

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)	
Embarq Corporation and Century Tel, Inc. for)	
Approval of Transfer of Control of United)	Case No. 08-1267-TP-ACO
Telephone Company of Ohio, United)	
Telephone Company of Indiana, Inc., and)	
Embarq Communications, Inc.)	

**MEMORANDUM CONTRA OF EMBARQ CORPORATION AND
CENTURYTEL, INC. TO APPLICATION FOR REHEARING OF THE OFFICE
OF THE OHIO CONSUMERS' COUNSEL**

I. Introduction

The Office of the Ohio Consumers' Counsel ("OCC") has filed an Application for Rehearing ("Application"). OCC claims that the Commission's Opinion and Order entered February 25, 2009 ("Order") is unreasonable and unlawful in five respects.¹ None of OCC's claims has any merit. OCC either misstates the law, rehashes earlier arguments that the Commission has rejected, ignores facts established by sworn testimony, or attempts to substitute its judgment for the Commission's. Accordingly, the Application should be denied and the Order affirmed.

II. Argument

A. The Commission correctly determined that R.C. § 4905.49 does not apply to the transfer of control.

In claiming that R.C. § 4905.49 rather than R.C. § 4905.402 applies to the

¹ Application at 1, 2.

subject transaction, OCC fails to provide any new legal or factual arguments. Because OCC has presented nothing new for the Commission to consider, rehearing on this ground must be denied.²

Embarq Corporation (“Embarq”) and CenturyTel, Inc. (“CenturyTel”) have previously demonstrated that the applicable statute is R.C. § 4905.402, not R.C. § 4905.49.³ The latter statute applies to the consolidation of “telephone companies.” The primary flaw in OCC’s argument is the mistaken claim that CenturyTel and Embarq (the parent holding companies) are “telephone companies, being engaged in the business of transmitting telephonic messages...”⁴ OCC is simply incorrect. OCC ignores the fact that a parent corporation (e.g., Embarq) is a completely separate legal entity from its operating subsidiaries (e.g., United Telephone Company of Ohio d/b/a Embarq). Therefore, it is factually incorrect to claim that either Embarq or CenturyTel, each of which is a holding company and each of which operates no telephone network in Ohio, is engaged in the business of transmitting telephonic messages. Because neither Embarq nor CenturyTel is a telephone company, R.C. § 4905.49 does not apply.

OCC cites no authority in support of its claim that R.C. § 4905.49 applies. The only relevant case law is a decision by the Ohio Supreme Court that concluded that R.C. § 4905.49 does not apply to a transaction pursuant to which an Ohio telephone company

² *In the Matter of Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier I Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry on Rehearing at par. 7. See, also, *Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA et. al., Entry on Rehearing entered July 31, 2008 at par. 14 and *In the Matter of American Municipal Power-Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio*, Case No. 06-1358-EL-BGN, Entry on Rehearing entered April 28, 2008 at par. 8.

³ Memorandum Contra of Embarq and CenturyTel to Motion to Intervene, etc. of the OCC at 5-7.

⁴ OCC Application, Memorandum in Support at 4.

became a wholly owned subsidiary of a holding company.⁵ OCC's earlier attempt to distinguish this case was unavailing.⁶ And because the transfer of control at issue here involves a telephone company (United Telephone Company of Ohio) becoming (indirectly) a wholly owned subsidiary of CenturyTel, R.C. § 4905.49 does not apply.

B. The Commission properly exercised its statutory discretion and did not require a hearing.

OCC concedes, as it must, that R.C. § 4905.402 provides the Commission with discretion as to whether to hold a hearing.⁷ But OCC fails to make a convincing argument that the Commission improperly exercised its statutorily provided discretion. OCC first claims that the Commission "accepted uncritically" the statements in the Application and supporting testimony.⁸ OCC offers no analysis to support its claim that the Commission did not review the Joint Application and the sworn testimony critically. OCC fails to suggest in what way the Commission acted "uncritically."

Second, OCC claims that the Commission, by not conducting a hearing, denied itself the benefits of cross-examination.⁹ But accepting this argument would eliminate the discretion that R.C. 4905.402 gives the Commission. If the legislature believed that cross-examination was essential to evaluating a change of control, it would not have provided the Commission with discretion regarding the conduct of a hearing. Because the legislature did provide that discretion, it follows that changes in control can properly be approved by the Commission without a hearing and, thus, without cross-examination. Therefore, the absence of cross-examination cannot constitute an abuse of the Commission's discretion.

⁵ *International Tel. & Tel. Corp. v. Pub. Util. Comm. of Ohio*, 18 Ohio St. 2d 83 (1969) ("ITT Case").

⁶ Reply Memorandum of OCC filed December 15, 2008 at 8.

⁷ Application, Memorandum in Support at 4.

⁸ Id at 5.

⁹ Id.

Finally, approving a change of control without a hearing is consistent with past Commission practice. In their Joint Application, CenturyTel and Embarq showed that the Joint Application should be approved without a hearing.¹⁰ As CenturyTel and Embarq demonstrated, the Commission has approved, without a hearing, transactions involving changes in control of much greater size and complexity than the subject transaction.¹¹

C. The Commission correctly determined that the transfer of control meets the standards of R.C. § 4905.402.

OCC claims that the Commission erred by placing the burden of proof on OCC to demonstrate that the transaction does not meet the requirements of R.C. § 4905.402.¹² The Commission did no such thing, and the portion of the Order quoted by OCC does not support its claim. And OCC ignores other language in the Order that demonstrates that the Commission concluded that CenturyTel and Embarq had met the criteria of R.C. § 4905.402.

