

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

ARB 864

In the Matter of	)	
	)	
WESTERN RADIO SERVICES	)	RULING
COMPANY	)	
	)	
Request for Interconnection Agreement	)	
with CenturyTel of Eastern Oregon, Inc.	)	

**DISPOSITION: MOTIONS DENIED WITHOUT  
PREJUDICE**

On June 12, 2008, Western Radio Services Company (Western) filed a notice of a bona fide request for interconnection with CenturyTel of Eastern Oregon, Inc. (CenturyTel). Western requests that the Commission investigate where it is appropriate to terminate CenturyTel’s rural exemption from section (c) of 47 U.S.C. 251. On October 9, 2008, a prehearing conference was held. At that time, CenturyTel indicated that it waived the exemption for purposes of the negotiation of an interconnection agreement with Western.<sup>1</sup> In light of this representation by CenturyTel, I asked parties whether we still had a viable issue. I asked Staff and parties to identify and brief any threshold legal questions, and parties agreed to a schedule for doing so.<sup>2</sup>

On October 24, 2008, Western filed a Brief Regarding Procedural Issues. Western’s brief expressed concerns about whether Western could voluntarily waive the rural exemption. Moreover, should CenturyTel voluntarily waive the rural exemption for purposes of the negotiation of an interconnection agreement with Western, Western expressed concern that the doctrine of judicial estoppel would not prevent CenturyTel from later asserting the rural exemption should an interconnection dispute land in a civil court. Western requests that the Commission make a final determination about CenturyTel’s rural exemption status.

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<sup>1</sup> See Western Radio’s Brief Regarding Procedural Issues, p. 5, quoting CenturyTel as stating, during the October 23, 2008, prehearing conference, that CenturyTel was “not asserting” the rural exemption with regard to negotiation of an interconnection agreement.

<sup>2</sup> Parties agreed to a schedule that extended beyond 120 days after the submission of the bona fide request for interconnection.

On November 6, 2008, CenturyTel filed a Brief Addressing Preliminary Procedural Issues. In the brief, CenturyTel indicates that CenturyTel has entered into numerous exchange of traffic interconnection agreements based upon a voluntary waiver of the rural exemption.<sup>3</sup> In the brief, Century reaffirms that it “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.”<sup>4</sup> To the extent that it is necessary to review CenturyTel’s rural exemption under section 251(f), CenturyTel asserts that it would be more practical and efficient to do so in conjunction with a section 252 arbitration proceeding.

On November 18, 2008, Commission Staff filed Reply Comments that suggested the following process:

Clearly, two carriers may agree to voluntarily negotiate an interconnection agreement and file it with the Commission. CenturyTel asserts it has in fact done so many times. If the voluntary negotiations conclude with no disputed issues, there is no need to go forward and consider all the various factual and legal matters inherent with a proceeding to terminate CenturyTel’s rural exemption. However, if the negotiations end with disputed issues, including possibly a claim for lack of good faith negotiations, it would then be appropriate to go forward and consolidate the termination proceeding with the underlying arbitration. It is important to note that under this approach Western would not be left with open questions concerning the legal meaning of a ‘voluntary waiver’ of the rural exemption. Rather, Western would be entitled to proceed with a full-blown hearing on its request to have the exemption terminated. This process, combined with CenturyTel’s written agreement to not assert the exemption as a possible defense to a lack of good faith claim for the voluntary negotiation stage of the process, should fully protect Western’s legal interests and

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<sup>3</sup> CenturyTel’s Brief Addressing Preliminary Procedural Issues, p. 2. CenturyTel points to Docket No. ARB 830 as a recent example of the arbitration of an interconnection agreement between CenturyTel and a telephone carrier in which the Commission approved an agreement on the basis of an implied voluntary waiver of the rural exemption by CenturyTel.

<sup>4</sup> *Id.* at 3. CenturyTel refers to Attachment A, which is a letter from Calvin K. Simshaw, Associate General Counsel for CenturyTel, to Richard L. Oberdorfer at Western. In that letter, Mr. Simshaw states:

You specifically inquired whether CenturyTel was willing to ‘waive’ the rural exemption with regard to its obligations under Sections 251(c)(1) . . . and 251(c)(2) . . . 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)(20). This commitment applies to negotiations arising from the current bona fide request as well as any necessary 252 arbitration.

allow for a more efficient method of proceeding in this matter.<sup>5</sup>

On November 20, 2008, Western filed a Petition for Arbitration. Indicating that CenturyTel refuses to negotiate in good faith, Western's Petition for Arbitration offers a proposed interconnection agreement. On December 9, 2008, Centurytel filed a response that offers an entirely different interconnection agreement.

