

1  
2  
3  
4  
5 BEFORE THE PUBLIC UTILITY COMMISSION  
6 OF OREGON

7 ARB 864  
8

9 In the Matter of

10 WESTERN RADIO SERVICES COMPANY

11 Request for Interconnection Agreement with  
12 CenturyTel of Eastern Oregon, Inc.  
13

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

14  
15 CenturyTel of Eastern Oregon, Inc. ("CenturyTel") submits its Reply Comments on the certified  
16 questions in this matter.

17 In these Reply Comments, CenturyTel will first point out that Western Radio Services  
18 Company's ("Western Radio") allegations regarding toll restriction have nothing to do with local  
19 interconnection and are not within the scope of the questions raised by the Commission. Second,  
20 CenturyTel will point out that Western Radio does not reply to the first certified question and instead  
21 raises arguments concerning good faith negotiations and, even there, misstates the context in which  
22 those arguments should be raised. Finally, CenturyTel will briefly respond to Western Radio's  
23 comments on the second certified question. Since Western Radio does not raise anything new  
24  
25

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

Law Office of  
Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, WA 98512  
(360) 956-7001

1 concerning the issue of waiver versus termination of the rural exemption, CenturyTel will briefly  
2 summarize the arguments on that point.

3 1. Western Radio is Concerned About Toll Restriction Which is Not a Local Interconnection Issue.

4 Rather than responding to the first certified question concerning the Commission's ability to  
5 enforce an informal interconnection arrangement, Western Radio argues that toll restriction is a violation  
6 of CenturyTel's obligation to negotiate a local interconnection agreement in good faith.  
7

8 CenturyTel respectfully requests that the Commission keep in mind that the facts alleged by  
9 Western Radio are not proven facts. CenturyTel disputes many of the allegations and adamantly  
10 disputes allegations that it did not negotiate in good faith. However, one statement made by Western  
11 Radio can be taken as an admission against interest by Western Radio and points out the underlying  
12 problem with Western Radio's position.

13 In Footnote 1 of its pleading, Western Radio makes the following statement concerning toll  
14 restriction, "This prevents Western's customers from accessing anything but CenturyTel's network,  
15 thereby preventing Western's customers from calling the customers of any other telecommunications  
16 carriers." (Emphasis added.) This admission against interest demonstrates that Western Radio is not  
17 discussing local interconnection with CenturyTel. Instead, Western Radio wants its customers to be able  
18 to use CenturyTel as their free toll carrier for carrying traffic to other telecommunications carriers'  
19 networks. In fact, it is Western Radio that has the obligation to negotiate with those other carriers or  
20 arrange for toll services for its customers.  
21

22 There are three basic points concerning Western Radio's fundamental misunderstanding of  
23 CenturyTel's obligations. First, Western Radio cannot force CenturyTel, through the guise of local  
24

1 interconnection, to become an indentured toll carrier for Western Radio nor is CenturyTel required to  
2 negotiate becoming the toll carrier for Western Radio. There is nothing in Section 251 and 252 of the  
3 Communications Act of 1934, as amended by the Telecommunications Act of 1996, that can be read  
4 even remotely to create such an obligation on CenturyTel. Second, CenturyTel is not an interexchange  
5 carrier even for its own customers. CenturyTel operates only as a local exchange carrier. Third, under  
6 no set of circumstances can CenturyTel be made to be a toll carrier which carries Western Radio's traffic  
7 for free.

8  
9 Yet, this appears to be precisely Western Radio's goal. Western Radio is inserting a toll issue  
10 into local interconnection on the assumption that local interconnection requires the incumbent company  
11 to be the toll carrier for the competitive entrant. Western Radio provides no supporting citation for that  
12 proposition because there is no supporting authority for that proposition.

13 2. Western Radio Ignores the Certified Question and Argues About Good Faith Negotiations  
14 Instead.

15 Western Radio does not address the Commission's certified question, which is as follows:

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

19 Instead, Western Radio argues that the Commission has authority to hear a complaint for an injunction  
20 concerning the duty to negotiate in good faith. The duty to negotiate in good faith concerns negotiating  
21 the formal interconnection agreement. It has nothing to do with the question asked by the Commission  
22 concerning enforcement of an existing informal arrangement that precedes an approved interconnection  
23 agreement. Western Radio's arguments and comments on this issue should be totally ignored.

