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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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*Filed
Sept. 5, 2018*

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

STEFANIE A. BRAND
Director

Via Electronic and Regular Mail

August 30, 2018

Ms. Aida Camacho - Board Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Fl., Ste. 314
P.O. Box 350
Trenton, New Jersey 08625-0350

Re: I/M/O the Joint Petition of United Telephone Company of New Jersey, Inc.,
d/b/a/ CenturyLink and Onvoy, LLC for Approval of an Interconnection
Agreement **BPU Docket No.: TO18060665**

Dear Secretary Camacho:

The New Jersey Division of Rate Counsel ("Rate Counsel") submits the following comments on the above-referenced matter, filed by United Telephone Company of New Jersey, Inc., d/b/a/ CenturyLink ("CenturyLink" and/or "ILEC") on behalf of both CenturyLink and Onvoy, LLC, ("Onvoy" and/or "CLEC" or "Carrier") collectively ("Petitioners") seeking approval by the New Jersey Board of Public Utilities ("Board") of an Interconnection Agreement ("Agreement") entered into between Petitioners which sets forth the terms, conditions, and prices under which Petitioners will offer and provide network interconnection, access to network elements, ancillary network services, and wholesale telecommunications services. CenturyLink is a New Jersey corporation, and an authorized incumbent local exchange telephone services provider throughout portions of the State of New Jersey. Onvoy is certified to provide telecommunications services in New Jersey as a competitive local exchange carrier ("CLEC").

Rate Counsel does not object to Board approval of the Agreement subject to the recommendations discussed below. Enclosed are original and (10) copies of Rate Counsel's comments. Kindly return a stamped "Received" or "Filed" copy to Rate Counsel for its record.

Subsequent Board Review of Changes or Amendments

Rate Counsel respectfully recommends that the Board assert its continuing authority over this Agreement¹ and state specifically in the language of the Order in this matter that any

¹See, *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753 (8th Cir. 1997). State commissions, rather than the Federal Communications Commission, have continuing authority over such agreements. The subsequent history of this case comprises both administrative and judicial decisions: *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (1997), cert. granted *AT&T Corp. v. Iowa Utilities Bd.*, 522 U.S. 1089, 118 S. Ct. 879, 139 L.Ed.2d 867 (1998), affirmed in part, reversed in part by *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119

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subsequent amendments or modifications to the Agreement negotiated by the Parties or the Agreement or occasioned either directly or indirectly by any change or revision in Federal or State law shall be subject to review and approval by the Board in accordance with applicable legal standards.² The Board has previously adopted this position, which also preserves the function of Section 252(i) of the Act.³ Section 252(i) entitles a carrier to avail itself of terms and condition in any approved agreement. Without such action taken by the Board, other carriers will not have reasonable notice of any change or revision to the Agreement.

Prohibition Against Anticompetitive and Discriminatory Treatment

Pursuant to 47 U.S.C. §252(a)(1), incumbent local exchange carriers (“ILECs”) such as CenturyLink may negotiate and enter into binding interconnection agreements with common local exchange carriers (“CLECs”) requesting interconnection, service or network elements. However, the terms crafted by the ILEC in said agreements must be forthright, non-abusive and non-discriminatory in application.

The Board may reject the Agreement if it finds that the Agreement discriminates against other carriers or is not consistent with the public interest, convenience or necessity.⁴ Certain provisions of Section 43 (Security Deposit) and Section 114 (Bankruptcy) of the Agreement warrant Board attention under Section 252(e) (2) (A) (ii) of the Act.⁵ The Agreement sections contain language that implicate potential discriminatory and unjust treatment of competitive carriers, and violate the public interest, as exercising such action could act as a barrier to entry for competitive providers and should therefore be either modified or rejected by the Board. These include but are not limited to the following:

Subsection 43.7⁶

Any security deposit shall be held by CenturyLink as a guarantee of payment of any charges for services billed to CLEC pursuant to this agreement or in connection with any other services provided to CLEC by CenturyLink. CenturyLink may exercise its rights to credit any cash deposit to CLEC’s account, or to demand payment from the issuing bank or bonding company of any irrevocable bank letter of credit, upon the occurrence of any one of the following events:

S. Ct. 721, 142 L.Ed.2d 835 (1999), agency opinion after remand, *In Re: the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Order*, CC Docket No. 96-98, 14 FCC Rcd. 5263 (1999), *Iowa Utilities Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000), *cert. granted in part: Verizon Communications, Inc. v. F.C.C.*, 121 S. Ct. 877 (2001); *WorldCom, Inc. v. Verizon Communications, Inc.*, 121 S. Ct. 877 (2001); *F.C.C. v. Iowa Utilities Bd.*, 121 S. Ct. 878 (2001); *AT&T Corp. v. Iowa Utilities Bd.*, 121 S. Ct. 878 (2001); *General Communications, Inc. v. Iowa Utilities Bd.*, 121 S. Ct. 879 (2001).