The Order states:

Upon reviewing the Joint Application and the supporting testimony, the Commission concludes that the statutory criteria of § 4905.402, Revised Code, have been satisfied. Further, we believe that the transaction will promote the public convenience and will result in the provision of adequate service and reasonable rates. The Commission has thoroughly considered the concerns expressed by OCC and, nevertheless, we find that this transaction should be approved at this time without further proceedings.¹³

That language from the Order demonstrates that the Commission concluded that CenturyTel and Embarq had met their burden of showing that the transaction meets the statutory criteria. Nowhere in the Order did the Commission state that OCC failed to

¹⁰ Joint Application at 32, 33.

¹¹ Id.

¹² Application, Memorandum in Support at 5, 6.

¹³ Order at 8.

carry a burden of proof. Rather, the Commission merely concluded (correctly) that the OCC had provided no basis for rejecting the showing that the Joint Applicants had made in their sworn testimony.

OCC is also wrong to claim that the Commission erred in applying the statutory criteria for approval. OCC would have the Commission utterly ignore the beneficial result of the transaction, i.e. that the Embarq operating entities would become part of a larger and financially stronger corporate organization. OCC claims that, because every merger results in a larger organization with economies of scale and efficiencies, there would be no need for the statute if size were the only issue.¹⁴ But no one has ever claimed that size is the only issue. And R.C. § 4905.402 does not apply to only mergers. It applies whenever there is a change in control. A change of control can occur without a merger (e. g., Bill Gates could buy United Telephone Company of Ohio). Therefore, if the change in control results from a merger, that is no reason to ignore the benefits that OCC claims all mergers produce.

In its focus on the issues of size and the fact that, post-merger, the Ohio operating entities will be subject to the same rules and regulations, OCC simply ignores the other benefits of the transaction that CenturyTel and Embarq demonstrated. For example, Mr. Clay Bailey of CenturyTel provided sworn testimony that directly addressed the issue of whether bigger is always better.¹⁵ Mr. Bailey testified to, among other things:

1. CenturyTel and Embarq are very similar companies with complementary cultures;
2. CenturyTel is very sound and stable financially with an investment grade credit rating;

¹⁴ OCC Application, Memorandum in Support at 7.

¹⁵ Direct Testimony of G. Clay Bailey at 39-44.

3. CenturyTel has a very experienced, qualified and stable group of executive managers, with the same six member senior management team intact for over five years;
4. CenturyTel has a long history of successful integrating numerous acquired properties and companies in its expansion from a single exchange to more than two million access lines.¹⁶

D. The Commission correctly concluded that the transaction satisfies the statutory requirements without the conditions proposed by OCC.

OCC's last argument is that the Commission erred by failing to adopt OCC's proposed conditions.¹⁷ OCC wanted the Commission to require Embarq to make broadband service available to ninety-five percent of its residential customers in two years after the transaction closes and to one-hundred percent of the residential customers within four years. OCC also wanted the Commission to eliminate CenturyTel's monthly touch-tone charge and eliminate Embarq's monthly intrastate access fee. OCC's proposed conditions are arbitrary. The Commission was correct to reject them because the transaction meets the statutory criteria without the conditions OCC proposes.

OCC's proposed condition for expanding broadband availability fails to even mention, let alone analyze, the economic feasibility of providing ubiquitous broadband service. Without a rigorous analysis of the cost and benefits of OCC's wished-for broadband expansion, it is impossible to know whether it would serve the public interest.

Similarly, OCC's suggestion that CenturyTel eliminate its monthly touch-tone charge of \$1.65 and that Embarq eliminate its \$4.10 monthly intrastate access fee is nothing more than an arbitrary rate reduction. By claiming that the Commission erred in not requiring these rate reductions and expanded broadband availability, the OCC is attempting to substitute its judgment for that of the Commission. CenturyTel and

¹⁶ Id.

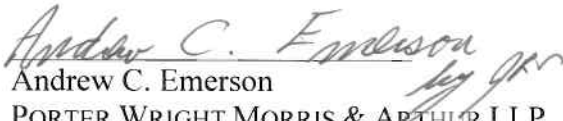
¹⁷ OCC Application, Memorandum in Support at 8, 9.


Embarq showed in the Joint Application and with sworn testimony that the change in control meets the statutory criteria of R.C. § 4905.402. Because they made that showing, the Commission was right to approve the transaction without adding the additional and arbitrary conditions proposed by the OCC.

III. Conclusion

The OCC's Application should be denied. The Order correctly found that the transfer of control meets the requirements of R.C. § 4905.402.

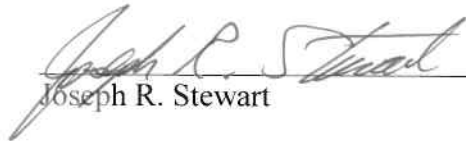
Respectfully submitted,


Andrew C. Emerson
PORTER WRIGHT MORRIS & ARTHUR LLP
41 S. High St.
Columbus, Ohio 43215
(614) 227-2000 tel.
(614) 227-2100 fax
aemerson@porterwright.com
Counsel for CenturyTel, Inc.


Joseph R. Stewart
Senior Counsel
Embarq
50 W. Broad St., Suite 3600
Columbus, OH 43215
614.220.8625 (voice)
614.224.3902 (fax)
614.975.5637 (wireless)
e-mail: joseph.r.stewart@embarq.com
Attorney for Embarq Corporation

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Memorandum Contra was served via electronic mail and first class mail, postage prepaid, this 30th day of March 2009 on the persons listed below.



Joseph R. Stewart

David C. Bergmann
Melissa Yost
Office of Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
bergmann@occ.state.oh.us
yost@occ.state.oh.us

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Summary: Memorandum Contra of Embarq Corporation and CenturyTel, Inc. to OCC's Application for Rehearing electronically filed by Sonya I Summers on behalf of Embarq and CenturyTel, Inc.