1 Out of an abundance of caution, if the Commission is going to consider Western Radio's  
2 comments concerning injunctive relief on a claim for failure to negotiate in good faith, CenturyTel will  
3 point out that Western Radio has totally confused the issue.

4 Western Radio cites two cases to support its concept. The first of these is Western Radio  
5 Services Co. v. Qwest Corporation, 530 F.3d 1186 (9th Cir. 2008). In this case, Western Radio sought  
6 to bring before the Federal Court an allegation that Qwest had not negotiated in good faith prior to the  
7 Commission determining whether Qwest had failed to do so. The Court found that, as a prudential  
8 matter, the Commission should first address the good faith claim. In doing so, the Court described the  
9 context in which that claim is to be considered. The Court stated "In conducting the arbitration, the state  
10 commission may 'impos[e] appropriate conditions as required to' ensure that the requirements of Section  
11 251, which contains a local exchange carrier's good faith obligations, are met." [Emphases added.]  
12 [Citing 47 U.S.C. § 251(c)(1) and 252(b)(4)(C).] 530 F.3d at 1197. Thus, the Ninth Circuit's decision is  
13 premised on review of a claim that a party had violated its obligation to negotiate in good faith within  
14 the scope of an arbitration. After all, it is the duty to negotiate a formal interconnection agreement  
15 where the duty to negotiate in good faith arises. See, 47 C.F.R. § 51.301(a) and (b). This Ninth Circuit  
16 case is not authority that a separate injunctive relief claim can be filed in front of the state commission.  
17 In this Docket, ARB 864, Western Radio filed a petition for arbitration that was totally deficient and the  
18 Commission has repeatedly explained to Western Radio what it needs to do to file a proper petition.  
19 Western Radio has ignored that advice to date.

20 The second case cited by Western Radio is Verizon Maryland, Inc. v. Public Service Com'n of  
21 Maryland, 535 U.S. 635, 122 S. Ct. 1753 (2002). It is difficult to understand why Western Radio cited

1 to this case. Apparently, it was cited for the concept that an action can be brought in federal court on  
2 other than interconnection agreements. CenturyTel agrees that that is a true statement in a general sense.  
3 However, it has nothing to do with the issue before the Commission. In fact, in the Verizon Maryland  
4 case, the issue that was before the Court was the state commission's decision interpreting a negotiated  
5 interconnection agreement that ISP-bound traffic fell within the concept of "local" traffic under the  
6 terms of the interconnection agreement. The case raised the question of the extent to which a federal  
7 court may review a decision of a state commission interpreting an existing interconnection agreement  
8 when that interpretation is alleged to violate federal law. The Verizon Maryland case offers no support  
9 to Western Radio's contentions on injunctive relief by state commissions.  
10

11 Beyond these cases, Western Radio cites to Commission rules that Western Radio argues allow  
12 the Commission to issue injunctive relief, in particular citing to OAR 860-016-0050(2)(f) and OAR 860-  
13 034-0290(2)(c). Western Radio asserts in relation to these rules, "There is no reason the PUC would not  
14 have similar injunctive authority in this situation...."<sup>1</sup> Unfortunately for Western Radio, its arguments  
15 undermine its own position.  
16

17 First, OAR 860-016-0050(2)(f) allows for a complaint for enforcement of an interconnection  
18 agreement to include a request for injunctive or temporary relief. That authorization is very narrow in  
19 scope. It does not apply, by its own words, outside of the context of enforcement of an existing, formal  
20 interconnection agreement. Thus, despite Western Radio's contention that "there is no reason the PUC  
21 would not have similar injunctive authority," Western Radio's argument is undercut by the specific  
22  
23

---

24 <sup>1</sup> Western Radio Brief at p. 3.  
25

1 reference in the rule to injunctions in the limited context of the enforcement of interconnection  
2 agreements and no mention in any Commission rule of similar authority for informal arrangements.

