**Ruth Nettles**

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**Sent:** Friday, January 23, 2009 12:30 PM
**To:** Filings@psc.state.fl.us
**Cc:** Susan Masterton
**Subject:** 080692-Joint Applicants' Response to Comcast's Comments
**Attachments:** 080692 Joint Applicants Response to Comcast Comments.pdf

*Filed on Behalf of:* **Susan S. Masterton**
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*Docket No.* **080692**

*Title of filing:* ***Joint Applicants' Response to Comcast's Comments***

*Filed on behalf of:* ***Embarq Corporation, CenturyTel, Inc., Embarq Florida, Inc., and Embarq Payphone Services, Inc.***

*No of pages:* *7*

*Description:* ***Joint Applicants' Response to Comcast's Comments***

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January 23, 2009

**FILED ELECTRONICALLY**
Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 080692-TP
Joint Applicants' Response to Comcast's Comments

Dear Ms. Cole:

Enclosed for filing please find the Joint Applicants' Response to Comcast's Comments in the above referenced docket matter.

Copies are being served pursuant to the attached certificate of service.

Sincerely,

/s/ Susan. S. Masterton
Susan S. Masterton

Enclosure

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**CERTIFICATE OF SERVICE**
**DOCKET NO. 080692**

**I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail on this 23rd day of January, 2009 to the following:**

**Florida Public Service Commission**
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/s/ Susan. S. Masterton
Susan S. Masterton

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | |
|---|---|
| Joint application for approval of indirect transfer of control of telecommunications facilities by Embarq Corporation, CenturyTel, Inc., Embarq Florida, Inc., and Embarq Payphone Services, Inc. | Docket No. 080692-TP<br><br>Filed: January 23, 2009 |

**JOINT APPLICANTS' RESPONSE TO COMCAST'S COMMENTS**

Embarq Corporation, CenturyTel, Inc., Embarq Florida, Inc. and Embarq Payphone Services, Inc. ("Joint Applicants") file this Response to the Comments submitted by Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone ("Comcast") in this docket on January 16, 2009 ("Comments").

## I. Introduction

Comcast states that its Comments are intended to address concerns related to "the merger's potential anti-competitive effects." (Comments at page 1) Specifically, the Comments describe various interconnection and related issues Comcast claims to have experienced, apparently throughout each company's national service territory, with CenturyTel or Embarq. The Commission consistently has found that these types of issues are not properly within the scope of an application for change of control under section 364.33, F.S.[1] Rather, these issues appropriately are addressed in arbitration or complaint proceedings authorized under separate provisions of state and federal law. The indirect

[1] See, e.g., *In re: Joint Application for approval of indirect transfer of control of telecommunications facilities resulting from merger between AT&T, Inc. and BellSouth Corporation*, Order No. 06-0711-FOF-TP ("*ATT/BellSouth Protest Order*") and Order No. PSC-06-0531-PAA-TP ("*ATT/BellSouth Merger Order*"), issued in Docket No. 060308-TP (denying protests and approving a parent-level transfer of control of BellSouth Corporation to AT&T, Inc. where the certificated ILEC entity would remain unchanged); *In re: Joint Application of MCI WorldCom, Inc. and Sprint Corporation for Acknowledgement or Approval of Merger*, Order No. PSC-00-0421-PAA-TP (denying intervention and approving the parent company level transfer of control of Sprint Corporation to MCI Worldcom, Inc., ultimately vacated because the merger was not consummated); *In re: Request for approval of transfer of control of MCI Communications Corporation to TC Investments Corp., a wholly-owned subsidiary of WorldCom, Inc. d/b/a LDDS WorldCom.*, Order No. PSC-98-0702-FOF-TP (dismissing protests and finalizing approval of the MCI/WorldCom merger).

transfer of control described in the Joint Application satisfies the applicable public interest criteria established by the Commission and should be approved.

## II. Discussion

In denying several competitive carriers' protests of a Commission order approving the merger of AT&T, Inc. and BellSouth Corporation, a similar parent-company level indirect transfer of control, the Commission found that "[w]e have consistently held that a transfer of control proceeding under Section 364.33, Florida Statutes is not designed to protect alleged competitive injuries."[2] The Florida Supreme Court subsequently upheld the Commission's denial of the competitive carriers' standing in the AT&T/BellSouth proceeding, affirming that "the Joint CLECs lack standing to challenge the transfer of control approval."[3] Based on this definitive precedent, the interconnection and other competitive issues raised in Comcast's comments clearly are not relevant to the Commission's consideration of the Joint Applicants' request for approval of the transfer of control of Embarq Corporation to CenturyTel, Inc.

