Charles L. Best
Attorney at Law
1631 NE Broadway #538
Portland, OR 97232-1425
Telephone: (503) 287-7160/ Facsimile: (503) 287-7160
E-mail: charlesbestlaw@q.com
Web site: www.charleslbest.com

June 2, 2009

Oregon Public Utility Commission
Attn: Filing Center
550 Capital St, NE #215
Salem, OR 97308-2148

Re: UM 1416; Notice of Last State Filing Adopting New Conditions

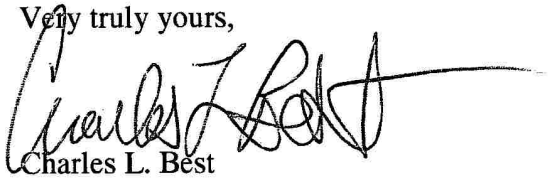
Dear Commission,

Enclosed for filing is a copy of the Final Order of the Washington Utilities and Transportation Commission which is the last state filing regarding the proposed merger of CenturyTel, Inc (CenturyTel) and Embarq Corporation (Embarq) adopting new conditions. This Order is being filed pursuant to Condition 4(r) of Appendix B to Order No. 09-169.

Also enclosed are copies of the final Orders from the Virginia Corporation Commission and the Pennsylvania Public Utility Commission approving the merger. Although CenturyTel and Embarq do not believe any of these Orders contain conditions that identify a harm that this Commission had not previously identified or are more effective at preventing a harm than the conditions imposed in Oregon, we are providing these Orders as a courtesy to the Commission and the other parties.

If you have any questions regarding this filing, please don't hesitate to contact me.

Very truly yours,



Charles L. Best

encls

[Service Date May 28, 2009]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of	)	DOCKET UT-082119
	)	
EMBARQ CORPORATION AND CENTURYTEL, INC.	)	ORDER 05
	)	
	)	FINAL ORDER APPROVING AND
For Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq and Embarq Communications, Inc.	)	ADOPTING SETTLEMENT AGREEMENT; AUTHORIZING TRANSACTION SUBJECT TO CONDITIONS; RESCINDING ORDER 03; APPROVING AND REJECTING SIDE-AGREEMENTS; GRANTING AND DENYING PENDING REQUESTS FOR LEAVE TO WITHDRAW; DISMISSING PARTY
. . . . .	)	

1 *Synopsis: The Commission approves and adopts subject to conditions, a Settlement Agreement filed by the Applicants (Embarq Corporation and CenturyTel, Inc.), Public Counsel and Staff on April 22, 2009, in resolution of the issues in this proceeding. The Commission authorizes the proposed merger between Embarq Corporation and CenturyTel, Inc., subject to the terms of the Settlement Agreement and the additional reporting requirements imposed by this Order.*

SUMMARY

2 **PROCEEDINGS:** On November 24, 2008, Embarq Corporation (Embarq) and CenturyTel, Inc. (CenturyTel) [1] filed a joint application with the Washington Utilities and Transportation Commission (Commission) for expedited approval of an indirect transfer of control of Embarq's regulated Washington State operating subsidiaries to CenturyTel. Following the Applicants' waiver of consideration at a regularly scheduled open meeting, the Commission convened a prehearing conference at Olympia, Washington on January 5, 2009**,** before Administrative Law Judge Dennis J. Moss. The Commission, among other things, granted petitions to intervene by Comcast Phone of Washington, LLC (Comcast), Level 3 Communications, LLC (Level 3), and the International Brotherhood of Electrical Workers Local 89 (IBEW).

[1] In this Order, we refer collectively to Embarq and CenturyTel as "Applicants."

Comcast and Level 3 are CLECs (competitive local exchange carriers) that do business in Washington. IBEW is a labor union. The Commission established a procedural schedule in Order 01.

3 The intervenors, prior to the scheduled date for filing response testimony, each sought leave to withdraw from the proceeding. Although not filed for approval as required under the Commission's procedural rules, it came to light that the Applicants had made certain concessions in individual "side-agreements" in exchange for the intervenors' agreements to withdraw.

4 On April 13, 2009, two days prior to the previously scheduled evidentiary hearing, the parties that remained active in this proceeding—Applicants, Staff and Public Counsel—informally notified the Commission that they had reached a global settlement in principle. The Commission suspended the procedural schedule in response to these parties' request.

5 Applicants, Staff and Public Counsel filed their Settlement Agreement on April 22, 2009. The Commission conducted a hearing on May 19, 2009, before Chairman Jeffrey D. Goltz and Commissioner Patrick Oshie, assisted by Judge Moss.

6 **PARTY REPRESENTATIVES:** Charles L. Best, Attorney at Law, Portland, Oregon, represented CenturyTel. William E. Hendricks III, Embarq in-house counsel, Hood River, Oregon, represented his employer.

7 Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represented Comcast Phone of Washington, LLC, d/b/a Comcast Digital Phone. Mr. Butler also appeared at the settlement hearing for Level 3. Gregory L. Rogers, Senior Corporate Counsel, Broomfield, Colorado, also represented Level 3 Communications, LLC in this proceeding. Scott J. Rubin, attorney, Bloomsburg, Pennsylvania, represented the International Brotherhood of Electrical Workers Local 89.

8 Sarah Shifley, Assistant Attorney General, Seattle, Washington, represented the Public Counsel Section of the Washington Office of Attorney General (Public Counsel). Jonathon Thompson, Assistant Attorney General, Olympia, Washington, represented the Commission's regulatory staff (Commission Staff or Staff).[2]

[2] In formal proceedings, such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding

9 **COMMISSION DETERMINATIONS**: The Commission approves and adopts the Settlement Agreement filed by Applicants, Public Counsel and Staff on April 22, 2009, subject to conditions, in resolution of the issues in this proceeding. The Commission approves the Application of Embarq Corporation and CenturyTel, Inc. for Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq and Embarq Communications, Inc., subject to the conditions set forth in the Settlement agreement and the conditions of this Order.

10 The Commission approves the side-agreement between Applicants and Level 3 and the side-agreement between Applicants and Comcast, subject to the condition the Applicants will make available to any person requesting similar treatment the terms and conditions included in their agreements with Level 3 and Comcast. Pursuant to the terms of their agreements, Level 3 and Comcast are granted leave to withdraw. The Commission rescinds Order 03, which is superseded by the terms of this Order.

11 The Commission rejects the side-agreement between Applicants and IBEW, and denies IBEW's request for leave to withdraw. IBEW's side-agreement demonstrates that the union had no substantial interest in the subject matter of this proceeding, despite its representations to the contrary in its petition to intervene and at prehearing. IBEW's participation did not promote the public interest. The Commission, on its own motion, dismisses IBEW as a party.

MEMORANDUM

I. Background and Procedural History

12 CenturyTel and Embarq, on November 24, 2008, filed jointly with the Commission their application for approval of what they characterize as "an indirect transfer of control of Embarq's regulated Washington State operating subsidiaries to CenturyTel." In more straightforward terms, they sought approval of a merger between the two holding companies, including various operating affiliates and subsidiaries, some of which are subject to the Commission's jurisdiction. CenturyTel will be the surviving holding company following the merger. We will refer to the

---

Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455.*

combined companies as "New CenturyTel."[3] Commission review of the merger is governed under RCW 80.12 and WAC 480-143, the statutes and rules concerning jurisdictional transfers of property.[4]

13 CenturyTel, headquartered in Monroe, Louisiana, currently is a multi-state provider of a wide range of communications services. It is a holding company that conducts its business in 25 states principally through operating subsidiaries. CenturyTel provides service to approximately 2.1 million access lines and 600,000 broadband connections via a network infrastructure that includes more than 37,000 miles of fiber capable of providing high speed internet to over 89 percent of its access lines. The company has approximately 6500 employees and annual sales of approximately $2.6 billion. The CenturyTel operating company subsidiaries regulated by the Commission are CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., and CenturyTel of Cowiche, Inc. These are indirect subsidiaries of CenturyTel operating as ILECs (incumbent local exchange carriers) in Washington. CenturyTel provides service to approximately 149,225 access lines throughout the state of Washington.[5]

14 Embarq Corporation currently is a Delaware corporation headquartered in Overland Park, Kansas. It is a holding Company that conducts its business operations principally through subsidiaries offering a variety of communications services. As of September 30, 2008, Embarq had ILEC operations in 18 states, providing local exchange service to nearly 5.9 million telephone access lines and broadband service to 1.4 million subscribers. Embarq offers a portfolio of services that includes local and long distance home phone service, high-speed internet access, and satellite video from DISH Network. The Embarq Corporation operating company subsidiaries

---

[3] This descriptive reference is used only to promote clarity in this Order. So far as the Commission is aware, there is no corporate entity that actually bears this name.

[4] The Commission has previously discussed in detail the breadth of its jurisdiction in the context of mergers and acquisitions involving both telecommunications and energy companies. *See, e.g., In re Application of US West, Inc., and Qwest Communications International, Inc., for an Order Disclaiming Jurisdiction or in the Alternative Approving the US West, Inc. – Qwest Communications International, Inc., Merger,* Docket No. UT-991358, Ninth Supp. Order (June 19, 2000); *In the Matter of the Application of GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the GTE Corporation–Bell Atlantic Corporation Merger,* Docket No. UT-981367, Fourth Supp. Order (December 16, 1999); *In the Matter of the Application of PacifiCorp and ScottishPower PLC for an Order (1) Disclaiming Jurisdiction or, in the Alternative, Authorizing the Acquisition of Control of PacifiCorp by ScottishPower and (2) Affirming Compliance with RCW 80.08.040 for PacifiCorp's Issuance of Stock in Connection with the Transaction,* Docket No. UE-981627, Second Supp. Order (March 16, 1999).

[5] Exhibit GCB-1T (Bailey) at 4:11-23.

regulated by the Commission are United Telephone of the Northwest (UTNW) and Embarq Communications Inc. (ECI). UTNW is an ILEC serving approximately 73,000 access lines in Washington.[6]

15 On January 2, 2009, shortly before the initial prehearing conference on January 5, 2009, Applicants filed their direct testimony. They contended through the testimony of three witnesses that the Commission should approve the merger without conditions. Applicants asserted that the proposed transaction would not harm the public interest and, in fact, would provide benefits to customers.

16 The Commission set March 4, 2009, as the filing date for response testimony by Staff, Public Counsel, and any intervenor who wished to submit evidence. Before that deadline, each of the three intervenors sought leave to withdraw from the proceeding. As discussed separately below, the intervenors entered into private side-agreements with the Applicants, gaining commitments of various sorts in exchange for their agreements to withdraw. Although two of the intervenors' requests for leave to withdraw remained pending at the time, none of the intervenors filed response testimony on March 4, 2009.[7] Staff and Public Counsel, however, filed testimony. Their witnesses contended that, because there would be some risk of harm if the merger were to take place, the proposed transaction would be consistent with the public interest only if certain conditions were imposed.

17 Staff recommended the following five conditions through Mr. Weinman:

- That certain "ring fence restrictions and reporting requirements" be applied to Embarq and the CenturyTel LECs in Washington. (This essentially means slight modifications to the conditions imposed in connection with the Commission's approval during March 2006 of Sprint's spin-off of Embarq in Docket

[6] Exhibit TRR-1T (Roycroft) at 6:12-26 (quoting from *Application to Transfer of Control of Domestic Authorizations Held by Embarq Corporation to CenturyTel, Inc. Under Section 214 of the Communications Act,* Federal Communications Commission, WC Docket 08-238, November 25, 2008, pp. 2 and 5).

[7] The Commission granted Level 3's request prior to it being disclosed that the company had entered into a side-agreement with the Applicants. Considering the subsequent filing of the side-agreement, we reconsider Order 03 below.

UT-051291, and extension of those requirements to CenturyTel's LEC subsidiaries).[8]

- Embarq and the CenturyTel LECs must file results of operations with proper restating and pro forma adjustments no later than five years from the date of any order approving the transaction.

- Embarq and the CenturyTel LECs must not seek to recover merger costs in rates. If Embarq and the CenturyTel LECs are being allocated merger, transaction or branding costs, those companies must make a quarterly report to Staff of the accounts and amounts of such expenditures recorded in each company.

- Embarq and the CenturyTel LECs must provide additional reporting regarding changes in affiliated interest transactions during the five year period the other conditions will be in effect.

- Embarq and the CenturyTel LECs must offer a customer service guarantee modeled after Embarq's Washington service guarantee and provide additional business office and repair answering system reporting.

18 Similar to Staff, Public Counsel's witness, Dr. Roycroft argued that there would be some harm should the merger be undertaken as proposed, which could be mitigated if certain conditions were imposed. He recommended that the conditions imposed in connection with Sprint's spin-off of Embarq be required here and expanded to encompass the combined company. Dr. Roycroft also contended that there should be conditions to monitor and ensure the sharing of any synergy savings that result from the merger. His analysis suggests $26.4 million in synergies associated with Washington operations through 2012 as a reasonable expectation. He recommended that one-half of these synergy savings be flowed through to ratepayers in the form of rate credits on monthly bills. Dr. Roycroft also proposed a condition to ensure that any merger, branding or transaction costs are not recovered in rates.

19 Dr. Roycroft recommended that the Applicants be required to file a broadband improvement plan for their Washington state service areas. He stated this was

[8] *In* the *Matter of the Request of Sprint Nextel Corporation for an Order Declining to Assert Jurisdiction Over or, in the Alternative, Application of Sprint Nextel Corporation for Approval of the Transfer of Control of United Telephone Company of the Northwest and Sprint Long Distance, Inc. From Sprint Nextel Corporation to LTD Holding Company,* Docket UT-051291, Order 06 Approving and Adopting Settlement Agreement (March 14, 2006).

necessary to improve digital subscriber line availability in Embarq's service areas to achieve a similar level to that currently available in CenturyTel's service territory.[9] In addition, Dr. Roycroft testified the Commission should require stand-alone DSL service.

20 In addition, Dr. Roycroft recommended conditions regarding:

- Call center and billing system changes.
- Network maintenance and repair.
- Service quality reporting.
- LifeLine programs.
- Marketing of basic telephone service.

21 The Applicants filed their rebuttal testimony on March 18, 2009. Conceding none of the points raised by Staff and Public Counsel, the Applicants' witnesses maintained their position that the Commission should approve the proposed transaction without imposing any conditions.

22 On April 13, 2009, two days prior to the previously scheduled evidentiary hearing, the parties that remained active—Applicants, Staff and Public Counsel—informally notified the Commission that they had reached a global settlement in principle. The Commission suspended the procedural schedule, as requested by these parties. The settling parties filed their Settlement Agreement and Narrative Supporting Settlement Agreement on April 22, 2009. The Settlement Agreement is attached to this Order as Appendix 1 and is incorporated into and made part of this Order by this reference.

23 The Commission conducted its settlement hearing on May 19, 2009. The settling parties stipulated to the admission of all prefiled testimony and exhibits, and to various bench exhibits and exhibits offered in support of the Settlement Agreement. The settling parties made available a panel of witnesses including Mr. Clay Bailey and Ms. Barbara Young for Applicants, Ms. Stephanie Johnson for Public Counsel

[9] Messrs. Bailey and Gast testified at hearing that DSL service is currently available to 89 percent of CenturyTel customers and 78 percent of Embarq customers.

and Mr. Bill Weinman for Staff. Other witnesses who prefiled testimony were available in the hearing room or by telephone to respond to questions from the Bench.

24 The Commission's authority and responsibility regarding transfers of ownership and control of public service companies are found in RCW 80.12 and WAC 480-143.[10] These statutes require Commission approval whenever a public service company agrees to a change-of-control transaction. The standard governing our review is:

> If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not consistent with the public interest, it shall deny the application.

25 *WAC 480-143-170.* Applying this legal standard, we turn now to our consideration of the Settlement Agreement and the evidence presented.

II. Discussion and Decisions

A. Transfer of Property

1. Settlement Agreement

26 The Settlement Agreement includes conditions related to the following issue areas raised by Public Counsel and Staff in their respective response testimonies:

- Continuation of conditions approved in the Commission's order authorizing the separation of Embarq from Sprint (Separation Order) in 2006.[11]
- Financial fitness of the merged company.

---

[10] No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do. RCW 80.12.020. Any such sale, lease, assignment, or other disposition, merger or consolidation made without authority of the commission shall be void. RCW 80.12.030.

[11] *See, supra,* fn. 8.

- Service guarantees.
- Merger synergies and future treatment of synergy benefits.
- Recovery of merger, branding and transaction costs.
- Customer notice.
- Transfer of long distance customers.
- Broadband service improvement.
- Affiliated interest transactions.
- One-time Lifeline notification; and,
- Milestone reporting.

Section E of the Settlement Agreement sets forth the specific terms, which we summarize below.[12]

27 As previously discussed, Staff and Public Counsel advocated that the conditions imposed via the Separation Order be continued as to United as an operating division within the combined companies and extended to CenturyTel. The parties now agree that these conditions will continue to apply to United subject to their expiration under the terms of the Commission-approved settlement agreement in Docket UT-051291, and subject to certain modifications related to service quality and financial protections.

28 With regard to the Separation Order's service guarantee, there is no change until CenturyTel and Embarq combine their billing and customer care systems. Once these billing and customer care systems are integrated, the provisions of the Settlement Agreement will take effect and supersede the Separation Order's service guarantee. The new service guarantee will apply to all New CenturyTel ILECs.

29 CenturyTel and Embarq agree that for a period of twelve (12) months following the projected date for conversion to the CenturyTel billing and customer care system, the New CenturyTel ILECs will provide bill credits in their service territories based on

[12] To the extent of any inconsistency between the descriptions here and the settlement terms, the language of the Settlement Agreement controls.

the same structure as those currently provided by UTNW under the terms of the settlement agreement approved in the Separation Order. Automatic credits will be provided to customers for each repair and/or installation commitment missed due to reasons within the New CenturyTel ILECs' control. The credit will be $15 for residential customers and $25 for basic business customers. The New CenturyTel ILECs must have in effect tariffs providing for these credits by the beginning of the conversion to the CenturyTel billing and customer care system.

30 The Separation Order's finance conditions will continue to apply to UTNW and ECI, except that the financial evaluations and restrictions included in the Separation Order's provisions 6ai, 6aii, 6c and 6f will be based on the post-merger combined companies. All of the finance conditions from the Separation Order will apply to UTNW and ECI until their expiration on May 17, 2010. At that time, UTNW and ECI will become subject to the finance conditions contained in the Settlement Agreement. CenturyTel ILECs will be subject to the finance conditions contained in the Settlement Agreement at the close of the merger. The finance conditions for all New CenturyTel ILECs will expire three years after the merger closes.

