

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 864

In the Matter of)	
)	
WESTERN RADIO SERVICES)	WESTERN RADIO'S BRIEF
COMPANY)	REGARDING ALJ'S 2
)	QUESTIONS
Request for Interconnection Agreement)	
with CENTURYTEL OF EASTERN)	
OREGON, INC.)	

Pursuant to the ALJ's June 18, 2009, request for additional briefing on two questions, Western Radio hereby presents its initial arguments regarding those two questions.

I. THE PUC HAS AUTHORITY TO ENFORCE THE TERMS OF AN INTERCONNECTION "ARRANGEMENT" BEFORE THERE IS AN APPROVED ICA; AND THERE ARE REMEDIES AVAILABLE

As explained *infra*, the PUC has authority to enforce the terms of an interconnection "arrangement" before there is an approved ICA. The remedies available are injunctive relief and a declaration regarding whether CenturyTel has negotiated in good faith.

CenturyTel has cited nothing that would bar the PUC from enjoining CenturyTel from toll-restricting WR's trunk group.¹

¹ To refresh the ALJ's memory – as stated in the prior briefs, for the past several years, CenturyTel's equipment has been generating erroneous billings to Western for "toll" calls when in fact the calls are not toll calls, and CenturyTel has been writing off the charges in recognition of the error. But immediately upon receiving on Western's Petition for Arbitration, CenturyTel

As the Ninth Circuit recently held, "the federal statutory scheme specifically grants authority to a state agency to interpret and enforce the provisions of [47 U.S.C.] §§ 251 and 252 (as well as the regulations the F.C.C. promulgates to implement them), including the duty to interpret and enforce the obligation to negotiate in good faith. See § 252(b)(1), (e)(1)-(3)." Western Radio Services Co. v. Qwest Corp., 530 F.3d 1186, 1200-1201 (9th Cir. 2008). As explained *infra*, Western's complaint and motion for injunction invokes sections 251 and 252.

The Supreme Court has made clear that Interconnection Agreements are not the only matter under the Telecommunications Act which are actionable. Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 122 S. Ct. 1753 (2002) (state commission ordering reciprocal compensation was reviewable under the Telecommunications Act). Rather, any interconnection or related matter which arises between carriers is reviewable under federal question jurisdiction. Id.

Thus, the question is whether non-ICA-related claims must be "exhausted" through initial review by the state Commissions. Western Radio and its sister company Autotel have participated in several federal lawsuits against other carriers. Each time, the courts have held that all claims must first go to the state public utilities commission. See, e.g., Western Radio Services Co., 530 F3d 1186. In that recent Ninth Circuit decision, the court explained:

"We therefore agree with Qwest that the only sensible conclusion in this case,

ceased writing off the erroneous "toll" charges. Western refused to pay the erroneous charges. Because Western refused to pay, on December 10, 2008, CenturyTel began "toll-restricting" the trunk group associated with Western Radio. This prevents Western's customers from accessing anything but CenturyTel's network, thereby preventing Western's customers from calling the customers of any other telecommunications carriers. It appears that CenturyTel's reason for doing so is to pressure Western into dropping its arbitration and accepting its standard terms and conditions.

given the nature of Western's asserted cause of action and the role allotted to state commissions by Congress, is that the PUC must address Western's good faith claim before that claim may be brought in district court. . . . [W]hile we might under other circumstances be hesitant to require that a party bring its claim to a state agency before raising a federal private right of action in district court, §§ 251 and 252 give the PUC a uniquely prominent role."

ORS 756.500(1) provides that:

Any person may file a complaint before the Public Utility Commission, or the commission may, on the commission's own initiative, file such complaint. The complaint shall be against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission.