3 OAR 860-034-0290(2)(c) is even less availing for Western Radio. That language simply lists  
4 what information must be included in a customer notice and clearly points out what relief a court can  
5 grant against an information provider. This rule parrots the language of ORS 759.720(1) which talks  
6 about the jurisdiction of a court, not the Commission. This rule does not come close to saying the  
7 Commission has authority to issue an injunction.  
8

9 Western Radio also notes in passing that ORCP provisions are incorporated by general reference  
10 through OAR 860-011-0000(3). The fact that the Oregon Rules of Civil Procedure are made applicable  
11 to the Commission's proceedings does not mean that the Commission can confer upon itself authority it  
12 does not otherwise possess.

13 Western Radio argues that OAR 860-013-0031 allows motions for injunction. However, that  
14 rule does not mention the word "injunction" anywhere within its scope. The rule is simply a general  
15 procedural rule stating that motions may be filed. This still does not address the issue of whether the  
16 Commission has the substantive authority to provide injunctive relief in the context that Western Radio  
17 seeks.  
18

19 Western Radio's final argument on the subject appears to be that it would be inequitable not to  
20 have injunctive authority. The concept that an injunction is a form of relief grounded in equity is  
21 CenturyTel's point; injunctions are equitable forms of relief and the Commission has to have the  
22 authority to grant that type of relief. Unfortunately for Western Radio, the Commission does not have  
23 this type of equitable power in the context of informal interconnection arrangements. Western Radio's  
24

1 point is stated thusly, "If the PUC did not have such [injunctive] authority, the PUC could protect small  
2 companies which have successfully negotiated an IA with an incumbent, but not those which have been  
3 rebuffed by the incumbent -- an outcome which would make no sense and which would be inequitable."<sup>2</sup>

4 The problem with Western Radio's argument is that a small company that has been "rebuffed" by the  
5 incumbent does have relief. That relief is to file a petition for arbitration in a manner which complies  
6 with the FCC and Commission's rules. As noted above, the Commission has explained in detail to  
7 Western Radio its deficiencies in filing its petition for arbitration and Western Radio has yet to remedy  
8 those deficiencies.  
9

10 Western Radio concludes its comments by attempting to address in a substantive fashion its  
11 allegations that CenturyTel has not negotiated in good faith. As noted above, the factual basis for  
12 Western Radio's arguments have not been established. Thus, Western Radio's conclusory language that  
13 different regulations and statutes have been violated must be ignored.  
14

15 As a creature of statute, the Commission has only the authority explicitly granted to it or  
16 necessarily implied from the express grant of authority. Lee, Inc. v. Pac. Tel. & Tel., 154 Or. 272, 59  
17 P.2d 683 (1936); Gates v. Pub. Service Comm'n., 86 Or. 442, 167 P. 791 (1917). See, also, Lee v.  
18 Oregon Racing Comm'n., 142 Or. App. 1114, 920 P.2d 554 (1996). Western Radio has not been able to  
19 cite any express grant of authority for the Commission to enter injunctive relief concerning an allegation  
20 of failure to negotiate in good faith. Nor can Western Radio show that such authority is necessarily  
21 implied from the granted powers. Western Radio's remedy, which it tried and failed to perfect, is to  
22  
23

---

24 <sup>2</sup> Western Radio Brief at p. 3.

1 bring the good faith negotiation claim in the context of an arbitration. Western Radio's Petition for  
2 Arbitration has been dismissed for failure to comply with the Commission's rules. A new remedy can  
3 not be created out of whole cloth.

4 3. Western Radio Makes no New Argument Concerning the Waiver Versus Termination of the  
5 Rural Exemption.

6 In addressing the second certified question, Western Radio raises no new arguments. Western  
7 Radio simply asserts that there is no ability to waive the exemption and it must be terminated. As  
8 pointed out by CenturyTel in the Opening Comments, such a result does not make sense. The  
9 differences in the burdens and obligations on a rural incumbent local exchange carrier that is protected  
10 by the rural exemption are vast. Resale at a discount is not the same thing as offering UNEs.  
11 Negotiating in good faith is not the same thing as offering collocation. The only logical reading of the  
12 rural exemption contained in 47 U.S.C. § 251(f) is that it can be waived in part to accommodate unique  
13 circumstances of each obligation.  
14