31 The Settlement Agreement further provides that for three years after the close of the merger the New CenturyTel ILECs will limit annual payments of dividends on common equity distributed to New CenturyTel, or any other subsidiary or affiliate of New CenturyTel, to no more than 50 percent of net income in the prior fiscal year at any time when the average market value of CenturyTel's common equity is less than 50 percent of the book value of CenturyTel's net debt.[13] The New CenturyTel ILECs will limit dividend payments on common equity in any quarter, if dividends are distributed quarterly, to not more than one-fourth of the annual limitation amount.

32 The Settlement Agreement also provides that the Merged Company will not pledge the assets of the New CenturyTel ILECs to secure borrowing undertaken by it, or any other subsidiary, without Commission approval.

33 Finally, in terms of financial commitments, the Settlement Agreement provides that for three years after the close of the merger, the New CenturyTel ILECs will not

[13] The average market value of CenturyTel's common equity will be calculated by multiplying the average stock price by the average number of fully-diluted common stock shares outstanding during the preceding 120 calendar day period. As used in this section, "net debt" means total long-term debt less cash. This test will be calculated prior to the determination of each declaration of dividends by the Merged Company ILECs, whether quarterly, special, or other.

advocate in any general rate case for a higher cost of capital as compared to what its cost of capital would have been absent the merger.

34 Sections 4 and 12 of the Settlement Agreement require the New CenturyTel ILECs to file a petition for an alternative form of regulation ("AFOR") under RCW 80.36.135, or subsequent AFOR law, within five years after the close of the merger. Section 4 also provides that the New CenturyTel ILECs will not seek to increase stand alone residential local exchange service rates for one year from the merger close date except for occurrence of certain "exogenous events."[14] Section 12 of the Settlement Agreement preserves the parties' ability to address any synergy benefits resulting from the merger in any future revenue requirement review or general rate case proceeding before the Commission. Further, CenturyTel and Embarq have agreed to not oppose any effort by Staff and Public Counsel to initiate and conduct an earnings review "consistent with the then prevailing legal requirements applicable to AFORs."[15]

35 Section 5 of the Settlement Agreement provides that CenturyTel and Embarq will not seek to recover any of the merger-related branding and transaction costs in intrastate regulated rates established for the New CenturyTel ILECs. The Applicants have also agreed to account separately for such costs in New CenturyTel's records.

36 Section 6 of the Settlement Agreement provides that CenturyTel and Embarq will send notices to customers of any names changes relevant to CenturyTel or Embarq. The Applicants also agree to work with Staff and Public Counsel on the specific language to be contained in any required notice.

37 In Section 7, Applicants agree to give 30-day advance notice to customers of any change in their long distance carrier as a consequence of the merger. Further, Applicants agree to waive any primary interexchange carrier (PIC) charge for ninety

---

[14] "Exogenous Events" are defined as any orders, rules, or other actions, individually or in combination, by a governmental body that have an annual impact of $1 million or more on either (a) CenturyTel of Washington, Inc., and CenturyTel of Inter Island, Inc., on a combined basis, (b) CenturyTel of Cowiche, Inc., or (c) United. An operating company (or in the case of CenturyTel of Washington, Inc., and CenturyTel of Inter Island, Inc., which utilize a combined revenue requirement) would be entitled to seek recovery of the financial impact of such Exogenous Events during the Stay Out Period in a general rate proceeding as defined by WAC 480-07-505 or in an AFOR. All other rates may be adjusted at any time pursuant to existing statutes and rules or in conjunction with an earnings review.

[15] Settlement Agreement, Section 12.

days if a customer decides to change to a different, unaffiliated, long distance carrier as a result of a merger-related conversion.

38 Section 8 of the Settlement Agreement requires that after the merger is completed, UTNW will expand broadband service to an additional 2,200 residential lines over a three year period and provide an annual report to Staff and Public Counsel showing (1) the number of lines enabled through this commitment, (2) the wire centers of the newly enabled lines, (3) the data speed for each upgraded wire center, and (4) the number of lines in each upgraded wire capable of various download speeds.

39 Section 9 of the Settlement Agreement "requires" the New CenturyTel ILECs to comply with all applicable statutes and rules relating to affiliated interest transactions, including timely filing of any applications or reports.[16]

40 Section 10 of the Settlement Agreement requires the New CenturyTel ILECs to notify "Lifeline" and tribal agencies of a name change if or when it occurs. Should a name change occur, the New CenturyTel ILECs are required to update and communicate all Lifeline materials for the new name including, but not limited to, agency contact letters, social service agencies, an "FYI Bulletin," bill messages, and newspaper advertising.

41 Section 11 of the Settlement Agreement requires the Joint Applicants to provide Staff and Public Counsel with advance written notice of any major system conversions that may have an effect on Washington customers.[17]

2. Commission Determination

42 CenturyTel and Embarq filed pleadings and testimony at the outset of this proceeding contending the Commission should approve the proposed transaction without conditions, arguing that it causes no harm to the public interest and, in fact, benefits customers. Public Counsel and Staff took a contrary view, finding the potential for harm to the public interest unless certain conditions were imposed. As discussed above, the conditions proposed included continuation for Embarq's operating

[16] We note that the New CenturyTel ILECs are required to comply with *all* applicable provisions of law regardless of anything in the Settlement Agreement, so this portion of the Settlement Agreement is simply surplusage, and we assume there was no "quid pro quo" for this provision.
[17] "Major systems" include business office and trouble reporting call centers, maintenance systems that monitor central office and transport equipment, engineering systems, outside plant record systems, and billing systems.

subsidiaries UTNW and ECI, and extension to the CenturyTel's ILECs, of certain conditions from the Separation Order approving the Embarq spin-off from Sprint in Docket UT-051291,[18] several conditions related to the continued financial health of the New CenturyTel ILECs, service quality reporting and guarantees, prohibitions on the ability to recover merger transaction or branding costs from ratepayers, affiliated interest transaction reporting, a requirement to file an earnings review, and broadband improvement obligations.

43 Although the Applicants did not concede on rebuttal the necessity for conditions related to any of these matters, they nevertheless agreed in settlement negotiations to a set of conditions that address the concerns raised by Public Counsel and Staff. Staff and Public Counsel believe that the conditions CenturyTel and Embarq have accepted ensure that the proposed merger results in no harm to the Washington customers of the CenturyTel and Embarq local exchange companies, and that the Settlement Agreement is therefore consistent with the public interest.[19] We note that the Commission is concerned with the broader public interest, not simply the interests of the customers. The question of potential harm to customers, however, is central to our consideration of the proposed transaction.

44 While we agree generally with the parties that the Settlement Agreement includes conditions that help protect the public interest, they are not adequate for us to find that the proposed transaction is consistent with the public interest and therefore should be approved. Three aspects of the Settlement Agreement cause us concern: the conditions related to synergies, dividends and the expansion of DSL service. These warrant more detailed discussion.

Synergies

45 Conditions 4 and 12, labeled "Merger Synergies" and "Synergy Benefits," require the merged company ILECs to file a petition for an alternative form of regulation ("AFOR") under RCW 80.36.135, or subsequent AFOR law, within five years after the close of the merger. All of the parties appear to support the idea of transitioning the merged companies to an AFOR, arguing that it would provide New Century Tel

[18] *See supra*, fn. 8.
[19] Exhibit JT-2T ¶¶ 10 and 19.

with more flexibility to compete effectively in the future with cable and wireless companies that offer similar or identical services.[20]

46 Apparently recognizing up to point the relationship between consideration of an AFOR and the determination of fair, just and reasonable rates for regulated services,[21] these Settlement Agreement conditions preserve the parties' ability to address any synergy benefits resulting from the merger in a future earnings (*i.e.*, revenue requirement) review or general rate case proceeding before the Commission. CenturyTel and Embarq have agreed to not oppose any effort by Staff and Public Counsel to initiate and conduct an earnings review "consistent with the then prevailing legal requirements applicable to AFORs."[22]

47 We find these provisions in the Settlement Agreement to be less definitive than is preferable.

48 According to testimony at our hearing, the parties contemplate this AFOR filing will use the Qwest AFOR, approved by the Commission in 2007,[23] as a starting point or even a model. That may be all well and good, but the parties should not consider the Commission's decision in that case to not undertake a full-blown earnings review as suggestive of what will be required when the New CenturyTel files for an AFOR. The decision in the Qwest AFOR proceeding was based on particular facts specific to Qwest. Here, the Commission is faced with consideration of an AFOR for what is an entirely new company from a financial perspective; a new company that results from the combination of two companies, neither of which have been before the Commission for a full earnings review in more than 20 years. Moreover, the merger partners estimate that approximately $400 million in annual merger synergy savings will be realized within a few years following the merger. This means, first, that we

---

[20] An AFOR, among other things, can give a rate-regulated telecommunications company greater control over its rates for most services, while maintaining tariff rates for basic retail telephone service to residential and business customers.

[21] RCW 80.36.135(2) provides in part:

> The commission shall consider, in determining the appropriateness of any proposed alternative form of regulation, whether it will: . . . (e) provide for rates and charges that are fair, just, reasonable, sufficient, and not unduly discriminatory or preferential.

[22] Settlement Agreement, Section 12.

[23] *In the Matter of the Petition of Qwest Corporation for an Alternative Form of Regulation Pursuant to RCW 80.36.135,* Order 06 Accepting Settlement and Approving Alternative Form of Regulation, on Conditions, Docket UT-061625 (July 24, 2007).

do not have a very complete or thoroughgoing understanding of the current financial situation of these companies and, second, that we face a financial picture for the combined companies that is dynamic and susceptible to a wide range of changes in the near term. These circumstances compel an earnings review consistent with that required in a general rate case. The "public interest" requires the Commission be vigilant in review of the finances of the New CenturyTel companies before they are relieved on any substantial rate oversight.

49 We are concerned in this context that conditions 4 and 12 of the Settlement Agreement are not supported by any requirements for recordkeeping and reporting such as are necessary to ensure the Commission will have the information it needs to carry out its regulatory responsibilities going forward. The pace at which merger synergy savings will be realized is uncertain. If they are quickly realized, and New CenturyTel has not filed a general rate case or petitioned for an AFOR it will be important for Staff to consider filing a complaint to initiate an earnings review sooner than five years from now. Regardless of when merger synergy savings are realized, when New CenturyTel does file an AFOR, as it is required to do within the next five years, it will be important for the Commission to have a complete and up-to-date understanding of relevant financial measures and accounting entries.

50 In light of these concerns, we will require the combined companies to file a report on the third anniversary of the closing date that includes a normalized, *pro forma* results of operations for regulated services in Washington that captures merger synergies realized through the relevant periods (test year and pro forma year). In addition, having considered the Staff and Public Counsel joint response to Bench Request No. 3, and the Applicants' response to Staff and Public Counsel, we will require New CenturyTel to track and report annually to the Commission the costs and synergy savings of the merger on both a company-wide basis and a Washington basis. These reports should be in the form and include the data identified in the Staff and Public Counsel response to our bench request, which we attach to this Order as Appendix 4 and incorporate into this Order by this reference.[24] We will make these reports due each year for five years, 120 days after the anniversary date of the merger closing.

---

[24] Appendix 4 is the redacted version of the bench request response. We further adopt by reference, without publication here, the highly confidential attachment to Staff and Public Counsel's joint response to Bench Request No. 3.

The Commission can revisit this requirement at the time of the New CenturyTel AFOR proceeding.[25]

Dividends

51 The second area that concerns us relates to condition 2 of the Settlement Agreement, which imposes dividend restrictions under certain circumstances. Our concern here, again, is again the absence of any reporting requirement.[26] There is no readily apparent means by which Staff will be able to easily monitor whether the conditions that trigger dividend restrictions have occurred or, if so, whether dividends have been limited as required. Reliance on publicly available information and the company's annual earnings report, such as was suggested at hearing to be adequate, does not provide in our view a sufficiently timely, rigorous and focused presentation of information to the Commission. Therefore, we will impose by condition a reporting requirement in connection with each dividend declared and paid during the three year period following the effective date of the merger. Specifically, we will require New CenturyTel to submit a report to Commission Staff at least five days prior to the payment of each dividend by any CenturyTel ILEC that calculates the average market value of CenturyTel's common equity as a percent of the book value of the company's net debt in the manner contemplated in Section 2.a.i of the Settlement Agreement regardless of whether the dividend restriction set forth in Section 2.a is triggered. The report must include supporting data sufficient to permit Staff to confirm the calculation. In addition, we will condition our approval of the merger by requiring the combined companies to inform Staff within three business days if the conditions triggering restrictions materialize. Any failure to do so would then, of course, subject the combined companies to penalties.

Expanded DSL Availability

52 Our final area of concern relates to condition 8, which provides for expansion of DSL availability to 2200 additional customers in Embarq's service territory. Mr. Bailey and Ms. Young agreed at hearing that the definition of synergy is one that involves

---

[25] These additional conditions are well within the authority of the Commission to impose as reasonable conditions to the approval of this transaction, as they are necessary to permit a finding that the merger is consistent with the public interest. However, even if that were not the case, imposition of these reporting requirements is authorized by RCW 80.04.090.

[26] Mr. Bailey testified at hearing that the company would not object to a reporting requirement that would permit the Commission to monitor compliance with this commitment in the Settlement Agreement.

mutual benefits, including benefits to customers. Considering the Applicants' expectation of $400 million in annual merger synergy savings, expansion of DSL availability to 2200 customers seems a modest benefit indeed. Yet, in the context of the overall Settlement Agreement, it represents the only concrete benefit to customers that will result from this transaction.[27] This strengthens our resolve to monitor the combined companies' realization of synergy savings over the coming years, so that such savings can be fully considered in the context of the reporting requirement we impose above the planned AFOR filing and any earnings review. We will not impose any specific condition in connection with this provision of the Settlement Agreement, but we do expect to see in coming years concrete examples of merger synergy savings working to the benefit of Washington customers. The "public interest" would not be served if such synergy savings do not result in tangible benefits, financial and otherwise, to the customers.

53 Essentially, the Settlement Agreement would allow the merger, with the downside risks described in the testimony of Public Counsel witness Roycroft and the Staff witness Weinman, and offset those harms and potential harms with some modest commitments. Granted, the downside risks may be minor, but the proposed offsetting commitments are minimal. They include a commitment by the companies to provide non-regulated DSL service to 2200 customers and an acknowledgement that sometime in the future there would be an opportunity for the ratepayers to realize some of the $400 million in synergy savings to by an earnings review. We think that the "public interest" demands somewhat more. Accordingly, we will impose the above-described reporting requirements in order to ensure that Staff and Public Counsel have the requisite information to determine whether and when such synergy savings may be available to the ratepayers.

54 The remaining conditions in the Settlement Agreement are straightforward and are sufficient to address the concerns raised by Public Counsel and Staff through their respective response testimonies. These conditions, considered in combination with those we have discussed above at greater length and coupled with the reporting requirements we establish as conditions to our approval of the pending application,

---

[27] We emphasize in this connection that while we encourage the combined companies to take full advantage of funds that may become available under the American Recovery and Reinvestment Act of 2009 (ARRA) to support broadband rollout in new areas, we expect the combined companies to finance the modest expansion of DSL availability provided under the terms of the Settlement Agreement without using such funds and devote any available ARRA funds to greater broadband expansion.

are necessary to support our finding that the proposed transaction is consistent with the public interest. It should, therefore, be approved.

III. Requests for Leave To Withdraw

A. Side Agreements

1. Background

55 In addition to the principal matter set for hearing in this docket—whether the Commission should approve the Applicants' merger—there are pending two requests from intervenors for leave to withdraw; one from Comcast Phone of Washington, LLC (Comcast) and one from the International Brotherhood of Electrical Workers Local 89 (IBEW). Previously, the Commission granted in Order 03 a similar request from the only other intervenor in this proceeding, Level 3 Communications (Level 3). The Commission now has reason to revisit Order 03 at the same time it considers the other intervenors' requests for leave to withdraw.

56 Subsequent to the Commission's entry of Order 03, granting Level 3's request for leave to withdraw, Staff brought to the Commission's attention in its response to Comcast's similar request the fact that Level 3 had entered into an undisclosed, written side-agreement with the Applicants. Staff provided the Commission a "confidential" copy of the side-agreement that it had obtained during discovery under the protective order in this proceeding. Upon examination, the Commission learned that the Applicants made certain concessions concerning interconnection agreements as *quid pro quo* for Level 3's withdrawal.

57 Staff noted in response to Comcast's request for leave to withdraw that the company referred to "an agreement" it had reached with the applicants. Staff requested that the Commission issue a bench request to Comcast, requiring the company to provide a copy of the agreement. The Commission issued Bench Request No. 1 on March 3, 2009, requiring applicants to provide any such agreements with any of the intervenors. In the meantime, on February 27, 2009, Comcast supplemented its request for leave to withdraw, providing a copy of its settlement agreement with applicants under a claim of confidentiality. Upon examination, the Commission learned that the Applicants again made certain concessions concerning interconnection agreements as *quid pro quo* for Comcast's agreement to withdraw.

58 Applicants provided in response to Bench Request No. 1 copies of side-agreements the Applicants entered into with Level 3, Comcast and IBEW[28] granting various concessions in exchange for the agreement by each of these intervenors to withdraw from this proceeding. All three side-agreements were designated as "confidential" under the protective order in this proceeding. Applicants declined to respond to the inquiry in Bench Request No. 1 asking whether the provisions of these agreements "provide guarantees or assurances, confer rights, or impose obligations that will not be generally available or applicable to competitive local exchange companies or customers." With respect to this question, applicants stated they had "not yet determined" the answer. Applicants later supplemented their response, stating that they do intend the provisions of their agreements with Level 3 and Comcast to be generally available to others. Applicants also supplemented their response to Bench Request No. 1 by re-filing their agreements with Level 3 and Comcast, no longer designating them as confidential.[29]

59 In its response to Comcast's request for leave to withdraw from this proceeding, Staff discussed Commission precedent on the subject of side-agreements between intervenors and applicants for approval of a merger. Staff quoted from the Commission's Eighth Supplemental Order in Docket UT-991358, the Qwest/US West merger proceeding, as follows:

> Corporations are expected to be good citizens as well as good companies. When corporations elect to participate in proceedings such as this one, we expect them to fulfill their good citizenship obligation by bringing forth evidence and making sound argument that will assist us to make a reasoned decision in the public interest. As a corollary, the Intervenors are encouraged to engage with other parties in settlement discussions that may produce negotiated results to be presented to the

[28] Applicant's side-agreement with IBEW involves the companies making labor-related concessions to IBEW in exchange for IBEW's agreement to withdraw. IBEW acknowledged at prehearing its understanding that labor relations issues have no place in this proceeding. IBEW committed to limit its participation in this proceeding to issues appropriate to it and within the Commission's jurisdiction to determine.

[29] The Commission, on April 23, 2009, issued its Notice of Commission Challenge to Assertions of Confidentiality and Determination that Confidential Designations are not Warranted and Notice of Intent To Make Documents Public (effective May 4, 2009). This notice was given with respect to the Applicants' side-agreement with IBEW. Neither the Applicants nor IBEW responded to the notice within the ten-day period it allowed for response. Accordingly, the confidential designation of the IBEW side-agreement with the Applicants was removed and the document became publicly available as of May 4, 2009.

