

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1431

In the Matter of

VERIZON COMMUNICATIONS INC. and
FRONTIER COMMUNICATIONS
CORPORATION

Joint Application for an Order Declining to
Assert Jurisdiction, or, in the alternative, to
Approve the Indirect Transfer of Control of
VERIZON NORTHWEST INC.

STAFF'S REPLY BRIEF IN OPPOSITION TO
APPLICANTS' MOTION FOR AN ORDER
DECLINING JURISDICTION

1. Introduction

Staff opposes Verizon Communications Inc.'s and Frontier Communications Corporation's (collectively, Applicants) motion for a Commission order declining to assert jurisdiction over the proposed transaction in this docket (Motion). Less than 60 days ago, this Commission issued its order in *In the Matter of Embarq Corporation and CenturyTel, Inc.*, Order No. 09-169 (issued May 11, 2009) (*CenturyTel*). In *CenturyTel*, the Commission concluded it had jurisdiction over a proposal that began with separate "incumbent local exchange companies" (ILECs), owned by separate parent companies and concluded with the ILECs, operating under the control and ownership of one common surviving parent corporation.

The *CenturyTel* decision is directly applicable to the present proposed merger/acquisition. However, the Applicants give only the very briefest of nods to the *CenturyTel* order, euphemistically asking the Commission to "revisit" it. Plainly speaking, the Applicants desire and require the Commission to *reverse* its legal conclusion that it had jurisdiction over the merger/acquisition at issue in *CenturyTel*.

The Commission should reject the Applicants' request for a reversal of its *CenturyTel* Order. The Commission correctly concluded that it has jurisdiction under ORS 759.375 and

1 ORS 759.380 over merger and acquisition transactions that involve two or more independently-
2 owned ILECs.

3 **2. Summary of Relevant Facts**

4 The Applicants fail to discuss the facts surrounding their acquisition in any detail.
5 However, in order to apply the relevant statutes, ORS 759.375 and 759.380, it is necessary to
6 first understand the Applicants' proposal.

7 The Applicants' application contains a high-level summary of the acquisition,
8 accompanied by several attachments. The Applicants also provide an "execution version" of
9 their operative document entitled "Agreement and Plan of Merger." *See* Application, Exhibit 1.
10 The Applicants refer to this document as the "Merger Agreement." *See* Application at 5,
11 Paragraph 12. The Applicants summarize relevant aspects of the Merger Agreement in their
12 Application.

13 Verizon Northwest is an ILEC operating in Oregon. Verizon Northwest is controlled by
14 Verizon Communications, its parent company. *See* Application at 17, Paragraph 40. Citizens
15 Telecommunications Company of Oregon (Frontier Oregon) is an ILEC operating in Oregon that
16 is controlled by its parent company Frontier Communications (Frontier). *Id.* Upon completion
17 of the Merger Agreement, Verizon Northwest will continue to operate as an ILEC, but as a
18 wholly-owned subsidiary of Frontier instead of Verizon Communications. Frontier Oregon will
19 continue its operations unchanged as a wholly-owned subsidiary of Frontier. *See generally*
20 Application at 5-7, Paragraphs 12-14. The Applicants will effectuate the merger/acquisition/sale
21 by means of a series of intra-corporate stock transfers that conclude with Verizon Northwest
22 shareholders owning stock of two direct subsidiaries of Frontier (NCIH and NewLD). *See*
23 Application at 7, Paragraph 14. Thus, upon conclusion of the Merger Agreement, "Frontier will
24 own and control two incumbent local exchange companies in Oregon: Verizon Northwest and
25 Frontier Oregon." Application at 8, Paragraph 21.

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1 **3. The CenturyTel Order is directly applicable to Applicants' proposed merger**

2 The facts underlying the *CenturyTel* transaction are remarkably similar to those presented
3 in Applicants' Merger Agreement. In *CenturyTel*, each of the applicants (Embarq and
4 CenturyTel) owned Oregon ILEC subsidiaries. At the conclusion of the transaction, CenturyTel
5 became the ultimate parent of all of the formerly separately-owned ILECs. The
6 merger/acquisition was effectuated by means of a stock swap where the Embarq shareholders
7 received a certain percentage share of CenturyTel stock in exchange for their Embarq stock. *See*
8 *generally CenturyTel* at 2-3.

9 To determine whether it had jurisdiction over the transaction, the Commission analyzed
10 these facts under ORS 759.375(1)(c) and ORS 759.380. ORS 759.375(1)(c) provides, in relevant
11 part:

12 (1) A telecommunications utility shall not, without first obtaining
the...Commission's approval of such transaction:

13 ...
14 (c) *By any means whatsoever, directly or indirectly*, merge or consolidate any
15 of its lines, plant, system or other property whatsoever, or franchise or permit
to maintain or operate any telecommunications utility property, or perform any
service as a telecommunications utility, or any part thereof, with any
other...telecommunications utility. (emphasis added).

