

November 6, 2008

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol Street N.E., Suite 215
Salem, OR 97308-2148

**RE: ARB 864 – Western Radio Services Company request for
Interconnection Agreement with CenturyTel of Eastern Oregon, Inc.**

Enclosed for filing, please find an original and five copies of CenturyTel's Brief Addressing Preliminary Procedural Issues in reference to the above matter.

If you have any questions please feel free to contact me.

Sincerely,

Calvin K. Simshaw
Assoc. Gen. Counsel

CKS/rk
Encl.

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 864

In the Matter of)	
)	
WESTERN RADIO SERVICES)	CENTURYTEL'S BRIEF
COMPANY)	ADDRESSING PRELIMINARY
)	PROCEDURAL ISSUES.
)	
Request for Interconnection Agreement)	
with CenturyTel of Eastern Oregon, Inc.)	

INTRODUCTION:

This ARB docket is at its very early stages. There has not yet been a petition for arbitration under Section 252 of the Communications Act (47 U.S.C. 252). Indeed, it has not yet even been determined that there are open issues that will require such an arbitration proceeding. Nonetheless, Western Radio Services Company (“Western”) is requesting that the Commission immediately conduct a proceeding to consider and rule upon a termination of the Rural Exemption embodied in 47 U.S.C. 251 (f) (1) and currently held by CenturyTel of Eastern Oregon, Inc. (“CenturyTel”). It is CenturyTel’s position that such a proceeding at this stage of this docket is completely unnecessary and would constitute a wasteful use of the time and resources of the parties and the Commission. Instead, in the unlikely event such a termination proceeding becomes necessary, it could much more appropriately be conducted as part of a section 252 arbitration.

I. “EXCHANGE OF TRAFFIC” INTERCONNECTION AGREEMENTS ARE ROUTINELY NEGOTIATED AND ARBITRATED WITHOUT THE NEED TO REVIEW THE RURAL EXEMPTION.

The interconnection being sought by Western in its bona fide request to CenturyTel is of a type commonly referred to as an “exchange of traffic” interconnection.¹ As the Commission is aware, interconnection agreements for exchange of traffic with incumbent rural telephone companies who possess the rural exemption are routinely negotiated and/or arbitrated without the need for proceedings to consider termination of the rural exemption. Within the context of exchange of traffic agreements, the existence of the rural exemption is, by the very nature of that type of interconnection, not an issue. CenturyTel is living proof of this phenomenon. CenturyTel has entered into numerous exchange of traffic agreements with a variety of other parties without the need to assert the rural exemption or any need to have its rural exemption reviewed or terminated. The most recent example is Docket No. ARB 830, Order No. 08-486 issued September 30, 2008, where the Commission arbitrated an agreement between CenturyTel of Oregon, Inc.² and Sprint Communications Company L.P.. In that case there were several contested issues between CenturyTel and Sprint but as is the nature of exchange of traffic agreements, the existence of the rural exemption was never an issue.

¹ In fact, the networks of CenturyTel and Western are already interconnected for exchange of traffic. The current negotiations will result in a formalization of terms and conditions for ongoing exchange of traffic into a section 251/252 agreement.

² CenturyTel of Oregon, Inc. is the affiliated sister company of CenturyTel of Eastern Oregon, Inc. under common ownership and management.

In its brief filed in this matter, Western has failed to show why its request for an exchange of traffic agreement is different. Western has failed to explain why it alone, amongst all of the carriers that CenturyTel has dealt with must have the Commission consider termination of the rural exemption, particularly at so early a stage of the proceeding. Instead Western has presented only speculation as to a series of unlikely events.

First, Western speculates that CenturyTel will at some point refuse to negotiate in good faith with Western. There is absolutely no basis for such speculation. CenturyTel has negotiated and arbitrated several interconnection agreements with a variety of carriers in recognition of its obligations under sections 251 and 252 of the Telecommunications Act. There is no basis to speculate that CenturyTel would now suddenly reverse that behavior and refuse to negotiate in good faith.

Second, Western speculates that CenturyTel will at some point assert the rural exemption as support for a claim that CenturyTel has no obligation to negotiate in good faith. Western makes this speculation despite the fact that, at Western's specific request, CenturyTel has stated in writing that it will not assert the rural exemption for the proposition that it has no obligation to negotiate in good faith. (See Attachment A hereto) In its brief, Western asserts that estoppel principles are insufficient to make CenturyTel's commitment in this regard binding. For the reasons stated hereafter, the Commission need not make a determination on the sufficiency of estoppel principles in order to conclude that it should not conduct a rural exemption termination proceeding at this time and that any such proceeding, if one ever becomes necessary, would be more appropriately conducted as part of a section 252 arbitration proceeding.