> Commission as a means to resolve *in the public interest the previously contested issues in the case.*
>
> Here, the Intervenors purported to enter the proceedings to further public interest considerations, but now they seek to withdraw from the proceedings based on their private interests. They have abdicated their broader responsibility to be good citizens in favor of pursuing their own narrower commercial interests. This threatens to undermine the integrity and credibility of the Commission's adjudicatory process. With respect to the arrangements between Joint Applicants and AT&T, between U S WEST and MetroNet, and between U S WEST and McLeodUSA, these Intervenors to have asked our leave to intervene in the public interest and then agreed privately to withdraw under a veil of confidentiality when offered a concession in what they characterize as a private dispute that is wholly unrelated to the matters before us. Although Level 3 Communications ultimately waived its initial claim of confidentiality, we regard its agreement to withdraw in exchange for a cash payment in the same light.
>
> The side-agreements between U S WEST and the remaining Intervenors who seek to withdraw pursuant to their agreements (*i.e.*, Rhythms Links, Covad Communications, NEXTLINK, and SBC), do touch on some of the issues raised in the merger proceeding. But these private agreements are not intended to, and do not, assist the Commission in its duty to ensure the merger between U S WEST and Qwest is consistent with the public interest. Instead, these agreements promote the narrower commercial ends of those who entered into them. Indeed, the agreements arguably raise the question whether they are contrary to the public interest, to the extent an individual corporate participant in the telecommunications sector gains advantages for itself relative to other corporate participants in the same industry.[30]

60 Staff also pointed out that the Commission later initiated a penalty proceeding against Qwest and numerous CLECs for failing to file certain agreements with the Commission pursuant to 47 U.S.C. § 252, including agreements that Qwest had made with CLECs in return for those companies' agreement to drop their opposition in the Commission proceeding to review the proposed merger between Qwest and US

[30] In Re Application of US WEST, Inc. and Qwest Communications International, Inc., Docket UT-991358, Eighth Supp. Order ¶¶57-66 (June 19, 2000).

WEST. The companies involved agreed to pay penalties totaling millions of dollars to resolve that complaint.[31]

61 The Commission's concerns with "unfiled" or "private" side-agreements entered into by applicants in exchange for the agreement of the intervenors to withdraw from a proceeding are as vital and serious a matter today as in 2000 and 2005. This practice by parties is particularly troubling when, as here, the intervenors entering into the agreements do not disclose their agreements, provide them as part of their requests for leave to withdraw, or otherwise file them requesting Commission review and approval. Our procedural rules are perfectly clear that any such agreements must be filed for review. WAC 480-07-700 states in relevant part:

> The commission supports parties' informal efforts to resolve disputes without the need for contested hearings when doing so is lawful and consistent with the public interest, and subject to approval by commission order. . . .
>
> The commission cannot delegate to parties the power to make final decisions in any adjudicative proceeding. The commission retains and will exercise its authority in every adjudicative proceeding to consider any proposed settlement or agreement for approval.

62 While the Commission understands a party's interest in seeking to address and resolve issues relevant to a matter pending before us in a particular proceeding, we expect that any resolution of such issues will be done in a manner that is transparent and fully consistent with our obligation to protect the public interest. Agreements affecting the rights of parties and, possibly, a broader set of interests that are not filed with a request for Commission review and approval in accordance with the Commission's procedural rules and, in some cases, state and federal statutes, run afoul of this fundamental Commission responsibility.

63 Accordingly, in light of the seriousness of this matter, the Commission has kept the pending requests of Comcast and IBEW for leave to withdraw under advisement and also reconsiders its prior order giving leave to Level 3 to withdraw. Because they present somewhat different issues from a substantive perspective, we provide further background below as to the IBEW side agreement and, separately, the Level 3 and Comcast side-agreements.

---

[31] *See* Order No. 21, Order Adopting and Approving Settlement Agreement; Closing Docket, Docket UT-033011 (Feb. 28, 2005).

2. IBEW Side-Agreement

64 The IBEW side-agreement is in the form of a Letter Agreement provided to the IBEW by CenturyTel and Embarq on February 25, 2009. The letter opens with the following (emphasis added):

> We have appreciated the engagement of your two labor organizations ("CWA" and "IBEW") ***in our discussions of the proposed merger*** between CenturyTel, Inc. of Monroe, LA, and Embarq Corporation of Overland Park, KS. This letter is written to *set* ***forth the agreements we have reached with respect to that merger*** and the relationship among the CWA, IBEW, and "NewCo," which will refer to CenturyTel, the surviving parent, and its consolidated subsidiaries, including Embarq Corporation.

65 The agreements reached "with respect to [the] merger" are set forth in detail in the letter. The Applicants make a series of labor relations concessions to the unions. In exchange the unions agree to give up their opposition to the merger in all state and federal regulatory proceedings, to withdraw from such proceedings and to "acknowledge that the merger meets all applicable approval standards without conditions."

66 On April 13, 2009, the IBEW filed with the Commission a letter responding to the Commission's Notice Concerning Agenda for Hearing, which informed the parties that the side-agreements and pending requests for leave to withdraw would be considered during the hearing. IBEW's response is both procedurally inappropriate and substantively disingenuous, claiming that the union adhered to its commitment to not use it participation in this proceeding in any fashion related to matters outside the scope of the proceeding and the Commission's jurisdiction when, in fact, it did not adhere to that commitment. IBEW's response states, in part:

> Local 89 also takes issue with the implication in the Notice that Local 89 had an obligation to provide a copy of the agreement to the Commission as an attachment to its request to withdraw from this proceeding. As discussed above, the agreement relates primarily to labor relations and collective bargaining issues. Local 89 was cautioned at the outset of this case, and readily agreed, that it should not raise any matters related to collective bargaining or labor relations in this proceeding. Local 89 was not trying to hide something from the

> Commission; it was simply complying with the procedures set forth at the beginning of this case to keep labor relations matters completely separate from this proceeding.

67 This is simply sophistry. On the one hand, considering the language of its agreement with the Applicants and IBEW's argument quoted above, the union admits that "the agreements … reached with respect to [the] merger" "relate primarily to labor relations and collective bargaining issues." On the other hand, having acknowledged its early agreement to "not raise any matters related to collective bargaining or labor relations in this proceeding," IBEW asserts that by withholding the side-agreement from Commission scrutiny "it was simply complying with the procedures set forth at the beginning of this case to keep labor relations matters completely separate from this proceeding." The paucity of reason inherent in these statements, considered together and in relation to the side-agreement that describes itself as having been reached in the context of IBEW's participation in this proceeding and "reached with respect to [the] merger" is baffling.

68 We have two principal concerns about the IBEW side-agreement. One, in common with our concerns about the other side-agreements discussed below, is that by entering into such an agreement and not insisting that it be filed for Commission review, the Applicants exhibit either an insufficient knowledge of our statutory mission and our procedural rules or their willingness to skirt around regulatory requirements. Either way, this reduces our confidence in the Applicants' managerial fitness, one of the key considerations we must review in the context of a proposed merger. We expect, in the wake of this proceeding, that New CenturyTel will give greater attention to building and maintaining a strong working relationship with the Commission, and to internal compliance monitoring insofar as satisfaction of the requirements of our statutes and rules is concerned. We expect no procedural gaffes in the forthcoming AFOR application and any earnings review proceeding associated with the AFOR or prior to it.

69 Our second principal concern relates specifically to IBEW, and its counsel. Despite IBEW's representations at prehearing that it would keep labor relations out of this case, and its unreasoned argument later that it did so, the language of the side-agreement and IBEW's own arguments show beyond peradventure that the union used its status as a party in this proceeding principally, if not exclusively, to extract labor concessions from the Applicants. While union-management negotiations are important, and we would not want to interfere with them in any way, their insertion in the regulatory process can undermine the integrity of our processes. The Commission

is charged in proceedings such as this one with furthering the public interest. If parties dwell on issues outside the Commission's regulatory purview, then it is possible that the timeliness of our proceedings, and their substance, may be impacted to the detriment of the greater public interest we must promote. It also undermines the credibility of counsel who made representations to the tribunal that were disingenuous at best The principles of the Rules of Professional Conduct, and common professional courtesy, require attorneys appearing before us to be honest and forthright in their representations and actions. The public interest deserves no less.

3. Level 3 and Comcast Side-Agreements

70 The Level 3 side-agreement, memorialized by a letter from Embarq to Level 3 dated January 13, 2009, gives us less concern substantively than the IBEW or the Comcast side-agreements.[32] It basically memorializes their understanding that existing interconnection agreements between Embarq and Level 3 will be left in place for up to 12 months and that both parties will "use their best efforts to negotiate new interconnection agreements" within that period of time. In exchange, Level 3 agrees to withdraw from this docket.

71 As previously discussed, we are concerned about this side-agreement from a process perspective. It undermines the integrity of the Commission's adjudicatory process for parties to intervene, ostensibly in the public interest, principally, or only, to gain leverage to extract private concessions. Failure by Level 3 to disclose the side-agreement at the time of its request for leave to withdraw from this proceeding is equally troubling. The Commission's procedural rules require that all agreements parties reach to resolve their interests in contested proceedings be filed with supporting documents, be reviewed by the Commission for consistency with the public interest, and be the subject of a Commission order accepting them, accepting them subject to conditions, or rejecting them.[33] Failure to file the side-agreement violates these rules. Violations of Commission rules are a serious matter that can lead to penalties of up to $1,000 per day for each day of a continuing violation.

72 On a substantive level, our main concern is that to the extent this side-agreement confers a benefit with respect to Level 3's interconnection agreements with Embarq,

---

[32] The Level 3 side-agreement is attached to this Order as Appendix 2 and is incorporated into the body of this order by this reference.
[33] WAC 480-07-700, *et seq.*

any such benefit(s) must also be made available to other CLECs. This issue now has been addressed by the Applicants' commitment to make the terms of this side-agreement generally available in the industry. We will make this a condition of this Order.

73 Turning to the Applicant's side-agreement with Comcast, we have the same process concerns as with the other two that need not be reiterated. We have stronger concerns of a substantive nature with respect to this side-agreement.

74 The side-agreement with Comcast is in the form of a formal Settlement Agreement entered into on February 13, 2009.[34] It provides that:

> 1) Joint applicants will enter into or continue negotiations to reach an interconnection agreement with Comcast affiliates and will not object to the Comcast affiliates utilizing the interconnection to support VOIP services.
>
> 2) Joint applicants and Comcast will apply the change of law provisions to any VOIP changes.
>
> 3) Joint applicants will not oppose any Comcast affiliate interconnection, application for certificate, or expansion of certificate on the grounds that such will be used to provide VOIP services.
>
> 4) Embarq will not limit the number of requests (including local service requests, directory services requests, and requests to port numbers) it will accept from Comcast during a given time period.

In exchange for these commitments by the Applicants, Comcast agrees not to advocate against the merger.

75 Comcast currently is a party in a pending docket before this Commission in which an ILEC is objecting to interconnecting with Comcast because the requested interconnection will be used to support VOIP services.[35] While Applicants and their

---

[34] The Comcast side-agreement is attached to this Order as Appendix 3 and is incorporated into the body of this order by this reference.

[35] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Comcast Phone of Washington, LLC and Lewis River Telephone Company, d/b/a TDS Telecom, Pursuant to 47 U.S.C. Section 252(b)*, Answer of Lewis River Telephone Company d/b/a TDS Telecom to Comcast Phone of Washington, LLC Petition for Arbitration, Docket UT-083055 (December 1, 2008).

affiliates may not have raised such arguments in interconnection negotiations, the fact that they here waive any such objection as part of the consideration in their side-agreement with Comcast means that Comcast could gain an advantage relative to others telecommunications providers who may enter into such negotiations with Applicants. In addition, the Applicants' agreement to not limit requests to port numbers and other types of requests confers an advantage on Comcast relative to other CLECs that do not have any such assurance.

76 As in the case of the Level 3 side-agreement with Applicants, this issue now has been addressed by the Applicants' commitment to make the terms of the Comcast side-agreement generally available in the industry. Again, we will make this a condition of our Order.

B. Commission Determinations

77 Considering that its subject matter is entirely inappropriate in the context of this proceeding and considering the circumstances of its negotiation, we expressly reject the side-agreement between Applicants and IBEW. We deny IBEW's request for leave to withdraw voluntarily from this proceeding. However, we dismiss IBEW as a party on our own motion, finding on review that it misrepresented its interest in this proceeding in its petition to intervene, that it in fact had no substantial interest in this proceeding, and that its participation is not in the public interest.

78 Because it was entered without the Commission having knowledge of the written side-agreement between Level 3 and the Applicants, we rescind our Order 03, which granted Level 3's request for leave to withdraw. Order 03 is, in any event, superseded by this Order.

79 We now have had the opportunity to review the side-agreements between Level 3 and the Applicants and between Comcast and the Applicants. They arguably confer benefits upon these CLECs with respect to their interconnection agreements, or interconnection agreement negotiations. The Applicants now state that the terms of these agreements will be made generally available in the industry, specifically to other CLECs. We find under these circumstances that it is in the public interest to approve these agreements as resolving the issues about which Level 3 and Comcast were concerned in connection with this merger. Our approval is subject to the condition that the terms of the agreements will be made available to other CLECs on a nondiscriminatory basis, if requested.

FINDINGS OF FACT

80 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

81 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

82 (2) CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., and CenturyTel of Cowiche, Inc., are ILECs, "public service companies" and telecommunications companies as those terms are defined in RCW 80.04.010, and as those terms are otherwise used in Title 80 RCW. These companies conduct business in Washington that is subject to the Commission's jurisdiction. These companies are wholly owned subsidiaries of CenturyTel, Inc.

83 (3) United Telephone of the Northwest (UTNW), an ILEC, and Embarq Communications Inc. (ECI), a provider of intrastate interexchange (*i.e.*, long distance) services, are "public service companies" and telecommunications companies as those terms are defined in RCW 80.04.010, and as those terms are otherwise used in Title 80 RCW. These companies conduct business in Washington that is subject to the Commission's jurisdiction. These companies are wholly owned subsidiaries of Embarq Corporation.

84 (4) On November 24, 2008, Embarq Corporation and CenturyTel, Inc. filed a joint application with the Commission seeking approval of an indirect transfer of control of Embarq's regulated Washington State operating subsidiaries to CenturyTel. The proposed transfer of control will result from a merger between CenturyTel, Inc. and Embarq Corporation.

85 (5) On April 22, 2009, the active parties in this proceeding—Applicants, Staff and Public Counsel—filed a Settlement Agreement including conditions as discussed in the body of this Order and as set forth in Appendix 1 to this Order. Conditions 1, 3 and 5-11in the Settlement Agreement adequately

address potential harms arising from the proposed merger, as identified in the response cases filed by Public Counsel and Staff. Conditions 2, 4 and 12 lack reporting requirements that are necessary to address potential harms recognized by the Commission on the basis of the record, as discussed in the body of this Order.

86 (6) We are unable to find that the proposed merger between CenturyTel, Inc. and Embarq Corporation, and their wholly owned subsidiaries that do business in Washington state subject to the Commission's jurisdiction, is consistent with the public interest based on the on the terms provided by their joint application as modified by the Settlement Agreement. However, with the addition of the conditions set forth in this Order, the proposed transaction is consistent with the public interest.

87 (7) The side-agreement between Applicants and IBEW concerns only matters that are outside the Commission's jurisdiction and inappropriate to this proceeding. It would be contrary to the public interest for the Commission to approve this agreement. The Commission finds on review that IBEW does not have a substantial interest in this proceeding and its participation is not in the public interest.

88 (8) The side-agreements between Applicants and Level 3, and between Comcast and Level 3 resolve the specific interests of the two CLECs. Subject to the condition that the terms of these agreements will be generally available in the industry, specifically to other CLECs, it is consistent with the public interest to approve these agreements and grant these intervenors leave to withdraw.

CONCLUSIONS OF LAW

89 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

90 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.

91 (2) Chapter 80.12 RCW requires public service companies to secure Commission approval before they can lawfully sell or otherwise dispose of the whole or

any part of their franchises, properties or facilities that are necessary or useful in the performance of their duties to the public. Any sale or disposition made without Commission authority is void.

92 (3) WAC 480-143-170 governs the Commission's standard of review for a change of control transaction and requires finding that the transaction is consistent with the public interest. To be consistent with the public interest, the transaction must not harm the public interest.

93 (4) The Settlement Agreement commitments, as further conditioned by this Order, are sufficient to protect customers and the public interest from risks of harm associated with this change of control transaction.

94 (5) The Commission should authorize this change of control transaction, as consistent with the public interest.

95 (6) The Commission should reject the side-agreement between IBEW and Applicants and deny IBEW's request for leave to withdraw voluntarily. However, the Commission should dismiss IBEW from this proceeding because it has no substantial interest in the subject matter of this proceeding and its participation is not in the public interest.

96 (7) The Commission Secretary should be authorized to accept by letter, with copies to all parties to this proceeding, any filing necessary to comply with the requirements of this Order.

97 (8) The Commission should retain jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order.

ORDER

THE COMMISSION ORDERS THAT:

98 (1) The merger between CenturyTel, Inc. and Embarq Corporation, and the change in control of their wholly owned subsidiaries—CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., and CenturyTel of Cowiche, Inc., United Telephone of the Northwest and Embarq Communications Inc.—on the terms provided by their joint application, as conditioned by the terms of the Settlement Agreement attached to and made a

part of this Order by prior reference, and as further conditioned below in ordering paragraphs (2), (3) and (4) is approved.

99 (2) Three years after the date on which the merger closes the combined companies are required to file with the Commission a report that includes a normalized, *pro forma* results of operations for regulated services in Washington reflecting merger synergy savings realized through the relevant periods (test year and *pro forma* year).

100 (3) The combined companies are required to track and report annually to the Commission on the anniversary date of the merger closing the costs and synergy savings of the merger on a company-wide basis and a Washington basis.

101 (4) The combined companies are required to submit a report to Commission Staff at least five days prior to the payment of each dividend by any New CenturyTel ILEC that calculates the average market value of New CenturyTel's common equity as a percent of the book value of the company's net debt in the manner contemplated in Section 2.a.i of the Settlement Agreement regardless of whether the dividend restriction set forth in Section 2.a is triggered. The report must include supporting data sufficient to permit Staff to confirm the calculation. In addition, the combined companies are required to inform Staff within three business days if the conditions triggering restrictions materialize.

102 (5) Order 03 Granting Leave to Withdraw to Level 3 is rescinded.

103 (6) Side-agreements between Applicants and Level 3, and Applicants and Comcast are approved. Level 3 and Comcast are granted leave to withdraw from this proceeding.

