

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

In the Matter of the Petition)
for Arbitration of an) DOCKET NO. UT-023043
Interconnection Agreement)
Between) AMICUS BRIEF
) CONCERNING RURAL
LEVEL 3 COMMUNICATIONS, LLC,) EXEMPTIONS UNDER
) SECTION 251 OF THE
and) TELECOMMUNICATIONS ACT
) OF 1996
CENTURYTEL OF WASHINGTON,)
INC.,)
)
Pursuant to 47 U.S.C. Section 252.)
)
_____)

INTRODUCTION

COMES NOW the Washington Independent Telephone Association ("WITA"), by and through its attorney of record, Richard A. Finnigan, attorney at law, and file this Amicus Brief Concerning Rural Exemptions under Section 251 of the Telecommunications Act of 1996 ("Amicus Brief") with the Washington Utilities and Transportation Commission (the "Commission").

This Amicus Brief demonstrates that rural incumbent local exchange companies ("ILECs"), such as CenturyTel of Washington, Inc. ("CenturyTel") and other WITA members, are exempt under Section 251(f) of the Act from any obligation to negotiate an interconnection agreement with a competitive local exchange company ("CLEC") such as Level 3 Communications, LLC ("Level 3") under Sections 251(c) and 252 of the Act. This, in turn, means that the Commission lacks jurisdiction to arbitrate a dispute concerning the voluntary negotiations, if any, concerning Section 251 (a) or Section 201 interconnection.

ARGUMENT

This matter arises in the context of a request for arbitration filed by Level 3 purported to be consistent with Section 251(c) and Section 252 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 251(c), 252.¹ Through its counsel, Level 3 sent a letter to CenturyTel, dated March 1, 2002, which stated:

¹ Hereafter, references to the sections of the Act will be in the form of "Section 251" and will not include references to the codified version for ease of reading.

Pursuant to Section 251(c)(1) of the Communications Act of 1934, as amended ("Act"), by this letter, Level 3 requests that CenturyTel, Inc. commence good-faith negotiations with Level 3 to fulfill the interconnection duties described in Sections 251(a)-(c) of the Act.

In the Petition for Arbitration filed in this docket, Level 3 recognizes that CenturyTel may possess a rural exemption from the obligations of Section 251(c) and states that Level 3 "is willing to delete from the standard CT [CenturyTel] template agreement all sections relating to bundling and other Section 251(c) obligations that might be subject to an exemption held by CT."² Emphasis added. Level 3 also states in its Petition that it is willing to negotiate an agreement related solely to ISP-bound traffic.³

As WITA understands the present position between Level 3 and CenturyTel, the traffic under consideration is limited to ISP-bound traffic. In addition, CenturyTel does hold a rural exemption.

Therefore, there are two jurisdictional issues that must be addressed. The first is whether the Commission has jurisdiction to arbitrate if the portion of the rural

² Petition for Arbitration at footnote 10.

³ Petition for Arbitration at footnote 9.

exemption held by CenturyTel related to negotiation under Section 251 has not been properly removed? The second question is whether the Commission has jurisdiction under any circumstance to arbitrate a dispute related an agreement for ISP-bound traffic.

1. The rural exception applies to Section 251(c)(1) and Section 252.

Section 252(b) of the Act allows a CLEC, such as Level 3, to compel an ILEC to enter into an interconnection agreement if the CLEC petitions the state commission to initiate compulsory arbitration proceedings within the time frame outlined by Section 252(b) and the ILEC is not exempt from the requirement to negotiate an interconnection agreement.⁴

The only section of the Act that imposes the obligations of Section 252 on ILECs is Section 251(c). Section 251(c)(1) states that each non-exempt ILEC has the duty to:

⁴ It is important to note that an interconnection agreement is not the only way the parties can interact with each other, and other obligations are imposed on ILECs even if they are not required to enter into an interconnection agreement. See Section 251(a) and (b). For example, the obligation to provide resale without a discount or local number portability under Section 251(b)(1) and (2), respectfully, do not require an interconnection agreement.

negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.

