

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554**

In the Matter of Qwest Communications International  
Inc. and CenturyTel, Inc. d/b/a Century Link  
Application for Transfer of Control Under Section 214  
of the Communications Act, As Amended

WC Docket No. 10-110

**OPENING COMMENTS OF BROADVOX, INC.  
ON APPLICATIONS FILED BY QWEST COMMUNICATIONS INTERNATIONAL  
INC. AND CENTURYTEL, INC., D/B/A/ CENTURYLINK FOR CONSENT  
TO TRANSFER OF CONTROL**

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Broadvox, Inc. (“Broadvox”) submits these Opening Comments in response to the Federal Communications Commission’s (“Commission”) Public Notice released May 28, 2010 soliciting comments on the proposed merger between Qwest Communications International Inc. (“Qwest”) and CenturyTel, Inc. d/b/a CenturyLink (“CenturyLink”). Broadvox submits that the proposed merger is not in the public interest because it would fortify Qwest’s ability to further engage in anti-competitive conduct. In the last year, Qwest has embarked on a campaign to eliminate or weaken competitors in markets for emerging technologies such as IP-enabled services. As discussed below, Qwest has also filed two frivolous lawsuits against Broadvox over the last two years demanding access charges to which it must know it is not entitled and interfering with Broadvox’ relationship with its providers. To date, Qwest may have been constrained by finances in extending its anti-competitive efforts against providers of IP-enable services, but if it merges with CenturyLink/Embarq, it will be able to draw upon additional resources to continue its campaign. Such behavior is directly contrary to the goals of the Telecommunications Act. Thus the merger should thus not be approved unless substantial safeguards are put in place to prevent Qwest from ruining its competitors through litigation and other tactics.

### **I. Legal Standard for Merger Review**

Pursuant to 47 U.S.C. § 214(a), when reviewing a merger application of a utility, the Commission must undertake a multi-part review. The Commission must first determine whether the proposed merger complies with the specific provisions of the Telecommunications Act, other applicable statutes, and the Commission's rules.<sup>1</sup> Even if the proposed transaction would not violate a statute or rule, the Commission must consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the

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<sup>1</sup> See e.g., *Applications Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46 (2009) (“*CenturyTel/Embarq Merger Order*”); *AT&T, Inc. and Bell/South Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5663 (2007) (“*AT&T/BellSouth Merger Order*”).

Communications Act or related statutes.<sup>2</sup> Finally, the Commission must employ a balancing test weighing any potential public interest benefits of the merger against all potential public interest harms.<sup>3</sup> The applicants must demonstrate through a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.<sup>4</sup>

The FCC has noted in prior merger reviews that the public interest evaluation “necessarily encompasses” the broad aims of the Communications Act, which include, among other things, “a deeply rooted preference” for competition, whether the merger will affect the quality of communications services and will result in the provision of new or additional services to consumers.”<sup>5</sup> The FCC’s analysis must take a broad view of competition, and determine “whether a transaction will enhance, rather than merely preserve, existing competition. . . .”<sup>6</sup> If the FCC determines that a proposed merger could harm the public interest (for example by impeding competition), it has authority to impose and enforce conditions that ensure that the public interest is served by the transaction.<sup>7</sup>

When it reviewed the CenturyLink/Embarq merger, the FCC determined that the transaction might increase those entities’ incentive and opportunity to engage in anticompetitive activity. For example, the FCC noted that the merged entity could export practices that impede competition from one service area to the other.<sup>8</sup> To address these anticompetitive effects of the merger, the FCC required the CenturyLink and Embarq to submit and follow a set of commitments to prevent anticompetitive conduct, particularly against wholesale customers. The strikingly similar CenturyLink/Embarq merger, which was finalized just over a year ago, provides a compelling roadmap for the evaluation of the instant merger.

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<sup>2</sup> *CenturyTel/Embarq Merger Order*, at 8745-46.

