicated by *, by electronic mail or ECFS:



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