

AUG 24 2009
FCC Mail Room

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:)
)
Applications Filed for the Transfer of) WC Docket No. 08-238
Control of Embarq Corporation to)
CenturyTel, Inc.)

REPLY TO OPPOSITION OF CENTURYLINK TO JOINT PETITION FOR
RECONSIDERATION OR CLARIFICATION BY
NEW JERSEY DIVISION OF RATE COUNSEL
AND THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

On June 25, 2009, the Federal Communications Commission ("FCC" or "Commission") adopted its order approving the merger of Embarq Corporation and CenturyTel, Inc., with conditions.¹ On July 27, 2009, the New Jersey Division of Rate Counsel ("Rate Counsel") and the National Association of State Utility Consumer Advocates ("NASUCA") (collectively, "State Advocates") filed a Joint Petition for reconsideration or clarification of two conditions contained in Appendix C of the merger Order. On August 6, 2009, CenturyLink – the name adopted for the combined company – filed its Opposition. Pursuant to 47 C.F.R. § 1.06(f), State Advocates reply to the Opposition.

In the Joint Petition, State Advocates asked that the Commission modify or clarify the merger conditions to require that all reports regarding the state specific service

¹ *In the Matter of Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order (adopted June 24, 2009 and released June 25, 2009) ("Order")

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performance levels that are made available to the CLEC's should be provided to the respective state Public Service Commissions as well as State Advocates. Additionally, State Advocates asked that the Commission modify or clarify the merger conditions to require that the merged entity provide quarterly updates to Public Service Commissions and State Advocates on the implementation of the broadband commitments contained on page 31 of the Order.

None of the arguments raised by CenturyLink demonstrate that the public interest is not served by permitting State Commissions and State Advocates to have access to service reports and to receive quarterly updates on CenturyLink's progress towards meeting its broadband commitments under the Order.

CenturyLink notes that the so called "voluntary" conditions of Appendix C were presented in an ex parte on June 19, 2009 and subsequently clarified in another ex parte on June 22, 2009.² Thus State Advocates had no opportunity to offer or propose modifications to the conditions contained in Appendix C prior to the adoption and release of the Order. Thus the very existence of the conditions is an "additional fact[]" not known or not existing until after the petitioner's last opportunity to present such matters," as cited by CenturyLink.³

State Advocates' filing was the appropriate procedural step to enable the Commission an opportunity to modify or clarify conditions when there was no opportunity to raise these concerns prior to the issuance of the Order. Section 405(a) of

² Opposition at 2, footnote 4.

³ Opposition at 2-3.

the Act requires a reconsideration to be filed on issues which the Commission was not afforded an opportunity to pass.⁴

Therefore, State Advocates' Joint Petition is procedurally proper. Once the Commission decided to impose conditions to support the approval of the transaction, notice and comment on those conditions was appropriate and necessary.⁵ In the absence of notice and comment, a Petition for Reconsideration or Clarification is the next best thing.

The Commission required access to CLEC service performance reports that are available to CLECs and to the Commission, if requested, as being necessary to ensure that service levels of the combined companies would remain at the superior service levels offered by Embarq prior to the merger. Service levels are important to both State Commissions and State Advocates to ensure that consumers are not adversely impacted by any degradation in service. Contrary to CenturyLink's assertion,⁶ by expanding access to such reports, the public interest is furthered.

Likewise, quarterly reporting on the investment in broadband for tracking the progress in meeting the commitment of 100% broadband availability in three years to single line residential and business customers is clearly in furtherance of the public interest. Section 706 of the 1996 Act requires that the Commission and State Commissions encourage the deployment on a reasonable and timely basis of advanced telecommunication capability to all Americans.⁷ The addition of a quarterly reporting

⁴ 47 U.S.C. § 405(a).

⁵ See *Owner-Operator Independent Drivers Association, Inc. v Federal Motor Carrier Safety Administration*, 494 F.3d, 188, 199-200 (D.C. Cir. 2007); *Solite Corp. v. U.S. E.P.A.*, 952 F.2d 473, 485 (D.C. Cir. 1991, citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) cert denied, 549 U.S. 835 (1982).

⁶ Opposition at 4-5.

⁷ See Section 706 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 157 nt.

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requirement so that State Commissions and State Advocates can determine the progress toward the 100% commitment is an important and necessary component to know in order to formulate additional state initiatives so that all Americans have access to advanced services.⁸ The justification for imposing a further obligation with respect to an individual company⁹ is that for this company, the condition was the basis for the Commission's finding that the merger was in the public interest.

CenturyLink also warns the Commission against adopting "new conditions" or "casually chang[ing]" voluntary commitments "though reconsideration, perhaps long after the fact" because this will make "parties in a wide range of Commission proceedings ... less willing to negotiate voluntary commitments."¹⁰ The State Advocates request is not for new conditions; rather it is for clarification – in the public interest -- of the conditions adopted. The commitments were agreed to by the Companies as a condition for the approval of their merger; if similarly-situated firms want their proposals adopted by the Commission, they should be willing to be flexible or face disapproval.

Finally, the filing through the Commission's electronic comment filing system ("ECFS") provided actual notice to all parties in the proceeding. Indeed, State Advocates became aware of CenturyLink's filing from the August 10, 2009 issue of NECA Washington Watch... which was one day prior to the receipt of a service copy by regular

⁸ State Advocates submitted comments in the NOI for a National Broadband Plan, GN Docket No. 09-51, to ensure affordable broadband for all. But contrary to the arguments of CenturyLink, the broadband proceeding does not preclude imposition of conditions in order to further the requirements of Section 706 of the 1996 Act. State Advocates also participated in WC Docket No. 07-52, *Broadband Industry Practice ("Net Neutrality")*; GN Docket No. 07-45, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 ("Broadband Deployment")*; and WC Docket No. 07-38, *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 Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data ("Broadband Data")*.

⁹ Opposition at 5.

¹⁰ *Id.*

mail. CenturyLink can scarcely claim any prejudice from State Advocates' inadvertent failure to provide service by regular mail.¹¹

Accordingly, the State Advocates ask that the Commission modify or clarify the conditions as set forth in the Joint Petition.

Respectfully submitted,

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August 17, 2009

¹¹ See id. at 6, note 15.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Opposition of CenturyLink to Joint Petition for Reconsideration or Clarification by New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates was served on August 17, 2009 by first-class United States mail, postage prepaid.

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