

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the Petition for Arbitration of an)		
Interconnection Agreement Between))	
LEVEL 3 COMMUNICATIONS, LLC.))	
and))	DOCKET NO. UT-023043
CENTURYTEL OF WASHINGTON, INC.,))	
Pursuant to 47 U.S.C. Section 252))	

BRIEF OF CENTURYTEL ON JURISDICTIONAL ISSUES

In the Arbitrator's Pre-arbitration Conference Order issued September 27, 2002 in this matter, the Parties were directed to file memoranda of law on the question of whether the Commission has jurisdiction to conduct the requested arbitration proceeding. CenturyTel of Washington, Inc. ("CenturyTel") submits this brief in response to that directive.

INTRODUCTION

Level 3 Communications, LLC ("Level 3") brought its Petition for Arbitration under section 251/252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). In the Petition, Level 3 seeks to exchange traffic originating from CenturyTel's customers and terminating to Level 3 ISP customers

not located in the same exchange or calling area. Because such traffic is: 1) interexchange traffic, 2) because CenturyTel is a rural telephone company, and 3) because the traffic is dial-up internet traffic, there are at least three reasons why the Washington Utilities and Transportation Commission (the “Commission” or “WUTC”) does not have jurisdiction to conduct a section 252 arbitration proceeding. First, sections 251 and 252 of the Act concern rights and obligations for the exchange of local telecommunications traffic and do not apply to interexchange traffic. Second, as a rural telephone company under the Act, CenturyTel is exempt from those obligations of section 251 necessary to trigger a section 252 arbitration proceeding. Third, the traffic Level 3 seeks to exchange is ISP-bound traffic that would not be subject to section 251 even if it were exchanged locally, and is instead, subject to section 201 of the Act.

ARGUMENT

I. Section 251/252 Interconnection Applies Only to Local and Not Interexchange Traffic.

Governance of the exchange of traffic between two carriers is dependent upon the type of traffic exchanged. As the FCC recently described in the *Unified Intercarrier Compensation NPRM*:

Existing intercarrier compensation rules may be categorized as follows: *access charge rules*, which govern the payments that interexchange carriers (“IXCs”) and CMRS carriers make to LECs to originate and terminate long distance calls, and *reciprocal compensation rules*, which govern the compensation between telecommunication carriers for the transport and termination of local traffic.

(In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, Released April 27, 2001, at Paragraph 6, emphasis in original)

The local versus interexchange nature of the traffic determines whether the exchange of traffic will take place under the access charge regime or under section 251 interconnection provisions. The access charge regime, which applies to interexchange traffic, is governed by section 201 of the Act. Interconnection, which would apply to local traffic, is governed by section 251/252 of the Act.

Nowhere in its Petition does Level assert that it will compete for, or provide local exchange service to any customers located within CenturyTel's service territory. Level 3 instead intends to provide service to ISP customers located outside the local calling area of CenturyTel's customers. With no customers located within the local calling area of CenturyTel's customers, any traffic exchanged between CenturyTel customers and Level 3 customers will necessarily be interexchange traffic and would not be local traffic. As interexchange traffic, the arrangements to exchange this traffic would be governed by the access charge regime and not by section 251/252 interconnection.

The FCC has made it clear that the access charge regime, and not section 251/252 interconnection applies to interexchange traffic. The FCC did contemplate that IXC's could potentially avail themselves of section 251/252 interconnection, but only to the extent they became local competitors with local customers and local traffic.

Thus, all carriers (including those traditionally classified as IXC's) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e. non-interexchange calls).

(In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, Released August 8, 1996, at Paragraph No. 190, emphasis added)

The FCC admonished IXC's that they should not seek section 251/252

interconnection with incumbent LEC's if they were merely conducting business as usual.

We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its *interexchange* traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2).

(In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, Released August 8, 1996, at Paragraph No. 191, emphasis in original)

This same declaration that interconnection does not apply to interexchange traffic is now in the FCC's rules at 47 C.F.R. 305(b).