104 (7) The side-agreement between Applicants and IBEW is rejected. IBEW is dismissed as a party to this proceeding.

105 (8) CenturyTel, Inc. and Embarq Corporation, and New CenturyTel are authorized and required to make any filings necessary and sufficient to effectuate the terms of this Order.

106 (9) The Commission Secretary is authorized to accept by letter, with copies to all parties to this proceeding, a filing that complies with the requirements of this Order.

107 (10) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective May 28, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

APPENDIX 1
SETTLEMENT AGREEMENT

APPENDIX 2
AGREEMENT BETWEEN APPLICANTS AND LEVEL 3

APPENDIX 3
AGREEMENT BETWEEN APPLICANTS AND COMCAST

APPENDIX 4
STAFF AND PUBLIC COUNSEL JOINT RESPONSE
TO BENCH REQUEST NO. 3
(REDACTED VERSION)

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MAY 19, 2009

JOINT PETITION OF

EMBARQ CORPORATION,
CENTRAL TELEPHONE COMPANY OF VIRGINIA,
UNITED TELEPHONE SOUTHEAST LLC,

and

CENTURYTEL, INC.

For Approval of the Indirect Transfer of Control of Central Telephone Company of Virginia and United Telephone Southeast LLC from Embarq Corporation to CenturyTel, Inc.

CASE NO. PUC-2008-00104

ORDER GRANTING APPROVAL

On November 21, 2008, CenturyTel, Inc. ("CenturyTel"), Embarq Corporation ("Embarq"), Central Telephone Company of Virginia ("Centel Virginia"), and United Telephone Southeast LLC ("United Virginia") (collectively "Petitioners"), pursuant to Chapter 5 of Title 56 of the Code of Virginia (§§ 56-88, et seq., the "Transfers Act"), filed with the State Corporation Commission ("Commission") a Petition seeking approval of the transfer of control of Embarq and, indirectly, its Virginia operating subsidiaries, including Centel Virginia and United Virginia[1] (hereinafter "Transaction" or "Merger"). In Virginia, Embarq provides local exchange telecommunications services through two operating subsidiaries, Centel Virginia and United Virginia. CenturyTel currently does not provide telecommunications services in Virginia.

[1] There are two additional Embarq Corporation subsidiaries providing telecommunications services in Virginia that will also experience an indirect change of control as a result of the Transaction. Embarq Communications of Virginia, Inc., is a switchless reseller of long-distance telecommunications services. Embarq Payphone Services, Inc., is an Embarq Corporation subsidiary providing telecommunications services in Virginia. The Commission has previously held that transfers of control of long-distance resellers and non-certificated payphone service providers are not subject to the Transfers Act. Joint Petition of Bell Atlantic Corporation and GTE Corporation for approval of agreement and plan of merger, Case No. PUA-1998-00031; Petition of Sprint Nextel Corporation and LTD Holding Company for Approval of Transfer of Control, Case No. PUC-2005-00118.

According to the Petition, Embarq, CenturyTel, and Cajun Acquisition Company ("CAC") entered into an Agreement and Plan of Merger ("Merger Agreement") as of October 26, 2008. Embarq is a publicly traded holding company with incumbent local exchange operations in 18 states, including Centel Virginia and United Virginia. CenturyTel is a publicly traded holding company with its own incumbent local exchange operating company subsidiaries in 25 states, currently providing no telecommunications services in Virginia. CAC is a direct wholly owned subsidiary of CenturyTel created in order to effectuate this Transaction.

The Petitioners propose that Embarq and CAC will merge with Embarq being the surviving corporation and CAC ceasing to exist. The Transaction will be accomplished through a stock-for-stock transaction. Embarq will become a direct wholly owned subsidiary of CenturyTel. The terms of the Merger Agreement provide that Embarq's Virginia operating subsidiaries will remain subsidiaries of Embarq; however, a transfer of control of Embarq will occur. CenturyTel's various operating subsidiaries will remain subsidiaries of CenturyTel; however, a transfer of majority equity ownership will occur. Following the completion of the Transaction, the shareholders of pre-transaction Embarq are expected to own approximately 66% of the post-transaction CenturyTel, and the shareholders of pre-transaction CenturyTel are expected to own approximately 34% of post-transaction CenturyTel.

The Petitioners state that Centel Virginia and United Virginia will continue as the certificated carriers in Virginia and that end-user customers will continue to receive service from the same local operating company and at the same rates, terms, and conditions as immediately prior to the Transaction. The Petitioners state that the Transaction will be transparent to customers and that the Transaction will not impair or jeopardize the provision of adequate

service to the public at just and reasonable rates and is in full compliance with applicable Virginia law.

On December 16, 2008, the Commission issued an Order for Notice and Hearing that, among other things, authorized interested persons and entities to become Respondents in this proceeding by filing Notices of Participation on or before January 26, 2009. Notices of Participation were filed by Level 3 Communications, LLC ("Level 3"); Comcast Phone of Virginia, LLC d/b/a Comcast Digital Phone ("Comcast"); the Communications Workers of America ("CWA"); and the Office of the Attorney General, Division of Consumer Counsel ("Consumer Counsel"). By Order dated March 12, 2009, the Commission granted the requests of Level 3, Comcast, and the CWA to withdraw from this proceeding.

On January 20, 2008, the Petitioners filed the direct testimony of Richard A. Schollmann, Mark D. Harper, and G. Clay Bailey. On February 17, 2008, Consumer Counsel informed the Commission that it would not be filing testimony in this proceeding but that it intended to participate in the evidentiary hearing.

Also on February 17, 2008, the Commission's Staff ("Staff") filed the direct testimony of Robert C. Dalton, Steven C. Bradley, Amy J. Gilmour, and Lawrence T. Oliver. Staff generally agreed with the Petitioners that the proposed transaction will not result in any change in the rates paid by customers in Virginia and, therefore, the transaction will be virtually transparent to customers. Subject to certain enumerated conditions, Staff stated that the proposed transaction complied with the requirements of the Utility Transfers Act and should, therefore, be approved by the Commission. Staff witness Dalton proposed that within thirty (30) days of completing the Merger, subject to administrative extension by the Commission's Director of Public Utility Accounting, the Petitioners should file a Report of Action with the Commission, including the

date the transaction took place. Staff witness Gilmour proposed that the Petitioners be required to track the incremental state-specific merger costs and savings for Centel Virginia and United Virginia for a minimum of three (3) years after the merger is consummated to ensure that such information is available to the Commission if needed. Staff witness Gilmour further proposed that the Petitioners be required to continue to file the annual rate of return statement, rate base statement, and capital structure statements mandated by the Commission in Case No. PUC-2005-00118 when it approved the spin-off of Centel Virginia and United Virginia.

On March 10, 2009, the Petitioners filed the rebuttal testimony of Richard A. Schollmann. Mr. Schollmann testified that the Petitioners would agree to the three conditions proposed in Staff's direct testimony.

On March 10, 2009, Sprint Communications Company of Virginia, Inc.; Sprint Spectrum, L.P.; Sprintcom, Inc.; Nextel Communications of the Mid-Atlantic, Inc.; and NPCR, Inc. d/b/a Nextel Partners (collectively, "Sprint Nextel") filed public comments. Sprint Nextel stated that it did not take a position either in support of or opposition to the Merger Petition but requested that the Commission address the level of Centel Virginia's and United Virginia's intrastate switched access rates before approving the proposed merger.[2]

The Commission held an evidentiary hearing on March 17, 2009. The Petitioners, Consumer Counsel, and Staff appeared at the hearing by counsel. The pre-filed direct testimony of the Petitioners and Staff, as well as the rebuttal testimony of the Petitioners, was admitted into

[2] The Commission also received one written comment from an Embarq customer stating that the Commission should consider more stringent regulation if the merger is approved to ensure that the cost of local phone service will not increase.

the record.[3] The Commission heard additional oral testimony from Mark D. Harper and G. Clay Bailey for the Petitioners and Lawrence T. Oliver for Staff.

NOW THE COMMISSION, having considered the record, the pleadings, and the applicable law, is of the opinion and finds as follows. The Joint Petition is approved subject to the requirements ordered herein.

Transfers Act

Petitioners request approval of the proposed merger under the Transfers Act, § 56-88 et seq., of the Code. The General Assembly has set forth the criteria that the Commission must apply in evaluating the Joint Petition under the Transfers Act. Specifically, § 56-90 of the Code states as follows:

> [i]f and when the Commission, with or without hearing, shall be satisfied that adequate service to the public at just and reasonable rates will not be impaired or jeopardized by granting the prayer of the petition, the Commission shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order....

We must evaluate the Joint Petition, the support therefor, the objections thereto, and the requirements proposed by others according to this statutory criteria. Based on the evidence presented in this case, we find that adequate service to the public at just and reasonable rates will not be impaired or jeopardized by granting the Joint Petition subject to the requirements ordered herein, which we deem proper and the circumstances require.

Staff proposes that the Commission condition approval of the merger upon the Petitioners being required to: (1) within thirty (30) days of completing the Merger, file a Report of Action with the Commission, including the date the transaction took place; (2) track the incremental

[3] The confidential version of Staff witness Bradley's testimony was not separately identified and admitted into the record in this proceeding during the hearing; however, it is admitted pursuant to this Order.

state-specific merger costs and savings for Centel Virginia and United Virginia for a minimum of three years after the merger is consummated to ensure that such information is available to the Commission if needed; and (3) continue to file the statements mandated by the Commission in Case No. PUC-2005-00118. We agree with Staff that these conditions are reasonable and necessary to ensure that adequate service to the public at just and reasonable rates will not be impaired or jeopardized, as required under the Transfers Act.[4]

Accordingly, IT IS THEREFORE ORDERED THAT:

(1) Pursuant to §§ 56-88.1 and 56-90 of the Code of Virginia, the Joint Petition is granted subject to the requirements established in this Order Granting Approval.

(2) Within thirty (30) days of completing the Merger, subject to administrative extension by the Commission's Director of Public Utility Accounting, the Petitioners shall file a Report of Action with the Commission. The Report shall include the date the transaction took place.

(3) Petitioners shall be required to track the incremental state-specific merger costs and savings for Centel Virginia and United Virginia for a minimum of three (3) years after the merger is consummated. This information need not be filed with the Commission but shall be made available upon request by the Commission or its Staff.

(4) Petitioners shall be required to continue to comply with the requirements of the Commission's Order in Case No. PUC-2005-00118, including filing the annual rate of return statement, rate base statement, and capital structure statements, as well as a continuing obligation to notify the Commission of any dividend payment by Centel Virginia or United Virginia to their corporate parent.

---

[4] With respect to the public comments submitted by Sprint Nextel in this case, we note that our decision in this proceeding is separate and independent from our consideration of intrastate access rates in Case No. PUE-2007-00108.

(5) The remedies for violation of any of the Commission's Orders herein include the penalties set forth in § 12.1-13 of the Code.

(6) The confidential version of the pre-filed Direct Testimony of Steven C. Bradley is admitted to the record as Exhibit 11-C.

(7) This matter is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Kevin K. Zarling, Senior Counsel, Embarq Corporation, 400 West 15th Street, Suite 1400, Austin, Texas 78701; Cliona M. Robb, Esquire, and Peter E. Broadbent, Esquire, Christian & Barton, L.L.P., 1200 Mutual Building, Suite 1200, 909 East Main Street, Richmond, Virginia 23219-3095; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, 2nd Floor, Richmond, Virginia 23219; Andrew Fisher, Esquire, Comcast Cable Communications, LLC, One Comcast Center, Fl. 50, Philadelphia, Pennsylvania 19103; Martin P. Hogan, Esquire, Evening Star Building, Suite 600, 1101 Pennsylvania Avenue, N.W., Washington, D.C. 20004; JoAnne L. Nolte, Esquire, The Nolte Law Firm, 1427 West Main Street, Richmond, Virginia 23220; Eric M. Page, Esquire, LeClair Ryan, P.C., 951 East Byrd Street, 8th Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Division of Communications.

A True Copy
Teste: Joel H. Peck
Clerk of the
State Corporation Commission

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held May 28, 2009

Commissioners Present:

James H. Cawley, Chairman, Statement
Tyrone J. Christy, Vice Chairman, Statement
Kim Pizzingrilli, Statement, Concurring and dissenting in part
Wayne E. Gardner, Statement
Robert F. Powelson

Joint Application of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. For Approval of the Indirect Transfer of Control To CenturyTel, Inc.

Docket No. A-2008-2076038

Table of Contents

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the April 6, 2009 Initial Decision (I.D.) of presiding Administrative Law Judge (ALJ) Wayne L. Weismandel and the Exceptions and Reply Exceptions filed thereto. The Initial Decision approves, without conditions, the Joint Application (Application) of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania (Embarq PA) and Embarq Communications, Inc. (ECI) (together with Embarq PA, Joint Applicants) seeking Commission approval of the indirect transfer of control of these regulated entities to CenturyTel, Inc. (CenturyTel) (together with Joint Applicants, Merging Parties).

Exceptions were filed on or about April 17, 2009, by the Broadband Cable Association of Pennsylvania (BCAP), the Office of Consumer Advocate (OCA) and the Office of Small Business Advocate (OSBA). The Merging Parties (M.P.) filed Reply Exceptions on April 23, 2009.

I. History of the Proceeding

On November 21, 2008, the Joint Applicants filed the Application with the Commission seeking all approvals required under the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. §§ 101 *et seq*., for the indirect transfer of control of these two regulated entities to CenturyTel. The Joint Applicants also filed proof of publication of notice of the Application in the Gettysburg Times, the Lewistown Sentinel, the Butler Eagle, the Fulton County News and the Harrisburg Patriot News during the period December 6-11, 2008. The Commission caused a notice of the Application to be published in the Pennsylvania Bulletin on December 17, 2008. Protests or petitions to intervene were to be filed by December 23, 2008.

Timely petitions to intervene were filed by: CenturyTel, the Communications Workers of America (CWA) and Comcast Business Communications, LLC d/b/a Comcast Long Distance (CBC). Formal protests against the Application were filed by: the BCAP, the OCA and the OSBA.

On January 9, 2009, Level 3 Communications, LLC (Level 3) filed an untimely Petition to Intervene, which was withdrawn on January 15, 2009.

The Application was assigned to ALJ Weismandel, who, on January 22, 2009, issued a protective order to prevent public dissemination of confidential information provided in the course of this proceeding.

A Prehearing Conference was conducted on January 9, 2009, in Harrisburg, Pennsylvania and representatives of the Joint Applicants, CenturyTel, the CWA, the CBC, the OCA, the OSBA and the BCAP participated. An expedited litigation schedule was developed with the concurrence of all parties.

On February 17 and 26, 2009, CBC and CWA filed Petitions to withdraw their respective Petitions to Intervene.

A hearing was conducted by ALJ Weismandel on March 3, 2009, in Harrisburg.[1] Counsel for CenturyTel, the OSBA, the OCA and the BCAP participated. The pre-filed written direct testimony was admitted into evidence upon affidavit of the sponsoring witness, with cross-examination waived. Oral rejoinder testimony was offered by several witnesses, with an opportunity to cross-examine these witnesses.

Main Briefs were filed by the Merging Parties, the OCA, the OSBA and the BCAP. These parties also filed Reply Briefs.

As noted, the Initial Decision of ALJ Weismandel was issued on April 6, 2009. ALJ Weismandel found that the proposed indirect transfer of control is in the public interest because it will affirmatively promote the service, accommodation, convenience or safety of the public in a substantial way. I.D. at 20-28. ALJ Weismandel recommended approval of the Joint Application without any conditions.

As previously stated, Exceptions were filed on or about April 17, 2009, and Reply Exceptions were filed April 23, 2009.

[1] The scheduled second day of evidentiary hearings (March 4, 2009), proved unnecessary and evidentiary hearings concluded on March 3, 2009.

II. The Companies and the Proposed Transfer of Control

A. Description of the Companies

The Joint Applicants are direct, wholly-owned subsidiaries of Embarq Corporation (Embarq). Embarq is a publicly-traded Delaware corporation with headquarters at 5454 West 110th Street, Overland Park, Kansas, 66211. Embarq is in the Fortune 500's list of America's largest corporations. Nationally, as of December 31, 2007, Embarq's incumbent local exchange carrier (ILEC) operations served approximately 6.5 million local access lines in eighteen states. Embarq subsidiaries offer a complete suite of communications services to residential consumers and businesses, including local, long distance, high speed data, wireless and video services.

In the Commonwealth of Pennsylvania, each of the Joint Applicants holds a certificate of public convenience issued by the Commission. Embarq PA is a certificated ILEC, authorized to provide local exchange services in ninety-two exchanges in all or parts of twenty-five counties in Pennsylvania. Embarq PA is subject to alternative rate regulation, with a revised amended alternative regulation plan approved by the Commission pursuant to Act 183. As of December 31, 2007, Embarq PA served approximately 326,078 access lines in Pennsylvania.

ECI is certificated as an interexchange toll reseller. As of December 31, 2007, ECI had approximately 160,000 customers in Pennsylvania.

CenturyTel is a Louisiana corporation, headquartered at 100 CenturyTel Drive, Monroe, Louisiana, 71211-4065. Included in the S&P 500 Index, CenturyTel is a provider of communications, high-speed Internet and entertainment services in small-to-mid-size cities through its broadband and fiber transport networks. As of December 31,

2007, CenturyTel's ILEC operations served approximately 2.1 million local access lines in twenty-five states.

B. Description of the Proposed Transfer of Control

On October 26, 2008, Embarq, CenturyTel, and Cajun Acquisition Company (CAC) entered into an Agreement and Plan of Merger (Merger Agreement).

CAC, a Delaware corporation, is a newly formed, wholly-owned subsidiary of CenturyTel created to effectuate this transaction. Under the terms of the Merger Agreement, Embarq and CAC will merge, with Embarq being the surviving corporation and CAC ceasing to exist. Embarq will adopt the By-Laws and Certificate of Incorporation of CAC. I.D. at 8 and 20.

The merger will be accomplished through a stock-for-stock transaction. No incremental debt will fund the purchase price. As a result of the transaction, Embarq will become a direct, wholly-owned subsidiary of CenturyTel. Following the transaction, the shareholders of pre-transaction Embarq are expected to own approximately 66% of the post-transaction CenturyTel and the shareholders of pre-transaction CenturyTel are expected to own approximately 34% of post-transaction CenturyTel. The post-transaction CenturyTel Board of Directors will be composed of eight members designated by the pre-transaction CenturyTel Board of Directors and seven members designated by the pre-transaction Embarq Board of Directors. I.D. at 8 and 20.

Following the transaction, Embarq's Pennsylvania operating subsidiaries will remain subsidiaries of Embarq. The transaction will not result in any transfer of assets or facilities in Pennsylvania, nor change the regulatory status of the Joint Applicants. End-user customers will continue to receive service from the same local

company at the same terms and conditions as immediately prior to the transaction. I.D. at 9 and 21.

