

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 864

In the Matter of

WESTERN RADIO SERVICES
COMPANY

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

ORDER

DISPOSITION: CERTIFIED QUESTIONS ANSWERED

I. BACKGROUND

Western Radio Services Company (Western Radio) does not yet have an interconnection agreement with CenturyTel of Eastern Oregon, Inc. (CenturyTel), but both parties agree that they have been interconnected for some period of time. Both parties admit an informal interconnection arrangement exists (or existed), but each party indicates that the details of such arrangement are not written, nor has any agreement, in any form, ever been presented to, or approved by, the Public Utility Commission of Oregon (Commission).

Western Radio now seeks to negotiate a formal interconnection agreement with CenturyTel that would be presented to the Commission for approval. Western Radio also seeks the termination of CenturyTel's rural exemption under 47 U.S.C. § 251(f) for this purpose.

We previously dismissed, without prejudice, Western Radio's Petition for Arbitration of an Interconnection Agreement on the grounds that it failed to meet the minimum requirements set forth in The Telecommunications Act of 1996 (the 1996 Act or the Act).¹ We affirmed that decision on reconsideration, and also denied other requests for relief.² We concluded, however, that Western Radio could further develop its assertion that this Commission has the authority to enforce the terms of an informal interconnection *arrangement* that precedes an approved interconnection agreement. We also allowed the parties to further explore a related issue of whether a rural exemption may be waived for the purpose of negotiating an interconnection agreement.

¹ See Order No. 09-025.

² See Order No. 09-188.

Accordingly, on June 18, 2009, the Administrative Law Judge (ALJ) issued a ruling that certified two specific questions for our consideration and established a schedule for comments by the parties:

- 1) 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?
- 2) Can the rural telephone exemption under 47 U.S.C. § 251(f) be voluntarily waived on a case-by-case basis or must it be terminated?

On July 7, 2009, Western Radio and CenturyTel filed comments. On July 22, 2009, both parties filed reply comments.

II. DISCUSSION

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?**

Although Western Radio and CenturyTel have never entered into a formal interconnection agreement, nor presented any negotiated interconnection agreement to the Commission for approval, the parties have been interconnected, in some form, for some period of time. Both parties admit that an interconnection *arrangement*³ exists, or has existed, and each party indicates that the details of such an arrangement are not written nor formalized in any way.⁴ Seeking to formalize its interconnection with CenturyTel, Western Radio filed a Petition for Arbitration (among other actions).

Western Radio alleges, however, that its filing of a Petition of Arbitration resulted in a change of operations between the parties under the informal *arrangement*. Western Radio requests a return to the status quo until the parties negotiate a formal interconnection agreement. In other words, Western Radio requests the Commission enforce the terms of an interconnection *arrangement* that precedes an approved interconnection agreement.

1. *Parties' Positions*

Western Radio primarily contends that the Commission has broad authority to regulate the interconnection of telecommunications carriers, including the power to enforce

³ The definition of the term, “interconnection *arrangement*” is discussed below.

⁴ See Western Radio Motion for Injunction, pp. 2-3 (Dec 15, 2008) (“The parties do not yet have an Interconnection Agreement.”) See also CenturyTel Response, pp. 4-5 (Dec 23, 2008).

the terms of an informal interconnection arrangement.⁵ Western Radio observes that the Ninth Circuit recently held that “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.”⁶ Western Radio also asserts that the Supreme Court has “made clear that Interconnection Agreements are not the only matter under the Telecommunications Act which are actionable,” and that “any interconnection or related matter which arises between carriers is reviewable” by a court “under federal question jurisdiction.” Western Radio acknowledges, however, that any such claim must be “‘exhausted’ through initial review by the state Commission.”⁷