The PUC's rules provide for motions seeking specific relief, and Western has stated the specific relief required to prevent continued violating of the laws the PUC administers. OAR 860-016-0050(2)(f) allows for injunctive relief to enforce an Interconnection Agreement. Other provisions give PUC authority to issue injunctions to assist consumers. See, e.g., OAR 860-034-0290(2)(c). There is no reason the PUC would not have similar injunctive authority in this situation (and, as CenturyTel has noted, the ORCP provides for injunctive relief, and the ORCP generally applies to these proceedings, OAR 860-011-0000(3)). If the PUC did not have such authority, the PUC could protect small companies which have successfully negotiated an IA with an incumbent, but not those which have been rebuffed by the incumbent -- an outcome which would make no sense and which would be inequitable.

PUC's regulations provide not only for petitions for arbitration, but also "complaints" (pursuant to OAR 860-013-0015) and motions for injunction (pursuant to OAR 860-013-0031). "A complaint is a written pleading filed with or by the Commission requesting or instituting a formal investigation or hearing." OAR 860-013-0015. "Such pleading shall: (1) Contain the full name and address of each party complainant and each party defendant; (2) Set forth the

specific acts complained of in sufficient detail to advise the parties and the Commission of the facts constituting the grounds of complaint and the exact relief requested; (3) Cite the applicable statutes or rules alleged to have been violated." Id. (emphasis added). "A motion is a request to the Commission or Administrative Law Judge (ALJ) for a ruling or other action which affects the rights of a party to the proceeding." OAR 860-013-0031. Western filed a combined complaint and motion for injunction, separate from the petition for arbitration.

The exact relief requested is an injunction against CenturyTel billing Western for the above-referenced charges and from "toll-restricting" the trunk group associated with Western Radio. As explained in the initial complaint/motion, the applicable statutes or rules alleged to have been violated are:

A. 47 U.S.C. 251(c)(1) requires the incumbent local exchange carrier "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements."²

B. 47 U.S.C. 251(a) requires every telecommunications carrier (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title. This requirement does not require that an ICA be in place. CenturyTel has violated this provision as of December 10.

² As explained in the complaint/motion, in response to the petition for arbitration, CenturyTel began conditioning the processing of Western's interconnection orders on Western's blanket acceptance of CenturyTel's new decision to start imposing its erroneous "toll" charges on Western and its customers; and when Western refused, cut off service. Western therefore alleges that CenturyTel is violating the Act's good faith negotiation obligations set out in Section 251(c)(1).

C. 47 U.S.C. 252(b)(5) provides: "The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith."

D. 47 C.F.R. 20.11(d) provides: "Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." CenturyTel's erroneous "toll" charges violate this provision.

E. 47 C.F.R. 20.11(a) requires a local exchange carrier to "provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable." This does not require an interconnection agreement. CenturyTel's decision to "toll-restrict" Western's traffic as of December 10 violates this provision.

F. 47 C.F.R. 20.11(b) requires local exchange carriers and commercial mobile radio service providers to "comply with principles of mutual compensation"; specifically, "(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier; and (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider." CenturyTel's actions violate this provision as well.

G. 47 C.F.R. 51.305(a) requires an incumbent LEC to:

"provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both; (2) At any technically feasible point within the incumbent LEC's network . . . (4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself."

PUC has authority to enforce these provisions of the law. The appropriate remedies are an order enjoining CenturyTel from billing Western for the above-referenced "toll" charges and from "toll-restricting" the trunk group associated with Western Radio, pending completion of the arbitration in this matter; and a determination of whether CenturyTel has negotiated in good faith.

II. THERE IS NO PROVISION IN THE TELECOMMUNICATIONS ACT ALLOWING THE RURAL TELEPHONE EXEMPTION UNDER 47 U.S.C. 251(f) TO BE VOLUNTARILY WAIVED ON A CASE-BY-CASE BASIS; IT MUST BE TERMINATED

There is no provision in the Telecommunications Act allowing the rural telephone exemption under 47 U.S.C. 251(f) to be voluntarily waived on a case-by-case basis. Rather, the Act requires the PUC to terminate the exemption if the facts no longer support the exemption – that is, when 1) a rural telephone company has received a bona fide request for interconnection, services, or network elements, and 2) the State commission then determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the Act.