- (b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

Level 3 seeks interconnection with CenturyTel for the sole purpose of having CenturyTel gather and deliver to Level 3 traffic that originated from CenturyTel's customers so that Level 3 can in turn deliver that traffic to customers located outside of the local calling area. This is classic business-as-usual IXC interexchange service. It is no different from the traffic that CenturyTel currently exchanges with numerous other IXC's.

Despite Level 3's best efforts to disguise the traffic by assigning inappropriate telephone numbers to its customers, Level 3 cannot change the fact that it is interexchange traffic and not local traffic. Level 3 cannot hide the location of the customer at each end of the call. Those customers simply are not located in the same exchange or local calling area. Calls between them are interexchange. Nothing short of eliminating the distinction between interexchange and local traffic designations will change that basic fact. Unfortunately for Level 3, Congress and the FCC have not yet done that. The distinction between interexchange and local traffic still exists and the law maintains separate access charge and interconnection regimes in recognition of that distinction.

The WUTC's authority to conduct a section 252 arbitration proceeding is dependent upon a petitioner seeking interconnection for purposes of exchanging local traffic. Parties seeking interconnection solely for the purpose of exchanging interexchange traffic (as Level 3 is seeking in this case) are not entitled to section 251 interconnection. A section 252 arbitration can be triggered only by a party making "a request for interconnection, services, or network elements pursuant to section 251" (section 252(a)(1) read together with section 252(b)(1)). Consequently section 252 is to be utilized only for the purpose of adjudicating interconnection under section 251. Section 252 cannot be used to adjudicate terms and conditions for exchange of interexchange traffic. The access charge regime continues to govern the exchange of interexchange traffic.

Therefore the WUTC has no jurisdictional basis to conduct a section 252 arbitration in this matter.

II. A Section 252 Arbitration Proceeding is Precluded by the Rural Exemption Provision of Section 251(f)(1)(A).

The Act provides that those incumbent local exchange carriers that meet the definition of a “rural telephone company” are exempt from the duty to negotiate interconnection under section 251. Section 251(f)(1)(A) provides:

(A) EXEMPTION – Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (e)(1)(D)(thereof).

Clearly, until such time as the exemption is removed, a rural telephone company is exempt from all of the provisions of section 251(c) including 251(c)(1) – Duty to Negotiate. The duty to negotiate is among the list of obligations under section 251(c) and provides as follows:

(1) DUTY TO NEGOTIATE – The duty to 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.

Pursuant to section 251(f)(1)(A) quoted above, rural telephone companies are exempt from the duty to negotiate the provisions of section 251 (b) (1) through (5) and section 251(c). In its Prehearing Brief and Response to Arbitrator’s Request for Information submitted on September 16, 2002, CenturyTel documented the fact that it is a rural telephone company under the Act and continues to hold a rural exemption under

section 251(f)(1)(A). Therefore, CenturyTel is exempt from the duty to negotiate, in accordance with section 252, the particular terms and conditions of agreements to fulfill the duties described in subsection (b) and (c) of section 251.

Level 3 itself acknowledged that it was relying on the obligation in section 251(c)(1) to bring its request for interconnection with CenturyTel. Level 3 brought its Petition for Arbitration on the basis of its March 1, 2002 letter, which it attached as Exhibit A to the Petition. The letter states:

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.

The letter requesting interconnection and in turn the Petition for Arbitration both rely upon the obligation in section 251(c)(1). However, as already noted, CenturyTel is exempt from the obligation in section 251(c)(1). Therefore there is no basis for either the letter or the Petition.

A section 252 arbitration can only be triggered by the issuance and receipt of a valid request for negotiation. Section 252(b)(1) provides:

- (1) ARBITRATION – During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Clearly a precondition to the institution of an arbitration proceeding under section 252(b)(1) is the existence of a valid request for negotiation. CenturyTel’s rural exemption means that there was no valid request for negotiation in this case. Level 3’s

unilateral desire to have a negotiation is not sufficient to trigger the arbitration provision.