In addition, Western Radio states that our own rules provide for injunctive relief to enforce an interconnection agreement (pursuant to OAR 860-016-0050(2)(f) and to assist consumers (such as OAR 860-034-0290(2)(c)). Western Radio also notes that the Oregon Rules of Civil Procedure, which apply to this proceeding pursuant to OAR 860-011-0000(3), provide for injunctive relief. Western Radio comments that if the Commission did not have injunctive relief to enforce informal interconnection arrangements, then the Commission “could protect small companies which have successfully negotiated an interconnection agreement 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.”⁸

CenturyTel counters that the Commission’s powers are limited to those expressly delegated by federal and state law.⁹ CenturyTel asserts that federal and state law limit the Commission’s authority to the facilitation and approval of formal interconnection agreements. Under federal law, a state commission’s authority is limited, CenturyTel indicates, to: (1) reviewing negotiated agreements for approval or rejection (pursuant to 47 U.S.C. § 252(a)(1) and (e)); (2) mediating disputes arising out of section 251 negotiations (pursuant to 47 U.S.C. 252(a)(2)); (3) arbitrating agreements when section 251 negotiations fail if a timely and sufficient petition is filed (pursuant to 47 U.S.C. 252(a)(2); and (4) arbitrating disputes over the terms of an approved interconnection agreement. CenturyTel argues, therefore, that the Commission does not have any federal delegated authority to interpret or enforce the terms of an informal interconnection arrangement.

Under OAR 860-016-0050, CenturyTel observes, the Commission only has authority to interpret and enforce an interconnection agreement that has been *executed* pursuant to the Act. CenturyTel also asserts that no other state law allows the Commission to address a complaint regarding an informal interconnection arrangement.

⁵ In its opening brief, Western Radio also asserts that CenturyTel has violated numerous other federal rules and statutory provisions. As these allegations do not relate to the questions the ALJ certified to the Commission, they are separately addressed in another section of this Order.

⁶ Western Radio’s Brief Regarding ALJ’s 2 Questions (Western Radio’s Brief), p. 2, (Jul 6, 2009) citing *Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186, 1200-1201 (9th Cir. 2008).

⁷ *Id.*

⁸ Western Radio’s Brief, p. 2.

⁹ CenturyTel’s Opening Comments Concerning Certified Questions (CenturyTel’s Opening Comments), p. 2 (Jul 6, 2009) citing *Pacific Northwest Bell Tel. Co. v. Davis*, 43 Or. App. 999, 1005, 608 P.2d 547 (1979).

CenturyTel asserts that Western Radio has recourse, however:

If the Commission does not have authority under either federal or state law to entertain a complaint concerning an informal interconnection arrangement, does that mean that Western radio is without a remedy? The answer is no. Western Radio could file a bona fide request for interconnection, and then actually negotiate in good faith with CenturyTel. If Western Radio believed by the 135th day after CenturyTel's receipt of the notice of bona fide request that sufficient progress was not being made, it could then file a proper petition for arbitration containing the sufficient documentation that the Commission has patiently explained to Western Radio is required.¹⁰

2. *Resolution*

In sections 251 and 252 of the Act, "Congress designed a comprehensive system" under which telecommunications carriers "enter into interconnection agreements setting forth the terms and conditions of their business relationship."¹¹ Under the comprehensive system, state commissions provide mediation services pursuant to 47 U.S.C. § 252(a)(2) to facilitate the development of interconnection agreements. Once an interconnection agreement is agreed to, the state commission with jurisdiction is authorized to either approve or reject the negotiated interconnection agreement. Alternatively, if negotiation does not produce an agreement, the Act provides that either party may ask the state commission to undertake binding arbitration of open issues, and the Act provides specific guidelines for such arbitration pursuant to section 252(b)—(d). If the state commission does not act within the prescribed timelines, the Act provides, in section 252(e), for the Federal Communications Commission (FCC) to take over, thereby preempting the state commission. If the state commission makes a determination on a proposed interconnection agreement within the required time, section 252(e)(6) of the Act provides that a party aggrieved by the commission's determination may bring an action for review in federal district court.

