

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 864

In the Matter of

WESTERN RADIO SERVICES
COMPANYRequest for Interconnection Agreement
with CenturyTel of Eastern Oregon, Inc.

ORDER

DISPOSITION: APPLICATION FOR REHEARING OR
RECONSIDERATION DENIED;
QUESTIONS TO BE CERTIFIED

I. PROCEDURAL BACKGROUND

On January 28, 2009, the Public Utility Commission of Oregon (Commission) entered Order No. 09-025 in Docket No. ARB 864. The Order dismissed, without prejudice, the Petition for Arbitration of an Interconnection Agreement (Petition) of Western Radio Services Company (Western Radio) with CenturyTel of Eastern Oregon (CenturyTel). Western Radio filed the Petition with the Commission on November 20, 2008. The Order addressed a question certified by Administrative Law Judge (ALJ) Kirkpatrick to the Commission regarding whether Western Radio's Petition met requirements set forth in 47 U.S.C. 252(b)(2) and OAR 860-016-0030(2). The Commission determined that Western Radio's Petition did not meet the requirements of either law, finding that Western Radio failed to present any issues for the Commission's consideration.

On February 3, 2009, ALJ Kirkpatrick issued a ruling (ALJ Ruling) that denied, without prejudice, Western Radio's Complaint Regarding CenturyTel and Motion for Injunction (Motion for Injunction), filed on December 15, 2008, and Western Radio's Motion for Clarification and Procedural Schedule, filed on January 26, 2009. The Ruling also noted that CenturyTel had voluntarily waived the exemption under 47 U.S.C. 251(f)(A) for the purposes of informally interconnecting with Western Radio, and for negotiation of a formal interconnection agreement with Western Radio.¹

At 11:55 p.m. on March 30, 2009, by electronic mail transmission, Western Radio filed an Application for Reconsideration or Rehearing and/or For Clarification

¹ On June 16, 2008, Western Radio had filed a notice of a bona fide request for interconnection.

(Application) pursuant to ORS 756.561. On April 10, 2009, CenturyTel filed a reply to Western Radio's Application (CenturyTel Reply). On April 12, 2009, Western Radio filed a Reply in Support of Application for Reconsideration (Western Radio Response).

II. WESTERN RADIO'S APPLICATION

Western Radio's Application requests reconsideration of Order No. 09-025 and of the ALJ Ruling. Western Radio complains that neither the order nor the rule adequately address the termination of CenturyTel's rural exemption. Western Radio asserts that 47 U.S.C. 251(f) does not provide for the temporary waiver of the rural exemption. Western Radio asks the Commission to determine whether CenturyTel should be exempt on a permanent basis.

Western Radio's Application also asserts that the Motion for Injunction should proceed. Western Radio claims that it does not understand the basis for the ALJ Ruling, stating:

The Commission itself did not dismiss the complaint/motion which Petitioner filed. PUC's Order states at the end "We direct the ALJ to address the Western Motion in context of this order." The ALJ, in turn, stated in her 'Ruling': 'By Western's own admission the Motion for Injunction is based upon a viable petition for arbitration,' and therefore denied the Motion for Injunction. It is unclear to Petitioners what the ALJ was referring to. Petitioner's Motion for Injunction is based upon an emergent situation, described clearly in the Motion for Injunction and in the conference calls with the ALJ. It is not in any way dependent upon the existence of a viable petition for arbitration. It is a separate complaint and motion as allowed for in the PUC's rules. It was error to dismiss it.²

Western Radio argues that the Commission has jurisdiction to address rates associated with Autotel, as well as CenturyTel's shutoff of service to Autotel pursuant of OAR 860-012-0305 *et seq.*

Western Radio also challenges the Commission's dismissal, without prejudice, in Order 09-025 of the Petition for Arbitration. Western Radio states:

It is the duty of the PUC to resolve the issues presented to the PUC in the petition and response. Section 252 allows CenturyTel to petition for arbitration or raise open issues in its response as well. Section 252 does not require the requesting carrier to create issues when the incumbent refuses to negotiate. To require otherwise would obstruct the whole process for promoting competition. Section 252(b)(4)(A) limits the PUC to consider only the issues

² Application, p. 4. (Emphasis in original.)

submitted in the petition and response. Its authority under 252(b)(4)(B) is not intended to result in a dismissal decision to allow the incumbent to unilaterally determine the rates, [sic] terms and conditions of interconnection.³