² See, *In the Matter of the Joint Application of Bell Atlantic-New Jersey, Inc. and Focal Communications Corporation of New Jersey for an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996: Order Approving Interconnection Agreement*, BPU Docket No. TM98060367, (Aug. 18, 1999) at p. 4.

³ See, *I/M/O Joint Application of Bell Atlantic-New Jersey, Inc. and Accelerated Connections, Inc., for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, BPU Docket No. TO98121410 (Aug. 18, 1999).

⁴ 47 U.S.C. § 252(e)(2).

⁵ 47 U.S.C. § 252(e)(2)(A)(ii) establishes a public interest consideration for State Commission approval of an interconnection agreement.

⁶ Interconnection Agreement By and Between United Telephone Company of New Jersey, Inc., d/b/a/ CenturyLink and Onvoy, LLC for the State of New Jersey, dated April 19, 2018, at pp.46-48.

- 43.7.1 - when CLEC's undisputed balances due to CenturyLink are more than thirty (30) Days past due; or
- 43.7.2 - when CLEC files for protection under bankruptcy laws; or
- 43.7.3 - when an involuntary petition in bankruptcy is filed against CLEC and is not dismissed within sixty (60) Days;
- 43.7.4- when this Agreement expires or terminates; inclusive of requirements set forth under (Agreement Sections 43.7.5 through 43.10.4)

Section 114⁷

If any voluntary or involuntary petition or similar pleading under any section or sections of any bankruptcy act shall be filed by or against CLEC, or any voluntary or involuntary proceeding in any court or tribunal shall be instituted to declare CLEC insolvent or unable to pay CLEC's debts, or CLEC makes an assignment for the benefit of its creditors, or a trustee or receiver is appointed for CLEC or for the major part of CLEC's property, CenturyLink may, if CenturyLink so elects but not otherwise, and with or without notice of such election or other action by CenturyLink, forthwith terminate this Agreement.

The provisions discussed above are similar to previous other proposals intended to reduce credit risks that were investigated and determined to be discriminatory by the FCC and such credit terms warrant close consideration and rejection if determined by the Board to foster and/or result in discriminatory practices creating barriers to competitive entry by other service providers and contrary to the public interest.

The subjective triggers (i.e., "CenturyLink reserves the right") contained throughout the noted sections of the Agreement permit CenturyLink great discretion in saddling its CLEC competitor with additional deposit requirements similar to those that were not approved by the FCC.⁸ The terms contained under Sections 43 and 117 of the Agreement may (i) discriminate against a telecommunications carrier not a party to the agreement, acting as a barrier to entry for potential competitive providers, and are (ii) not consistent with the public interest, convenience, and necessity, and are contrary to 47 U.S.C. §252(e) (2) (A) (ii) of the Act.⁹ Agreements that contain such terms and conditions frustrate and thwart the intent and purpose of Section 252(e) to the detriment of New Jersey ratepayers who pay the price in the form of less competition and higher rates for telecommunications services. Accordingly, Rate Counsel respectfully recommends that the Board modify and/or reject these specific provisions of the Agreement.

⁷ Interconnection Agreement By and Between United Telephone Company of New Jersey, Inc., d/b/a/ CenturyLink and Onvoy, LLC for the State of New Jersey, dated April 12, 2018, at p.166. Rate Counsel notes that the FCC has noted that in many bankruptcy cases involving telecommunications carriers, the courts have used their discretion to treat telecommunications services as administrative expenses receiving priority above all other claims, or require bankrupt carriers to pay a deposit (amounting to one or two weeks of service) or make accelerated or advance payments. Such orders have also allowed creditors to terminate service to nonpaying customers on short notice. *I/M/O Verizon's Petition for Emergency Declaratory and Other Relief: Policy Statement*, WC Docket No. 02-202, ("Policy Statement") (rel. Dec. 23, 2002), at paras. 6, 18 and 20 (internal citations omitted).


⁸ Tariff revisions are generally adopted by the FCC as filed, and are set for investigation only where a potential problem is discerned.

⁹ 47 U.S.C. §252(e)(2)(A)(ii) establishes a public interest consideration for State commission approval of an interconnection agreement.

Notwithstanding, Rate Counsel notes that the terms of the Agreement, except as discussed and noted above, meet the requirements of Section 252(e) of the Telecommunications Act of 1996.¹⁰ Moreover, Rate Counsel is cognizant that it is the policy of the State to provide diversity in the supply of telecommunications services, and found that competition will “promote efficiency, reduce regulatory delay, and foster productivity and innovation” and “produce a wider selection of services at competitive market-based prices.”¹¹ Accordingly, Rate Counsel does not object to Board approval of the Agreement subject to the recommendations stated herein.

Very truly yours,

STEFANIE A. BRAND, ESQ.,
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Maria T. Novas-Ruiz,
Assistant Deputy Rate Counsel

MNR/td
c: Service List

¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the Act,” and all citations to the sections of the Act will be to the Act as it is codified in the United States Code.

¹¹ *N.J.S.A.* 48:2-21.16(a)(4) and *N.J.S.A.* 48:2-21.16(b)(1) and (3).

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