Western Radio asserts that we have the authority, using injunctive relief, to enforce the interconnection of two telecommunications carriers that was arranged outside of the processes established by the Act. The United States District Court for Oregon (Oregon District Court) indicates, however, that our authority over interconnection is constricted by the framework of the Act.¹² The Oregon District Court held, in *MCI v. GTE NW*, that we do not have the authority to authorize the interconnection of two telecommunications carriers "via a procedure that bypasses the Act entirely and ignores the procedures and standards that Congress has established."¹³ In *MCI v. GTE NW*, the Oregon District Court addressed our direction to GTE to publish a tariff that listed unbundled elements and prices that would

¹⁰ *Id.* at 5.

¹¹ *Verizon North v. Strand*, 309 F. 3d 935, 939 (2002).

¹² *MCI Telecommunications Corp. v. GTE Northwest, Inc. (MCI v. GTE NW)*, 41 F. Supp. 23, 1157, 1178.

¹³ *Id.*

allow CLECs to order services “off-the-rack” without entering into an interconnection agreement. The Oregon District Court indicated that we may sanction “steps to expedite the interconnection process,” such as setting unbundled element prices and wholesale discounts for a particular ILEC to be used in all interconnection agreements involving that ILEC, but that such steps must be “within the overall framework established by the Act.”¹⁴ The Oregon District Court determined that a CLEC must enter into an interconnection agreement that complies with “the substantive standards of the Act” before obtaining finished services or unbundled elements from an ILEC.¹⁵ The Oregon District Court specifically stated:

The court concludes that the challenged tariff is preempted by the Act, to the extent GTE is required to sell unbundled elements or finished services to a CLEC that has not first entered into an interconnection agreement with GTE pursuant to the Act.¹⁶

By the admission of each party, Western Radio and CenturyTel bypassed section 252 of the Act to informally interconnect. Although we did not facilitate the informal interconnection arrangement, if we enforce it with injunctive relief, then we sanction the bypass of section 252 of the Act. We cannot authorize the interconnection of two telecommunications carriers outside of the Act.¹⁷ Accordingly, we conclude we lack the authority to enforce the terms of an informal interconnection arrangement that precedes a Commission approved interconnection.

B. Can CenturyTel voluntarily waive its rural telephone exemption under 47 U.S.C. § 251(f) to negotiate an interconnection agreement with Western Radio?

1. Parties’ Positions

Western Radio contends that CenturyTel’s willingness to waive its rural exemption to negotiate an interconnection agreement is without effect, because the rural telephone exemption under 47 U.S.C. § 251(f) may not be voluntarily waived. Western Radio argues that the exemption applies until a state commission formally terminates it after an inquiry conducted pursuant to section 251(f)(B) of the Act and findings that the bona fide request for interconnection is: (1) technically feasible; (2) not economically burdensome; and (3) consistent with section 254 of the Act.

Western Radio contends that allowing a rural telephone company to “waive” the exemption permits the company to “keep the exemption in its back pocket, so to speak—to be used on an ongoing basis in its operations.” Western Radio expresses concern that “the good faith provision of the Act is not found in the sections of the Act that apply to

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Nor can we overlook the interconnection of two telecommunications carriers outside of the Act. An investigation would be warranted should we learn that Western Radio and CenturyTel resume an informal interconnection arrangement.

carriers with a rural exemption; only to ILECs, under 251(c)(1).”¹⁸ Western Radio further asserts, “[a]nother 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.”¹⁹ Western Radio explains:

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.²⁰

CenturyTel counters that it is not asserting the rural exemption to evade negotiation of an interconnection agreement with Western Radio, just as it previously has not done so to negotiate interconnection agreements with other carriers. Western Radio argues that CenturyTel “has no explanation for why its rural exemption should not be terminated,” except to save time and resources. “To the contrary,” Western Radio avows, “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.”²¹ Western Radio asks the Commission to determine whether CenturyTel’s rural exemption should be waived, not whether CenturyTel may waive it on a case-by-case basis.