Section 252 is also referenced in Section 251(c)(2), which imposes certain interconnection obligations on the ILEC. Section 252 is not referenced in any other part of Section 251. In other words, Section 252 is only mentioned in Sections 251(c)(1) and 251(c)(2). Thus, the requirements of Section 252 are only triggered by the language of Section 251(c).

Level 3 contends that the obligations of Section 252 can be triggered by any request for negotiation under Sections 251(a), (b) or (c). Aside from ignoring the plain language of Section 251(c), this interpretation of the Act would make the exemptions in Section 251(f) meaningless.

Further, Level 3's interpretation would require the Commission to arbitrarily separate the negotiation provisions of Section 251(c)(1) from the rest of Section 251(c) as though Section 251(c)(1) did not exist and was of no effect. In other words, the only way Level 3's interpretation of the Act can be correct is if Congress mistakenly included the negotiation provisions in Section

251(c)(1) without realizing that rural ILECs would be exempt from these negotiation requirements due to Section 251(f).

However, it is an axiomatic principle of law that, when possible, statutes are interpreted in such a manner as to give meaning to all of the provisions of the statute. See, e.g., Martin v. Aleinikoff, 63 Wn.2d 842, 850, 389 P.2d 422 (1964); U.S. v. Crocker-Anglo National Bank, 263 F. Supp. 125, 134 (N.D. Cal. 1966). If there are two divergent readings of a statute and one will give effect to all of the provisions while the other will make one or more of the provisions meaningless, the interpretation that makes all of the provisions effective will always prevail. See, State ex rel Dawes v. Washington State Highway Comm'n, 63 Wn.2d 34, 38, 385 P.2d 376 (1963); Crocker-Anglo National Bank, 263 F. Supp. at 134. Level 3's interpretation of Section 251 runs counter to this well-established principle of statutory construction.

Additionally, Level 3's interpretation of Sections 251 and 252 has been rejected by several state commissions, including this Commission. In considering an assertion that the Contel study area qualified for the rural exemption under the Act, the Commission stated:

Section 251(f)(1)(A)⁵ creates a two-step process by eliminating a rural telephone company's duty to negotiate with new entrants.

In the Matter of the Claim of GTE Northwest, Inc. for Rural Telephone Exemption Pursuant to 47 U.S.C. Section 251, Second Supplemental Order, Docket No. UT-960324 (Dec. 11, 1996) ("GTE Northwest"), at 14 (emphasis added). The Commission's ruling on this issue was upheld in an unpublished opinion of the Federal Court for the Western District of Washington. MCI Metro Access Transmission Services, Inc. v. GTE Northwest, Inc., 1998 U.S. Dist. LEXIS 11335 (W.D. WA., 1998).

In GTE Northwest, however, the Commission found that GTE Northwest had waited too long to assert the exemption from the duty to negotiate found in Section 251(f)(1)(A). Accordingly, the Commission held that GTE was estopped from asserting the Section 251(f) exemptions. GTE Northwest, at 15-17. That is not the case here. CenturyTel asserted its exemption in its first communication with the Commission on this matter.

⁵ GTE Northwest actually refers to "Section 252(f)(1)(A)." Since there is no Section 252(f)(1)(A), it can only be assumed that this is a typographical error and meant to reflect Section 251(f)(1)(A) as quoted above.

More importantly, Level 3 now states that it only seeks to negotiate an agreement under the terms of Section 251(a), not Section 251(b) or Section 251(c). Thus, there is no need to assert the exception. It is only under Level 3's mistaken interpretation of Sections 251(c) and 252 that an obligation to negotiate via arbitration can be imposed on CenturyTel in this matter. As demonstrated by the GTE Northwest case above and the other state commission cases cited below, Level 3's interpretation is wrong.

