

State of Florida



## Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** January 29, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Compliance (Curry, Mailhot)  
Office of the General Counsel (Brooks)

**RE:** Docket No. 080692-TP – 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.

**AGENDA:** 02/10/09 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCP\WP\080692.RCM.DOC

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### Case Background

On October 26, 2008, Embarq Corporation (Embarq), CenturyTel, Inc. (CenturyTel) and Cajun Acquisition Company entered into a merger agreement whereby Embarq will become a direct, wholly owned subsidiary of CenturyTel.

On November 26, 2008, Embarq, CenturyTel, Embarq Florida, Inc. (Embarq Florida), and Embarq Payphone Services, Inc. (EPSI), (collectively, the Applicants) submitted a joint application requesting approval by the Florida Public Service Commission (Commission) for the transfer of control of Embarq and indirectly, Embarq Florida and EPSI to CenturyTel.

Embarq is a publicly traded holding company headquartered in Overland Park, Kansas. Embarq subsidiaries offer services to residential and business customers, including local and long distance telecommunications, high speed data, wireless and video services. Embarq has incumbent local exchange (ILEC) operations in 18 states including Florida.

Embarq Florida is currently an indirect wholly owned subsidiary of Embarq and is authorized by the Commission, pursuant to ILEC Certificate No. 22, to provide local exchange telecommunications services. EPSI is currently a wholly owned subsidiary of Embarq. EPSI is authorized by the Commission, pursuant to Pay Telephone (PATS) Certificate No. 3822, to provide pay telephone services. Pursuant to Section 364.33, Florida Statutes, Certificate of Necessity Prerequisite to Construction, Operation, or Control of Telecommunications Facilities, Commission approval is required for the transfer of control of Embarq Florida's and EPSI's ILEC and PATS facilities, respectively, from Embarq to CenturyTel<sup>1</sup>.

CenturyTel is a Louisiana-based corporation that provides communications, high-speed internet, and entertainment services to small-to-mid size cities through its broadband and fiber networks. CenturyTel has ILEC operations in 25 states. Cajun Acquisition Company (CAC) is currently a wholly owned subsidiary of CenturyTel that was created to facilitate the merger of the Applicants.

Under the terms of the transaction Embarq and CAC will merge. Embarq will emerge as the surviving corporation and become a wholly owned first tier subsidiary of CenturyTel.<sup>2</sup> Embarq's subsidiaries, Embarq Florida and EPSI, will continue to be wholly owned subsidiaries of Embarq and will continue to exist in their current form after the merger. However, the ultimate parent company of the subsidiaries will change from Embarq to CenturyTel. The transaction will be accomplished through a stock-for-stock transaction, but the merger will not result in any transfer of certificates, assets, or facilities in Florida. The pre and post-merger corporate structure is illustrated in Attachment A.

Although not mentioned by the Applicants in their filing, Embarq Florida is designated as an eligible telecommunications carrier (ETC). Staff believes that the Commission need not address Embarq Florida's designation as an ETC in this proceeding. Embarq Florida will continue as the telecommunications services provider after the transfer is consummated, and retain its designation as an ETC. Thus no action is required.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.01, 364.33, 364.335, and 364.603, Florida Statutes (F.S.). Accordingly, staff believes the following recommendations are appropriate.

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<sup>1</sup> Embarq Communications, Inc. (ECI) is a subsidiary of Embarq that is certificated as a competitive local exchange company (CLEC), Certificate No. 8609, and registered as an intrastate interexchange company (IXC), Registration No. TK001, in Florida. CenturyTel Long Distance, LLC is registered as an IXC in Florida, Registration No. TJ994. In addition, Madison River Communications, LLC, a subsidiary of CenturyTel, is a certificated CLEC, Certificate No. 5254, and a registered IXC, Registration No. TJ409. While this transaction also includes these entities, CLECs are exempt from Section 364.33, Florida Statutes (F.S.), in accordance with Section 364.337(2) F.S., and IXCs are exempt in accordance with Sections 364.011(1) and 364.02(14)(g), F.S. Accordingly, this Joint Application does not include these entities as petitioning parties seeking relief.

<sup>2</sup> Embarq will be the surviving corporation but will adopt the By-Laws and Certificate of Incorporation of CAC.

### **Discussion of Issues**

**Issue 1:** Should the Commission approve the joint application for the transfer of control of Embarq Corporation and indirectly, Embarq Florida, Inc., holder of ILEC Certificate No. 22, and Embarq Payphone Services, Inc., holder of PATS Certificate No. 3822, to CenturyTel, Inc.?

**Recommendation:** Yes, the Commission should approve the joint application for the transfer of control of Embarq Corporation and indirectly, Embarq Florida, Inc., holder of ILEC Certificate No. 22, and Embarq Payphone Services, Inc., holder of PATS Certificate No. 3822, to CenturyTel, Inc. **(Curry, Mailhot, Brooks)**

#### **Staff Analysis:**

##### **I. Jurisdiction - Section 364.33, Florida Statutes**

The Commission has authority under Section 364.33, F.S., to approve an application for transfer of control. Staff notes that this provision does not provide specific standards which the Commission may follow in making its decision to approve a transfer of control. However, staff believes that Section 364.01, F.S., implies a public interest standard that the Commission should follow when deciding whether to approve or deny transfers of control, among other transactions.