CenturyTel avers that the question is wrongly asked. The issue should not be whether the rural exemption can be voluntarily waived by an ILEC on a case-by-case basis. CenturyTel asserts that a rural ILEC may not waive its rural exemption to provide a specific form of interconnection to one carrier, but then assert the exemption to not provide the same form of interconnection to another carrier.

Instead, CenturyTel asserts that the question the Commission should answer is whether a rural ILEC may partially waive the rural exemption to negotiate an interconnection agreement with a carrier, while continuing to maintain that the rural

¹⁸ Western Radio’s Brief, p. 7.

¹⁹ *Id.* at 8 (emphasis in original).

²⁰ *Id.*

²¹ *Id.*

exemption still exists as to the duty to provide unbundled network elements (UNEs) under 47 U.S.C. § 251(c)(3). CenturyTel further explains:

The rationale behind a partial waiver of the rural exemption is that the obligations under 47 U.S.C. § 251(c) vary greatly in scope of the burden imposed on a rural ILEC. It is a far different issue to negotiate terms of interconnection to provide resale at a discount than it is to have to go through the process of providing UNEs or providing collocation. The burdens are vastly different in their scope and effect on rural companies.²²

Western Radio disagrees that the Act provides for the partial waiver of the rural exemption. Western Radio argues that the distinction between a “case-by-case” waiver and a “partial” waiver is meaningless. If the Commission determines that CenturyTel may partially waive the rural exemption, however, Western Radio asks the Commission take a further step: partially terminating CenturyTel’s rural exemption as to provisions in 47 U.S.C. § 251(c)(1) and (2) relating to the negotiation of interconnection agreements.

CenturyTel disagrees that 47 U.S.C. § 251(f) envisions termination of the rural exemption on a sweeping basis. CenturyTel asserts:

In fact, given the structure of Section 251(f), it is clear that the rural exemption is to be examined on a case-by-case basis to determine if it should be terminated in part when termination is raised in the proper context. The language that Congress used in 47 U.S.C. § 251(1)(a) is that the exemption shall apply until the rural company has received a bona fide request for interconnection, services or network elements and the state commission determines “*that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254 of this title*” * * *.²³

2. Resolution

We address only the question whether CenturyTel may voluntarily waive its rural exemption under 47 U.S.C. section 251(f)(1) to negotiate an interconnection agreement with Western Radio. After considering the Act and the parties’ arguments, we are not persuaded that the termination process precludes voluntary waiver. Instead, we find that the section 251(f)(1)(B) process to terminate a rural exemption begins when a bona fide request for interconnection is filed by a telecommunication carrier *after* a rural carrier either declines to begin negotiation or explicitly exerts the rural exemption to preclude negotiation.

²² CenturyTel’s Opening Comments, p. 7.

²³ CenturyTel Reply Comments Regarding Certified Questions, p. 8, citing 47 U.S.C. § 251(1)(a) (emphasis theirs).

We thereby agree with other state commissions that a rural carrier may waive its exemption by not exerting the exemption to begin negotiations with another carrier.²⁴

Western Radio failed to present a persuasive argument why the rural exemption may not be waived, and we do not discern a compelling reason to analyze whether a particular request to terminate the rural exemption of a rural carrier is technically and economically feasible and consistent with section 254 of the Act when the rural carrier volunteers that the request meets the requirements of section 251(f)(1)(B). Indeed, at least one state commission likens termination to commission waiver. In a recent order, the North Carolina Utilities Commission stated:

Of course, an exemption can be waived. This can be done explicitly by the rural carrier.²⁵ It can also be waived by the Commission at the conclusion of a Section 251(f)(1)(B) proceeding.²⁶

The administrative burden on a state commission and the parties involved in a section 251(f)(1)(B) proceeding relieved by voluntary waiver is significant and should not be ignored. Indeed, we do not discern any benefit associated with a section 251(f)(1)(B) proceeding when the rural carrier waives the rural exemption to negotiate an interconnection agreement with a telecommunications carrier, thereby indicating that interconnection between the two carriers is technically and economically feasible and is not inconsistent with section 254 of the Act.

