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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

ARB 864

In the Matter of

WESTERN RADIO SERVICES COMPANY

Request for Interconnection Agreement with
CenturyTel of Eastern Oregon, Inc.

OPENING COMMENTS OF CENTURYTEL OF
EASTERN OREGON, INC. CONCERNING
CERTIFIED QUESTIONS

BACKGROUND

This docket began by Western Radio Services Company ("Western Radio") filing a request for arbitration of an interconnection agreement with CenturyTel of Eastern Oregon, Inc. ("CenturyTel"). On January 28, 2009, the Public Utility Commission of Oregon ("Commission") entered Order No. 09-025 in this docket which dismissed, without prejudice, the filing by Western Radio. Effective March 31, 2009, Western Radio filed an Application for Reconsideration or Rehearing and/or for Clarification. The Application was denied by the Commission in Order 09-188 issued May 28, 2009. The Commission's May 28, 2009, Order directed that two questions be certified to the Commission for its consideration. Those two questions are as follows:

OPENING COMMENTS OF CENTURYTEL OF
EASTERN OREGON, INC. CONCERNING
CERTIFIED QUESTIONS - 1

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1) Does the Public Utility Commission of Oregon have the authority to enforce the terms of an interconnection *arrangement* that precedes an approved interconnection agreement, and, if so, what remedies are available?

2) Can the rural telephone exemption under 47 U.S.C. 251(f) be voluntarily waived on a case-by-case basis or must it be terminated?

By a Ruling dated June 18, 2009, Administrative Law Judge Kirkpatrick established a schedule for comments on the two questions. Opening comments are due July 6, 2009. CenturyTel hereby submits its Opening Comments.

QUESTION 1

1) Does the Public Utility Commission of Oregon have the authority to enforce the terms of an interconnection *arrangement* that precedes an approved interconnection agreement, and, if so, what remedies are available?

There is a set of obvious facts that underlie this question. These facts are readily apparent from the history of this docket. The first of these facts is that the parties have had in place for quite some time an informal interconnection *arrangement* under which they have exchanged traffic. The parties do not have a formal *interconnection agreement*. Western Radio is unhappy about certain aspects of the informal arrangement.¹ However, Western Radio has failed to perfect its ability to seek arbitration of an interconnection agreement with CenturyTel before the Commission.

With these facts in mind as background, the analysis of Question 1 begins from the basic premise that the Commission is a creature of statute and possesses only those authorities that have been expressly delegated to it. Pacific Northwest Bell Tel. Co. v. Davis, 43 Or. App. 999, 1005, 608 P.2d 547 (1979).

¹ The primary concern of Western Radio seems to center around billing for intraLATA toll. Ironically, intraLATA toll billing would not be the subject of an interconnection agreement.

1 For telecommunications interconnection matters, there are two sources for the Commission's
2 authority. One is federal law and the second is state law. In the discussion of Question 1 in these
3 Opening Comments, CenturyTel will first review the provisions of federal law and then turn to the
4 contents of state law.