<sup>3</sup> *CenturyTel/Embarq Merger Order*, at 8746; *AT&T/BellSouth Merger Order*, at 5663.

<sup>4</sup> *CenturyTel/Embarq Merger Order*, at 8746; *AT&T/BellSouth Merger Order*, at 5663.

<sup>5</sup> *CenturyTel/Embarq Merger Order*, at 8747.

<sup>6</sup> *CenturyTel/Embarq Merger Order*, at 8747.

<sup>7</sup> *CenturyTel/Embarq Merger Order*, at 8747.

<sup>8</sup> *CenturyTel/Embarq Merger Order*, at 8755.

## II. Qwest Violated the Telecommunications Act By Failing To Act In Good Faith Towards Its Competitors

When Congress passed the Act, it created a new telecommunications regime expressly intended to encourage competition in the local telecommunications marketplace. Section 257 of the Act expressly requires the removal of barriers to entry for entrepreneurs providing telecommunications and information services, and encourages “vigorous economic competition” and “technological advancement.”

Broadvox is an enhanced service provider (“ESP”) offering, among other things, voice over Internet Protocol (“VoIP”). The FCC has made clear that VoIP is exactly the kind of innovative service that the Telecommunications Act intended to encourage. In opening a rulemaking to examine IP-enabled services, the FCC stated:

Increasingly, these customers will speak with each other using VoIP-based services instead of circuit-switched telephony and view content over streaming Internet media instead of broadcast or cable platforms. By doing so, they will change, fundamentally, their use of these applications and services - consumers will become increasingly empowered to customize the services they use, and will choose these services from an unprecedented range of service providers and platforms.<sup>9</sup>

The FCC also recognized that innovative IP-enabled services “challenge the central role that legacy technologies have played in American communications for over 100 years.”<sup>10</sup> Qwest told its shareholders in its most recent Form 10-K filed with the Securities and Exchange Commission (“SEC”) that “[w]e compete in a rapidly evolving and highly competitive market, and we expect intense competition to continue. Regulatory developments and technological advances have increased opportunities for alternative communications service providers, which in turn have increased competitive pressures on our business.”<sup>11</sup> Apparently Qwest believes that the only way it can continue to compete is to try to stymie providers of IP-enabled

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<sup>9</sup> *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4864 (2004).

<sup>10</sup> *Id.*, at 4866.

<sup>11</sup> Qwest Communications International, Inc., Form 10-K dated 12/31/09, at p. 6.

services such as Broadvox by filing meritless litigation and disrupting those providers' ability to obtain necessary inputs for its service.

#### **A. Qwest Has Filed Multiple Frivolous Lawsuits**

In late 2008, Qwest Corporation sued Broadvox and several other ESP defendants to obtain access charges based on the unorthodox theory that Broadvox was "acting like" an interexchange carrier (IXC) and therefore should have to pay access charges for terminating traffic to Qwest's network. Not only did Qwest sue Broadvox based on extremely tenuous grounds, but it also chose a state (Washington) that was highly inconvenient. Broadvox is an Ohio corporation and through 2007, its principal places of business and headquarters was in Cleveland, Ohio. Since 2007, Broadvox has been headquartered in Dallas, Texas. Broadvox never had any employees or offices in Washington, was not licensed to do business in Washington, never directed any marketing into Washington, nor owned or used any real estate in Washington, nor sent any representatives to the state to negotiate contracts. Throughout its existence only 0.4154% of its purchasing and only 0.3065% of its sales have involved Washington businesses. In short, Qwest chose a state in which to sue Broadvox that would make it as logistically difficult and expensive as possible for Broadvox to defend itself.