The proposed transfer of control will require the approval of the Federal Communications Commission (FCC), which has not yet ruled on the proposed transfer of control. According to the Initial Decision, "a full one-third of the states with ILEC operations requiring regulatory approvals of this transaction have done so." Finding of Fact 23. Published press reports indicate that additional states have approved the transaction since that date.

III. Discussion

Before addressing the Exceptions, it is noted that any issue or Exception we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993).

The ALJ made seventy-nine Findings of Fact and reached thirteen Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

A. Legal Standards

A public utility must obtain a certificate of public convenience from the Commission before transferring to any person or corporation "by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease," ownership or possession of property used or useful in the public service.

66 Pa. C.S. § 1102(a)(3). The transfer of stock of a utility's parent is jurisdictional, regardless of the remoteness of the transaction. 52 Pa. Code § 69.901.

The Commission is to approve a proposed merger "only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. § 1103(a). The Commission must find more than the absence of an adverse effect on the public; the Commission must find that the merger will affirmatively benefit the public in some substantial way. *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825 (1972).

> [T]he Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the Public Utility Commission properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

Popowsky v. Pa. PUC, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007).

The beneficial and detrimental impacts of the proposed transaction on the "public interest" are to be assessed as they impact all affected parties. *Middletown Twp. v. Pa. PUC*, 482 A.2d 674 (Pa. Cmwlth. 1984). In addition, the Commission is to consider the competitive impact of the proposed merger. *Popowsky*, *supra*. "The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable." 66 Pa. C.S. § 1103(a).

As the proponent of a rule or order of this Commission, the Joint Applicants bear the burden of proof. 66 Pa. C.S. § 332(a). To satisfy that burden, the Joint Applicants must prove each element of their case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A

preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. *Dutchland Tours, Inc. v. Pa. PUC*, 337 A.2d 922 (Pa. Cmwlth. 1975). The term "substantial evidence" has been defined by the Pennsylvania Courts as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Murphy v. DPW, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1994); *Erie Resistor Corp. v. Unemployment Compensation Board of Review*, 166 A.2d 96 (Pa. Super. 1961).

B. Exceptions

1. Attachments to the BCAP's Exceptions

The BCAP's Exceptions include two attachments: a letter from Thomas Jones, an attorney for Charter Communications, Inc., to Marlene H. Dortch, Secretary of the FCC (Attachment A); and an *ex parte* presentation to the FCC from Gregory J. Vogt and Samuel L. Feder, attorneys for CenturyTel and Embarq, respectively (Attachment B). The BCAP requests that we take judicial notice of these FCC filings. BCAP Exc. at 9. In the alternative, the BCAP asks that the Commission reopen the evidentiary record for the receipt of this information pursuant to our Regulations at 52 Pa. Code § 5.571. *Id*., at note 3.

The Merging Parties argue that we should strike and not consider the BCAP's Attachment A:

> First, this material contains unproven claims being asserted by BCAP for the truth of the matter and thus the letter complaint is improper hearsay. Second, Joint Applicants and CenturyTel also have had no opportunity to cross-examine Mr. Thomas Jones. Third, this letter was filed with the FCC on February 27, 2009, well prior to the close of the record in this proceeding on March 20, 2009. BCAP makes no showing of good cause for this information to be admitted at this late stage as required by 52 Pa. Code § 5.431(b) . . . . Finally, this letter is not admissible as a "public document" under 52 Pa. Code § 5.406(a)(2) because this document was not issued by a governmental agency.

M.P. R. Exc. at 19, note 56. The Merging Parties do not object to our consideration of Attachment B. *Id*. at 19.

We will not take judicial notice of the BCAP's Attachment A pursuant to 52 Pa. Code § 5.408, nor will we reopen the record pursuant to 52 Pa. Code § 5.431(b) to permit the introduction of this document into the record. We find this evidence irrelevant. By this document, the BCAP seeks "to demonstrate that litigants in other jurisdictions also express concern with the impact of this combination of ILECs on competitors." BCAP Exc. at 9. The competitive impact of the proposed transfer of control is an important consideration in our evaluation of the transaction before us. However, we must reach our conclusion based on Pennsylvania-specific evidence of competitive impact introduced in this proceeding. *Popowsky*, *supra*. The "concerns" expressed by litigants in other jurisdictions are irrelevant for proving the competitive impact of the proposed transaction in Pennsylvania. Attachment A, therefore, is irrelevant and we will not consider it here.

We will, however, consider Attachment B. As stated above, the Merging Parties do not object to our consideration of this document. In fact, the Merging Parties confirmed portions of that document in these proceedings. Attachment B encourages the

FCC to approve the proposed merger without conditions. It also indicates that the Merging Parties made the following commitments:

> - For Embarq companies, the merged company will maintain substantially the service levels that Embarq has provided for wholesale operations, subject to reasonable and normal allowances for the integration of CenturyTel and Embarq systems.
>
> - CenturyTel will integrate, and adopt for CenturyTel CLEC orders, the automated Operation Support Systems ("OSS") of Embarq within fifteen months of the transaction's close.
>
> - In the interim, CenturyTel will devote additional resources to its existing manual CLEC order processing system to ensure that all local number portability requests are promptly processed.
>
> - The Applicants are willing to negotiate multiple contracts in a state at the same time in most circumstances when such consolidated negotiations will aid in addressing common issues.

BCAP Exc. Attachment B at 2.

The Merging Parties argue in their Reply Exceptions that certain conditions requested by the BCAP are not necessary because of commitments the Merging Parties had agreed to:

> [N]amely, that (1) "(f)or Embarq companies, the merged company will maintain substantially the service levels that Embarq has provided for wholesale operations . . . , and (2) the combined companies will adopt Embarq's EASE[2] service ordering system.

M.P. R. Exc. at 22 (note added).

We will adopt the Merging Parties' commitments as conditions to our approval of the proposed merger. We recognize, of course, that we do not have jurisdiction over CenturyTel. We, therefore, adopt the following conditions:

1. The Joint Applicants will maintain substantially the service levels that they currently provide for wholesale operations, subject to reasonable and normal allowances for the integration of CenturyTel and Embarq systems.

2. The Joint Applicants will negotiate multiple contracts in a state at the same time in most circumstances when such consolidated negotiations will aid in addressing common issues.

3. The Joint Applicants will adopt Embarq's EASE service ordering system.

[2] EMBARQ Administration and Service Order Exchange.

2. The OCA's Exceptions 2 and 3: The ALJ Erred in Finding that the Joint Applicants Satisfied their Burden of Proving that the Proposed Transfer of Control has Substantial Affirmative Benefits

a. ALJ's Recommendation

The ALJ concluded that the Joint Applicants satisfied their burden of proving that the proposed transfer of control has substantial affirmative benefits. Specifically, the ALJ stated:

> The record in this proceeding establishes that the transaction will provide affirmative benefits for the public and for Embarq's Pennsylvania ratepayers. In particular, the combined company will be a financially stronger entity in terms of its balance sheet, operating efficiencies, access to capital for investment, adoption of best practices, and the integration of technical expertise and a strong employee base. Both the public and Embarq PA's ratepayers will benefit from: strengthened intermodal competition; the application of best practices derived from both companies; the development of core competencies in emerging technologies, such as 700 MHz wireless service and IPTV, and the opportunity to connect in the future to CenturyTel's Lightcore fiber backbone network. These are exactly the kind of affirmative benefits that the Commission has previously found to satisfy the standards for approving a merger. See, *In re PG Energy, Inc.*, 1999 WL 1036580 (Pa. PUC 1999).

I.D. at 22. Consequently, as previously noted, the ALJ recommended approving the proposed merger without conditions. I.D. at 20.

The ALJ noted that the transaction contemplates a parent level transfer of equity. It will be seamless to end-users. No Pennsylvania assets or facilities will be transferred. I.D. 21.

The ALJ further noted that the Joint Applicants will continue as certificated carriers in Pennsylvania. As existing carriers, they are entitled to a presumption of fitness. After the merger, they will continue to have the necessary fitness to provide service to customers. *Id*. at 20-21.

With respect to the new parent of the Joint Applicants, the ALJ found that CenturyTel is an established, experienced telecommunications provider with a "proven track record of successful business acquisitions." I.D. at 21. He also found that CenturyTel has the financial strength to support the acquisition and the delivery of service. *Id.*

The ALJ concluded that the combined company will be a stronger and more financially capable company than if either CenturyTel or Embarq were to continue to exist independently. I.D. at 22. He elaborated on this finding as follows:

> CenturyTel and Embarq, as stand-alone companies, were industry-leading telecommunications providers in terms of their size, services, balance sheets and access to capital, but this combination makes them more capable of coping with revolutionary and remarkable new market conditions. The strengthening of the operating characteristics and credit profile of Embarq through the proposed combination with CenturyTel will result in the company having greater access to both equity and debt capital that should provide the company with an enhanced ability to tap reasonably-priced external capital sources, to the extent necessary, to fund ongoing levels of high investment in infrastructure and services. This improved capital availability will provide Pennsylvania customers with the benefit of a truly advanced communications service provider.
>
> * * *
>
> The affirmative benefits arising from this transaction are not the immediacy of specific new products and services, but rather the creation of a combined company with strong

> resources – and therefore stronger access to capital markets – enhanced infrastructure, and increased operating efficiencies that substantially benefit the public interest in Pennsylvania in the long term.

I.D. at 24. The ALJ noted that both Embarq and CenturyTel have proven track records of being innovative and bringing new services to the market. He found that the combined companies are committed to focusing on the advancement of products and services. I.D. at 24.

In addition, the ALJ found that the proposed merger would have a positive impact on competition in Pennsylvania. According to the ALJ, Embarq faces significant intermodal competition in many of its operating territories in Pennsylvania. "Intermodal competition is advantageous for consumers and the financial strengthening of a competitor in the Pennsylvania intermodal marketplace is an affirmative public benefit of this transaction." I.D. at 26. Just the threat of strong intermodal competition has the effect of constraining prices and forcing market participants to enhance their service offerings.

Another substantial public benefit from the proposed merger is "the pooling of dedicated employees, expertise and systems to serve the needs of predominantly rural customers." I.D. at 26. The ALJ noted that CenturyTel and Embarq were each inventorying their operations to identify best practices and integration opportunities. One such best practice is CenturyTel's Ensemble billing system, which would be used following the merger. The ALJ found that the use of this "customer care platform" would have clear benefits for consumers, such as allowing a customer service representative to view all information about a particular customer in one place. Another such best practice is CenturyTel's Systems Applications and Products (SAP) accounting system, which would be extended to the Joint Applicants following the merger.

The ALJ found that the substantial, affirmative benefits of the proposed merger included the combined companies' ability to share both risks and benefits of their current operations. CenturyTel's service region in other parts of the country is more rural than Embarq's service territory and the switched access line loss in rural regions is slower. As a result, "the combined company is expected to realize more modest levels of revenue declines than at Embarq alone." I.D. at 28. The ALJ noted that CenturyTel receives more Universal Service Fund (USF) support than Embarq, which makes the combined companies more vulnerable to a loss of such revenue. Nevertheless, the ALJ concluded that the proposed merger would increase diversification. As a result, the combined company would be a lower risk operation than the existing Joint Applicants operating independently. *Id.*

b. Exceptions and Replies

The OCA contends that the Joint Applicants did not demonstrate any substantial affirmative benefit to the public as a result of the merger. According to the OCA, the alleged benefits of the transaction are speculative and/or overstated. OCA Exc. at 5-17. The OCA further contends that the ALJ failed to properly consider the likely harms to Pennsylvania consumers from the proposed merger. OCA Exc. at 17-24.

The OCA states that the ALJ identified six benefits in approving the transaction. The OCA's Exceptions review each benefit and conclude that in each case the ALJ erred in finding that the record demonstrates a substantial benefit that supports the proposed merger. OCA Exc. at 9-17.

First, the OCA argues that the ALJ erred in finding that the transaction would provide a stronger company in Pennsylvania. It notes that Embarq is an investment grade company with a strong balance sheet. The proposed merger would not change the *status quo* in this regard. The OCA further argues that the proposed transaction carries

serious risks because (a) CenturyTel receives a greater percentage of its operating revenues from state and federal USFs, which are in a state of flux, and (b) CenturyTel is more dependent on access charge revenues than Embarq, and access charge reform is a possibility. OCA Exc. at 9-10.

Second, the OCA argues that the synergy savings cited by the ALJ will come at the expense of Pennsylvania ratepayers and will not be flowed through to Pennsylvania ratepayers. The OCA characterizes this transaction as a "market extension" merger, in which firms that do not have overlapping operations combine to become a larger firm with a larger geographic footprint. OCA Exc. at 17. Since CenturyTel and Embarq do not compete in or share the same service territories, economies of scale can only be realized through staffing reductions and operational changes. These changes could negatively impact Embarq's Pennsylvania ratepayers. OCA Exc. at 10-11.

Third, the OCA argues that the ALJ erred in finding that the proposed transaction will result in the enhanced ability of the companies to deal with intermodal competition. According to the OCA, the offerings of Embarq's competitors are not comparable. Thus, strengthening Embarq's ability to compete with intermodal competitors will not provide a substantial benefit. OCA Exc. at 11-13.

Fourth, the OCA submits that the ALJ erred in citing the possible use of "best practices" as a benefit of the proposed merger. The OCA argues that the benefits of "best practices" are completely speculative. "[I]t is entirely possible that no meaningful 'best practice' will be incorporated for the benefit of Embarq's ratepayers." OCA Exc. at 13. Moreover, the Joint Applicants failed to explain how such "best practices" as the pooling of dedicated employees will benefit ratepayers. In fact, the OCA submits that the application of best practices is likely to result in harm to Pennsylvania ratepayers. *Id*. at 13-14.

Fifth, the OCA submits that the ALJ erred in finding that the proposed merger will allow the Companies to develop core competencies in emerging technologies, or to connect to CenturyTel's fiber network. The OCA contends that the evidence shows that these alleged benefits are unlikely to materialize in Pennsylvania. For example, CenturyTel's existing fiber backbone currently does not provide service in Pennsylvania, and there are no current plans for deployment in or near Pennsylvania. OCA Exc. at 14-15.

Sixth, the OCA argues that the ALJ erred in finding that the merger will spread risks. The OCA contends that "CenturyTel's significantly greater reliance on the federal Universal Service Fund raises questions as to whether the combined company, and Embarq, will be subject to additional financial risk" as a result of the combination. OCA Exc. at 16. Moreover, to the extent that Embarq has positive attributes that are not possessed by CenturyTel, CenturyTel would lean on Embarq, which would result in a net harm to Embarq and its ratepayers. *Id.* at 15-17.

With regard to the potential harms of the transaction, the OCA contends that the ALJ overlooked four potential harms in approving the transaction. One such harm was discussed previously, in the context of the alleged benefits of this transaction. That is, the OCA argues that this transaction could negatively impact Embarq's financial position because, as compared to Embarq, (a) CenturyTel receives a greater percentage of its operating revenues from state and federal USFs, which are in a state of flux; and (b) CenturyTel is more dependent on access charge revenues, and access charge reform is a possibility. OCA Exc. at 23-24.

Similarly, a second harm discussed by the OCA was discussed previously in the context of the alleged benefits of this transaction. That is, the OCA argues that the merger synergies of this transaction will be realized through staffing reductions and operational changes that will harm Embarq's customers in Pennsylvania. Specifically, the

OCA argues that CenturyTel will place exclusive pressure on the reduction of management overhead and the consolidation of back office operations for cost savings. Harm could result from reduced employment and/or reduced quality of service. OCA Exc. at 18-19.

The OCA also notes the risks attendant to CenturyTel's acquisition of a firm of Embarq's size. Although CenturyTel acquired a number of firms during the period 2000-2007, Embarq is nearly twenty-seven times the size of the average firm CenturyTel acquired during that period. OCA Exc. at 20. The OCA contends that the challenges of integrating such a large firm may have a negative impact on Embarq's ratepayers.

Finally, the OCA states "the Joint Applicants have indicated that, if the acquisition is approved, it will seek additional revenues in its newly expanded service territory. As such, the Joint Application will result in Pennsylvania consumers bearing the burden of additional revenues sought by the merged company." OCA Exc. at 21. Although the additional revenue is projected to come from services such as inside wire maintenance that are no longer rate-regulated by the Commission, the OCA submits that this is a detriment to Pennsylvania consumers.

In response, the Merging Parties argue that the Initial Decision identified numerous affirmative benefits to the transaction in addition to those discussed by the OCA. For example, they note that the ALJ found the transaction will strengthen intermodal competition and provide an opportunity for the combined company to bring innovative and new services to the market. M.P. R. Exc. at 3, citing I.D. at 24-26.

The Merging Parties further argue that the OCA's claims in this proceeding are identical to those made and rejected in *Popowsky*. For example, they state:

> As the ALJ correctly found, the immediate deployment of the advance services is an opportunity to strengthen core competencies in emerging technologies, which will create the opportunity for the companies to bring 700 MHz and IPTV to Pennsylvania in the future. Precisely this type of proof was held to be sufficient in *Popowsky* and *York*.

M.P. R. Exc. at 5 (notes omitted).

The Merging Parties dispute the OCA's claim that the identified affirmative benefits of the transaction are overstated or illusory. They state that they presented extensive testimony and detailed financial projections to show that the proposed merger will create a financially stronger entity. M.P. R. Exc. at 3. The proposed transaction would not merely maintain the *status quo* in this regard, according to the Merging Parties. They note that Embarq has lost nearly one-third of its retail lines since 2001 and "experienced significant revenue pressures, making it difficult for the company to achieve the economies of scale necessary to compete in the ever-changing telecommunications market." *Id*. at 4 (note omitted). They contend that the telecommunications industry requires vast capital investments in infrastructure, research and development. Therefore, they argue that the ALJ correctly found that, by making Embarq a financially stronger firm, the proposed transaction has affirmative benefits for competition.

Moreover, the Merging Parties submit that the OCA's position is not supported by, or is even contrary to, the evidence. This is particularly true, they contend, with regard to the potential harms that the OCA alleges could flow from the transaction. The Merging Parties argue that the OCA's assertions regarding negative consequences from headcount reductions and operational changes, as well as the OCA's assertions regarding CenturyTel's potential difficulties integrating Embarq, are based on "theoretical speculation" rather than record evidence. M.P. R. Exc. at 6-7. The Joint Applicants further argue that the OCA's concerns about possible post-merger price increases in

unregulated competitive services is a red herring because the marketplace will impose discipline by reducing demand. *Id*. at 7.

c. Disposition

Based on our careful review of the record in this proceeding, including the Initial Decision, the Exceptions and Reply Exceptions, we will deny the OCA's Exceptions Nos. 2 and 3. We find that the Joint Applicants satisfied their burden of proving, by a preponderance of the evidence, that the merger is necessary or proper for the service, accommodation, convenience, or safety of the public because the merger will affirmatively benefit the public in substantial ways.