The legislative intent in Section 364.01, F.S., is clear: the Commission is to exercise its jurisdiction in order to protect “the public health, safety, and welfare” as it relates to basic local telecommunications services. Based on the intent of the Florida Legislature, the Commission should base its decisions to grant applications for transfer of control on the transfer satisfying the public interest. In developing its recommendation, staff reviewed the management, technical, and financial capability of the acquiring entity.

##### **II. Comments Filed by Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone**

On January 16, 2009, Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone (Comcast) filed comments regarding the Applicants' proposed merger. Comcast notes that, although it does not oppose the merger, the company does have concerns about the merger's potential to limit access to competitive providers and services, resulting in increased prices and inferior service. Through the merger, Century Tel will gain size and scope and may increase its power to circumvent competitive entry.

Comcast argues that Century Tel has adopted a number of anti-competitive practices in such areas as number porting, operations support systems (OSS), interconnection, and directory listings. If these Century Tel policies are perpetuated post-merger, Comcast believes competition will be further harmed.

Number porting is allegedly both expensive, at \$10-\$44 per order, and slow, since Century Tel limits a CLEC's wholesale service orders to 50 per day, nationwide. According to Comcast, Century Tel also has not adopted the industry-recognized 10-digit trigger process, which provides a safety-net during the porting time frame by ensuring that up-to-date network routing instructions are followed.

Comcast believes that the Commission should explore whether the Applicants will adopt Embarq's OSS, since Century Tel currently processes certain orders manually, causing delays and increasing the likelihood of mistakes. Embarq's new electronic bonding system is purportedly superior since CLECs' orders will feed automatically into the ILEC's systems, minimizing delays and mistakes.

A further problem according to Comcast is Century Tel's unwillingness to allow CLECs to use indirect interconnection if the CLEC ports telephone numbers in the same exchange. Century Tel allegedly requires CLECs to extend their facilities to exchange traffic directly, which Comcast believes is both inefficient and unnecessarily costly.

Finally, Comcast believes that the amount of time (five business days) provided by Century Tel to review the gallery proof of directory listings is inadequate to ensure accuracy. In addition, Comcast states that Embarq imposes unreasonable, non-cost based directory listing storage and maintenance fees (up to \$3.00 per month, per listing), which violates Embarq's duty under Section 251(b)(3) of the Telecommunications Act of 1996 to provide nondiscriminatory access to directory listings.

### **III. Applicants' Response to Comcast's Comments**

The Applicants believe that this proceeding is not the appropriate venue for Comcast to address its concerns regarding indirect interconnection and directory listings. In addition, the Commission has found that the types of issues that Comcast has raised are not within the scope of an application for change of control under Section 364.33, F.S. The Commission evaluates a transfer of control application based on public interest standards. Comcast's position on these issues should be addressed through arbitration and complaint proceedings authorized under separate provisions of state and federal law.

Comcast's concerns are based on the incorrect assumption that when the companies merge, Embarq's interconnection agreements and wholesale practices will be replaced by agreements and practices of CenturyTel. However, the Applicants have indicated in their joint application that the merger will not impact the terms of any existing interconnection agreements or Embarq Florida's obligations under the state and federal laws regarding interconnection. In regards to Comcast's concerns about which OSS system the Applicants will use post-merger, the Applicants believe that this is not the proper proceeding for Comcast to address those concerns.

The Commission has an ongoing docket (Docket No. 000121B-TP) to address Embarq's performance measures. In Re: Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies. (EMBARQ FLORIDA TRACK). By Order No. PSC-03-0067-PAA-TP, issued January 9, 2003, the Commission adopted wholesale permanent performance measures for Embarq. Embarq's Performance Measurement Plan is a monitoring device that compares the level of wholesale service performance that Embarq provides to CLECs against a standard. CLECs and this Commission can measure performance over time to detect and correct any degradation of service provided to CLECs. The Applicants believe that Comcast's concerns regarding Embarq's OSS system should be raised in this docket.

#### IV. Staff's Assessment

##### A. Standing

While stating that "it does not oppose the merger [of CenturyTel and Embarq], Comcast has asked the Commission to consider its Comments as a part of the Commission's review of the proposed transfer. In this context, Comcast has expressed concern that the merger may be anti-competitive. However, the Commission has previously determined that issues relating to "competition" are not properly considered when evaluating an application for change of control pursuant to section 364.33, F.S.

A related issue is whether Comcast has standing to raise competitive issues in this proceeding. In order to meet the applicable legal standard to establish standing, a petitioner must explain how its substantial interest will be affected by the agency determination. "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Agrico Chemical Co. v. Dept. of Environmental Reg., 406 So. 2d 478, 482 (Fla. 1<sup>st</sup> DCA 1981). The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987)(speculation on the possible occurrence of injurious events is too remote).