5 As it relates to arriving at a formal interconnection agreement, federal law is precise. The
6 limited remedy allowed under federal law if a negotiated interconnection agreement is not reached is for
7 one of the parties to the interconnection process to seek arbitration in front of the state commission in
8 days 135 to 160, inclusive, after delivery of a bona fide request for negotiation of an interconnection
9 agreement. See, 47 U.S.C. § 252(b). There is no similar process under federal law for state commission
10 involvement in an informal arrangement. Congress delegated to the states an important, but limited role,
11 in dealing with interconnection negotiations and agreements. A state commission is limited to: (1)
12 reviewing negotiated agreements for approval or rejection (47 U.S.C. § 252(a)(1) and (e)); (2) mediating
13 disputes arising out of Section 251 negotiations (47 U.S.C. § 252(a)(2)); (3) arbitrating agreements when
14 Section 251 negotiations fail if a timely and sufficient petition is filed (47 U.S.C. § 252(a)(2)); and (4)
15 arbitrating disputes over the terms of an approved (either negotiated or arbitrated) interconnection
16 agreement. It is clear that the Commission has not been delegated authority under federal law to
17 interpret, enforce, or arbitrate the terms of an informal interconnection arrangement.
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20 The Commission's rules reinforce this result. Under OAR 860-016-0050, the Commission has
21 set out the rules where a telecommunications provider may file a complaint "for the enforcement of an
22 interconnection agreement that was previously approved by the Commission." (Emphasis added.) The
23 rule goes on to define an interconnection agreement as "an agreement executed pursuant to the
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1 Telecommunications Act of 1996 (the Act). This includes interconnection agreements, resale
2 agreements, agreements for the purchase or lease of unbundled network elements (UNEs), or statements
3 of generally available terms and conditions (SGATs), whether those agreements are entered in through
4 negotiation, mediation, arbitration, or adoption of a prior agreement or portions of prior agreements.”
5 OAR 860-016-0050(1). It is clear from this language that an informal interconnection arrangement is
6 not subject to the Commission’s complaint process for interconnection agreements under the
7 Commission’s rules.
8

9 Thus, the Commission lacks authority under federal law to enforce the terms of an informal
10 interconnection arrangement that precedes an informal interconnection agreement. From a public policy
11 perspective, this fits with what appears to be the intent of Congress in enacting the Telecommunications
12 Act of 1996. In that Act, Congress sought to introduce competition into local telecommunications
13 markets. It gave state commissions very specific and very well-defined roles to play. As described
14 above, what Western Radio seeks is outside of the statutes enacted by Congress delegating authority to
15 this Commission.
16

17 If the Commission does not have authority to entertain complaints concerning informal
18 arrangements related to interconnection under federal law, does the Commission have jurisdiction to
19 hear such a complaint under state law? The answer is no.

20 Complaints can be filed under ORS 756.500 for matters that fall within the purview of the
21 Commission under state statute. However, no state statute allows the Commission to consider a
22 complaint about an informal interconnection agreement. The two most common types of complaints
23 would be allegations of unjust discrimination in rates under ORS 759.260 or granting an undue
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1 preference under ORS 759.275.² The informal interconnection arrangement is certainly not grounds for
2 a complaint under ORS 759.260 or 759.275. Nor, in a broader sense, does it fall under other state
3 statutes within the Commission's purview. For example, the informal interconnection arrangement is
4 not joint rate and classification that would allow a complaint under ORS 759.220(3). Since the
5 geographic area in which Western Radio operates is not classified as a competitive zone, there can be no
6 complaint that a Commission established condition for the competitive zone has been violated. ORS
7 759.050.
8

9 If the Commission does not have authority under either federal or state law to entertain a
10 complaint concerning an informal interconnection arrangement, does that mean that Western Radio is
11 without a remedy? The answer is no. Western Radio could file a bona fide request for interconnection,
12 and then actually negotiate in good faith with CenturyTel. If Western Radio believed by the 135th day
13 after CenturyTel's receipt of the notice of bona fide request that sufficient progress was not being made,
14 it could then file a proper petition for arbitration containing the sufficient documentation that the
15 Commission has patiently explained to Western Radio is required.
16

17 Just because Western Radio has failed to actually negotiate in good faith with CenturyTel and
18 then filed an insufficiently documented petition for arbitration should not give rise to an occasion to
19 allow Western Radio to "shoehorn" in a remedy that does not exist under federal or state law for
20 interconnection matters.
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24 ² See, e.g., Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon v. Qwest
25 Corporation, Public Utility Commission of Oregon, Docket No. UCB 35 (2008).
26

1 assert the rural exemption with regard to obligations under either Section 251(c)(1) or 251(c)(2). This is
2 a partial waiver of the rural exemption.

3 The rationale behind a partial waiver of the rural exemption is that the obligations under 47
4 U.S.C. § 251(c) vary greatly in the scope of the burden imposed on a rural ILEC. It is a far different
5 issue to negotiate terms of interconnection to provide resale at a discount than it is to have to go through
6 the process of providing UNEs or providing collocation. The burdens are vastly different in their scope
7 and effect on rural companies.