On December 15, 2008, Western filed a Complaint Regarding CenturyTel and Motion for Injunction (Western Motion for Injunction). On December 23, 2008, CenturyTel filed a Response to Western Radio's Motion for Injunction (CenturyTel Response). After a telephone conference in this proceeding to initially address the Motion for Injunction, Western filed a Reply in Support of Complaint and Motion for Injunction and Response to ALJ's Questions (Western Reply). A second telephone conference was held in this proceeding, on January 5, 2009. Appearances were entered by Marianne Dugan and Richard Oberdofer, on behalf of Western, and by Richard Finnegan and Jackie Phillips, on behalf of CenturyTel.

The Western Motion for Injunction seeks an injunction to "maintain the status quo"<sup>6</sup> operationally between Western and CenturyTel until an interconnection agreement between the two parties is finalized. As explained in the Western Motion for Injunction, and confirmed during the January 5, 2009, telephone conference, Western and CenturyTel do not yet have an Interconnection Agreement. Rather, on December 11, 2008, Western filed a Petition for Arbitration under Section 252 of the 1996 Telecommunications Act (the Act).<sup>7</sup> Asserting that CenturyTel refuses to negotiate in good faith the rates, terms and conditions of an interconnection agreement, Western's Petition for Arbitration offers an interconnection agreement in its entirety. In response, CenturyTel offers a different interconnection agreement.

The parties have been interconnected, however, in some form, for some period of time. Both parties admit that an arrangement exists, but each indicates that the details of such arrangement are not written, nor has any agreement ever been presented to, or approved by, the Commission. The Motion for Injunction alleges that operations between the parties under the unwritten interconnection arrangement changed soon after Western filed the Petition for Arbitration. Western explains:

The parties do not yet have an Interconnection Agreement. The parties have been interconnecting in Oregon for years. Western asked CenturyTel if it wanted to agree to not bill each other for facilities and transport and termination so the PUC would not have to do the costing and the parties would not have to bill each other. CenturyTel agreed.

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<sup>5</sup> Staff Reply Comments, pp. 2-3.

<sup>6</sup> Motion for Injunction, p. 1.

<sup>7</sup> Order No. 09-025 mistakenly indicates that Western filed a Petition for Arbitration

For the past three 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.

Less than one month ago, on November 21, Western filed its Petition for Arbitration with the PUC in this matter. Immediately upon receiving that filing, CenturyTel 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.<sup>8</sup>

CenturyTel responds, in pertinent part:

Western Radio has a Type 1 form of wireless interconnection with CenturyTel. A Type 1 form of interconnection allows Western Radio to connect with the CenturyTel end office. In terms of network configuration, a Type 1 interconnection is a carrier interconnection that mirrors end user line side service. It operates much like a PBX trunk for a business customer would operate. A Type 1 interconnection must have a preferred interexchange carrier or PIC to originate interexchange calls. Calls that are to leave the local calling area of the end office to which the Type 1 interconnection has direct connection can only be made on a 1+ dialing basis. Those calls are subject to toll charges. Western Radio does have a PIC, Qwest Communications.

As an alternative to routing toll calls to a PIC'd interexchange carrier through CenturyTel's switch under a Type 1 interconnection, a wireless carrier can make its own arrangements with interexchange carriers for the termination of calls. This is why many wireless carriers locate their point of presence or POP at a toll/access tandem.

As stated by Western Radio, there is no interconnection agreement between Western Radio and CenturyTel. CenturyTel has not at any time agreed that Western Radio

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<sup>8</sup> Motion, pp. 2-3.

may route toll traffic to CenturyTel to forward for termination on a bill and keep basis. Western Radio has been told that it is responsible for its own toll charges.

