BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET NO. UT-023043
LEVEL 3 COMMUNICATIONS, LLC and CenturyTel of Washington, Inc.	)	PETITION OF LEVEL 3 COMMUNICATIONS, LLC
Pursuant to 47 U.S.C. Section 252	)	

LEVEL 3'S RESPONSE TO WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION'S PETITION TO INTERVENE

On September 16, 2002, the Washington Independent Telephone Association ("WITA") filed a petition to intervene in the arbitration proceeding initiated by Level 3 Communications, LLC ("Level 3") against CenturyTel of Washington, Inc. ("CenturyTel"), docketed by the Washington Utilities and Transportation Commission (hereinafter sometimes referred to as the "Commission") as Docket No. UT-023043.

I. Introduction

In its petition to intervene, WITA seeks intervention for the limited purpose of addressing the method by which the parties will handle Virtual NXX ("VNXX") traffic. See WITA Petition, at 11:3. WITA also recognizes that it had earlier sought a declaratory ruling from the Commission concerning how VNXX traffic should be handled. See Id. at 3:13. In the alternative, WITA requests that the VNXX issue be addressed in a generic proceeding. See Id. at 12:1. For the reasons outlined below, Level 3 requests that WITA's petition to intervene be denied.

II. Petitions for arbitration brought under the Act address contract disputes between two parties.

In considering the relative merits of WITA's petition, the Commission should review the negotiation and arbitration process required by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act").[1] Under the Act, all telecommunications carriers have a duty to interconnect "directly or indirectly" with the facilities of other telecommunications carriers. Section 251(a)(1). If parties to a negotiation fail to resolve all issues following "a request for interconnection" and subsequent negotiations under Section 252(a)(1), a party to the negotiations may petition a State commission to arbitrate any open issues pursuant to Section 252(b)(1). A State commission – in this case, the Washington Utilities and Transportation Commission – must limit its consideration to the issues set forth in any petition brought under Section 252(b)(1), and any response to the petition. Section 252(b)(4). A State commission must resolve each issue set forth in the petition for arbitration and the response thereto no later than 9 months after the date on which the local exchange carrier received the negotiation request. Section 252(b)(4)(C). An interconnection agreement adopted by negotiation or arbitration must be submitted for approval to the State commission. Section 252(e)(1). A State commission may reject an interconnection agreement only if the agreement discriminates against a telecommunications carrier not a party to the agreement; or implementation of the agreement is not in the public interest, convenience and necessity. Section 252(e)(2)(A)(i)&(ii). An interconnection agreement may also be rejected by a State Commission if it does not meet the requirements of Section 251, including regulations prescribed by the Federal Communications Commission pursuant to Section 251. Section 252(e)(2)(B). A party to an arbitration may bring an action in Federal

[1] All references to sections of the Act will be as follows: "Section XXX."

district court "to determine whether the *agreement* or statement meets the requirements of section 251 and this section." Section 252(e)(6) (emphasis added).

Thus, the Act prescribes a procedural mechanism by which two competing telecommunications carriers may negotiate and/or arbitrate a bilateral interconnection agreement. At the end of the arbitration process, an interconnection agreement is approved by the State commission. In the instant proceeding, such interconnection agreement will establish the rights and terms and conditions by which Level 3 and CenturyTel will interconnect and exchange traffic. No other carrier will be bound by the terms of the interconnection agreement, except to the extent they specifically and expressly wish to adopt the agreement or portions of it under Section 252(i).

The Act does not envision third parties being involved in this negotiation and arbitration process – as already noted, the final outcome in the instant proceeding will be the approval of a bilateral interconnection agreement between Level 3 and CenturyTel. Even WITA recognizes that a petition for arbitration brought under the Act addresses contractual disputes between *two* parties. WITA Petition, at 2, 4. In fact, the Commission's policy statement that sets out how interconnection disputes are to be resolved recognizes that its decision is binding only to the parties to the arbitration:

> Arbitration decisions are *binding only upon the parties to the arbitration*. The Commission interprets the Act as contemplating that arbitrations *involve only the parties to the negotiations*.

See, *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Interpretative and Policy Statement Regarding Negotiation, Mediation, Arbitration and Approval of Agreements under the Telecommunications Act of 1996, Docket No. UT-960269 (June 28, 1996) ("Policy Statement"), ¶ II.C.2 (emphasis added).

WITA's petition further acknowledges that it is the Commission's policy to prohibit intervention in arbitration proceedings. *See, WITA Petition*, 5:5. WITA has presented no reason why the Commission should deviate from this established policy. As the Commission's prior policy statement makes more than clear, the only WITA member that will be affected by Level 3's petition for arbitration is CenturyTel, and CenturyTel is already a party to the proceeding and is able to represent its interests before the Commission.