Other state commissions have held that rural ILECs are under no duty to negotiate interconnection agreements under Section 251(c) or Section 252. For example, the Oregon Public Utility Commission held:

United maintains that it is subject to the rural exemption in Section 251(f). The Commission takes official notice of our records, which indicate that United is correct in its assertion. Accordingly, we find that United is not subject to the negotiation, interconnection, unbundling, resale at wholesale rates, public notice of changes, or collocation requirements of Section 251(c) until a bona fide request is made and we determine that the request meets the standards set out in Section 251(f)(1)(A)(ii).

In the Matter of the Investigation into the Cost of Providing Telecommunications Services, Order No. 96-188; UM 251 (July 19, 1996), at 30 (emphasis added). This case

clearly demonstrates that all of the requirements of Section 251(c), i.e., negotiation, interconnection, unbundling, etc., are listed together. This contradicts Level 3's interpretation of Section 251(c) that would separate the Section 251(c)(1) exemption of negotiation from the other obligations of Section 251(c).

Another neighbor of Washington has also followed this rationale. The Idaho Public Utilities Commission explicitly stated:

We also note that Section 251(f) of the Act provides relief to a rural telephone company from many of the Act's competitive requirements. For example, a rural telephone company does not have the same duty as other local exchange carriers (LECs) to negotiate and interconnect with potential competitors.

In the Matter of a Rural Telephone Company Exemption for GTE Northwest Incorporated's Idaho Operations, Case No. GTE-T-97-4, Order No. 27030 (June 1997), at 1 (emphasis added).

On the other side of the United States, Maine has also affirmed that rural ILECs are exempt from the duty to negotiate. The Maine Public Utilities Commission stated:

A rural telephone company is not required to negotiate an interconnection agreement or provide interconnection until after the Commission, pursuant to 47 U.S.C. § 251(f)(1)(B), finds that the requirement "is not unduly economically

burdensome, is technically feasible, and is consistent with [the universal service provisions of] section 254"

Now Communications, Inc. Petition for Finding of Public Convenience and Necessity to Provide Service as a Reseller Local Exchange Carrier, Order Granting Authority to Provide Local Exchange Service as a Reseller and Approving Schedule of Rates, Terms and Conditions, Docket No. 2000-82 (Nov. 27, 2000), at IV (all insertions in original).

Virginia has also followed the same rationale as the other state commissions cited and quoted above. The Virginia State Corporation Commission found that rural ILECs were not required to negotiate and interconnect due to the exemption found in subsection 251(f). In the Matter of investigating GTE South Incorporated's status as a rural telephone company pursuant to the Telecommunications Act of 1996, Docket No. PUC960109 (October 22, 1996).⁶

⁶ Due to GTE's size and a petition filed by a CLEC under Section 251(f)(1)(A)(ii), GTE's status as a rural ILEC, and therefore its exemption from Section 251(c), was revoked by the Virginia SCC's follow-up Order Terminating Rural Exemption and Closing Case, Docket No. PUC960109 (Jan. 18, 2000). Challenging a rural ILEC's exemption under Section 251(f)(1)(A)(ii) is the first step in the "two-step process" contemplated by the Washington Commission in GTE Northwest. See, GTE Northwest, at 14-16.

In California, Level 3 recently attempted to bypass the exemptions of certain rural ILECs by asking the California Public Utilities Commission (the "California Commission") to create special rules for it that allowed it to provide services in the rural ILECs' territories without seeking to challenge the 251(f) exemptions of the rural ILECs. See, Application of Level 3 Communications, LLC (U-5941-C) to Expand Its Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services in the Service Territories of Citizens Telecommunications Company of the Golden State, Inc.; Evans Telephone Company; and Sierra Telephone Company, Inc., Opinion Denying Application, Application 02-03-012 (March 8, 2002)(hereafter "California Level 3 Order"), at 3, 8-9.⁷ The California Commission rejected Level 3's end-run around the rules, including Level 3's argument that Section 251(f) was inapplicable because it was only offering data services instead of voice (dial tone) service. See, California Level 3 Order, at 2.