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CenturyTel would have been justified to completely disconnect the facilities that it is providing to Western Radio due to Western Radio's failure to pay for the toll calls incurred in the use of those facilities. Based on Western Radio's insistence that it should not have to pay toll charges for its end users' interexchange calls, CenturyTel placed a toll restriction on the facilities.<sup>9</sup>

Because an interconnection agreement does not govern the current operations between Western and CenturyTel, Western indicates that the Commission's jurisdiction to address the existing operations between Western and CenturyTel is contingent upon Western's Petition for Arbitration.<sup>10</sup> CenturyTel observes that Western's claims are based on federal law. CenturyTel indicates that the Commission has been granted the authority to arbitrate interconnection agreements under 47 U.S.C. § 252, not to enforce Federal Communications Commission (FCC) rules cited by Western's Motion, such as 47 C.F.R. § 20 or 47 C.F.R. § 51.305.<sup>11</sup> In a footnote, CenturyTel states, "if an interconnection agreement was in place, a party to the agreement could apply to the Commission for enforcement of the agreed upon terms that reflect Section 51.305 requirements."<sup>12</sup> Observing that as there is no agreement between Western and CenturyTel, CenturyTel states that "enforcement of Section 51.305, in the abstract is not within Commission authority."<sup>13</sup>

During the initial telephone conference, the ALJ requested that the parties consider an agreement to allow interim rates, subject to reconciliation, until the dispute could be resolved, thereby allowing operations to resume between the parties. In its Reply, Western states:

. . . since the parties agreed to bill and keep, Western does not believe it should have to pay any rates to CenturyTel in order to get its service restored. If the PUC does impose rates (interim or otherwise) for service which was not billed previously, Western will be entitled to obtain CenturyTel's billing address in order to begin billing CenturyTel

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<sup>9</sup> CenturyTel Response, pp. 4-5.

<sup>10</sup> See, e.g., Western Reply pp. 1-2.

<sup>11</sup> CenturyTel Response, p. 2.

<sup>12</sup> *Id.*, fn. 1.

<sup>13</sup> *Id.*

accordingly, instead of continuing the bill and keep arrangement.<sup>14</sup>

During the second telephone conference, CenturyTel proposed an escrow billing arrangement.

On January 26, 2009, Western filed a Motion for Clarification and Procedural Schedule. Indicating that the statutory period for consideration of Western's Petition for Arbitration ended March 16, 2009,<sup>15</sup> Western requested that a schedule be established to facilitate this deadline.

On January 28, 2009, the Commission entered Order No. 09-025, dismissing Western's Petition for Arbitration without prejudice. Order No. 09-025 directed Western to file a new Petition for Arbitration.

## DISCUSSION

By Western's own admission, the Motion for Injunction is based upon a viable petition for arbitration. As the Commission dismissed, on January 28, 2009, the Petition for Arbitration without prejudice, I must also deny the Motion for Injunction without prejudice.

Western may file a new motion for injunction in conjunction with a new petition for arbitration. Although I do not address the merits of Western's Motion for Injunction herein, I advise Western to more fully address, in any new motion for an injunction, the Commission's authority to enforce the terms of an interconnection arrangement that precedes an approved interconnection agreement, and the remedies that the Commission may have available to do so. I also continue to encourage Western to negotiate an interim means with CenturyTel, such as escrow billing, to continue operations until any dispute can be formally resolved.

Western's Motion for Clarification and Procedural Schedule is rendered moot by Order No. 09-025. I note for the record, however, that Western is incorrect regarding the anticipated timing for consideration of the original Petition for Arbitration. Western filed a notice of a bona fide request for interconnection, not a Petition for Arbitration, on June 12, 2008.<sup>16</sup> Western did not file a Petition for Arbitration until November 20, 2008. In any case, the Commission dismissed Western's Petition for Arbitration, and a new timeline will begin when Western files a new petition.

I also note for the record, that CenturyTel voluntarily waives its exemption under 47 U.S.C. 251(f)(A) for the purposes of the negotiation of an interconnection

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<sup>14</sup> *Id.*

<sup>15</sup> 47 U.S.C. 252(b)(4)(C) provides that the Commission must conclude the resolution of any unresolved issues not later than 9 months after the date on which the petitioner serves another local exchange carrier with a request under the section.

<sup>16</sup> Order No. 09-025 also incorrectly indicates that Western filed a Petition for Arbitration on June 12, 2008.

agreement with Western. CenturyTel originally waived the rural exemption to enter into an informal interconnection arrangement with Western. CenturyTel now represents that it voluntarily waives the rural exemption to negotiate a formal interconnection agreement with Western. Although Western intimates that CenturyTel refuses to negotiate in good faith, Western has not set out facts to support such a claim. I concur with Staff's suggested process for proceeding. I also remind the parties of the Commissions' mediation services available pursuant to OAR 860-016-0015.

Dated this 3<sup>rd</sup> day of February, 2009, at Salem, Oregon.

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Traci A. G. Kirkpatrick  
Administrative Law Judge