Finally, the only parties that have a right to seek judicial review of the Commission's decision are Level 3 and CenturyTel. The Act is clear that only parties to a Commission-approved agreement may seek review in Federal district court. Thus, neither WITA nor any of its members, other than CenturyTel, have an interest in the interconnection agreement resulting from this arbitration.

III. In the only other instance in which the Commission considered a petition for intervention in an arbitration proceeding brought under the Act, it rejected the intervention.

In its petition, WITA correctly argues that the Commission has addressed the issue of intervention - in an arbitration proceeding brought under the Act – only once before. WITA, however, misconstrues the Commission's findings in that instance. WITA argues that the Commission granted Sprint's petitions to intervene in arbitration proceedings brought under the Act by TCG Seattle.[2] See, WITA Petition, at 6:19. WITA is wrong.

[2] On September 17, 1996, Sprint filed petitions to intervene in arbitration disputes brought by TCG Seattle against U S West Communications, Inc. and GTE Northwest Incorporated. *See, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between TCG Seattle for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.; In the Matter of the Petition for Arbitration of an Interconnection Agreement between TCG Seattle and GTE Northwest Incorporated*, Order on Sprint's Petition to Intervene and to

To the contrary, the Commission denied Sprint's attempt to intervene, noting:

> Sprint's motion asks leave to intervene in the above-captioned arbitrations for the limited purpose of urging initiation of a generic proceeding. The Commission has been disinclined to allow intervention in arbitration proceedings under the Act. [footnote omitted] A number of parties argue that Sprint has not, as a procedural matter, successfully shown the existence of a 'compelling public interest' as a basis for intervention. The central thrust of Sprint's motion, however, is the request to the Commission to initiate a generic pricing proceeding, *not the request to intervene as a party on an ongoing basis. We will so interpret the motion.*

See, *Order on Sprint's Petition*, at 4 (emphasis added). Thus, the Commission *only* granted Sprint's motion to the extent that a generic pricing proceeding was initiated. Contrary to WITA's inferences, the Commission specifically rejected Sprint's motion to intervene and participate as a full party in any part of the individual arbitration proceedings brought by TCG Seattle under the Act. *Id*, at Ordering ¶¶ 1 & 2. Thus, WITA's allegations to the contrary, the Commission rejected Sprint's motion to intervene in individual arbitration proceedings. The Commission should likewise reject WITA's petition.

Indeed, the procedural posture here and in the Sprint case are strikingly similar, in that the third party seeking intervention in the arbitration already has a forum available in which its concerns can be considered. Specifically, as it did in addressing the Sprint petitions and initiating the generic pricing proceeding, the Commission has decided that the issues raised by WITA's Petition for Declaratory Order merit the Commission's attention:

> It appears from the discussion at the prehearing conference that the participants are in general agreement that *the issues raised in*

Establish Generic Pricing Proceeding, Docket No. UT-960326; Docket No. UT-960332 (October 23, 1996) ("Order on Sprint's Petition").

> *WITA's petition merit the Commission's review*, but that a declaratory order is not the appropriate procedural vehicle… *the issues presented in the WITA petition appear to deserve consideration*. We direct the participants to report on the progress of their efforts within thirty days of entry of this order with a recommendation as to appropriate process or to file individual statements of petitions. In the absence of a proposal from the parties, the Commission may consider process independently or may choose not to proceed.

See, In re the Petition of Washington Independent Telephone Association For a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns, Order Declining to Enter Declaratory Order, Docket No. UT-020667 (August 19, 2002). Thus, the Commission has already been presented with an opportunity to address WITA's apparent concern – the treatment of VNXX traffic – in a proceeding outside the confines of a petition for arbitration brought under the Act. Moreover, the fact remains that the ultimate resolution in the instant proceeding will result in approval of an interconnection agreement that will be binding only on Level 3 and CenturyTel. No other WITA member company will be forced to accept its terms. Should WITA or any of its individual members wish to address issues raised in its Petition for Declaratory Order, the interested parties will have adequate opportunity to do so in Docket No. UT-020667. As in the Sprint case, there is no need to allow any third party to intervene in the bilateral arbitration proceeding between Level 3 and CenturyTel when similar issues will be considered in a generic forum.