The Illinois legislature has actually codified a rural ILEC's exemption from the requirements of Section 251(c).

⁷ The California Level 3 Order is currently available only in draft form.

In Illinois Revised Code Section 731.105, the Illinois legislature defined "rural exemption as:

[T]he exemption from Section 251(c) of the Telecommunications Act granted to rural telecommunications under Section 251(f) of the Telecommunications Act.

In numerous other states, it is apparently assumed without question that rural ILECs are exempt under Section 251(f) from all of the requirements of Sections 251(c) and 252, including the requirement to enter into arbitration to negotiate an interconnection agreement, until the "rural exemption" is challenged under Section 251(f)(2). See, e.g., Regarding Notice of Bona Fide Request by Reanet Corporation for Interconnection, Services, and Network Elements Necessary to Provide Basic Local Exchange Services in the Service Areas of CenturyTel of Eagle, Inc., et al., Procedural Order and Assignment to Administrative Law Judge, Docket No. 00A-561T, Colorado Public Utilities Commission, (Oct. 5, 2000); In the Matter of The Inquiry of Bona Fide Request of JTC Communications, Inc. Pursuant to the Telecommunications Act of 1996, for Negotiation of an Interconnection Agreement with AllTel Kentucky, Inc., et

al., Order, Case No. 2000-354, Kentucky Public Service Commission, (Nov. 2, 2000).

2. The Commission does not have jurisdiction to arbitrate a dispute between parties related to the terms for interconnection of ISP-bound traffic.

The jurisdiction of a state commission under Section 252 is to approve or reject interconnection agreements and to mediate and arbitrate interconnection disputes related to the interconnection of local traffic. The Federal Communications Commission (FCC) has made it very clear that it classifies ISP-bound traffic as interstate in nature, at least for purposes of interconnection agreements, and has preempted state authority. In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order (FCC-01-131, 2001)(hereafter "ISP Remand Order").⁸ In the ISP Remand Order, the FCC clearly determined that ISP-bound traffic in a local exchange of traffic setting would be "information access" subject to the FCC's authority under

⁸ This order was remanded in WorldCom, Inc. v. FCC, No. 01-1218, slip op (DC Cir. May 3, 2002). Even though the order was remanded, the Court determined it would not stay the order while on remand.

Section 201 of the Act. ISP Remand Order at paragraphs 38, 39, 55-64. The FCC went on to state that the FCC would preempt state authority over such traffic:

Because we now exercise our authority under Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions no longer have authority to address this issue.⁹

The FCC went so far as to prohibit a carrier from invoking Section 252(i) in order to opt into an existing interconnection agreement that addressed the exchange of ISP-bound traffic.¹⁰ The FCC stated that such arrangements do not have application to a Section 201 traffic issue. Therefore, the FCC has made it clear that state commissions are preempted from addressing ISP-bound traffic in a local traffic exchange relationship, including an interconnection agreement. Thus, this Commission does not have jurisdiction to address the issues that Level 3 would like this Commission to address.

This Commission has recognized the preemptive nature of the ISP Remand Order. In considering Qwest Communication's Section 271 compliance, the Commission recognized that ISP-

⁹ ISP Remand Order at paragraph 82.

¹⁰ ISP Remand Order at paragraph 82.

bound traffic must be treated as interstate in nature for the purpose of determining local use of facilities. In Re Investigation into U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996; In Re U.S. West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, 201 Wash. UTC LEXIS 459 at *16 (December 20, 2001).

CONCLUSION

The law on these matters is clear. The language of the statute is plain. The principles of statutory construction are aligned. The Commission has dealt with this matter decisively in the past. Other state commissions have agreed in their implementation of the law. The result is that the Commission lacks jurisdiction in this matter and Level 3's Petition for Arbitration should be dismissed.

DATED: October 7, 2002.

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Association