Indeed, the Washington court dismissed Qwest's complaint on the basis that Broadvox had so little contact with Washington state that it would be unfair for Broadvox to have to defend itself there. The judge stated:

Judicial efficiency would be maximized by bringing the suit in a location that would reduce the burden on all defendants. And, particularly in an industry such as telecommunications, where traffic is routed to many different companies as it passes from callers to recipients around the world, it would offend traditional notions of fair play and substantial justice to hale into court defendants whose purposeful interjection into the forum state consists of such meager contacts as those of the Broadvox Defendants.<sup>12</sup>

Despite the Washington court's well reasoned rebuff, Qwest took the extraordinary step

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<sup>12</sup> *Qwest Corp. v. Anovian et al.*, Case No. C08-1715 RSM, Order Granting the Broadvox Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, Dec. 16, 2009, at p. 7.

of filing a First Amended Complaint, re-naming Broadvox as a defendant.<sup>13</sup> When that tactic did not work, Qwest appealed the order dismissing Broadvox to the Ninth Circuit Court of Appeals.<sup>14</sup> Not satisfied with that maneuver, however, less than a month later Qwest filed a virtually identical complaint in Texas federal court<sup>15</sup> while at the same time hoping the Ninth Circuit will rule in its favor, apparently so it can resume its lawsuit in Washington state. Such scorched earth litigation tactics force small competitors such as Broadvox to divert its limited resources to fighting court battles rather than focusing its time and attention on providing innovative new services to customers.

Further, Qwest has slandered Broadvox in its complaints, hiding under the cloak of absolute judicial privilege to do so. It has taken cookie-cutter complaints from other lawsuits it has filed, copied allegations of ANI-manipulation from those complaints into the Broadvox complaints, and proceeded to make those defamatory statements about Broadvox in court papers to cast doubt on Broadvox' honesty. Broadvox does not manipulate ANI, but no one who read Qwest's Washington or Texas complaints would ever know that. Qwest, meanwhile, has no good faith basis for making these outrageous and damaging statements. Qwest does not care, however. It only seems interested in scorching the earth as it sues VoIP companies for meritless claims and baseless allegations.

### **B. Qwest's Interference with Broadvox' Suppliers**

Qwest stated in both the Washington and Texas litigation that it approached CLECs to whom it believed Broadvox handed off traffic and demanded the identity of Broadvox and other ESPs.<sup>16</sup> Apparently Qwest accused Broadvox of wrongdoing in order to pressure these CLECs into giving Qwest non-public information about Broadvox' relationship (if any) to the CLEC.<sup>17</sup> For example, Qwest stated in its Washington litigation that it contacted Electric Lightwave, Inc.

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<sup>13</sup> Temnorod Decl., at ¶11.

<sup>14</sup> *Qwest v. Broadvox, Inc. et al.*, Case No. 10-35177, Ninth Circuit Court of Appeals, Feb. 19, 2010.

<sup>15</sup> *Qwest Corp. v. Broadvox, Inc. et al.*, Case No. 4:10-cv-134-A, U.S. District Court for the Northern District of Texas, March 8, 2010.

<sup>16</sup> Temnorod Decl., at ¶14.

<sup>17</sup> *Id.*

(“ELI”) and indicated that certain companies, including Broadvox, were routing traffic in a fraudulent manner in order to avoid access charges.<sup>18</sup> After being contacted by Qwest, ELI sent Broadvox an email in August 2006 stating that, based on Qwest’s claims, Broadvox was incorrectly routing traffic and that such supposed mis-routing would have to be immediately discontinued or ELI would disconnect Broadvox’ circuits.<sup>19</sup> ELI terminated Broadvox’ contract in November 2006.<sup>20</sup> Broadvox was then forced to find another CLEC to carry its traffic.<sup>21</sup>

### **III. Approval of the Merger Without Safeguards Will Not Be In The Public Interest Because Qwest Will Have Even Greater Ability To Engage In Anti-competitive Acts**

CenturyLink/Embarq/Qwest have filed an application seeking local approval for the merger in Washington state. In that application, the companies state that one of the “key” benefits of the merger would be to create a financially stronger company that can “compete against cable telephony providers, wireless carriers, VoIP offerings, and CLECs . . . .”<sup>22</sup> Further, Qwest told the FCC in its merger application that one important benefit of the merger is that “the combination [of Qwest with CenturyLink/Embarq] will enable the company to expand its reach and increase deployment of innovative services such as VoIP.”<sup>23</sup> Given these statements, it is clear that Qwest intends to use the increased strength after the merger to target the operations of the VoIP providers against whom they directly compete.