Rural telephone companies are exempt from 47 U.S.C. 251(c) until the PUC terminates the rural exemption. 47 U.S.C. 251(f) provides in relevant part as follows:

(1) Exemption for certain rural telephone companies

(A) Exemption – Subsection (c) of this section shall not apply to a rural telephone company until

(i) such company has received a bona fide request for interconnection, services, or network elements, and

(ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule – The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

* * *

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

There is no provision in this part of the Act or any other part of the Act which allows a rural telephone company to simply "waive" the exemption on a case by case basis. Such an approach would improperly allow the company to keep the exemption in its back pocket, so to speak – to be used on an ongoing basis in its operations. Either the rural telephone company is exempt or it is not. Once the company has received a bona fide interconnection request, and that request has been presented to the PUC, it is the PUC's duty to undertake the necessary inquiry as to whether the exemption should be terminated.

As discussed in earlier briefing, the good faith provision of the Act is not found in the sections of the Act that apply to carriers with a rural exemption; only to ILECs, under 251(c)(1). The provisions which apply to rural exception carriers (251(a) and (b)) do not contain the good faith requirement.

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).

Although CenturyTel has represented that it is voluntarily "waiving" its rural exemption for purposes of the interconnection negotiations, there is no indication that CenturyTel is also voluntarily submitting itself to liability for a lawsuit for money damages for failure to negotiate in good faith, and it appears to Western Radio that there is a significant risk that CenturyTel's voluntary waiver would not be enforceable in court unless the PUC explicitly rules that the rural exemption does not apply.

As CenturyTel itself noted at the prehearing conference, it has interconnected with many carriers, under 251 and 252, and "never had reason to assert the rural exemption and we're not asserting it here." CenturyTel therefore has no explanation for why its rural exemption should not be terminated, except to argue orally during that conference that "It would be a waste of the parties' and commission's time to conduct a termination proceeding." To the contrary, it is a waste of the Commission's time and resources – and the time and resources of other carriers – to allow CenturyTel to carry its exemption in its back pocket to be used at its convenience. The question should be answered once and for all, rather than the Commission having to face this

question again and again every time a new carrier seeks interconnection.

Regarding whether CenturyTel would later be "estopped" from arguing that the rural exemption applies, this is far from clear. It makes no sense to put off what is a fairly straightforward determination, in the hopes that a court later would rule in one's favor procedurally later on such a complex procedural issue. As explained in detail in earlier briefing (which is incorporated here by reference), Western Radio is concerned that the so-called "voluntary waiver" by CenturyTel does not fit neatly into any established principles of estoppel.

CONCLUSION

PUC has authority to enforce the terms of the interconnection "arrangement" between CenturyTel and Western Radio in the absence of an approved interconnection agreement. Western respectfully requests that the PUC enjoin CenturyTel from billing Western for the above-referenced "toll" charges and from "toll-restricting" the trunk group associated with Western Radio, pending completion of the arbitration in this matter; and determine whether CenturyTel has negotiated in good faith.

It would further the overall efficiency of the administrative and judicial systems for the PUC to make the rural exemption determination once and for all, and such a ruling would make clear to the parties which provisions of the Act apply to their negotiations. Such a ruling would simply codify CenturyTel's continued waiver of the exemption, and avoid any procedural confusion now and in the future.

Dated July 6, 2009.

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 864

In the Matter of)	
)	CERTIFICATE OF SERVICE
WESTERN RADIO SERVICES)	
COMPANY)	
)	
Request for Interconnection Agreement)	
with CENTURYTEL OF EASTERN)	
OREGON, INC.)	

I certify that on July 6, 2009, I sent Western Radio's Brief Regarding ALJ's 2 Questions by electronic mail and U.S. mail to the following:

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I further certify that on July 6, 2009, I also served copies of the above-referenced document 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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