If it were otherwise, the language in section 252(b)(1) would not make sense. The language speaks to an arbitration of “any open issues.” If there had been no duty to negotiate, and therefore no negotiations, there would be no basis upon which to identify open issues. The phrase “open issues” only has meaning in the context of negotiations. If there is no duty to negotiate, there is no basis for an arbitration under section 252(b)(1).

Section 252(b)(1) clearly contemplates arbitration only after a period of negotiations. Why else would there be the 135 to 160 day waiting period? That period was clearly designed to give the parties an opportunity to fulfill their duty to negotiate. If there is no duty to negotiate there is no basis for the waiting period and no basis for an arbitration of open issues.

Rural telephone companies holding the rural exemption are exempt from the duty to negotiate spelled out in section 251(c)(1). This has been consistently recognized by many state commissions including this Commission:

Section 251(f)(1)(A)¹ 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).

¹ 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.

See also, Oregon -- In the Matter of the Investigation into the Cost of Providing Telecommunications Services, Order No. 96-188; UM 251 (July 19, 1996); Idaho -- 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), Maine -- 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),

CenturyTel holds a rural exemption under section 251(f)(1)(A). Therefore CenturyTel is exempt from the duty to negotiate imposed by section 251(c)(1). It follows that there is no basis for arbitration under section 252(b)(1) as there is no valid request for negotiation under section 251(c)(1), a prerequisite to the initiation of such a proceeding. Accordingly, the WUTC lacks jurisdiction to conduct a section 252 arbitration in this matter.

III. Section 252 Arbitration Does Not Apply to the Exchange of ISP-Bound Traffic.

Even if the traffic Level 3 seeks to exchange were not interexchange, and even if CenturyTel did not possess a rural exemption, the fact that Level seeks to exchange ISP-bound traffic would itself preclude a section 252 arbitration. Level 3 seeks to have this Commission arbitrate its request for interconnection for ISP-bound traffic applying the same standards that would be applied to non-ISP traffic under Section 252 of the Act.²

² Petition, p. 6, footnote 9.

As discussed below, the FCC's *ISP Order on Remand* expressly removes such traffic from the application of Section 252 of the federal Act and places it under the FCC's exclusive jurisdiction under Section 201 of the Act.

A threshold issue in the Petition for Arbitration is whether any agreement the Commission may arbitrate will include an agreement for the transport and termination of Level 3's ISP-bound traffic. Level 3 asserts that the PUC has jurisdiction over ISP-bound traffic under Section 252 of the Act. This assertion is directly contrary to the FCC's *ISP Order on Remand* which finds ISP-bound traffic to be "information access" subject to the FCC's authority under Section 201 of the Act, and not within the scope of Section 251(c)(2) of the Act governing interconnection for "transmission and routing of telephone exchange service and exchange access."³ To the extent Level 3 seeks arbitration related to ISP-bound traffic, its request is outside this Commission's jurisdiction.

The WUTC's arbitration jurisdiction does not encompass interstate communications subject to the FCC's Section 201 jurisdiction. Rather, it is limited to traffic subject to Section 251 of the Act.⁴ Under the *ISP Order on Remand*, ISP-bound traffic is not subject to interconnection under Section 251(c)(2).⁵ Rather, this Order

³ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, FCC 01-131, at ¶¶ 38, 39, 55-64 (2001) ("*ISP Order on Remand*"), remanded *WorldCom, Inc. v. FCC*, No. 01-1218, slip op. (D.C. Cir. May 3, 2002). The Commission states ("[t]hese [access] services thus remain subject to Commission jurisdiction under section 201 This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic.") Although the Commission broadly states in the same paragraph that intrastate access sources remain subject to the state commissions' jurisdiction, it expressly carves out ISP-bound traffic as falling within the interstate jurisdiction and therefore subject to the FCC's authority. *See also* footnote 69 of the *ISP Order on Remand*, which references discussion of the jurisdictionally interstate nature of ISP-bound traffic.