If the merger goes forward, CenturyLink/Embarq will gain local exchange networks in four additional states -- Arizona, Utah, North Dakota, and South Dakota – thereby increasing its operations to a total of 37 states.<sup>24</sup> Thus, simply on a geographic basis, the merged entity will have an increased incentive and ability to discriminate against its VoIP competitors by leveraging its increased footprint and adopting the worst practices of both companies.

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<sup>18</sup> Qwest’s Consolidated Opposition Brief to Defendants’ Motions to Dismiss, at p.15, April 13, 2009.

<sup>19</sup> Qwest’s Consolidated Opposition Brief to Defendants’ Motions to Dismiss, at p.15, April 13, 2009.

<sup>20</sup> Qwest’s Consolidated Opposition Brief to Defendants’ Motions to Dismiss, at p.15, April 13, 2009.

<sup>21</sup> Qwest’s Consolidated Opposition Brief to Defendants’ Motions to Dismiss, at p.15, April 13, 2009.

<sup>22</sup> Joint Application for Expedited Approval of Indirect Control, Washington Public Utilities Docket No. UT-100820, May 13, 2010, at ¶30.

<sup>23</sup> Application for Consent to Transfer Control, May 10, 2010, at p.31.

<sup>24</sup> Application for Consent to Transfer Control, FCC WC Docket 10-110, May 10, 2010, at p. 6.

The FCC expressed these exact concerns when it reviewed the strikingly similar proposed merger of CenturyLink and Embarq just over a year ago. The FCC stated:

Consistent with the “Big Footprint” theory that the Commission addressed in prior BOC mergers, we find that the increase in the size of CenturyTel's study area resulting from the merger may increase its incentive to engage in anticompetitive activity . . . [A]dditionally, to the extent that CenturyTel has been less willing to cooperate with competitors than Embarq -- as numerous commenters allege -- following the merger, CenturyTel may extend this behavior to the Embarq territories. In order to address these potential harms, the Applicants have proposed a series of voluntary commitments, summarized above and included in Appendix C.<sup>25</sup>

The further merger of CenturyLink/Embarq with Qwest poses exactly the same concerns regarding perpetuation and export of anticompetitive practices. Therefore, the FCC should approve the merger only with specific conditions to guard against anticompetitive conduct by the newly merged entity.

#### **IV. FCC Required Safeguards in CenturyLink/Embarq Merger To Protect CLECs**

To prevent further delay or other anti-competitive behavior, Broadvox respectfully submits that, at a minimum,<sup>26</sup> the FCC must include the following safeguards as a condition to approving the CenturyLink/Embarq/Qwest merger.

- The merged entity should be required to suspend all litigation (whether in court or at state commissions) against VoIP competitors for payment of access charges until the FCC issues a final non-appealable ruling on intercarrier compensation for VoIP providers.
- The merged entity should be required to bring all disputes for access charges to the FCC for resolution rather than forcing VoIP competitors to defend themselves in multiple, far-flung courts.
- The merged entity should be required to file an annual report with the FCC detailing all litigation it is pursuing against VoIP competitors, and to disclose the amount of money it has expended on such litigation.
- The merged entity must refrain from contacting CLECs and alleging that VoIP providers are engaging in improper conduct.

Without these safeguards, Broadvox respectfully submits that the FCC cannot allow the merger to go forward because it will not serve the public interest.

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<sup>25</sup> *CenturyTel/Embarq Merger Order*, at 8755 (internal citations omitted).

<sup>26</sup> Broadvox reserves the right to comment in support of safeguards proposed by other parties.