8 Thus, it appears to be logical that a rural ILEC can waive the provisions of 47 U.S.C. § 251(c)(1)
9 and (2) to negotiate an interconnection agreement, but assert that the rural exemption still exists as to the
10 duty to provide unbundled network elements under 47 U.S.C. § 251(c)(3).

11 This result is entirely consistent with the concept of termination of the rural exemption contained
12 in 47 U.S.C. § 251(f)(1)(B). If a rural exemption is to be terminated, the state commission must
13 determine if the request is “unduly economically burdensome”; is “technically feasible”; and, is
14 consistent with the universal service objectives. Clearly the issues concerning technical feasibility,
15 economic burden and universal service are much different if the issue is providing access to UNEs than
16 if the issue is providing resale at a discount. The undertaking that is required under 47 U.S.C. §
17 251(f)(1)(B) appears to require factually specific analysis as to the specific issue before the
18 Commission. An interpretation that an agreement not to assert the rural exemption in response to a bona
19 fide request to negotiate would lead to termination of the entire rural exemption would render the rural
20 exemption meaningless.
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1 Thus, CenturyTel asserts that a partial waiver of the rural exemption is entirely consistent with
2 the way in which the rural exemption was created and the standards for termination of that exemption.
3 On the other hand, it does not appear that a true case-by-case waiver would be appropriate where a rural
4 telephone company chooses among various competitors whom to assert the rural exemption against and
5 whom not to. CenturyTel has consistently agreed that it would not assert 47 U.S.C. § 251(c)(1) as a
6 means to prevent good faith negotiation of the terms and condition of interconnection, while preserving
7 the rural exemption as to other provisions of 47 U.S.C. § 251(c).
8

9 Respectfully submitted this 6th day of July, 2009.

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12 RICHARD A. FINNIGAN, OSB No. 965357
13 Attorney for CenturyTel of Eastern Oregon, Inc.
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CERTIFICATE OF SERVICE
ARB 864

I certify that I have this day sent the attached Opening Comments of CenturyTel of Eastern Oregon, Inc. Concerning Certified Questions by electronic mail and U.S. mail to the following:

FILING CENTER
PUBLIC UTILITY COMMISSION OF OREGON
550 CAPITOL STREET NE, SUITE 215
SALEM, OR 97301-2551
puc.filingcenter@state.or.us

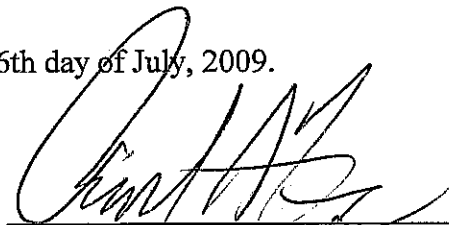
I further certify that I have this day sent the attached Opening Comments of CenturyTel of Eastern Oregon, Inc. Concerning Certified Questions upon all parties of record in this proceeding by mailing a copy properly addressed with first class postage prepaid, and by electronic mail pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

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Dated at Olympia, Washington, this 6th day of July, 2009.



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July 6, 2009

VIA ELECTRONIC MAIL AND U.S. MAIL

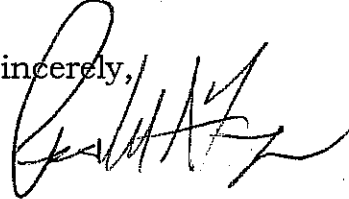
Filing Center
Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
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Re: ARB 864 – Opening Comments of CenturyTel of Eastern Oregon,
Inc. Concerning Certified Questions

Dear Sir/Madam:

Enclosed are the Opening Comments of CenturyTel of Eastern Oregon,
Inc. Concerning Certified Questions and Certificate of Service.

Sincerely,



RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: ALJ Kirkpatrick (via e-mail)
Service List (via e-mail and U.S. mail)
Clients (via e-mail)