Comcast's concerns appear to be founded on an erroneous assumption that when the companies merge, Embarq's interconnection agreements and wholesale practices will be replaced ("supplanted" according to Comcast) by agreements and practices implemented by CenturyTel in jurisdictions other then Florida.[4] Comcast's assumption is flatly incorrect. As stated in ¶ 24 of the Joint Application "this transaction will have no

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[2] *ATT/BellSouth Protest Order* at page 8. Consistent with long-established precedent, the Commission applied the two-pronged test set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In applying the *Agrico* standard, the Commission determined that the CLEC interveners failed to meet either prong of the test, that is, they failed to demonstrate substantial, immediate injury and they failed to establish that the transfer of control proceeding was designed to protect the injuries alleged. Comcast appears to be aware of the AT&T/BellSouth proceeding (Comments page 2, and footnotes 3-6), but apparently has misconstrued the Commission's final ruling.

[3] *Nuvox v. Edgar*, 958 So. 2d 920 (Fla. 2007), at 2 (decision without published opinion).

[4] As Comcast acknowledges at page 2 of its Comments, CenturyTel does not have any ILEC operations in Florida.

impact on the terms of any existing interconnection agreements or Embarq Florida's obligations under state and federal laws regarding interconnection." In addition, the Commission will continue to have the same regulatory authority over Embarq Florida's interconnection and other wholesale obligations that it has prior to the merger. Moreover, Embarq's President of Wholesale Markets, Bill Cheek, recently has been selected to lead the wholesale operations of the combined company, providing continuity for Embarq's wholesale customers and ensuring that the best practices of each company will be employed to benefit the wholesale customers of the combined company.

Even though this proceeding is not the appropriate place to address the myriad interconnection concerns identified by Comcast in its Comments, federal and state laws provide ample opportunities for Comcast to raise these issues before the Commission. These opportunities include arbitration and complaint proceedings under 47 U.S.C. §§251 and 252 and §§364.16, 364.161 and 364.162, Florida Statutes.[5] While Embarq and CenturyTel may disagree with the characterization of the facts and law surrounding the interconnection issues Comcast identifies, the companies certainly do not object to responding to these issues in the procedurally appropriate forums.

For instance, Comcast's positions regarding indirect interconnection and directory listings are legal and policy issues that arbitration proceedings are specifically designed to resolve. Embarq and CenturyTel certainly are willing to include issues such as these in interconnection agreement negotiations. Should the parties be unable to resolve these issues in their negotiations, disputes can be brought to the Commission for resolution in arbitration proceedings. In fact, for interconnection agreements in other states, Embarq

[5] In addition, the scope of the FCC's merger review authority includes a consideration of competitive concerns. The Joint Applicants filed their Section 214 application with the FCC on November 26, 2008 (WC Docket No. 08-238). To date, Comcast has not filed any comments in that proceeding.

and Comcast have negotiated and arbitrated the directory listing issue discussed in the Comments on pages 8 and 9, as Comcast acknowledges at footnote 15.[6] In the same vein, the Commission has an ongoing, open docket to address Embarq's performance measures (Docket No. 000121B-TP). That docket is the proper place to raise Comcast's concerns about Embarq's OSS systems, whether before or after the merger.

While the Commission has determined that competitive concerns are outside the scope of a transfer of control proceeding, the Commission evaluates a transfer of control application based on a public interest standard that considers "the financial, management and technical capabilities of the Applicants to determine if these aspects of the operation would impact such items as customer rates, service quality, or the ability to invest in preparing and upgrading infrastructure."[7] As described in ¶ 6 of the Joint Application, the Embarq/CenturyTel merger "combines two leading communications companies with customer-focused, industry-leading capabilities, each of whom has deep roots serving local markets. It will provide the combined entity with greater financial and operational resources to capitalize on marketplace opportunities, diversify revenues, and expand networks, expertise and financial resources to build long-term value for customers and shareholders." Clearly, as described in detail in the Joint Application, the Embarq/CenturyTel merger meets the Commission's public interest standard and, therefore, should be approved.

[6] Comcast's current interconnection agreement with Embarq in Florida (which was entered into in January 2007 and expires in January 2009) does not include this directory listings charge.
[7] *ATT/BellSouth Merger Order* at page 4.

## III. Conclusion

For the foregoing reasons, the Commission should acknowledge that Comcast's comments are irrelevant to its consideration of the Joint Applicants' Request for approval of the parent company transfer of control that is the subject of this docket. In addition, the Commission should determine that the transaction satisfies the applicable public interest criteria and should approve the Joint Application.

Respectfully submitted this 23rd day of January 2009.

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