16 The Commission applied this statute to the facts and concluded:

17 The italicized statutory language "*By any means whatsoever, directly or*
18 *indirectly...merge*" is very broad. Because the transaction begins with three
telecommunications utilities (ILECs) owned by two different companies and
19 ends with all three ILECs being owned by a single parent (CenturyTel, Inc.),
we conclude ORS 759.375(1)(c) applies to the merger transaction. In other
20 words, the Embarq ILEC is properly viewed as "indirectly" merging with the
CenturyTel ILECs through the stock swap of their respective parent holding
21 companies. Indeed, in other jurisdictions, the companies have asserted that, as
a result of the transaction, "indirect control of (the Embarq ILEC) will
effectively transfer to CenturyTel, Inc."

22 *CenturyTel* at 5.

23 The Commission then addressed the applicability of ORS 759.380. That statute provides,
24 in relevant part:

25 (1) No telecommunications utility shall, *directly or indirectly*, purchase,
26 acquire or become the owner of any of the stocks or bonds or property utilized
for utility purposes...of any other...telecommunications utility unless
authorized by the...Commission.

1 (2) Every contract by any telecommunications utility for the purchase,
2 acquisition, assignment or transfer to it of any of the stock of any other
3 telecommunications utility...without approval of the commission shall be
4 void... ORS 759.380 (emphasis added).

5 Pursuant to this statute, the Commission concluded:

6 As with the similar language of ORS 759.375(1)(c), the most reasonable
7 interpretation of the broad “directly or indirectly” language of ORS 759.380 is
8 that the statute applies to the merger transaction. The CenturyTel ILECs are
9 “indirectly” acquiring Embarq’s ILEC’s stock, bonds or other utility property
10 through the acquisition activities of its parent holding company. We therefore
11 conclude that our approval of the merger of the parent companies is a
12 precondition for the transfer of the ownership and control of (the Embarq
13 ILEC).

14 *CenturyTel* at 6.

15 The *CenturyTel* reasoning and conclusions directly apply to the proposed acquisition as
16 described in the Applicants’ Merger Agreement. Under the Merger Agreement, two separately-
17 owned Oregon ILECs, Verizon Northwest and Frontier Oregon, will undergo “intra-corporation”
18 stock swaps that will result in two Oregon ILECs being owned and controlled by a common
19 ultimate parent company (Frontier). For all important purposes, these facts are identical to those
20 presented in *CenturyTel*. Under the reasoning of that recent decision, the Commission should
21 deny the Applicants’ request to “decline to exercise jurisdiction.”¹

22 **4. Applicants’ motion is unpersuasive**

23 Applicants present two broad legal challenges to the *CenturyTel* decision. First, the
24 Applicants argue the “plain language” of ORS 759.375 and 759.380 does not apply to their
25 transaction under the Merger Agreement because the two ILECs (Verizon Northwest and
26 Frontier) will continue to exist after the merger. Motion at 1-2. However, the Commission
previously correctly concluded that ORS 759.375(1)(c)’s “directly or indirectly merge or
consolidate” language is sufficiently broad to encompass a transaction that begins with two
ILECs wholly-owned by separate parent companies and concludes with the two ILECs “existing

¹ Because the facts in this present docket are essentially identical to those presented in
CenturyTel, a finding that the Commission does not have jurisdiction in this proceeding would
necessarily mean the Commission would have to vacate its Order No. 09-169 and the merger
conditions set forth therein.

1 after the merger” but now wholly-owned by one ultimate parent company. Applicants fail to
2 explain why the Commission’s legal reasoning is inconsistent with the plain language of ORS
3 759.375(1)(c).

4 As to ORS 759.380(1), Applicants present a one-sentence argument in support of their
5 assertion that the plain language of the statute does not apply to their transaction. Applicants
6 assert, in a deceptively conclusive manner, that ORS 759.380 is inapposite because no stock,
7 bonds or property of Verizon Northwest will specifically transfer to Frontier Oregon, or vice
8 versa, as part of the Merger Agreement. Motion at 2. However, this argument is only apt, if it is
9 at all, to a “direct” acquisition of ILEC property by another ILEC. The Applicants’ ignore or fail
10 to appreciate the scope and reach of the very broad “indirectly acquire” language of ORS
11 759.380. *See CenturyTel* at 6 (“The CenturyTel ILECs are “indirectly” acquiring Embarq’s
12 ILEC’s stock, bonds or other utility property through the acquisition activities of its parent
13 holding company”).