⁴ The State's arbitration authority arises under Section 252(b) of the Act, which is limited to a "request for interconnection, services or network elements pursuant to Section 251." 47 U.S.C. §§ 251, 252.

⁵ *ISP Order on Remand* at footnote 1 above.

concludes that ISP-bound traffic is “interstate” in nature, and falls within the FCC’s Section 201 jurisdiction.⁶

In this Order, the FCC states further that it preempts the States with respect to intercarrier compensation for ISP-bound traffic, stating plainly:

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.⁷

Not only did the FCC preempt the states with regard to setting compensation for ISP-bound traffic, it also removed ISP-bound traffic from the duties and obligations under Sections 251 and 252 of the Act, and placed this traffic under the FCC’s Section 201 jurisdiction. In this respect, the Order prohibits any carrier from invoking Section 252(i), the “opt-in” provision, to opt into any existing interconnection agreement that addressed the exchange of ISP-bound traffic.⁸ In this regard, the Commission stated that the “opt-in” provision of Section 252 of the Act “applies only to agreements arbitrated pursuant to Section 252” and “has no application in the context of an intercarrier compensation regime set by this Commission pursuant to Section 201,” thus clearly removing ISP-bound traffic wholly from the arbitration provisions of Section 252 of the Act and placing it under Section 201 of the Act.⁹

⁶ *Id.*, ¶ 52.

⁷ *Id.*, at ¶ 82.

⁸ *Id.*

⁹ *Id.*

Because this Commission’s arbitration jurisdiction arises only under Section 252 of the Act, this Commission may no longer arbitrate any new agreement with respect to ISP-bound traffic.¹⁰

In its Order, the FCC determined that ISP-bound traffic is not local, applying an “end-to-end” analysis. The FCC referred to its previous order in which it concluded that “the jurisdictional nature of ISP-bound traffic should be determined . . . by the end points of the communication.”¹¹ “Applying this ‘end-to-end’ analysis, the FCC determined that Internet communications originate with the ISP’s end-user customer and continue beyond the local ISP server to websites or other servers and routers that are often located outside of the state.”¹² The FCC itself acknowledged in its *ISP Order on Remand* that it had previously found that “ISP-bound traffic is not local because it does not *originate[] and terminate[] within a local area.*”¹³ Alternatively, the FCC held that “ISP-bound traffic, which the [FCC] has long held to be interstate,”¹⁴ is under the jurisdiction of the FCC, not the state commissions.¹⁵ The FCC noted that “the LEC-provided link between an end-user and an ISP is properly characterized as interstate access,” and that it is “the [FCC]’s

¹⁰ The Commission may retain authority to arbitrate disputes regarding ISP-bound traffic arising under agreements in place at the time of the *ISP Order on Remand*. The *ISP Order on Remand* enacts phase-out provisions regarding such agreements. See *ISP Order on Remand* at ¶¶ 78-88.

¹¹ *ISP Order on Remand* at ¶ 14 citing *Declaratory Ruling* at 3695-3701; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3695-3701 (1999) (“*Declaratory Ruling*”); *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000).

¹² *Id.*

¹³ *ISP Order on Remand* at ¶ 14 citing *Declaratory Ruling* at 3697 (emphasis added).

¹⁴ *ISP Order on Remand* at ¶ 28.

¹⁵ *ISP Order on Remand* at ¶ 40. (FCC decided to “continue to regulate ISP-bound traffic under section 201”).

consistent view that the link LECs provide to connect subscribers with ESPs is an interstate access service.”¹⁶

