

ISSUED: August 26, 2010

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1484

In the Matter of

CENTURYLINK, INC.,

Application for Approval of Merger  
between CenturyTel, Inc., and Qwest  
Communications International, Inc.

RULING

**DISPOSITION: PETITION TO INTERVENE GRANTED  
IN PART AND DENIED IN PART**

In this ruling, the Administrative Law Judge (ALJ) grants the Petition to Intervene (Petition) filed by the City of Lincoln City, Lincoln County, and Tillamook County (Petitioners), with conditions.

**BACKGROUND**

On May 24, 2010, CenturyLink, Inc. (CenturyLink or Applicant), filed an Application for approval of merger between its wholly-owned subsidiary, CenturyTel, Inc., and Qwest Communications International, Inc., parent of Qwest Communications, Inc. (Qwest). A prehearing conference was held on June 8, 2010, at which time a schedule was adopted for the proceeding, including the establishment of June 22, 2010, as the suggested date for filing petitions to intervene.

On August 6, 2010, the City of Lincoln City, Lincoln County, and Tillamook County (Petitioners) filed an Amended Petition to Intervene (Petition) in the above-captioned proceeding. Petitioners claim that their interest in this proceeding relates to:

the failure of CenturyTel (including the failure of its predecessor, Embarq) to provide wireline redundancy within north Lincoln County and Tillamook Counties. This condition has resulted in excessive failure of all telephone services, including 911 [Public Safety Answering Point or PSAP] service, which this merger may further harm.

\* \* \* \* \*

The Joint Petitioners seek a condition of the merger to include a requirement that infrastructure investments be made to provide redundant wireline service for affected customers in Lincoln and Tillamook Counties.<sup>1</sup>

Petitioners argue that, because these issues are financially related to the application, the Commission's order in the Verizon/Frontier merger<sup>2</sup> provides a direct precedent to Petitioners' request. Petitioners claim that the Verizon/Frontier Order contains conditions which require infrastructure investments as a direct result of intervening parties' requests based upon analogous public interest concerns under the "no harm" standard. The Verizon/Frontier Order required the applicant to file a strategic plan with data on the useful life and replacement schedules for switches in a portion of the service area with the intention of maintaining then current service standards-in addition to the upgrades. Petitioners seek the opportunity to prove that Embarq failed to deliver on promises to fix the PSAP system in accordance with ORS 401.720(4) standards. A similar unfulfilled promise related to the provision of fiber route diversity for the Lincoln City coast district.<sup>3</sup>

Petitioners next set forth allegations of prior instances of loss of telephone and 911 services in their respective jurisdictions and actual and potential harm to the public if service quality levels are not improved. The Commission has the authority and duty under ORS 756.040 to require adequate service and

there is no reason not to require such service as a merger condition.  
\* \* \* Joint Petitioners do not currently know if the merged entities will have the money or have budgeted the financial resources to create this redundant system, but regardless, Petitioners believe the merged entities do not have the will on their own to do the work. \*  
\* \* The City has no other effective venue in which to seek redress or to require these necessary security upgrades to the telephone systems left by Embarq.<sup>4</sup>

CenturyLink filed its Opposition to Amended Joint Petition to Intervene (Opposition) on August 9, 2010, asserting:

[t]his is not the appropriate forum for the Petitioners to address concerns regarding the condition of service in the area. If the Petitioners believe that CenturyLink has violated a Commission

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<sup>1</sup> Petition at 1-2, 3.

<sup>2</sup> *In the Matter of Verizon Communications, Inc. and Frontier Communications corporation Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc.*, Docket UM 1431, Order No. 10-067, entered February 24, 2010. (Verizon/Frontier Order).

<sup>3</sup> Petition at 3-4.

<sup>4</sup> *Id.* at 5-6 (footnote omitted).

Petitioners believe that CenturyLink has violated a Commission rule or state law, they should seek redress in an appropriate forum, such as, for example, a commission complaint proceeding or a court complaint. The Petitioner's bald contention that 'it has no other effective venue' to address its allegations is not credible considerate appears the Petitioners have not even tried to assert its claims in any other manner. \* \* \* The timing and the overreaching nature of the Amended Joint Petition demonstrate that it is nothing more than an attempt to hold as hostage this merger transaction \* \* \* that they have not even attempted to address through proper legal means.<sup>5</sup>

CenturyLink further argues that if the Commission were to consider the Petitioners' issues, it would have to make complete factual findings after a full hearing and would thereby burden the record and cause unreasonable delay. Finally, CenturyLink notes that granting the petition would set a precedent that would encourage in future proceedings "a cavalcade of *interested persons* seeking to extract conditions that are beyond the scope of the Commission's jurisdiction, in the context of a proceeding held in accordance with ORS 860.375 and .380."<sup>6</sup>

Petitioners filed a Response to Centurylink's Opposition to Petition to Intervene (Response) on August 12, 2010, saying that it is not a disqualifying characteristic in American jurisprudence to use venue as a means to get leverage over an adversary and that nothing prevents the Commission from exercising its broad authority to address utility service issues in the context of the instant merger. "Judicial economy, if nothing else, is served by considering the proposed merger conditions now."<sup>7</sup>

Petitioners also note the Verizon/Frontier Order which imposed costly infrastructure improvements to address reliability concerns and reject CenturyLink's proposed alternative route because "Oregon statutes do not appear to create an actionable case from the fact of an unreliable network on the ground. \* \* \* Even if the statutes did create a separate right of action, that is not alone a basis for ejecting this petition because the PUC unquestionably has concurrent authority to consider all issues, including those under ORS 756.040 in a merger."<sup>8</sup>

Finally, Petitioners assert that there is no harm to the schedule caused by their late intervention; they are abiding by the current schedule and therefore the merger is not being 'held hostage.'<sup>9</sup>

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<sup>5</sup> Opposition at 2-3 (footnote omitted).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Response at 2.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 5.