The proposed transaction is a parent-level transfer of stock. Following the transaction, Embarq PA and ECI will continue to be certificated public utilities subject to our continuing regulation pursuant to the Code. "Upon completion of the transaction, end-user customers will continue to receive service from the same local company and at the same rates, terms and conditions as immediately prior to the transaction. Any subsequent service or price changes will be made in accordance with all applicable rules and laws." I.D. at 21.

The proposed transfer of control will nevertheless effect important changes. In our view, the ALJ correctly found that the post-merger companies will be financially stronger than the pre-merger Embarq considered alone. Finding of Fact 62, I.D. at 22. The combined companies are expected to have a better credit profile than the pre-merger Embarq. Findings of Fact 55. This will give the combined companies greater access to both equity and debt capital. Finding of Fact 59. Debt capital will be available at favorable interest rates, leading to lower borrowing costs. Finding of Fact 56.

"By combining assets, resources, and complementary strengths, the merged company can achieve greater economies of scale and scope than the two companies operating independently." Finding of Fact 50. The combined companies expect to realize enhanced cash flows through operating efficiencies and revenue opportunities through improved focus on services such as broadband and reduced losses of local customers. Finding of Fact 51. Nationwide, these synergies are estimated to reach $400 million annually. Finding of Fact 52.

Additionally, by merging with CenturyTel, Embarq will become part of a more diversified company. I.D. at 28. CenturyTel's service region in other parts of the country is more rural than Embarq's service territory. Finding of Fact 12. This diversification will make the combined companies lower risk operations than the present Embarq, considered alone. I.D. at 28.

The OCA would have us disapprove the proposed merger because the transaction carries certain risks. The OCA's witness testified:

> CenturyTel receives a substantial portion of its revenues from the federal Universal Service Fund, which is referred to as the USF, and, to a lesser extent, intrastate support funds. These governmental programs are reviewed and amended from time to time, and CenturyTel cannot assure you that they will not be changed or impacted in a manner adverse to CenturyTel.
>
> These risks could negatively impact United PA's ratepayers.

OCA. St. 1 at 18. In addition, the OCA notes that CenturyTel's acquisition of Embarq carries certain risks because Embarq is larger than other companies that have been acquired by CenturyTel. OCA Exc. at 20. Finally, the OCA points out that CenturyTel has recognized the risks of this transaction in its filings with the Securities and Exchange Commission. *Id.*

We will not disapprove the transaction on this basis. The proposed transaction, like all transactions that are presented for our approval, has advantages and disadvantages. On balance, we find the advantages far outweigh the disadvantages. Additionally, the OCA's argument is founded on speculation rather than evidence. For example, with regard to the contention that CenturyTel could have difficulty integrating Embarq, the OCA's witness testified "Embarq's substantially larger size will present CenturyTel with challenges that it has not faced with its previous acquisitions. Confronting these challenges *may* have a negative impact on United PA ratepayers." OCA St. 1 at 11 (emphasis added). Similarly, the OCA notes that the Joint Applicants expect to consolidate business office call center operations after the merger. The OCA argues "consolidation *can* result in disruptions in customer service that *may* be detrimental to the interests of Embarq's ratepayers in Pennsylvania." OCA Exc. at 19 (emphasis added). Furthermore, we believe that many of the OCA's concerns are addressed by the condition adopted above, requiring the Joint Applicants to maintain substantially the service levels that they currently provide for wholesale operations.

We specifically reject the OCA's argument that the proposed transaction would simply maintain the *status quo* because Embarq is currently in a relatively strong financial position. We find that the proposed merger will improve Embarq's financial position. We will not ignore this beneficial change simply because the pre-merger Embarq is in a relatively strong financial position.

A financially stronger firm will benefit the public in several respects. The events of the recent past demonstrate the importance of financial strength for allowing a firm to survive turbulent economic times and provide quality utility service to consumers during an economic downturn. In addition, Embarq's Pennsylvania ratepayers will benefit because the combined companies will be better able to invest in infrastructure and bring new products and services to market. Finding of Fact 59. Moreover, a financially stronger firm will benefit all Pennsylvania telecommunications consumers because the

combined companies will be better positioned than Embarq, standing alone, to compete in today's telecommunications marketplace. Finding of Fact 62; I.D. at 24-25. "Intermodal competition is advantageous for consumers and the financial strengthening of a competitor in the Pennsylvania intermodal marketplace is an affirmative public benefit of this transaction." I.D. at 26. The combined companies are committed to focusing on the advancement of products and services. Finding of Fact 64. Nevertheless, "just the threat of strong intermodal competition has the effect of constraining prices in the marketplace and forcing market participants to enhance their service offerings." Finding of Fact 63.

As stated by the ALJ, the affirmative, substantial benefits of the proposed transaction include the incorporation of CenturyTel's "best practices" into Embarq's operations. After the merger, Embarq will use CenturyTel's Ensemble billing system. "This system is a robust customer care platform . . . with clear benefits for consumers" compared to Embarq's existing systems. I.D. at 26-27. For example, customer service representatives will have all the information about a particular customer in one place, allowing better customer service.

> Another "best practice" the combined company will utilize is CenturyTel's SAP (Systems, Applications, and Products in data processing) accounting system, a resource planning system that includes modules for finance, human resources and materials management. CenturyTel's business office and call center operations have additional capabilities and processes that represent enhancements to the existing Embarq systems, including the following: an integrated ordering, provision and billing system that creates less manual intervention and error; presentation of all pricing, offers, and service requirements to the call center associate on a market-specific basis; employee evaluation mechanisms that enable automated monitoring and reporting of customer service representative performance; and, connection of call center teams supporting specific states with the local (in-market) service teams, technicians, and local servicing centers.

I.D. at 27.

In short, we find that the Joint Applicants introduced detailed, Pennsylvania-specific evidence sufficient to carry their burden of proving that the proposed transfer of control is necessary or proper for the service, accommodation, convenience, or safety of the public because the merger will affirmatively benefit the public in substantial ways. As previously stated, however, we will impose conditions on our approval of the Joint Application. We now turn to the Parties' Exceptions pertaining to certain conditions that were rejected by the ALJ.

3. OCA's Exception 1: The ALJ Erred by Placing the Burden of Proof on the OCA, the OSBA, and the BCAP with regard to their Requested Conditions

a. ALJ's Recommendation

The ALJ stated:

> OCA, OSBA, and BCAP have all suggested conditions that the Commission should impose on the approval of this transaction. None of the proposed conditions are supported by substantial evidence as to their necessity . . . . This is not a case where a marginally adequate or inadequate utility is being taken over by a better company and conditions are required to insure that improvements are made. OCA, OSBA, and BCAP must remember that the imposition of conditions is in no respect a compulsory aspect of merger approval.

I.D. at 28.

Specifically addressing the conditions proposed by the OCA, the ALJ concluded that the OCA could point to nothing in the record "requiring or even supporting" the proposed conditions. I.D. at 33. As a result, the proposed conditions were rejected as unreasonable, burdensome and unnecessary. *Id*.

Similarly, with regard to the OSBA's proposed conditions, the ALJ concluded that the proposals were unreasonable, inappropriate, and unsupported by the record. I.D. at 34-35.

Finally, the ALJ concluded that the BCAP's proposed conditions represented a "wish list" of terms and conditions for future interconnection agreements. The ALJ believed that the BCAP was trying to use this proceeding as a substitute for negotiations under Sections 251 and 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (codified as amended in scattered sections of Title 47, United States Code) (TA-96). I.D. at 35. According to the ALJ, this was inappropriate for several reasons. "First and foremost, BCAP has not satisfied its burden of demonstrating that the conditions it has proposed are necessary for the merger to create affirmative public benefits." I.D. at 35.

b. Exceptions and Replies

In its Exceptions, the OCA contends that the ALJ misapplied the burden of proof. According to the OCA, the ALJ placed the burden on the parties proposing conditions to prove that the proposed conditions are supported by substantial evidence as to their necessity. OCA Exc. at 3. The OCA argues that the ALJ incorrectly emphasized the various parties' alleged failure to prove that any of the proposed conditions would be necessary or in the public interest. *Id.*

The Merging Parties respond as follows:

> The ALJ rejected the OCA's proposed conditions not because he misapplied the burden of proof, but rather because the OCA failed to introduce substantial evidence in support of its claims and the necessity of the conditions it sought. While

> the Commission has the discretion under Section 1103(a) to impose conditions it deems just and reasonable, any such conditions must be based upon sufficient record evidence. OCA simply failed to introduce substantial evidence in support of its claims and its requested conditions.

M.P. R. Exc. at 2 (notes omitted).

The Merging Parties assert that they have satisfied their burden of introducing evidence sufficient to establish a *prima facie* case. They contend that it is, therefore, the OCA's duty to submit evidence of co-equal value sufficient to refute their evidence. According to the Merging Parties, the OCA did not meet this burden as to any of the conditions sought by the OCA. M.P. R. Exc. at 2, note 7.

c. Disposition

We will deny the OCA's Exception No. 1. As we explained in *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH for all Approvals Required Under the Public Utility Code in Connection with a Change in Control of Pennsylvania-American Water Company,* Docket Nos. A-212285F0096 *et al.* (Order entered September 4, 2002) (*PAWC/Thames*), at 8:

> As the proponent of a rule or order of this Commission, the Joint Applicants bear the burden of proof. 66 Pa. C.S. § 332(a) . . . . If a party has satisfied its burden of proof, it must then be determined whether the opposing party has submitted evidence of "co-equal" value or weight to refute the first party's evidence. *Morrissey v. Commonwealth of Pennsylvania, Department of Highways*, 424 Pa. 87, 225 A.2d 895 (1986).

In the instant case, the Joint Applicants are the proponents of an order approving the proposed merger without conditions. As such, the ALJ correctly stated that

the Joint Applicants bear the burden of proving their case by a preponderance of the evidence. Findings of Law 2 and 5.

The ALJ generally refrained from discussions of the burden of proof with regard to conditions. Instead, consistent with the language of the Code, 66 Pa. C.S. § 1103(a), the ALJ focused on the question of whether substantial record evidence demonstrated that each proposed condition was "just and reasonable." The ALJ, however, stated that the BCAP failed to satisfy its burden of demonstrating that the conditions it proposed are necessary for the merger to create affirmative public benefits. I.D. at 35.

We construe the ALJ's statement regarding the BCAP's burden as being consistent with the above-quoted passage from *PAWC/Thames*. That is, the ALJ determined that the Joint Applicants had satisfied their burden of introducing evidence to show that the proposed merger should be approved without conditions. The BCAP (and the other parties proposing conditions) then had the burden of going forward with the evidence to rebut the evidence of the Joint Applicants. While the burden of going forward with the evidence shifted, the burden of persuasion never did. The burden of persuasion always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001). We see nothing objectionable in the ALJ's treatment of the burden of proof regarding conditions on the proposed transaction.

4. The OCA's Exception 4, the OSBA's Exception 1 and the BCAP's Exceptions 1-4: The ALJ Erred by Rejecting Several Proposed Conditions to the Joint Application

As an alternative to rejecting the Joint Application, the OCA proposed that certain conditions be attached to its approval in order to provide public benefits to the transaction. OCA Exc. at 25. Similarly, the OSBA argued that the proposed transaction

should be disapproved, but, in the alternative, conditions should be attached to the approval of the Joint Application. Finally, the BCAP argued that the Joint Application should be disapproved unless conditions were attached.

Before addressing each proposed condition, we note that the OSBA contends that the ALJ misstated the law regarding the imposition of conditions. The ALJ stated:

> Even where the Commission finds sufficient public benefit to find that the granting of a certificate of public convenience is necessary or proper for the service, accommodation, convenience, or safety of the public without imposing any conditions, the Commission nevertheless has discretion to impose conditions which it deems to be just and reasonable. 66 Pa.C.S.A. §1103(a). However, the Commission has refrained from exercising the power to impose conditions when the proposed merger provides affirmative public benefits unless the record indicates service deficiencies or infrastructure deterioration to the point of impairing the technical, managerial, or financial fitness of the merging companies. *Joint Application of SBC Communications, Inc. and AT&T Corp. Together with its Certificated Pennsylvania Subsidiaries for Approval of Merger*, Docket Numbers A-311163F0006, A-310213F0008, A-310258F0005, Opinion and Order adopted and entered October 6, 2005.

I.D. at 19. The OSBA contends that the ALJ erred by relying on the *SBC Communications* decision to deny the requested conditions. The OSBA instead contends that "the Supreme Court in *Popowsky* confirmed the Commission's authority to impose just and reasonable conditions on the instant transaction, even if the Commission determines that the transaction would provide substantial public benefits without those conditions." OSBA Exc. at 5.

We agree with the OSBA. The Code gives the Commission authority to "impose such conditions as it may deem to be just and reasonable." 66 Pa. C.S.

§ 1103(a). We do not read the *SBC Communications* decision as restricting the scope of our authority under the Code.

a. Condition Requested by the OCA and the OSBA: Freezing Rates

(1) ALJ's Recommendation

As stated by the ALJ:

> OCA proposes that the Commission should continue the cap on Embarq PA's R1 rate at the existing $18.00 per month level until the end of 2012. OCA estimates that this particular aspect of its proposed condition will cost an estimated $10 million. OCA further recommends that Embarq PA should not be allowed to bank any basic residential rate increases during this period and should not be allowed to draw from the Pennsylvania USF to recover increases in the R1 rates above the $18.00 per month level. Finally, OCA's rate freeze condition also would not allow Embarq PA to raise any other non-competitive service rates by amounts that are greater than the rate of inflation.

I.D. at 29.

The ALJ rejected this proposal stating that the OCA failed to justify such a condition. The $18.00 per month rate cap was established in 2003, as a result of the Commission's adoption of a settlement agreement, and the ALJ concluded that the OCA failed to justify extending the cap for a total of nine years. In addition, the ALJ noted that the Commission's on-going USF investigation[3] may impact rate caps, banked revenues and the interrelationship of the state USF. I.D. at 29-30. Finally, the ALJ cited the Pennsylvania Supreme Court's statement that rate conditions were not necessary in the Verizon/MCI merger because of "the recent and revolutionary changes affecting the

telecommunications industry." *Popowsky, supra,* 594 Pa. at 614, 937 A.2d at 1058-1059. The ALJ opined that the changes are ongoing and no less revolutionary today. I.D. at 29.

The OSBA proposed the following condition: "Embarq PA shall not increase rates for non-competitive services for five years and shall not 'bank' any of the increases which could have been imposed during those five years in the absence of this freeze." OSBA M.B. at 18. The ALJ rejected this proposed condition, noting that the Joint Applicants demonstrated that affirmative benefits would flow from the merger without the condition. He stated:

> It is also important to realize that OSBA's proposed freeze on local exchange rates and a wide array of non-competitive services effectively seeks an additional five-year freeze on rates on top of the rate freezes arising from Embarq PA's spin-off from Sprint Nextel. Clearly, the further rate freezes proposed by OSBA are inconsistent with the rapidly changing telecommunications market and with competitive conditions.

I.D. at 34 (notes omitted).

(2) Exceptions and Replies

In its Exceptions, the OCA argues that its proposed condition is an appropriate method by which the merger can provide affirmative benefits to Embarq's ratepayers. According to the OCA, extending the existing local exchange rate cap for an additional three years would flow through to ratepayers a portion of the "synergy savings" from the proposed transaction. Synergies that benefit the corporation and not consumers cannot be public benefits of the transaction, according to the OCA. The synergy savings from this transaction are estimated to be $400 million per year nationally and, according

---

[3] *Access Charge Investigation per Global Order of September 30, 1999, et al.*, Docket Nos. M-00021596, *et al*. (Order entered July 15, 2003).

to the OCA's witness Dr. Roycroft, sixteen million dollars per year in Pennsylvania. The OCA estimates that the cost of the residential portion of the requested condition would be ten million dollars. The OCA notes that the Commission has adopted or extended rate caps as part of its approval of other mergers and contends that the Commission should do so here. OCA Exc. at 25-29.

In its Exceptions, the OSBA finds fault with the ALJ for not explaining how the $400 million in synergy savings would be used to benefit the Joint Applicants' ratepayers. OSBA Exc. at 3. If the proposed merger is approved without the requested condition, the OSBA submits that Embarq's ratepayers would not see any of the synergy savings. The OSBA notes that under Chapter 30's alternative form of regulation, an ILEC is allowed to adjust its revenues each year to keep pace with inflation; a determination of the ILEC's cost of providing service and a reasonable return on the company's investment are no longer components of deciding the level of revenue the utility can earn. The OSBA contends that, in the absence of its proposed condition, synergy savings could be used in ways that may be detrimental to Embarq's ratepayers. *Id*. at 10-13.

The Merging Parties' Reply Exceptions argue that the rate freezes proposed by the OCA and the OSBA are not necessary to ensure that the proposed merger benefits ratepayers or the public as a whole. The Merging Parties contend that the ALJ properly found the conditions unreasonable, burdensome and unnecessary. They further argue that the Commission's decision to impose or extend rate freezes as a condition of approving other mergers is irrelevant. The issue presented here, according to the Merging Parties, is whether substantial evidence in the record demonstrates that the requested conditions would be just and reasonable. The Joint Applicants contend that the record here does not merit the exercise of the Commission's discretion to impose conditions on the merger. M.P. R. Exc. at 12-15.

The Merging Parties also contend that, in light of the Commission's on-going USF investigation, the requested rate cap would result in the "Balkanization" of Embarq from the end result of that proceeding. Additionally, the Merging Parties state that the OCA and the OSBA failed to provide any justification for continuing the existing cap. M.P. R. Exc. at 9-10.

(3) Disposition

On consideration of the positions of the Parties, we will deny the Exceptions regarding the requested rate freezes. As stated above, our decision must be based on substantial evidence in the record. We do not find substantial evidence demonstrating that the requested conditions would be just and reasonable.

The primary justification for the proposed condition is that it is necessary to flow through a portion of the synergy savings from the proposed transaction to ratepayers. We are not persuaded by this logic. We must consider this transaction in its entirety and consider its impact on the public as a whole. We cannot focus exclusively on whether one particular benefit of this transaction (the synergy savings) has been used to benefit one particular group (Embarq's ratepayers). *Middletown Township, supra*.

The synergy savings from this transaction will strengthen the financial position of a competitor in the telecommunications marketplace, which will, in turn, have several substantial affirmative benefits for the public. We are concerned that the requested rate caps will undermine those benefits.