14 The Applicants’ second broad, but briefly stated, legal challenge to *CenturyTel* is that the
15 Order’s “rationale conflicts with the statutory language.” Motion at 3. According to Applicants,
16 ORS 759.375 only applies if the two ILECs at issue “ultimately end up merged together,
17 regardless of the method utilized to accomplish that merger.” *Id.* The Applicants’ theme
18 continues with ORS 759.380, where they argue for its inapplicability because Frontier Oregon’s
19 ultimate parent ends up with Verizon Northwest’s property, not Frontier Oregon itself. In other
20 words, the Applicants’ seem to argue that both statutes apply only to events that have a direct
21 impact at the ILEC-level, not to those that are accomplished through deals that are finalized at
22 the parent company level.

23 Again, the Commission has already disposed of this argument, relying upon ORS
24 759.375’s and 759.380’s very broad “indirectly” merge or acquire language. The Commission
25 correctly concluded that such expansive statutory language reasonably includes the merger and
26 acquisition activities of the ILECs’ respective parent companies. Indeed, it is hard to reasonably

1 arrive at any other conclusion where the ownership and control of an ILEC's utility property and
2 facilities transfers from one parent entity to another and that the ultimate parent entity also
3 controls and owns another ILEC's utility property and facilities.

4 Interestingly, the controlling statutes in Washington State are almost identical to ORS
5 759.375 and 759.380 and the Washington State Utilities and Transportation Commission
6 (WUTC) has historically applied each precisely as the Commission did in *CenturyTel*. RCW
7 80.12.020 reads like a combination of ORS 759.375(1)(a) and (c) as follows:

8 No public service company shall sell, lease, assign or otherwise dispose of the
9 whole or any part of its franchises, properties or facilities whatsoever...and no
10 public service company shall, by any means whatsoever, directly or indirectly,
11 merge or consolidate any of its franchises, properties or facilities with any other
12 public service company, without having first secured from the commission an order
13 authorizing it to so do...

14 RCW 80.12.040 reads similarly to ORS 759.380 as follows:

15 No public service company shall, directly or indirectly, purchase, acquire, or
16 become the owner of any of the franchises, properties, facilities, capital stocks or
17 bonds of any other public service company unless authorized so to do by the
18 commission...Any contract by any public service company for the purchase,
19 acquisition, assignment or transfer to it of any of the stocks or other securities of
20 any other public service company, directly or indirectly, without the approval of the
21 commission shall be void and of no effect.

22 The WUTC has consistently applied each of these statutes to support its assertion of
23 jurisdiction over mergers and acquisitions like that proposed by the Applicants, most recently in
24 its approval of the Embarq/CenturTel merger/acquisition transaction. *See In the Matter of the*
25 *Joint Application of Embarq and CenturyTel, Inc.*, Docket UT -082119 (issued May 28, 2009).
26 The Commission's interpretation and application of ORS 759.375 and 759.380 is consistent with
the WUTC's similar application of its almost identically-worded respective jurisdictional statutes
(i.e. RCW 80.12.020 and RCW 80.12.040).

5. ORS 759.375(1)(a) applies to Verizon Northwest's sale of its utility property

The Applicants do not discuss in their Motion the effect of ORS 759.375(1)(a), but it
clearly applies to Verizon Northwest's sale or disposal of its utility property or the right to
operate the utility or its property. The statute states:

1 (1) A telecommunications utility doing business in Oregon shall not, without first
obtaining the Public Utility Commission's approval of such transaction:
2 (a) Sell, lease, assign or otherwise dispose of the whole of the property of such
telecommunications utility necessary or useful in the performance of its duties to
3 the public or any part thereof of a value in excess of \$100,000, or sell, lease, assign
or otherwise dispose of any franchise, permit or right to maintain and operate such
4 telecommunications utility or telecommunications utility property, or perform any
service as a telecommunications utility.

5 ORS 759.375(1)(a).

6 In the Applicants' phrasing, the "plain language" of ORS 759.375(1)(a) clearly applies to
7 the sale or disposal of all of Verizon Northwest's utility property to Frontier. Such property has
8 value well in excess of \$100,000.


9 **6. Conclusion**

10 For the reasons stated, the ALJ and the Commission should deny Applicants' Motion.

11
12 DATED this 8th day of July 2009.

13 Respectfully submitted,

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26

1 **CERTIFICATE OF SERVICE**

2 I certify that on July 8, 2009 I served the foregoing Staff Reply Brief upon the parties in
3 this proceeding by electronic mail and by sending a true, exact and full copy by regular mail,
4 postage prepaid, or by hand-delivery/shuttle, to the parties accepting paper service.

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