We further find that once negotiation of an interconnection agreement begins, a rural telephone company is estopped from claiming the rural exemption to preclude further negotiation. We conclude that allowing a rural carrier to exert the rural exemption after negotiation starts would interfere with the negotiation timelines established by the Act. If a rural carrier declines to negotiate an interconnection agreement by asserting the rural exemption, the requesting carrier may serve a bona fide request for interconnection on the rural carrier and ask the state commission to begin a termination inquiry pursuant to section 251(f)(1)(B). The state commission must determine whether or not to terminate the rural exemption within 120 days of receiving the notice. As such, we conclude that the Act

²⁴ See e.g., *AT&T Communications of the Midwest, Inc.*, Docket P-442, 407/M-96-939 (Minn. P.U.C. Mar 5, 1997); *GTE Northwest, Inc.*, Docket UT-960324 (Wash. U.T.C. Dec 11, 1996).

²⁵ In a footnote, the North Carolina Commission noted a prior order stating, “[i]t is clear that a rural telephone company may voluntarily waive all or parts of its section 251(f)(1) exemption.” *In the Matter of Petition of Arbitration of Cricket Communications, Inc. with Lexcom Telephone Company, Inc.*, Order Denying Motion to Dismiss and Scheduling Hearing, Docket No. P-31, Sub 142 (Jun 29, 2005), p. 11. The North Carolina Commission also referred to: *In Order Granting US LEC Petition Under Section 251(f)(1)*, US LEC of North Carolina, Inc.’s Petition to Terminate the Exemption for Pineville Telephone Company Under section 251(f)(1) of the Act, Docket No. P-120, sub 17 (Nov 24, 2003).

²⁶ 2007 N.C. PUC Lexis 662 (June 4, 2007), North Carolina Commission, Docket No. P-294, sub 30, *In the Matter of Petition of Sprint Communications Company L.P. for Arbitration with Randolph Telephone Company*, Order Denying Motion to Dismiss and Consolidating Matters for Hearing.

intended a telecommunications company to know whether it could negotiate an interconnection agreement with a particular rural carrier within a certain timeframe.²⁷

We find that Western Radio may use the section 252(b) processes to negotiate an interconnection agreement with CenturyTel. Not only has CenturyTel expressed intent to waive its rural exemption and has begun negotiation with Western Radio, CenturyTel is, or has been, informally interconnected with Western Radio for some time. We conclude that CenturyTel's rural exemption is waived with regard to negotiation of an interconnection agreement with Western Radio and that negotiation should proceed.

C. Toll Restriction Allegations

In addition to addressing the certified questions, Western Radio asks this Commission to consider allegations that CenturyTel is in violation of numerous federal rules and statutory provisions.

1. Parties' Positions

Western Radio alleges that CenturyTel is in violation of numerous federal rules and statutory provisions, as follows:

- a) The requirement in 47 U.S.C. § 251(c) that an ILEC negotiate in good faith the terms and conditions of an interconnection agreement;
- b) Pursuant to 47 U.S.C. § 252(b)(5), when a party refuses to continue negotiations, with or without the assistance of a state commission, or refuses to cooperate with the state commission as an arbitrator, the party fails to negotiate in good faith;
- c) The requirements in 47 U.S.C. § 251(a) that every telecommunications carrier interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers and not install network features, functions or capabilities that do not comply with the guidelines and standards set forth in sections 255 and 256 of the Act;
- d) 47 U.S.C. § 252(b)(5) in demonstrating a failure to negotiate in good faith by refusing to further participate in negotiation with or without the assistance of the state commission or by not cooperating with the state commission in the arbitration of an interconnection agreement;

²⁷ The Washington Utilities and Transportation Commission made a similar conclusion back in 1996: "If this Commission allows incumbents to claim the exemption after commencing negotiations, it would sanction an anti-competitive strategy which incumbents the 1996 Act's explicit time frames." Second Supplemental Order, Docket No. UT-96-02324, p. 9 (Dec 11, 1996).