## **V. Conclusion**

For all of the foregoing reasons, Broadvox submits that the FCC may not find that the CenturyLink/Embarq/Qwest is in the public interest unless appropriate safeguards are put in place to protect against anticompetitive behavior of the merged entity in the wholesale marketplace.

Dated: July 12, 2010

Sincerely,

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**DECLARATION OF ANDRE TEMNOROD IN SUPPORT  
OF BROADVOX, INC.'S COMMENTS OPPOSING MERGER OF  
CENTURYLINK/EMBARQ WITH QWEST**

I, Andre Temnorod, hereby declare as follows:

1. I am over the age of 18.
2. I have personal knowledge of the facts in this matter and if called upon to testify could and would do so.
3. I am the CEO for Broadvox, Inc., an enhanced service provider ("ESP") offering, among other things, voice over Internet Protocol ("VoIP").
4. I have been involved with two lawsuits filed by Qwest against my company.
5. In late 2008, Qwest Corporation sued Broadvox and several other ESP defendants to obtain access charges based on the unorthodox theory that Broadvox was "acting like" an interexchange carrier (IXC) and therefore they should have to pay access charges for terminating traffic to Qwest's network.
6. Qwest sued Broadvox in Washington, a state that was a highly inconvenient place for Broadvox to defend itself.
7. Broadvox is an Ohio corporation and through 2007, its principal places of business and headquarters was in Cleveland, Ohio. Since 2007, Broadvox has been headquartered in Dallas, Texas.
8. Broadvox never had any employees or offices in Washington, it was not licensed to do business in Washington, it never directed any marketing into Washington, nor owned or used any real estate in Washington, nor sent any representatives to the state to negotiate contracts and throughout its existence only 0.4154% of its purchasing and only 0.3065% of its sales have involved Washington businesses.
9. Given the lack of any business operations in Washington, I believe Qwest chose to file its complaint there to make it as logistically difficult and expensive as possible for Broadvox to defend itself.
10. The judge in the Washington litigation concluded that it was unfair for Broadvox to have to defend itself in Washington and dismissed Qwest's complaint on the grounds of lack of personal jurisdiction.
11. Qwest, however, filed an amended complaint in which it once again named Broadvox as a defendant.
12. Qwest then filed an appeal of the dismissal in the U. S. Court of Appeals for the Ninth Circuit, and a new complaint in federal court in Dallas nearly identical to the Washington complaint.
13. Based on both of these actions, I believe that Qwest intends to resume its litigation in Washington state if it wins its appeal in the Ninth Circuit. Therefore, Qwest is unfairly (and improperly in my opinion) suing Broadvox in two different federal courts for the exact same alleged conduct – terminating VoIP traffic without paying access charges.
14. Qwest has slandered Broadvox in its complaints, alleging that Broadvox engages in ANI-manipulation. Broadvox does not manipulate ANI. Qwest has no good faith basis for making these outrageous and damaging statements.
15. Qwest's litigation has forced Broadvox to divert its limited resources to fighting court battles rather than focusing its time and attention on providing innovative new services to customers.
16. I believe that Qwest has accused Broadvox of wrongdoing in order to pressure some CLECs into giving Qwest non-public information about Broadvox' relationship (if any) to the CLEC.

17. Qwest stated in its Washington litigation that it contacted Electric Lightwave, Inc. ("ELI") and indicated that certain companies, including Broadvox, were routing traffic in a fraudulent manner in order to avoid access charges.
18. After being contacted by Qwest, ELI sent Broadvox an email in August 2006 stating that, based on Qwest's claims, Broadvox was incorrectly routing traffic and that such supposed mis-routing would have to be immediately discontinued, or ELI would disconnect Broadvox' circuits. ELI terminated Broadvox' contract in November 2006.
19. Broadvox was then forced to find another CLEC to carry its traffic.

I declare under penalty of perjury of the laws of the United States that these facts are true to the best of my knowledge and belief.



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Andre Temnored  
CEO for Broadvox, Inc.