II. THE TELECOMMUNICATIONS ACT FULLY ANTICIPATES CONDUCTING A RURAL EXEMPTION REVIEW AS PART OF A SECTION 252 ARBITRATION.

CenturyTel submits that a proceeding to review CenturyTel's rural exemption under section 251 (f), to the extent one is ever even required, could be much more practically and efficiently processed in conjunction with a section 252 arbitration. In a section 252 arbitration proceeding, the parties would already be before the Commission most likely with the very same witnesses and counsel who would present their case for both the rural exemption issues and the arbitration issues.

Section 252 (g) contemplates holding a rural exemption review in conjunction with a section 252 arbitration for the specific purpose of reducing administrative burdens on carriers and the Commission. Section 252 (g) provides as follows:

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections, 214 (e), 251 (f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

Western has presented no compelling reasons as to why a review of CenturyTel's rural exemption, if one is ever even needed, could not occur as part of a consolidated section 252 (g) proceeding. Instead, Western has presented only wild speculation as to a series of unlikely events, that even if they did come to pass, could efficiently be addressed as part of a consolidated section 252 (g) proceeding. To grant Western's unreasonable desire to have an immediate rural exemption review would be to engage in wasteful

activity that would result in the exact increase in administrative burdens that section 252 (g) was designed to avoid.

III. THE *WESTERN v. QWEST* NINTH CIRCUIT DECISION CITED BY WESTERN ACTUALLY SUPPORTS CENTURYTEL'S POSITION.

In its brief, Western cites and attaches a copy of the Ninth Circuit Court of Appeals decision in *Western Radio Services Co .v. Qwest and Oregon PUC*, No. 05-35796, D.C. No. CV-05-00159-ALA, (July 9, 2008). That decision does nothing to support Western's claim that a review of CenturyTel's rural exemption should be conducted immediately. Instead that decision in many respects supports CenturyTel's position in this matter.

In its decision the Ninth Circuit Court stated that:

In conducting the arbitration, the state commission may "impos[e] appropriate conditions as required to" ensure that the requirements of section 251, which contains a local exchange carrier's good faith obligations, are met. (Court's decision at page 8191, or see page 9 of Attachment to Western's Brief). (emphasis added).

Clearly the Court agrees with CenturyTel that any speculative claims as to breach of good faith obligations could be handled by the Commission in the conduct of a section 252 arbitration. The Court was describing specifically what the Commission can do "in conducting the arbitration." In the case at hand, if matters ever leave the realm of speculation, the Commission could terminate CenturyTel's rural exemption, if grounds existed to do so, in a review conducted in conjunction with a section 252 arbitration. Further, the Commission could address breach of good faith obligations, if grounds existed to do so, in that same section 252 arbitration proceeding. In fact, the Court cited

examples where state commission's, in the course of section 252 arbitration proceedings, have indeed addressed failures to act in good faith (see e.g., *In re Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Co. L.P. with Whidbey Tel. Co.*, No. UT 073031, 2008 WL 227939 (Wash. U.T.C. Jan. 24, 2008); *In re Beaver Creek Cooperative Tel. Co.*, No. 07-033, 2007 WL 385641 (Or. P.U.C. Jan. 29, 2007); *In re Sprint Communications*, No. 961173-TP, 1997 WL 294619, at *8 (Fla. P.S.C. May 13, 1997).

CenturyTel submits that Western's request in this case for an immediate review of CenturyTel's rural exemption is just one more example of Western's preference to litigate in court rather than allow the Commission to perform its role under sections 251 and 252 of the Telecommunications Act. It seems painfully clear that Western is seeking a premature review of CenturyTel's rural exemption for the express purpose of positioning itself to proceed directly to court, thereby evading the Commission's section 252 arbitration process.

A reading of the Ninth Circuit Court's decision confirms Western's propensity to waste the Commission's time and attempt to end-run the Commission's section 252 arbitration process.

The unusual two-step procedure required by the statute in which a state commission first arbitrates an agreement and then approves it after it is submitted by the parties, made it possible for Western to request binding arbitration, and then wait and see whether the PUC would decide the substantive issues in its favor. Only when the PUC did not did Western abandon the arbitration and head to district court, rather than either submitting its own version of the agreement or raising objections to Qwest's version.¹⁴ Such behavior wastes the agency's resources and makes it more difficult for the district court to reach a correct decision on the good faith claim. (Court's decision at page 8198, or see page 13 of Attachment to Western's Brief). (emphasis added)

In the referenced footnote 14 the Court went on to state:

Nonetheless, there are at least two other cases pending before this court in which Western appears to have headed directly to district court with its good faith claim, rather than waiting for the PUC to approve or reject an agreement. *See Autotel v. Qwest Corp.*, No. 07-17112; *Autotel v. Central Telephone Co.*, No. 06-16565.