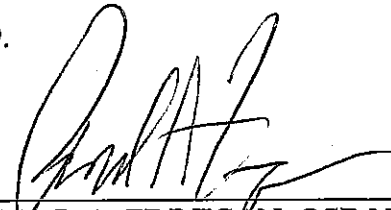
15 In fact, given the structure of Section 251(f), it is clear that the rural exemption is to be examined  
16 on a case-by-case basis to determine if it should be terminated in part when termination is raised in the  
17 proper context. The language that Congress used in 47 U.S.C. § 251(1)(a) is that the exemption shall  
18 apply until the rural company has received a bona fide request for interconnection, services or network  
19 elements and the state commission determines "that such request is not unduly economically  
20 burdensome, is technically feasible, and is consistent with Section 254 of this title...." (Emphasis  
21 added.) In other words, it depends upon the request, looking at each request, whether the rural  
22 exemption will be terminated as to that specific request. The task before the Commission in evaluating a  
23 request to terminate a rural exemption which is raised in the proper context is to look at the specific  
24  
25



1 request and evaluate its economic burden, to then evaluate that specific request technical feasibility and  
2 then, finally, to evaluate that specific request's consistency with universal service goals. If the rural  
3 exemption is terminable on a case-by-case basis, it can certainly be waived on a case-by-case basis for  
4 certain types of requests.

5 As CenturyTel earlier set out in its Opening Comments, CenturyTel does not believe that it is  
6 possible for an incumbent to say that it will negotiate with one carrier but raise the rural exemption to  
7 say it will not negotiate with another carrier. However, CenturyTel asserts that it is entirely consistent  
8 with Congressional language that the rural exemption can be waived as to negotiations, but then can be  
9 asserted as to the duty to provide UNEs. The analysis of economic burden, technical feasibility and  
10 consistency with the universal service goals and policies of the Telecommunications Act of 1996  
11 certainly vary by the nature of the request that is made.

12  
13 Respectfully submitted this 20th day of July, 2009.



14  
15  
16 RICHARD A. FINNIGAN, OSB No. 965357  
17 Attorney for CenturyTel of Eastern Oregon, Inc.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**  
**ARB 864**

I certify that I have this day sent the attached Reply 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

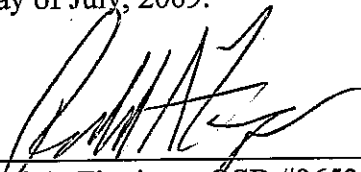
I further certify that I have this day sent the attached Reply Comments of CenturyTel of Eastern Oregon, Inc. Concerning Certified Questions upon all parties of record in this proceeding by mailing a copy properly addressed with first class postage prepaid, and by electronic mail pursuant to OAR 860-013-0070,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

MICHAEL T. WEIRICH  
ASSISTANT ATTORNEY GENERAL  
REGULATED UTILITY & BUSINESS  
SECTION  
1162 COURT ST NE  
SALEM, OR 97301-4096  
michael.weirich@doj.state.or.us

MARIANNE DUGAN  
FACAROS & DUGAN  
259 E 5<sup>TH</sup> AVE - 200-D  
EUGENE, OR 97401  
mdugan@mdugan.com

RICHARD L. OBERDORFER  
WESTERN RADIO SERVICES CO INC  
PO BOX 1618  
BEND, OR 97709-1618  
oberdorfer@earthlink.net

Dated at Olympia, Washington, this 20th day of July, 2009.

  
Richard A. Finnigan, OSB #965357  
Attorney for CenturyTel of Eastern Oregon, Inc.

Law Office of  
Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, Washington 98512  
Fax (360) 753-6862

Richard A. Finnigan  
(360) 956-7001  
rickfinn@localaccess.com

Kathy McCrary, Paralegal  
(360) 753-7012  
kathym@localaccess.com

---

July 20, 2009

**VIA ELECTRONIC MAIL AND U.S. MAIL**

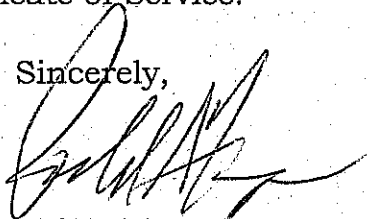
Filing Center  
Oregon Public Utility Commission  
550 Capitol Street NE, Suite 215  
Salem, OR 97301-2551

Re: ARB 864 – Reply Comments of CenturyTel of Eastern Oregon, Inc.  
Concerning Certified Questions

Dear Sir/Madam:

Enclosed are the Reply 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)