## DISCUSSION

Petitioners seek intervention under OAR 860-012-0001(2), which provides as follows:

If the Commission or Administrative Law Judge (ALJ) finds the petitioner has sufficient interest in the proceeding and the petitioner's appearance and participation will not unreasonably broaden the issues, burden the record, or unreasonably delay the proceeding, the Commission or ALJ will grant the petition. The Commission or ALJ may impose appropriate conditions upon any intervenor's participation in the proceeding.

This Commission previously addressed a request to intervene filed by one of the petitioners, the City of Lincoln City (Lincoln City or the City), in a similar docket. In docket UM 1416, the Commission considered the application of CenturyTel, Inc., a subsidiary of CenturyLink, Inc., to merge with Embarq Communications. In support of its petition to intervene in that proceeding, Lincoln City asserted an interest in two issues, both arising out of an alleged failure in the provision of 911 services by Embarq. First, would the CenturyTel/Embarq merger documents include provisions for switch redundancy between Lincoln City and Sheridan, Oregon, including sufficient financial capability and a commitment to build such facilities; and, second, whether the merger would include an obligation to provide the City with emergency stand-alone 911 service and enhance or diminish the current 911 service.

By Ruling of March 12, 2009, the Administrative Law Judge (ALJ) granted the City's petition with certain conditions, noting at page 2 of his Ruling as follows:

As a municipality with a population of approximately 7400 persons, the vast majority of whom are served by Embarq, the City has a legitimate interest in the overall financial strength of its wireline telecommunications service provider, as that provider has an obligation to serve the City's inhabitants. The City therefore has an interest in seeing that the proposed merger will not harm the financial ability of Embarq to serve its customers. The city of Lincoln City shall therefore be made a party to this proceeding.

However, questions regarding the specific direction of resources or managerial decisions to be made by either Embarq *or the merged company* with respect to the provision of particular services to a particular service area, do not relate to the overall financial condition of the merged entities and are beyond the scope of this docket. As such, I find that the issues proposed by the City with respect to the provision of 9-1-1 services and infrastructure to be contrary to OAR 860-012-0001(2), insofar as their

consideration would unreasonably broaden the issues and burden the record of this proceeding. (Emphasis added.)

The CenturyTel/Embarq merger was approved by the Commission by Order No. 09-169 entered May 11, 2009. It contained numerous conditions, none of which related to the provision of particular services to particular service areas.

The instant proceeding is even further removed from the actions of Embarq, as it relates to the merger of the parent of the company which merged with Embarq and another entity, Qwest, whom the Petitioners do not allege to have any facilities or operations in the areas that are the subject of their concerns.

The Petitioners essentially raise two reasons not previously offered for the ALJ to reach a conclusion different from the Ruling in UM 1416. Their first argument is that the Verizon/Frontier Order provides a precedent for inclusion of the issue because it contains conditions which require infrastructure investments as a direct result of intervening parties' requests based upon analogous public interest concerns under the "no harm" standard. However, the Verizon/Frontier Order is not directed to any one particular location or specific allegation of dereliction, but rather to an overall plan for the maintenance of the quality of service.<sup>10</sup>

The Petitioners have an interest in such an overall service assurance and safety plan and may raise such general issues, as well as the previously permitted inquiry into the financial strength of the merged entity, in this proceeding. The Verizon/Frontier Order does not alter or modify the conclusions reached in the ALJ's Ruling in UM 1416.

The second argument of Petitioners addresses the appropriateness of raising their concerns in this particular proceeding. Their first argument, that Oregon statutes do not provide them with a cause of action for an unreliable network, is incorrect. Petitioners could have filed a complaint against the Applicant or petition the Commission to undertake an investigation with respect to the matters they have alleged, at any time and may still do so. Furthermore, rather than including their allegations within this case as a matter of "judicial economy," such an action would do precisely what OAR 860-012-0001(2) was designed to prevent.

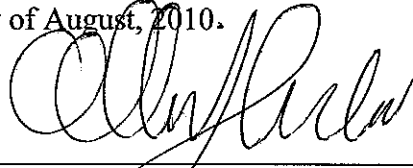
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<sup>10</sup> See *Verizon/Frontier Order* at 14-15, discussion of Conditions 22-23, (Engineering and Service Assurance) and 24-27 (Safety) and Appendix B at 12.

**RULING**

The City of Lincoln City, Lincoln County, and Tillamook County Amended Petition to Intervene is GRANTED to the extent indicated and is DENIED in all other respects.

Dated at Salem, Oregon, this 26th day of August, 2010.



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Allan J. Arlow  
Administrative Law Judge

UM 1484 Ruling Granting Intervention with Conditions 8-26-10