IV. The Commission is the appropriate forum for addressing the issues raised in Level 3's petition for arbitration.

WITA also suggests that, if Level 3 were to have brought its interconnection dispute in state court – instead of filing its petition with the Commission - WITA would have been entitled to intervention as a matter of "right." See, WITA Petition, at 8:17. In

support of its position, WITA cites *Dioxin/Organochlorine v. Department of Ecology*, 119 Wn. 2d 761, 837 P.2d 1007 (1992). WITA is being disingenuous. Under the Act, Level 3 must bring its petition for arbitration to the Commission. Section 252(b)(1). Only after the Commission enters its decision and an interconnection agreement is approved may Level 3 seek review, and then only in a Federal district court. Section 252(e)(6). Moreover, *Dioxin/Organochlorine* does not support WITA's contention. There the court recognized that administrative agencies have primary jurisdiction:

> Where the only question in a case is the interpretation of a statute, claimants need not resort to the administrative agency because the agency has no special competence over the controversy. [footnote omitted] This is a well-recognized exception to the doctrine of primary jurisdiction. [footnote omitted] However, *the exception implicitly requires an initial determination that only legal issues are in dispute.*

Dioxin/Organochlorine, 837 P.2d at 1013 (emphasis added). Nowhere in its petition to intervene does WITA argue that the VNXX issue raised in Level 3's petition addresses only a determination of "legal issues." To the contrary, the Commission can expect both parties to commit a significant amount of testimony on how the Commission should resolve the parties' dispute. In summary, both the structure of the Act and the subject matter in dispute make clear that the Commission is the proper forum for addressing the issues raised in Level 3's petition for arbitration.

V. An administrative agency may diverge from precedent.

WITA also argues that, because the Commission is bound to follow precedent in future disputes involving WITA members, it must allow WITA to intervene in the instant proceeding. See, WITA Petition, at 9:10. In support, WITA cites *McClaskey v. United States Department of Energy*, 720 F. 2d 583, 587 (9th Cir. 1983) and *Vergeyle v.*

Employment Security Department, 28 Wn. App. 399, 404, 623 P. 2d 736 (1981). As a preliminary matter, this is in direct contradiction to the Commission's prior Policy Statement, which indicates that arbitration decisions "*binding only upon the parties to the arbitration*." Policy Statement at ¶ II.C.2. Moreover, if followed to its logical conclusion, WITA's position is that the Commission must allow all interventions in all proceedings. This is not a desired result, for the Commission or the Washington telecommunications marketplace, nor is it an appropriate result under the negotiation and arbitration process required by the Act. Yet, even if one were to find some merit in WITA's concern about the precedential impact of this arbitration, a close reading of *McClaskey* reveals that an administrative agency may diverge from precedent provided it supplies sufficient explanation for doing so:

> Generally, an agency must follow its own precedent or explain its reasons for refusing to do so in a particular case. [citations omitted] If the board has failed to follow its own precedent, without offering an explanation, we may be required to reverse its decision.

McClaskey, 720 F. 2d at 587. Thus, the Commission is not bound by any decision reached in this proceeding. Should the Commission decide to address VNXX traffic in a generic proceeding, it is free to consider the evidence and arguments in that proceeding and possibly reach a different outcome based upon that separate record.

VI. The Commission is free to address VNXX traffic in a generic proceeding.

In the alternative, WITA requests that the VNXX traffic issue be addressed in a generic proceeding. See, WITA Petition at 12:1. More specifically, WITA argues that, "[b]ecause this is an important issue of general concern, it should not be resolved in an arbitration proceeding which generally designed to resolve a specific contract issue

between only two parties." Id. at 4:10. As has already been noted in Section II above, under the Act, the Commission *must* resolve each issue set forth in a petition for arbitration. Section 252(b)(4). Thus, the Commission is required to address the VNXX traffic issue raised by Level 3 in its petition for arbitration.

The Commission, however, may address VNXX traffic in a generic proceeding as a separate matter. As it did with Sprint's petitions to intervene, the Commission should treat WITA's request in this arbitration as a request that the Commission initiate a generic VNXX traffic proceeding, a proceeding that the Commission is in the midst of initiating in any event. *See, In re the Petition of Washington Independent Telephone Association For a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Order Declining to Enter Declaratory Order, Docket No. UT-020667 (August 19, 2002). Furthermore, as noted in Section V above, the Commission is not bound by any decision reached in this proceeding. Should the Commission address VNXX traffic in a generic proceeding, it may consider the evidence presented in such a proceeding and is free to reach a different outcome, provided that it explains its reasons for doing so. *McClaskey*, 720 F.2d at 587.

VII. Conclusion

For the reasons stated above, Level 3 requests that WITA's petition to intervene be denied.

Dated this 3rd day of October, 2002.

Respectfully submitted,

Level 3 Communications, LLC

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Certificate of Service

I hereby certify that the original and seven (7) copies of the foregoing *Level 3's Response to WITA's Petition to Intervene* in Docket No. UT-023043 was sent via Federal Express on this 3rd day of October, 2002 for service and filing of same on the 4th day of October, 2002, addressed to the following:

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And that a true and correct copy of same has been served via facsimile and/or via regular U.S. Mail, postage pre-paid, on this 3rd day of October, 2002, addressed to the following:

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