

**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: MOTION TO CERTIFY QUESTIONS DENIED

In this ruling, the Administrative Law Judge (ALJ) denies the Motion to Certify Questions to the Commission (Motion) filed by the City of Lincoln City, Lincoln County, and Tillamook County (Intervenors).

I. BACKGROUND

On August 26, 2010, the ALJ issued a ruling (Ruling) granting the Intervenors' Petition to Intervene with conditions. Petitioners asked the Commission to enlarge the scope of the proceeding in two respects. First, petitioners sought "to explore the alleged failure of CenturyTel * * * to provide wireline redundancy within north Lincoln and Tillamook County, which resulted in excessive failures of all telephone services, including 911 Public Safety Answering Point service * * *."¹ Second, petitioners sought "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."²

In the Ruling, the ALJ noted that the Intervenors had an interest in an overall plan for the maintenance of service quality assurance and safety and, to that end, 'may raise such general issues, as well as the previously permitted inquiry into the financial strength of the merged entity, in this proceeding.'³ However, the ALJ rejected Intervenors' contention that '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

¹ Petition to Intervene at 1-3.

² *Id.*

³ Ruling at 5.

basis for ejecting this petition * * * .”⁴ Similarly, the ALJ also rejected Intervenors’ argument that administrative efficiency would improve by adding the proposed issues to the instant proceeding.

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.⁵

II. POSITIONS OF THE PARTIES

On September 2, 2010, Intervenors filed the instant Motion which poses two questions, neither of which were raised in the original Petition:

1. Whether the Commission’s general jurisdiction, duties and powers pursuant to ORS 756.040 authorize the Commission, in a merger proceeding, to require adequate service at a reasonable price within any portion of the merger parties’ service area which has inadequate service?
2. Whether pursuant to that broad authority and duty under ORS 756.040, the Commission can condition the merger to require specific actions to insure the provision of adequate services to Lincoln and Tillamook Counties, and thereby direct financial, technical and managerial resources to that service area?⁶

Intervenors claim that the Ruling was too narrow and that the instant request, while similar to the relief granted in the *Verizon/Frontier* order, is even more compelling, because the intervening parties seek to ensure adequate telephone service, which is of greater public value than upgrading broadband services. They claim the Ruling fails to follow the Commission mandate of ORS 756.040 to protect consumer service interests, a statute the Ruling did not formally address. Intervenors therefore argue “The application of the Commission’s jurisdiction in all authorized matters, including adequate service, cannot be deemed to create delay or unduly burden the proceeding by expanding issues into legitimate areas of concern the Commission is mandated to watch over for the public.”⁷

CenturyLink, Inc., and Qwest Communications International, Inc. (Applicants), filed a Response to Motion of Intervenors to Certify Questions to the Commission (Response) on

⁴ *Id.* at 3, citing Intervenors’ Response to CenturyLink’s Opposition to Petition to Intervene at 3: “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.” (Ruling at 5.)

⁵ *Id.*

⁶ Motion at 1.

⁷ *Id.* at 2-3 and cases cited therein.

September 20, 2010.⁸ The Applicants assert that the ALJ does not need to exercise his discretion to grant the Motion. Applicants note that the Intervenors filed their Petition 38 days after the deadline, “have attempted to broaden the issues beyond the scope of the proceeding, and now seek to address legal issues that are misplaced and, once again, beyond the scope of this case and the review of which would cause substantial and unreasonable delay.”⁹

Applicants argue that the “leverage,” which Intervenors believe is proper to apply, is a tactic which the Commission’s intervention rule, OAR 860-012-0001, expressly prohibits. They claim that an intervention cannot be granted to every interested person who has a cognizable dispute with a party to a docket, merely to gain “leverage,” rather than bringing their dispute to the Commission in the form of a complaint or some other request for relief. Certifying the issues creates yet greater delay.¹⁰

III. DISCUSSION

OAR 860-014-0091(1) provides as follows:

A ruling of the Administrative Law Judge (ALJ) may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR 860-012-0035(1)(i), upon a finding that the ruling:

- (a) May result in substantial detriment to the public interest or undue prejudice to any party: or
- (b) Denies or terminates any person’s participation.

In the present case, there is neither detriment to the public interest, undue prejudice to the Intervenors, nor denial or termination of Intervenors’ participation. The questions Intervenors propose regarding the Commission’s authority to add additional issues or investigate circumstances surrounding the provision of telephone service in the context of a merger proceeding are not being contested in this case. The Commission *has* such authority and certification of such questions is unnecessary.

The question on which Intervenors and Applicants disagree, and for which Intervenors essentially seek reversal by the Commission, is whether investigating the allegations raised by Intervenors will unreasonably burden the record or delay the proceedings. In the Ruling, the ALJ answered the question in the affirmative and conditioned Intervenors’ participation accordingly.

As Applicants pointed out,¹¹ Intervenors have had over two years to file a complaint or petition the Commission to open an investigation on Embarq’s service problems and have declined to do so. The Commission is fully capable of immediately commencing a

⁸ Although Applicants sought to file on September 17, 2010, the Public Utility was closed pursuant to a mandatory requirement for certain state agencies.

⁹ Response at 1.

¹⁰ *Id.* at 2-3.

¹¹ *Id.* at 3.

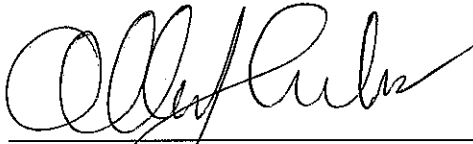
proceeding and addressing such a complaint or petition on the merits as soon as Intervenors file. The tactic of seeking the application of "leverage" in an unrelated proceeding, rather than involving one of the potential defendants in an as-yet-to-be-filed complaint, is contrary to the direct intent of OAR 860-012-0001, and Intervenors' participation was conditioned accordingly.

Intervenors have not been prejudiced with respect to their rights to participate in the proceeding by the failure of the ALJ to certify the questions Intervenors present in their Motion and, therefore, have not met the standard for certification of a question under OAR 860-014-0091 (1).

IV. RULING

The City of Lincoln City, Lincoln County and Tillamook County Motion to Certify Questions to the Commission is denied.

Dated at Salem, Oregon, this 23rd day of September, 2010.



Alan J. Arlow
Administrative Law Judge

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