III. CENTURYTEL'S REPLY AND WESTERN RADIO'S RESPONSE

CenturyTel asserts that Western Radio's Application is not timely. CenturyTel argues that the Application was filed at almost midnight on March 30, 2009, the sixty-first day following January 28, 2009, the date of entry for Order No. 09-025. Although the Application was filed within sixty days of the Ruling being issued, it was not filed within sixty days of Order No. 09-025, CenturyTel states. As the ALJ Ruling is predicated on Order No. 09-025, CenturyTel asserts that "because the Petition for Arbitration was dismissed by the Order No. 09-025, there is nothing left on which to hinge a reconsideration or rehearing of the Ruling."⁴

Western Radio responds that pursuant to OAR 860-013-0037(2), since the sixtieth day after the entered date for Order No. 09-025 was a Sunday, March 29, 2009, that the deadline for Western Radio to file a petition for rehearing was Monday, March 30, 2009. Western Radio asserts that "the system accepted the filing on that date and it should be considered timely filed."⁵ Western Radio also observes that there is no deadline to ask for reconsideration of a ruling.

If the Commission determines that the Application was timely filed, CenturyTel asserts that the Application should still be dismissed for failure to comply with the requirements of OAR 860-016-0030(2), and for failure to identify the issues for arbitration and the parties' positions. CenturyTel argues that the Application does not provide the Commission with any basis for reconsideration or rehearing.

IV. DISCUSSION

If sufficient reason is set forth, ORS 756.561 allows the Commission to reconsider an order, or any part of an order, upon application to do so within sixty days from the date of service of the order. The application for rehearing or reconsideration must meet the requirements of OAR 860-014-0095.⁶

³ *Id.* at 5.

⁴ CenturyTel Reply, p. 5.

⁵ Western Radio Response, p. 1.

⁶ OAR 860-014-0095 provides: (1) Within 60 days from the date of service of an order entered by the Commission, a party may file an application for rehearing or reconsideration of such order as provided by ORS 756.561. The application shall set forth all grounds for rehearing or reconsideration. (2) The application shall specify: (a) The portion of the challenged order which the applicant contends is erroneous or incomplete; (b) The portion of the record, laws, rules, or policy of the Commission relied upon to support the application; (c) The change in the order which the Commission is requested to make; (d) How the applicant's requested changes in the order will alter the outcome; and (e) One or more of the grounds for rehearing or reconsideration set forth under section (3) of this rule. (3) The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is: (a) New evidence which is essential to the decision and

An application for rehearing or reconsideration must be filed within sixty days of the date of the service of the order.⁷ Order No. 09-025 was entered on January 28, 2009, and was served by the Commission on January 29, 2009. Therefore, the sixtieth day after service of the order was March 30, 2009.

Western Radio submitted the Application on March 30, 2009 by electronic mail, but not until 11:55 p.m. A document is considered filed on the date it is received by the Commission between the hours of 8 a.m. and 5 p.m., Pacific Time.⁸ Consequently, the Application was not received by the Commission until March 31, 2009. Western Radio did not timely file for reconsideration and Order No. 09-025 became final by operation of law. The Application, therefore, must be denied on a procedural basis pursuant to ORS 756.561 and OAR 860-014-0095(1).

Even absent the procedural infirmity, the Application does not fulfill the substantive requirements of OAR 860-014-0095(2) and (3) because it fails to adequately identify the purported error in Order No. 09-025 or to provide sufficient grounds for reconsideration. Western Radio implies that we failed to fulfill our duty to resolve the issues presented in its Petition for Arbitration. We denied the Petition for Arbitration, however, because Western Radio failed to adequately present any issues to consider.

Pursuant to 47 U.S.C. 252(b)(4)(A), we may not define the issues for consideration in an interconnection arbitration. Under this statute, it is the duty of the petitioner to delineate the unresolved issues, identify the position of the parties on each unresolved issue, and describe other matters that the parties discussed and resolved. Our duty is to arbitrate unresolved issues that arise during the negotiation of an interconnection agreement. In this case, Western Radio identified no open issues for arbitration. Instead, it simply submitted two proposed interconnection agreements and asked us to “pick one”, without explaining how the proposed agreements intersect or differ. In order to select an interconnection agreement, we would have been required to define questions of law and factual issues. We do not have the authority to do either. Consequently, we stand by our dismissal of Western Radio’s Petition for Arbitration, without prejudice, in Order No. 09-025.