The FCC notes in its *ISP Order on Remand* that as it “has held, and the Eighth Circuit has recently concurred, ... although some traffic destined for information services providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated. Thus, ISP-bound traffic is properly classified as interstate, and it falls under the FCC’s section 201 jurisdiction.”¹⁷ Thus, because of the FCC determination that ISP-bound traffic is interstate in nature and that it falls within the FCC’s Section 201 authority, the state commissions have no authority to regulate ISP-bound traffic. Indeed, the D.C. Circuit Court has made it clear that based on the FCC’s *ISP Order on Remand*, “the state regulatory commissions would no longer have jurisdiction over ISP-bound traffic as part of their power to resolve LEC interconnection issues under § 252(e)(1) of the Act.”¹⁸

Several state utility commissions have interpreted the FCC’s *ISP Order on Remand* as placing ISP-bound traffic within the jurisdiction of the FCC instead of the state commissions. For instance, this Commission has ruled that “states have been preempted by the FCC’s *ISP Order on Remand* on this question [jurisdiction over ISP-bound traffic], and that ISP-bound traffic must be treated as interstate for the purpose of

¹⁶ *Id.* at ¶¶ 57, 55. The D.C. Circuit did not vacate this decision. It merely remanded to the FCC the question of whether 251(g) provided adequate authority for the FCC to exclude ISP-bound calls from the reciprocal compensation obligations of Section 251(b)(5). *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. May 3, 2002).

¹⁷ *ISP Order on Remand* at ¶ 52 citing *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

¹⁸ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), at p. 432.

determining local use of the facilities in question.”¹⁹ It therefore held that the “treatment of ISP-bound traffic as local violates the FCC’s ruling in its *ISP Order on Remand*.”²⁰ Similarly, the Colorado Public Utilities Commission stated that “[t]his [the *ISP Order on Remand*] gives us some confidence that the FCC will be able finally to conclude that ISP-bound traffic is interstate.”²¹

In summary, the WUTC does not have jurisdiction to arbitrate any issues involving Level 3’s ISP-bound traffic. This traffic is no longer subject to the arbitration provisions of Section 252 of the Act, which provides the sole authority for this Commission’s arbitration authority. This traffic is now subject to the FCC’s Section 201 jurisdiction.

CONCLUSION

There are at least three reasons why the WUTC does not have jurisdiction to conduct a section 252 arbitration proceeding in this matter. First, sections 251 and 252 of the Act concern rights and obligations for the exchange of local telecommunications traffic and do not apply to interexchange traffic. Second, as a rural telephone company under the Act, CenturyTel is exempt from those obligations of section 251 necessary to trigger a section 252 arbitration proceeding. Third, the traffic Level 3 seeks to exchange

¹⁹ *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*, 2001 Wash. UTC LEXIS 459, at *16 (Dec. 20, 2001).

²⁰ *Id.* at *25.

²¹ *In re Colorado Public Utilities Commission’s Recommendation to the Federal Communications Commission Regarding Qwest Corporation’s Provision of In-Region, Inter-lata Services in Colorado*, 2002 Colo. PUC LEXIS 636 at *51 (June 13, 2002).

is ISP-bound traffic that would not be subject to section 251 even if it were exchanged locally, and is instead, subject to section 201 of the Act.

Level 3 seeks to act as an IXC by carrying and exchanging interexchange traffic. The terms and conditions of such an exchange of interexchange traffic are governed by the access charge regime. To the extent Level 3 has a problem with the manner in which access charges are assessed, it must pursue such concerns in a forum and proceeding that has jurisdiction over interexchange traffic.

By filing its Petition for Arbitration under section 252 of the Act, Level 3 has selected the wrong forum for yet another reason. CenturyTel has a rural exemption under section 251(f)(1)(A) of the Act and therefore a section 252 arbitration cannot be triggered until and unless that rural exemption is removed (assuming even then, of course that the other requirements for section 252 jurisdiction are met).

In any event, it also remains the case that jurisdiction over ISP-bound traffic lies under section 201 of the Act and not under section 251/252.

For all, or any one of these reasons, the WUTC lacks jurisdiction to conduct a section 252 arbitration proceeding in this matter. Level 3's Petition should be denied on this basis.

Respectfully submitted this 7th day of October 2002.

CenturyTel of Washington, Inc.

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