As was the case in *Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, Docket Nos. A-310580F0009, *et al.* (Order entered January 11, 2006) (*Verizon/MCI Merger Order)*, at 42, we are concerned that the proposed rate freeze "may prove counter-productive to the interests of

the mass market in an increasingly competitive telecommunications environment . . . . [T]he better approach in this regard, and an approach which will benefit the mass market, is to promote a competitive environment consistent with the approach of the FCC."

b. Condition Requested by the OCA: Accelerating Embarq's Current Network Modernization Obligations

(1) ALJ's Recommendation

The OCA requested a condition that Embarq be required to: (1) complete its Chapter 30 universal broadband requirement by December 31, 2012 instead of December 31, 2013; or (2) modify its Bona Fide Retail Request (BFRR) program to allow individual communities in Embarq's service territory to get broadband service more easily. OCA Exc. at 29. The ALJ rejected the OCA's request stating that Embarq's modified amended alternative regulation plan cannot be amended without Embarq's consent. He added that there has been no demonstration that Embarq has failed to meet its regulatory obligation, nor has there been any demonstration that the Joint Applicants will be unable to meet their regulatory obligation following the merger. I.D. at 30-31.

(2) Exceptions and Replies

In its Exceptions, the OCA contends that the proposed condition would be in the public interest and would provide a substantial affirmative benefit to the proposed merger. Its witness, Dr. Roycroft, testified that broadband availability is inadequate for a large number of Embarq's wire centers in Pennsylvania. Accelerating the date at which 100% availability is achieved would address this situation. Dr. Roycroft also testified in support of the OCA's alternative proposal to use a portion of the synergy savings from the proposed merger to increase the number of communities to which the Joint Applicants provide DSL via the BFRR program. OCA Exc. at 29-30.

The OCA also argues that the ALJ erred in determining that the OCA's proposed condition would violate Section 3013(b) of the Code, 66 Pa. C.S. § 3013(b), which provides that a network modernization plan cannot be modified without the express agreement of both the Commission and the local exchange telecommunications company. The OCA states that Embarq has asked for the Commission's approval of the merger, but the Commission cannot grant such approval unless the Joint Applicants agree to conditions that provide substantial public benefit. The OCA's requested condition regarding the network modernization plan, like all other conditions, must be accepted by the Joint Applicants to move forward with the transaction. Thus, the OCA submits that its requested condition would not violate Section 3013(b). OCA Exc. at 30-31.

The Merging Parties state that the OCA failed to provide any specific justification for the proposed condition. According to the Merging Parties, the ALJ correctly found that there was no record of Embarq failing to meet any of its regulatory obligations. Further, the Merging Parties contend that the OCA's "attempted unilateral amendment" of Embarq's modified amended alternative regulation plan was legally suspect. M.P. R. Exc. at 10.

(3) Disposition

We agree with the OCA that Section 3013(b) of the Code, 66 Pa. C.S. § 3013(b), is not a bar to the requested condition. We will require any condition of our approval to the proposed merger to be accepted by the Joint Applicants. Thus, Embarq's network modernization plan would not be changed absent its consent.

Nevertheless, we agree with the ALJ that the requested condition is not just or reasonable based on the record. There is no evidence that Embarq's broadband deployment has been inadequate or deficient. Moreover, as stated above with regard to the proposed rate freeze, the synergy savings from this transaction will strengthen the

financial position of a competitor in the telecommunications marketplace, which will, in turn, have several substantial affirmative benefits for the public. We are concerned that the cost of implementing the OCA's proposal will undermine the benefits of the proposed transaction. We therefore will adopt the ALJ's position on this proposed condition, as modified consistent with this Opinion and Order.

We take administrative notice that Embarq PA, in its March 30, 2007 NMP, has exceeded its commitment to provide DSL and broadband availability within ten days. Embarq PA NMP Attachment 2. We encourage, but shall not include it as a condition of our approval, that the merged entity continue to strive to accelerate its broadband network deployment to those areas of the state where such service is currently lacking before the December 31, 2013 deadline.

c. Condition Requested by the OCA: Imposing Additional Reporting Requirements

(1) ALJ's Recommendation

The OCA proposed several reporting requirements, including the following:

- The Commission should require, during the first three years following the merger, that the combined company submit a quarterly report on the integration of billing systems and business and repair office operations, with speed of answer included in the report, with annual reports being filed thereafter;

- The Commission should require, during the first three years following the merger, that the combined company submit a quarterly report that identifies the number of company personnel that are associated with maintenance of the Pennsylvania network facilities, with the level of maintenance expense and personnel

described in the report, with annual reports being filed thereafter; and

- The Commission should require the combined company to continue the service quality reporting obligations outlined in the 2005 Spinoff settlement for an additional three year period following consummation of the merger that require the company to notify the OCA when a service outage repair index falls below 90% restored/repaired within 24 hours in any month across the United PA territory or for three consecutive months in any one exchange.

OCA Exc. at 32 (citations to the record omitted).

The ALJ rejected the proposed condition because he found that the OCA adduced no evidentiary support for requiring the reports. I.D. at 31-32. The ALJ added that Chapter 30 of the Code prescribes the general filing requirements for local exchange telecommunications companies. The Commission may require that additional reports be filed, but must make specific findings before doing so. 66 Pa. C.S. § 3015(e) and (f).

(2) Exceptions and Replies

The OCA submits that the proposed transaction, in which CenturyTel is acquiring a company nearly ten times its size, will present serious challenges that must be closely monitored. The OCA further submits that, "given the nature of the proposed transaction and the very real potential for harm to Pennsylvania consumers," these requirements are necessary information for the Commission and the parties. The OCA states that its proposed reporting requirements are reasonable and should be included in the conditions required by the Commission. OCA Exc. at 32.

The Merging Parties' Reply Exceptions argue that the ALJ properly found that the OCA's position was based on "supposition and conjecture." I.D. at 32. They

note that the OCA's Exceptions did not cite any record evidence that would lead to any other conclusion. Consequently, they argue that there is no basis for modifying the ALJ's conclusion. M.P. R. Exc. at 10.

(3) Disposition

We will grant the OCA's Exception consistent with the following discussion. The Joint Applicants made a commitment, which is confirmed by a condition imposed herein, that the Joint Applicants will maintain pre-merger service levels after the consummation of the transfer of control. We believe the requested reports will help monitor the performance of the Joint Applicants to ensure that they are complying with their own commitment.

We specifically find that we have statutory authority to impose this condition on the Joint Applicants. Section 3015(e) of the Code, 66 Pa. C.S. § 3015(e), states that the Commission's filing and audit requirements for a local exchange telecommunications company that is operating under an amended network modernization plan shall be limited to certain reports, including an annual service report. Section 3015(f) limits the Commission's ability to impose additional filing and reporting requirements. However, Section 3015(f)(2) states "nothing in this subsection shall be construed to impede the ability of the commission to require the submission of further information to support the accuracy of or to seek an explanation of the reports specified in subsection (e)." In our view, the reports described in the proposed condition seek additional information concerning service. This information is not currently provided in the Joint Applicants' annual service filing.

We will modify the requested condition, however. The first two reports requested by the OCA will be helpful for monitoring events during the immediate post-merger period, but we are not persuaded that there is a need for these reports in

perpetuity. Instead, we will require these reports, like the third report requested by the OCA, to be submitted only during the first three years following consummation of the merger.

d. Condition Requested by the OCA: Requiring Steps to Increase the Number of Lifeline Customers

(1) ALJ's Recommendation

The OCA requested that the Commission's approval of the proposed merger be conditioned on the Joint Applicants taking specified steps to increase the number of customers enrolled in their Lifeline program.

> Specifically, OCA would require publishing of a brochure unique to Embarq PA and distribution to County welfare offices and other appropriate locations in each county in Embarq PA's service territory. Also, the company would be required to undertake two bill inserts per year for 3 years and would be required to submit another report to the Commission of changes in the combined company's approach to Lifeline. Finally, confirmation of customer eligibility for Lifeline service would be obtained orally, rather than by submission of a written application.

I.D. at 32-33.

The ALJ rejected the OCA's proposed condition on the grounds that it was not justified by the record. I.D. at 33. He also concluded that the proposed condition is not reasonable or necessary because Chapter 30 addresses the requirements of publication and the means of enrollment in the Lifeline program. 66 Pa. C.S. § 3019(f).

(2) Exceptions and Replies

In its Exceptions, the OCA submits that it introduced evidence supporting the requested condition. Specifically, the OCA submits that the testimony of its witness Dr. Roycroft demonstrated that the Joint Applicants should be required to take specific steps to increase the number of customers enrolled in the Lifeline program. The OCA argues that its Lifeline condition would ensure that adequate attention is paid to this critical program in the post-merger period. In addition, "to the extent CenturyTel is able to enhance the Lifeline program, customers would benefit from the utilization of 'best practices.'" OCA Exc. at 33.

The Merging Parties respond by noting that the OCA offered no evidence that Embarq's Lifeline program was in any way inadequate or deficient. As such, the Merging Parties conclude that the requested condition is not just and reasonable and the ALJ's decision should be upheld. M.P. R. Exc. at 11.

(3) Disposition

We agree with the ALJ that the requested condition is not just or reasonable based on the record. As stated above, our order must be supported by substantial evidence, and we see no evidence indicating that the requested condition would be just and reasonable. The record does not demonstrate that Embarq's Lifeline program is inadequate or deficient. Moreover, the Joint Applicants have agreed to maintain Embarq's existing standards of service in the post-merger period. We see no reason to modify the Initial Decision with regard to this proposed condition.

e. Condition Requested by the OCA: Requiring a Stand-Alone DSL Offering

(1) ALJ's Recommendation

The OCA proposed, as a condition of approval, that the Joint Applicants "make a stand-alone DSL offering to residential Pennsylvania customers similar to the offering CenturyTel makes in its current service territory." OCA M.B. at 33. In other words, after the merger, the Joint Applicants would be required to offer stand-alone DSL service for $29.95 per month for a minimum of three months. I.D. at 32. The ALJ rejected this condition reasoning that DSL service is an interstate service that the Commission does not regulate. The ALJ stated that the Commission rejected an OCA proposal to require a stand-alone DSL product in the Verizon/MCI merger. He concluded that the same result should apply here. The ALJ opined that the highly competitive broadband market should determine the services that the Joint Applicants will offer after the merger and at what price. The ALJ considered the proposed condition to be "an unauthorized intrusion on management discretion." I.D. at 32.

(2) Exceptions and Replies

In its Exceptions, the OCA submits that its proposed condition relating to stand-alone DSL service is reasonable and consistent with CenturyTel's current practice. According to the OCA, the imposition of this condition would result in a substantial affirmative benefit for Embarq's Pennsylvania ratepayers. The OCA clarifies that providing stand-alone DSL will allow customers to choose one supplier for their telephone needs and another for their internet needs thus creating competitive options for consumers. OCA Exc. at 34.

The Merging Parties respond that the OCA offered no evidence to support the necessity for its requested condition. Instead, the Joint Applicants contend, the OCA

simply relied on the assertion that such a condition somehow would be reasonable. The Merging Parties urge the Commission to "reject the OCA's effort to substitute its judgment about the desirability and feasibility of competitive service offerings." M.P. R. Exc. at 11.

(3) Disposition

Before we address the proposed condition for deployment of stand-alone DSL in this case, we are compelled to clarify the ALJ's remarks regarding our refusal to require the deployment of stand-alone DSL in the *Verizon/MCI Merger Order*. Contrary to the ALJ's remarks in the Initial Decision, we adopted the condition that the FCC imposed on Verizon, requiring it to offer stand-alone ADSL within twelve months of the Verizon/MCI merger closing date. However, we did not make any additional requirements in this matter. The OCA's arguments in that case were that the FCC's conditions were insufficient in light of the technical and operational difficulties that Verizon must overcome in the deployment of stand-alone DSL. We rejected that argument. *Verizon/MCI Merger Order* at 55-56.

In this case, in contrast, there is no pre-existing FCC Order requiring the Merging Parties to provide stand-alone DSL. If the FCC does not require the Joint Applicants to provide stand-alone DSL service, we will not create such a requirement in Pennsylvania as a condition of our merger approval. We will, however require that any conditions that may be imposed by the FCC with regard to offering stand-alone DSL shall also be extended to Embarq's Pennsylvania customers to the extent it is possible. In this regard, we note that, when the FCC issues its decision regarding this merger, this Commission reserves the right to issue a subsequent Order that may incorporate additional

merger conditions mirroring those established by the FCC to the extent that these FCC conditions are consistent with applicable Pennsylvania law.[4]

f. Condition Requested by the OCA: Requiring Website Corrections

(1) ALJ's Recommendation

The OCA requested, as a condition of approval, that the Embarq website be modified "so that it correctly advertises its basic local exchange service as required by the Commission regulations." OCA M.B. at 33. The OCA alleged that the website's discussion of a product called "Basic Phone Service" does not address the availability of stand-alone basic service. The ALJ denied the OCA's request because the OCA did not produce evidence of any consumer complaining of confusion about the product. The ALJ concluded that, absent such proof, the requested condition would be "Commission overreaching on managerial authority." I.D. at 33.

(2) Exceptions and Replies

In its Exceptions, the OCA notes that the ALJ did not dispute its allegation that Embarq currently mislabels "basic phone service" on its website. The OCA's witness, Dr. Roycroft, testified that "calling a service that includes voice mail and multiple features 'Basic Home Phone' service is patently misleading." OCA St. 1-S at 15. The OCA argues that the ALJ erred by requiring it to introduce evidence of consumer complaints before Embarq's website becomes compliant with applicable laws. The OCA

[4] Any potential issuance of a subsequent Commission Order that may mirror the FCC-established conditions on the merger of the Joint Applicants will abide by the usual due process requirements of notice and comment as such requirements are applicable and necessary.

contends that the requested condition is reasonable and should be approved. OCA Exc. at 34-35.

The Merging Parties respond that the requested condition is unnecessary because the OCA failed to present evidence demonstrating customer confusion. The Merging Parties contend that the OCA's proposed condition improperly overreaches into managerial authority. M.P. R. Exc. at 11.

(3) Disposition

We agree with the OCA that the ALJ erred by requiring the OCA to produce evidence of customer confusion before reaching the question of whether or not the information on Embarq's website is deceptive or misleading in violation of our Regulations at 52 Pa. Code § 63.143. While we do not find the record evidence in this proceeding sufficient to support a conclusion that the website is in fact deceptive or misleading, we strongly recommend that the Joint Applicants review the website to ensure that it is not. In our view, the instant proceeding places the Joint Applicants on notice of a potential violation of our Regulations. It is our hope that the Joint Applicants will take such corrective action as may be necessary to avoid the possibility of any Formal Complaints being filed in the future on this matter.

g. Conditions Requested by the BCAP

(1) Introduction

The BCAP proposed twelve conditions, which the ALJ characterized as a "wish list" of terms and conditions for future interconnection agreements. The ALJ concluded that the BCAP was attempting to use this proceeding as a substitute for legally mandated negotiations under Sections 251 and 252 of TA-96, which the ALJ determined was improper. The ALJ therefore rejected all of the requested conditions. The ALJ gave

additional reasons for rejecting some of the individual conditions requested by the BCAP. Those reasons will be discussed below in the context of each requested condition.

The BCAP responds in its Exceptions that its proposed conditions are not a "wish list" of private benefits for the BCAP's members, but rather "conditions to ensure that CLECs continue to have reasonable opportunities to compete in the Embarq PA service territory after completion of the merger, which benefits the consumers in this Commonwealth." BCAP Exc. at 6, note 1. The BCAP argues that the conditions are intended to mitigate the anticompetitive effects that may arise as a result of the proposed transaction. *Id*. at 2.

Specifically, the BCAP contends that CenturyTel has certain anticompetitive practices that, if allowed to be implemented in Pennsylvania, will frustrate competition. *Id*. at 7. The BCAP consequently states that most of its proposed conditions do not seek affirmative changes, but rather seek to maintain the *status quo* for Embarq after the merger. *Id*. at 9.

The Merging Parties' Reply Exceptions argue that the ALJ carefully considered the BCAP's claims of harm to competition from the merger and rejected them as wholly unsubstantiated. The Merging Parties also argue that "the conditions sought by BCAP do not seek to preserve competition but to invert it – using this proceeding as a means to obtain a competitive advantage by enabling *certain* competing CLECs to refashion the terms of interconnection to their unilateral benefit." M.P. R. Exc. at 16 (emphasis in original).

(2) Negotiating Interconnection Agreements

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "Embarq should be required to enter into good faith negotiations pursuant to Sections 251 and 252 of TA-96 with all requesting competitive providers." BCAP Exc. at 5. The ALJ rejected this condition because it re-states an existing federal regulatory requirement. "It is inappropriate for BCAP to suggest that the Commission condition the merger on the combined company's compliance with a pre-existing regulatory duty." I.D. at 36.

(b) Exceptions and Replies

In its Exceptions, the BCAP explains that, on at least one occasion, CenturyTel has refused number porting due to the wholesale nature of the service being provided to a cable operator. "BCAP remains concerned that, as a result of its merger with CenturyTel, Embarq may use the innovative type of service delivery arrangement to refuse interconnection or other requests under Section 251 and 252 of the Telecommunications Act of 1996." BCAP Exc. at 10.

The Merging Parties contend that the requested condition is unnecessary. They agree with the ALJ that the requested condition re-states existing federal law. Moreover, the Joint Applicants have committed that they will not protest or challenge a CLEC's right to interconnect, or refuse to extend their interconnection agreements, because the CLEC is providing wholesale service. M.P. R. Exc. at 18 and 20.

(c) Disposition

We adopt, as a condition of our approval of the proposed merger, the Joint Applicants' commitment that they will not protest or challenge a CLEC's right to interconnect, or refuse to extend their interconnection agreements, because the CLEC is providing wholesale service. We believe this commitment addresses the BCAP's concern, eliminating the need for the requested condition. We will therefore modify the Initial Decision consistent with this Opinion and Order.

(3) Extending Interconnection Agreements

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "existing interconnection agreements should be extended, at a CLEC's option, for up to three years beyond the current term." *Id*. The ALJ rejected this proposal because it was unsupported by any evidence. The ALJ noted that the interconnection agreements in question were voluntarily negotiated. He concluded that it was inappropriate for the BCAP to seek to allow its members to unilaterally extend such agreements merely because the ILEC signing the agreement is changing its ultimate parent. I.D. at 37.

(b) Exceptions and Replies

In its Exceptions, the BCAP explains that CLECs and ILECs do not operate on a level playing field with regard to interconnection negotiations. It argues that CLECs approach these negotiations seeking to enter the market as quickly as possible, whereas ILECs seek to delay entry into their territory. Giving CLECs the option to extend Interconnection Agreements for up to three years beyond the current term would provide a benefit to some CLECs. BCAP Exc. at 11.

The Merging Parties point out that the terms and conditions of the current interconnection agreements, including their length, were voluntarily negotiated at arms length. They argue there is no evidence establishing that the requested condition would be merited, proper or necessary. M.P. R. Exc. at 21.