In addressing competitor standing in a prior merger case involving AT&T, the Commission found that protests filed by ITC^DeltaCom Communications, Inc., NuVox Communications, Inc., XO Communications Services, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jacksonville, LLC, and Time Warner Telecom of Florida, L.P., were insufficient to establish standing and that the defects in the pleadings could not be cured. *See* Order No. PSC-06-0711-FOF-TP,<sup>3</sup> issued August 24, 2006, in Docket No. 060308-TP. This decision denying standing was based on the inability of the petitioners to establish an injury in fact based on their assertions that a proposed merger would have a negative effect on competition.

Staff believes that Comcast similarly has failed to establish injury in fact under applicable legal standards and, therefore, lacks standing to raise its concerns regarding the merger's potential anti-competitive effects.

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<sup>3</sup> In re: Joint application for approval of indirect transfer of control of telecommunications facilities resulting from agreement and plan of merger between AT&T Inc. (parent company of AT&T Communications of the Southern States, LLC, CLEC Cert. No. 4037, IXC Registration No. TJ615, and PATS Cert. No. 8019; TCG South Florida, IXC Registration No. TI327 and CLEC Cert. No. 3519; SBC Long Distance, LLC, CLEC Cert. No. 8452, and IXC Registration No. TI684; and SNET America, Inc., IXC Registration No. TI389) and BellSouth Corporation (parent company of BellSouth Telecommunications, Inc., ILEC Cert. No. 8 and CLEC Cert. No. 4455); and BellSouth Long Distance, Inc. (CLEC Cert. No. 5261 and IXC Registration No. TI554).

B. Management Capability

Embarq Florida and EPSI are now wholly-owned subsidiaries of Embarq and are authorized to provide local exchange telecommunications services and payphone services, respectively, in Florida. If the Commission approves the Applicants' request for the indirect transfer of control, these certificated entities will continue to exist in their current form after the merger is completed. The Applicants have also indicated that the companies will continue to maintain the required managerial, technical, and financial capabilities needed to provide services to their customers.

According to the Applicants, CenturyTel has an experienced and highly qualified group of executive managers with a history of successfully integrating acquired ILEC operations. After the merger, the newly combined company will be managed by experienced and capable executives from both CenturyTel and Embarq. CenturyTel's current CEO, COO, and CFO will all hold the same positions post-merger. Embarq's current CEO will assume the role of executive Vice-Chairman of the Board of Directors, and Embarq's current non-executive Chairman of the Board will assume the same role post-merger. CenturyTel and Embarq will both contribute qualified staff to fill the post-merger company's middle management positions. The Applicants have indicated that the local operations of Embarq Florida will continue to be managed by employees with extensive knowledge of the local telephone business.

The transfer of control will be transparent to Embarq Florida and EPSI customers. Immediately following the transfer customers will continue to receive the same service at the same rates, terms and conditions that they received prior to the transaction.

C. Technical Capability

The applicants have stated that the merger will not result in a transfer of certificates, assets, or facilities in Florida and that Embarq Florida and EPSI will continue to employ experienced personnel. The customer service, network and operations functions that are critical to Embarq Florida and EPSI's success will continue to be staffed post-merger to ensure the company's continued success.

The Applicants argue that the merger will enhance the company's competitive position in the market. The merger will also position the company to capitalize on its collective knowledge of its customers' preferences and to deliver innovations in technology, products, and services. As a result, consumers will have more choices in the market for local and long distance calling services, as well as high speed internet and other data services, video services and wireless services.

D. Financial Capability

The merger should not affect the Applicants' combined financial capability to continue to provide services in Florida. The Applicants project expense and capital expenditure synergies of \$300-400 million annually within three years of the close of the transaction. Savings are expected from the elimination of duplicate headquarters and corporate costs, increased network

and operational efficiencies, increased purchasing power, and savings in IT support and advertising.

The merger is not expected to negatively affect the debt rating of Embarq. On October 28, 2008, Fitch Ratings affirmed its rating on CenturyTel and Embarq Corporation at BBB-. Standard and Poor's Ratings Services maintained its rating on CenturyTel and Embarq at BBB-. Moody's Investors Service placed the debt ratings of Embarq on review for possible upgrade and the debt rating of CenturyTel on review for possible downgrade. The merger should not impact Embarq's financial capability to continue to provide local exchange services to Florida consumers.

**V. Conclusion**

Based upon staff's analysis of the management, technical, and financial capabilities of the acquiring company, staff believes that the transfer of control of Embarq to CenturyTel would be in the public interest.

Therefore, staff recommends that the Commission approve the joint application for the transfer of control of Embarq Corporation and indirectly, Embarq Florida, Inc., holder of ILEC Certificate No. 22, and Embarq Payphone Services, Inc., holder of PATS Certificate No. 3822, to CenturyTel, Inc.

**Issue 2:** Should this docket be closed?

**Recommendation:** The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested, this docket should be closed administratively upon notification by the Applicants that this transfer of control either has or has not been consummated. **(Brooks)**

**Staff Analysis:** At the conclusion of the protest period, if no protest is filed, this docket should be closed administratively upon notification by the Applicants that the transfer of control either has or has not been consummated.