- e) 47 C.F.R. 20.11(d) by billing erroneous “toll charges” that illegally “impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs”;
- f) 47 C.F.R. 20.11(a) by toll restricting Western Radio’s traffic and thereby not providing “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”;
- g) The requirements in 47 C.F.R. 20.11(b) that every local exchange carrier and commercial mobile radio service provider pay reasonable compensation “in connection with terminating traffic that originates” on the facilities of another local exchange carrier and commercial mobile radio service provider; and
- h) The requirement set forth in 47 C.F.R. 51.305(a) that an incumbent LEC provide interconnection with any requesting telecommunications carrier on terms and conditions that are just, reasonable and nondiscriminatory.

CenturyTel counters that all of Western Radio’s allegations regarding toll restriction are unrelated to local interconnection issues. Moreover, CenturyTel argues that Western Radio is fundamentally mistaken that CenturyTel may be required to act as a free interexchange toll carrier.

CenturyTel also disputes many of the allegations, particularly the claim that it has not negotiated in good faith. In any case, CenturyTel asserts that such allegations are unrelated to the question certified to the Commission about its authority to enforce the terms of an interconnection *arrangement* that precedes an interconnection agreement.

CenturyTel also points out that many of the legal citations made by Western Radio to support the position that the Commission may enforce an informal interconnection arrangement are inapposite. For example, CenturyTel indicates that *Western Radio Services Co. v. Qwest Corp.*, originally cited by Western Radio, stands for the principal that a state commission may review a claim that a party has violated the obligation to negotiate in good faith within the scope of the arbitration of an interconnection agreement, rather than as a separate claim for injunctive relief. CenturyTel also observes that OAR 860-016-0050(2)(f) provides for injunctive relief to enforce an interconnection agreement, but does not apply as written to other situations. CenturyTel argues that the relief available from the Commission to a telephone carrier that does not yet have an interconnection agreement but desires one is arbitration, which is available by filing a proper petition for arbitration. CenturyTel indicates that Western Radio may also raise its good faith negotiation claim in context of an arbitration proceeding regarding an interconnection agreement.

2. Resolution

Western Radio’s allegations are beyond the scope of this proceeding. As a result, they are insufficiently developed for us to consider. In any case, to the extent that

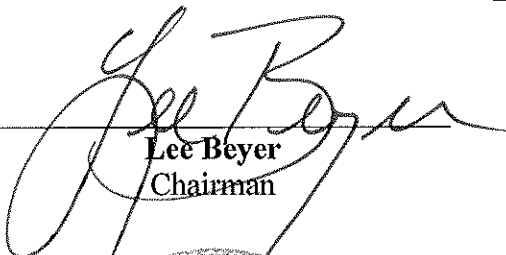
such allegations pertain to CenturyTel's alleged misconduct under an informal interconnection *arrangement* that bypasses section 252 of the Act, we have no authority to consider them. Alternatively, to the extent such allegations pertain to CenturyTel's alleged misconduct with regard to the negotiation of an interconnection agreement with Western Radio, we agree with CenturyTel that they should be raised in the context of the arbitration of an interconnection agreement. Again, we encourage Western Radio to file a new Petition for Arbitration that clearly identifies all unresolved issues, and the positions of Western Radio and CenturyTel on each unresolved issue.

III. ORDER

IT IS ORDERED that:

1. An informal interconnection *arrangement* that bypasses section 252 of the Telecommunications Act of 1996 is unenforceable by this Commission.
2. We conclude that CenturyTel of Eastern Oregon, Inc.'s rural exemption under 47 U.S.C. § 251(f) is waived with regard to negotiation of an interconnection agreement with Western Radio Services Company.
3. Western Radio Services Company may file a new Petition for Arbitration that complies with the requirements of OAR 860-016-0030(2) and 47 U.S.C. § 252(b)(2).

Made, entered, and effective DEC 14 2009.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may appeal this order to a court pursuant to applicable law