(c) Disposition

We find the requested condition is not just or reasonable based on the record. We see no reason why one party to an agreement should have the sole option to modify the terms thereof, simply because of a change in control in the corporate parent of the other party to that agreement. We fail to see how this condition would provide a public benefit to the proposed transaction. Moreover, we are not persuaded that this condition is necessary to address the competitive impact of the proposed transaction. We, therefore, deny the BCAP's Exceptions with regard to this proposed condition.

(4) Prohibiting Challenges to CLEC Applications

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger:

> With the exception of fitness challenges, Embarq should be precluded from challenging or protesting any CLEC application, including any application submitted by entities such as those that will partner with cable voice or other VoIP providers. Further, Embarq should be precluded from challenging the right of these entities to interconnect once they have received a Commission approved CLEC certificate.

BCAP Exc. at 5. The ALJ rejected this proposed condition stating that the proposal "far overreaches anything reasonable." I.D. at 36.

(b) Exceptions and Replies

The Merging Parties state that it would be "virtually unprecedented to strip away the right of an ILEC to refuse interconnection or challenge a CLEC application for any reason except for a fitness challenge. There is no evidence in this proceeding that such a condition would be merited, proper or necessary." M.P. R. Exc. at 20.

(c) Disposition

We agree with the ALJ that the proposed condition is neither just nor reasonable. The BCAP's proposed condition would have us prevent the Joint Applicants from filing what might be valid protests to CLEC applications. We fail to see how this proposed condition would affirmatively benefit the public in a substantial way. We, therefore, reject the BCAP's Exception regarding this proposed condition.

(5) Eliminating CLEC Deposits

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "Embarq's deposit requirement of $10,000 for CLECs that enter a new market or state should be eliminated, however, to the extent that deposits are permitted, any such deposit should be subject to payment of interest to the party making the deposit." BCAP Exc. at 5-6. The ALJ rejected this proposed condition because he found it contrary to the evidence, which he found shows that Embarq's deposit requirement was instituted to protect it from losses due to defaulting CLECs. According to the ALJ, the proposed

condition seeks to force the Joint Applicants, after consummating the merger, to shoulder the risk of a CLEC default. The ALJ found nothing in the record to indicate that shifting the risk in this manner is an affirmative public benefit. I.D. at 38.

(b) Exceptions and Replies

In its Exceptions, the BCAP "questions the necessity of a $10,000 deposit for each new state or market a competitor enters when that amount is in no way tied to the actual cost of facilities ordered or are refunded upon demonstration of a good payment history and/or creditworthiness." BCAP Exc. at 16. In the alternative, the BCAP suggests that any deposit that is required should be subject to the payment of interest. *Id.*

The Merging Parties disagree with the BCAP's proposal on this matter and argue that the ALJ's decision is supported by substantial evidence. They contend the evidence demonstrates that deposits protect the ILEC in the event of a CLEC default. The Initial Decision, they submit, correctly stated that Embarq collects security deposits "on a state-by-state basis because with each new state it enters, the competitor is increasing its liability to the ILEC and thereby the ILEC's exposure and risk is increasing." I.D. at 38. In addition, they submit that the request for interest on security deposits is a new proposal that should be stricken. M.P. R. Exc. at 21.

(c) Disposition

With regard to the proposal to eliminate the Joint Applicants' deposit requirement, we will adopt the Initial Decision. Our decision must be supported by substantial evidence. As noted by the ALJ, the evidence demonstrates that the Joint Applicants' existing policy limits their exposure in the event of a default by a CLEC.

I.D. at 37-38. We are not persuaded that it would be just and reasonable to force the Joint Applicants to shoulder all of the risk of a default by a CLEC simply because of a change in control of their corporate parent.

With regard to the proposal to order the payment of interest on deposits, we agree with the Merging Parties that this recommendation is a late proposal that should not be considered. Both the BCAP's Main Brief, at 12, and its Reply Brief, at 7, requested that the deposit requirement be eliminated. We will not consider a proposal that was not advanced until the exceptions phase of this proceeding.

(6) Billing Format

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger:

> Instead of delivering invoices in ".pdf" format, Joint Applicants should be required to provide CLECs with billing data in a more usable format, such as Excel spreadsheets or another commercially-common format where data can be uploaded to a database, such as MS-Access.

BCAP Exc. at 6. The ALJ did not specifically address this proposed condition in the Initial Decision.

(b) Exceptions and Replies

In its Exceptions, the BCAP contends that CenturyTel's billing format is unworkable in today's market and makes billing reconciliation a time-consuming process. "Given the claimed synergies that will result from the merger, competitive carriers should

not be forced to pay additional charges to obtain ordinary business data in a usable format." BCAP Exc. at 11-12.

The Merging Parties submit that the proposed condition addresses an issue that should be resolved in the course of good faith negotiations pursuant to Sections 251 and 252 of TA-96. They also contend this condition is unnecessary in light of their commitment to maintain substantially the service levels that Embarq currently provides for wholesale operations. M.P. R. Exc. at 22.

(c) Disposition

This proposed condition is unnecessary in light of the condition adopted here confirming the Joint Applicants' commitment to maintain substantially the service levels that they currently provide for wholesale operations. We do, however, encourage the Merging Parties to work with the CLECs to develop electronic billing formats in lieu of .pdf invoices to make it easier for the CLECs to upload the information to a computerized database.

(7) Prohibiting directory listing practices

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, the "Joint Applicants should be prohibited from adopting CenturyTel's current directory listing practices." BCAP Exc. at 6. The ALJ did not specifically address this condition in the Initial Decision.

(b) Exceptions and Replies

In its Exceptions, the BCAP states:

> BCAP members have routinely encountered frustrations with CenturyTel's directory listing galley reviews. As further explained in BCAP's [Main Brief], during the one-week review period in which a CLEC must review, correct and resubmit galley files to CenturyTel, errors are regularly uncovered, such as missing Directory Service Requests ("DSRs") or Directory Service Orders ("DSOs"). In addition, BCAP members have routinely identified incorrect listings due to subsequent change orders.

BCAP Exc. at 12 (citations to the record omitted).

The Merging Parties submit that the proposed condition addresses an issue that should be resolved in the course of good faith negotiations pursuant to Sections 251 and 252 of TA-96. They also contend this condition is unnecessary in light of their commitment to maintain substantially the service levels that Embarq currently provides for wholesale operations. M.P. R. Exc. at 22.

(c) Disposition

We believe this proposed condition is unnecessary in light of the condition adopted here confirming the Joint Applicants' commitment to maintain substantially the service levels that they currently provide for wholesale operations. This disposition should not be construed as suggesting that this Commission is not concerned about the accuracy of directory listing. Although the evidence regarding CenturyTel's record with regard to directory listing errors is sparse, we admonish the Merging Parties that this Commission does not condone directory listing errors and we encourage the Merging

Parties to work with the CLECs to ensure the DSRs or DSOs are not overlooked and that incorrect listings dues to subsequent change orders are kept to a minimum.

(8) Implementing EASE

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, the "Joint Applicants should be required to implement EASE (or a system with similar formats and compatibility for CLEC ordering) as the Applicants aver they intend." BCAP Exc. at 6. The ALJ did not specifically address this condition in the Initial Decision.

(b) Exceptions and Replies

According to the BCAP, its members have experienced frustration when using CenturyTel's Service Ordering Portal. The BCAP alleges that CenturyTel's Graphical User Interface is limited in functionality and the ability to search for orders. BCAP Exc. at 12-13. In their Reply Exceptions, the Merging Parties reiterate that they have agreed to utilize Embarq's EASE service order entry system after the consummation of the merger. M.P. R. Exc. at 18.

(c) Disposition

We granted the requested condition above, in the context of the BCAP's Attachment B.

(9) Extending Docket No. A-310190

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "the Commission's recent determination at Docket No. A-310190 should be extended to all CLECs, including those under existing Interconnection Agreements." BCAP Exc. at 6. In *Petition of Comcast Business Communications, LLC d/b/a Comcast Long Distance for Arbitration of an Interconnection Agreement with The United Telephone Company of Pennsylvania, Inc. d/b/a Embarq Pennsylvania, Pursuant to 47 U.S.C. § 252(b),* Docket No. A-310190 (Order entered December 18, 2008), this Commission held that Embarq's proposed $2.00 monthly fee for maintaining and storing Comcast's directory listing in Embarq's databases was discriminatory and contrary to the requirements of Section 251(b)(3) of TA-96. The ALJ did not specifically address this proposed condition in the Initial Decision.

(b) Exceptions and Replies

In its Exceptions, the BCAP states that Embarq is currently planning on imposing charges for Directory Listing Storage and Maintenance. Citing the Commission's ruling in Docket No. A-310190, the BCAP argues that these charges are discriminatory and illegal. BCAP Exc. at 16. The BCAP asks the Commission to confirm that the decision at Docket Number A-310190 will also apply to all CLECs, including those under existing Interconnection Agreements.

The Merging Parties reply that interconnection agreements reflect the results of arms-length, good faith negotiations between sophisticated parties. If a CLEC wishes to address the charges for Directory Listing Storage and Maintenance, it can do so as part of renegotiating a new interconnection agreement. M.P. R. Exc. at 24.

(c) Disposition

We will deny this requested condition. Although administrative agencies are not bound by the rule of *stare decisis*, they must render consistent opinions, and should either follow, distinguish, or overrule their own precedent. *Bell Atlantic-Pennsylvania, Inc. v. Pa. PUC*, 672 A.2d 352 (Pa. Cmwlth. 1995). If a party believes that its particular situation is controlled by the Commission's decision in Docket No. A-310190, it may so argue in an appropriate Commission proceeding.

(10) Order Processing Timeframes

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "Embarq should be required to meet or exceed the industry standard of five days for order processing after completion of this transaction." BCAP Exc. at 6. The ALJ did not specifically address this proposed condition in the Initial Decision.

(b) Exceptions and Replies

According to the BCAP, CenturyTel averages seven days to process port-in or LSR orders, while other carriers routinely process these types of orders within five days. BCAP Exc. at 13.

The Merging Parties submit that the proposed condition addresses an issue that should be resolved in the course of good faith negotiations pursuant to Sections 251 and 252 of TA-96. They also contend this condition is unnecessary in light of their commitment to maintain substantially the service levels that Embarq currently provides for wholesale operations. Finally, they note that the combined companies remain

committed to comply with 47 CFR § 42.26(a), which requires properly submitted service orders to be processed within four days. M.P. R. Exc. at 22-23.

(c) Disposition

We believe this proposed condition is unnecessary in light of the condition adopted here confirming the Joint Applicants' commitment to maintain substantially the service levels that they currently provide for wholesale operations.

(11) Maintaining Fall-Out Performance

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "Embarq should be required to maintain its performance regarding fall-outs to ensure CenturyTel's poor performance on fall-outs does not spread to Pennsylvania." BCAP Exc. at 6. The ALJ did not specifically address this condition in the Initial Decision.

(b) Exceptions and Replies

According to the BCAP, Embarq's order fall-out numbers are within industry standards, but CenturyTel's are excessive. BCAP Exc. at 14.

The Merging Parties submit that the proposed condition addresses an issue that should be resolved in the course of good faith negotiations pursuant to Sections 251 and 252 of TA-96. They also contend this condition is unnecessary in light of their commitment to maintain substantially the service levels that Embarq currently provides for wholesale operations. M.P. R. Exc. at 22.

(c) Disposition

We believe this proposed condition is unnecessary in light of the condition adopted here confirming the Joint Applicants' commitment to maintain substantially the service levels that they currently provide for wholesale operations.

(12) Limiting Orders

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "CenturyTel's current order limitation of 50 orders per day per CLEC should not be imposed in Pennsylvania." BCAP Exc. at 6. The ALJ did not specifically address this condition in the Initial Decision.

(b) Exceptions and Replies

In its Exceptions, the BCAP states "CenturyTel's current policy of limiting orders to 50 per day, per CLEC, nationwide is on its face antithetical to the pro-competitive policies of Pennsylvania and should not be allowed to be imposed as a result of this merger." BCAP Exc. at 14. The BCAP contends that this proposed condition merely seeks to maintain the *status quo* and ensure that post-merger operational changes at Embarq do not impair the ability of competitive providers to compete. *Id*. at 10.

The Merging Parties submit that the BCAP's proposed condition addresses an issue that should be resolved in the course of good faith negotiations pursuant to Sections 251 and 252 of TA-96. They also contend this condition is unnecessary in light

of their commitment to maintain substantially the service levels that Embarq currently provides for wholesale operations. M.P. R. Exc. at 22.

(c) Disposition

We believe this proposed condition is unnecessary in light of the condition adopted here confirming the Joint Applicants' commitment to maintain substantially the service levels that they currently provide for wholesale operations.

(13) Dispute resolution forum

(a) ALJ's Recommendation

The BCAP requested that, as a condition of our approval of the proposed merger, "the Commission should establish a forum for carriers to quickly obtain resolution of interconnection and other operational disputes with Embarq." BCAP Exc. at 6. The ALJ noted that every interconnection agreement contains negotiated dispute resolution processes. He concluded that the BCAP seeks to "disturb the carefully negotiated relationship established between two consenting parties with no basis for doing so." I.D. at 38. He found the proposed condition burdensome for both the combined companies and the Commission. Consequently, he rejected the proposed condition.

(b) Exceptions and Replies

According to the BCAP, "due to the number of potential concerns and frustrations with CLECs seeking to operate in the Joint Applicants' territory, it is essential to have an opportunity to quickly resolve technical issues and disputes, prior to instituting a formal proceeding." BCAP Exc. at 15. The BCAP therefore asks this Commission to

establish a forum for carriers to obtain resolution of interconnection and other operational issues quickly. *Id*. The BCAP's witnesses described the forum as a quarterly meeting of a carrier working group, facilitated by a senior member of the Commission's staff. If an issue cannot be resolved by negotiation, the Commission could issue a determination. *Id*. at 17-18.

The Merging Parties argue that this condition is unreasonable because the BCAP's members already have ample avenues to resolve any disputes that arise with respect to interconnection or operational issues. They contend that the proposed dispute resolution process would duplicate the dispute resolution procedures agreed-to in the existing interconnection agreements. Citing *Interim Guidelines for Abbreviated Dispute Resolution Process*, Docket No. M-00021685, they contend that the Commission already has in place an Abbreviated Dispute Resolution Process for disputes arising under interconnection agreements. They, therefore, conclude that this condition represents a "solution in search of a problem." M.P. R. Exc. at 24.

(c) Disposition

We will adopt the Initial Decision with regard to this proposed condition. We agree with the ALJ and the Merging Parties that the requested dispute resolution forum is unnecessarily duplicative of existing dispute resolution processes.

IV. Conclusion

Based on the foregoing, the Exceptions filed by the OSBA are denied, the Exceptions filed by the OCA and the BCAP are each granted in part and denied in part, and the Initial Decision of ALJ Weismandel is modified, all consistent with this Opinion and Order; **THEREFORE**,

IT IS ORDERED:

1. That the Exceptions filed by the Office of Consumer Advocate on April 17, 2009, are granted in part and denied in part.

2. That the Exceptions filed by the Office of Small Business Advocate on April 17, 2009, are denied.

3. That the Exceptions filed by the Broadband Cable Association of Pennsylvania on April 17, 2009, are granted in part and denied in part.

4. That the Initial Decision of Administrative Law Judge Wayne L. Weismandel, issued on April 6, 2009, is modified consistent with this Opinion and Order.

5. That the Joint Application of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. for Approval of the Indirect Transfer of Control to CenturyTel, Inc. is granted, subject to the duly authorized officers of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. having filed with the Pennsylvania Public Utility Commission within thirty (30) days of the entry date of the Commission's Order their fully-executed written acceptance of each of the following conditions:

a. The Joint Applicants will maintain substantially the service levels that they currently provide for wholesale operations, subject to reasonable and normal allowances for the integration of CenturyTel and Embarq systems.

b. The Joint Applicants will negotiate multiple contracts in a state at the same time in most circumstances when such consolidated negotiations will aid in addressing common issues.

c. The Joint Applicants will adopt Embarq's EASE service ordering system.

d. The Joint Applicants will, during the first three years following the merger, submit a quarterly report on the integration of billing systems and business and repair office operations, with speed of answer included in the report.

e. The Joint Applicants will, during the first three years following the merger, submit a quarterly report that identifies the number of company personnel that are associated with maintenance of the Pennsylvania network facilities, with the level of maintenance expense and personnel described in the report.

f. The Joint Applicants will continue the service quality reporting obligations outlined the 2005 Spinoff settlement for an additional three-year period following consummation of the merger, except that the company shall notify the Commission (rather than OCA) when a service outage repair index falls below 90% restored/repaired within twenty-four (24) hours in any month across the United PA territory or for three consecutive months in any one exchange.

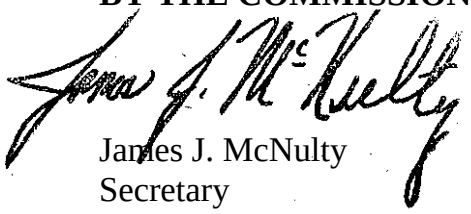
g. The Joint Applicants shall not protest or challenge a CLEC's right to interconnect, or refuse to extend their interconnection agreements, because the CLEC is providing wholesale service.

h. Any merger conditions imposed by the FCC with regard to offering stand-alone DSL also shall be extended to Embarq's Pennsylvania customers to the extent it is possible. The Commission reserves the right to issue a subsequent Order that may incorporate additional merger conditions mirroring those established by the FCC to the extent that these FCC conditions are consistent with applicable Pennsylvania law.

6. That, upon compliance with Ordering Paragraph No. 5 above, a certificate of public convenience be issued evidencing the Pennsylvania Public Utility Commission's approval of the transaction occurring as a result of the Agreement and Plan of Merger between Embarq Corporation, CenturyTel, Inc. and Cajun Acquisition Company. Within thirty (30) days after the consummation of the transfer of control, the Joint Applicants shall notify the Commission of the effective date of the transfer of control. The record at Docket No. A-2008-2076038 shall then be marked closed.

7. That upon non-compliance with Ordering Paragraph No. 5 above, the Joint Application of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. for approval of the Indirect Transfer of Control to CenturyTel, Inc. shall be dismissed, and the record at Docket No. A-2008-2076038 shall then be marked closed.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: May 28, 2009
ORDER ENTERED: May 28, 2009

CERTIFICATE OF SERVICE

I certify that on June 2, 2009, I served the foregoing document upon all parties of record in Docket No.UM 1416 by email and for parties who have not waived paper service, by U.S. mail, postage prepaid.

G. Catriona McCracken
Staff Attorney
Citizens' Utility Board
610 SW Broadway, Suite 308
Portland, OR 97205

Joan S. Kelsey
City Attorney, Lincoln City
P.O. Box 520
Tillamook, OR 97141

Michael Weirich
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096

David White
Tonkin Torp
888 Fifth Ave #1600
Portland, OR 97204

By: 

Charles L. Best
Attorney for CenturyTel, Inc.
OSB No. 781421