This Commission, like the Ninth Circuit Court, should be wary of Western's pattern of behavior.

CenturyTel is not suggesting that Western does not have the right to have other parties deal with them in good faith. CenturyTel is merely pointing out that Western should not be allowed to waste the time of the Commission and other parties by seeking a needless and premature review of CenturyTel's rural exemption based only upon wild speculation. This is especially the case when it is well established that any claims of failure to act in good faith can be fully and adequately addressed within a section 252 arbitration proceeding.

Western is of the mistaken belief that termination of CenturyTel's rural exemption would be a precondition to pursuing a claim of failure to act in good faith. The fact that Western is mistaken in this regard is really a moot point given that review of CenturyTel's rural exemption could also be taken up in conjunction with a section 252 arbitration proceeding.

IV. WESTERN PRESENTS NO OTHER BASIS FOR AN IMMEDIATE REVIEW OF THE RURAL EXEMPTION.

Western's only argument, beyond its "good faith" argument, consists of a single sentence at page 5 of its brief. There Western states:

Another problem is that the sections which apply to rural exception carriers impose a duty to interconnect "directly or indirectly," whereas the ILEC section

requires direct interconnection at “any technically feasible point within the carrier’s network.” 47 U.S.C. 252(c)(2)(B).

CenturyTel finds this statement puzzling, given that CenturyTel’s prefers direct interconnection and strives for it in all of its interconnection negotiations.

It is also the case that this Commission has previously ordered the very form of interconnection that Western apparently desires based upon the above statement, and did so without having to review or terminate the rural exemption. (See Order No. 08-486, Appendix A at page 10, Sprint/CenturyTel arbitration, ARB 830).

Once again, Western has failed to justify why the Commission should impose the administrative burden of immediately reviewing the rural exemption separate and apart from a section 252 arbitration.

CONCLUSION

Western seeks an immediate review of CenturyTel’s rural exemption based only upon wild speculation that CenturyTel will at some point fail to act in good faith and will also renege on the commitment expressed in its letter of August 19, 2008 (Attachment A to this brief). Such an unnecessary proceeding would impose a wasteful administrative burden on the parties, and more importantly on the Commission. A review of CenturyTel’s rural exemption, if one ever becomes necessary, could much more appropriately and efficiently be conducted in conjunction with a section 252 arbitration. The Commission has the discretion to proceed in this manner as section 252 (g) of the Telecommunications Act provides for such a combined proceeding specifically for the purpose of reducing administrative burdens.

Western's request that the Commission conduct an immediate review of CenturyTel's rural exemption should be denied.

Respectfully submitted this 6th day of November, 2008

CENTURYTEL OF EASTERN OREGON, INC.

Calvin K. Simshaw
Associate General Counsel - Regulatory

805 Broadway, VH 800
Vancouver, WA 98660
(360) 905-5958
(360) 905-5953 FAX

August 19, 2008

Richard L. Oberdorfer
Western Radio Services, Inc.
114 N.E. Penn Ave
Bend, OR 97701

Re: Western Radio bona fide request for interconnection.

Dear Richard:

The purpose of this letter is to memorialize commitments made during our recent 3-way discussions with OPUC Staff. At that time there were discussions as to whether CenturyTel of Eastern Oregon, Inc. ("CenturyTel") intended to assert the Section 251(f)(1) rural exemption with regard to any obligations under Section 252(c) of the Communications Act of 1934 as amended. You specifically inquired whether CenturyTel was willing to "waive" the rural exemption with regard to its obligations under Sections 251(c)(1) ("duty to negotiate" and 251(c)(2) ("interconnection"). Consistent with my statement during that discussion, CenturyTel hereby reiterates in writing that CenturyTel will not assert the rural exemption with regard to obligations under either Section 251(c)(1) or 251(c)(2). This commitment applies to negotiations arising from the current bona fide request as well as any necessary Section 252 arbitration.

If you have any questions please feel free to contact me at (360) 905-5958 or calvin.simshaw@centurytel.com.

Sincerely,

Calvin K. Simshaw
Assoc. Gen. Counsel

cc; Jackie Phillips
Shelley Jones, OPUC

CERTIFICATE OF SERVICE

I hereby certify that the original *CenturyTel Brief Addressing Preliminary Procedural Issues* relating to Docket ARB 864 was filed this 6th day of November, 2008, with the Public Utility Commission of Oregon and true and correct copies thereof have been served on the party listed below, via first class mail, postage prepaid.

Michael Weirich
Department of Justice
Regulated Utility & Business Section
1162 Court Street NE
Salem, OR 97301-4096

Marianne Dugan
Attorney at Law
259 E. 5th Ave., Suite 200-D
Eugene, OR 97401-2677

Rhonda Kent



CENTURYTEL

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