Upholding Order No. 09-025 does not obstruct Western Radio’s ability to obtain an interconnection agreement with CenturyTel, however. Rather, we continue to

which was unavailable and not reasonably discoverable before issuance of the order; (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision; (c) An error of law or fact in the order which is essential to the decision; or (d) Good cause for further examination of a matter essential to the decision. (4) Within 15 days from the date the application is filed, any party may file a reply setting forth its position on the application. (5) Unless ordered by the Commission under OAR 860-014-0093, an order granting an application for rehearing or reconsideration shall not stay or postpone compliance with the original order. (6) The application is deemed denied if, by the sixtieth day after filing, the Commission has not issued an order granting the application. If the application is granted, the Commission may adhere to, modify, or rescind its prior order or take such other action as it may deem appropriate.

⁷ See ORS 756.561 and OAR 860-014-0095(1).

⁸ OAR 860-013-0037(1).

encourage Western Radio to file a new petition for arbitration that set forth issues for the Commission's consideration in compliance with the requirements of 47 U.S.C. 252(b)(2) and OAR 860-016-0030(2).

Western Radio also challenges the ALJ Ruling dated February 3, 2009. The Ruling dismisses, without prejudice, the Motion for Injunction on the basis that without an approved interconnection agreement or a viable petition for arbitration of an interconnection agreement before the Commission, the Commission does not have jurisdiction to address a dispute between Western Radio and CenturyTel. The Ruling indicates that Western Radio may file a new motion for injunction together with a new petition for arbitration.

Western Radio has failed to timely appeal the ALJ Ruling. A party may appeal a ruling of an ALJ by seeking certification to the Commission.⁹ A request for certification, however, must be made within ten days of the date of service of the ruling.¹⁰ Western Radio's Application, filed on March 31, 2009, did not meet this deadline.

Although the challenge to the ALJ Ruling was not timely, we will allow Western Radio to further develop its assertion that the Commission does, in fact, have the authority to enforce the terms of an interconnection *arrangement* that precedes an approved interconnection agreement. We direct the ALJ to certify the issue to the Commission, and to establish a schedule for comment by the parties.

Finally, the ruling also notes for the record that CenturyTel has voluntarily waived its exemption under 47 U.S.C. 251(f)(A) for the purpose of negotiating an interconnection agreement. The Application continues to assert that the exemption can not be waived on a case-by-case basis. We direct the ALJ to certify this issue to the Commission as well, and to determine whether any additional comment by the parties is needed.

V. ORDER

IT IS ORDERED that:

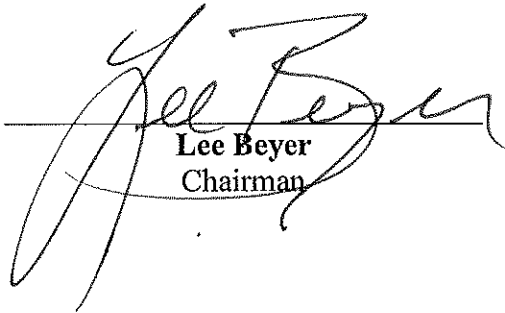
1. Western Radio Services Company's Application for Reconsideration or Rehearing and/or For Clarification is denied.
2. Western Radio Services Company may file a new Petition for Arbitration that complies with documentation requirements of OAR 860-016-0030(2) and 47 U.S.C. 252(b)(2).

⁹ OAR 860-014-0091(1).

¹⁰ OAR 860-014-0091(2).

3. The Administrative Law Judge assigned to this proceeding shall certify two questions for consideration by the Public Utility Commission of Oregon and establish a schedule, as appropriate, for comments regarding each question:
- a) 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?
 - b) Can the rural telephone company exemption under 47 U.S.C. 251(f) be voluntarily waived on a case-by-case basis or must it be terminated?

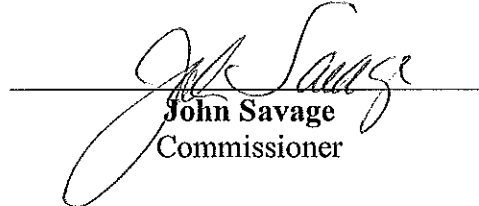
Made, entered and effective MAY 28 2009 .



Lee Beyer
Chairman



Ray Baum
Commissioner



John Savage
Commissioner

