

**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 REPLY BRIEF
) CONCERNING
LEVEL 3 COMMUNICATIONS, LLC,) JURISDICTIONAL ISSUES
)
and)
)
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 files this Amicus Reply Brief Concerning Rural Exemptions under Section 251 of the Telecommunications Act of 1996 ("Reply Brief") with the Washington Utilities and Transportation Commission (the "Commission"). For the purposes of this Reply Brief, Level 3 Communications, LLC's ("Level 3") Brief and Memorandum of

Law will be referred to as the "Level 3 Brief," and CenturyTel of Washington, Inc.'s ("CenturyTel") Brief on Jurisdictional Issues will be referred to as the "CenturyTel Brief."

ARGUMENT

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

In the Level 3 Brief, Level 3 argues that Section 251(a) triggers the arbitration and interconnection agreement provisions of Section 252.¹ If so (and no other barriers to arbitrating an interconnection agreement exist),² a competitive local exchange carrier ("CLEC"), like Level 3, could force a rural incumbent local exchange carrier ("ILEC"), like CenturyTel and WITA's other members, to enter into an interconnection agreement via mandatory arbitration.

¹ References to the sections of the Telecommunications Act of 1996 (the "Act") will be in the form of "Section 251" and will not include references to the codified version for ease of reading.

² This argument assumes that the rural exemption under Section 251(f) is the only applicable issue that curtails the Commission's jurisdictional authority in this matter. In reality, as pointed out in WITA's Amicus Brief and in CenturyTel's Brief, there are at least three arguments that remove the interconnection issues presented by Level 3 from the Commission's jurisdiction.

However, Level 3's interpretation of Sections 251(a) and 252 of the Act is wrong. Level 3 fails to cite any cases or Commission orders, whether from this Commission or other state commissions, to support its skewed interpretation of Section 251(a) and Section 252. This is because the decisions that exist from this Commission and other state commissions have definitively addressed this issue contrary to Level 3's position.

As detailed in WITA's Amicus Brief, the arbitration provisions of Section 252 are only triggered by the requirements in Section 251(c). Section 251(a) does not make mention of Section 252 and Section 252 does not make mention of Section 251(a). Thus, despite Level 3's observation that Sections 251 and 252 are "remarkably straightforward,"³ Level 3 has misapplied these sections by attributing the provisions of Section 251(c) to Section 251(a).

As pointed out by the Commission:

Section 251(f)(1)(A) creates a two-step process by eliminating a rural telephone

³ See, Level 3 Brief, at 5.

company's duty to negotiate with new entrants. (Emphasis added).⁴

Section 251(f)(1)(A) creates a "rural exemption" from the requirements of Section 251(c). If Section 251(a) could be used to trigger the arbitration provisions of Section 252, then the "rural exemption" in Section 251(f) from the obligations of Section 251(c) would be meaningless. This is directly counter to well-settled Washington and federal case law on statutory interpretation. See, e.g., State v. Felix, 78 Wn.2d 771, 776, 479 P.2d 87 (1971); Staples v. United States, 511 U.S. 600, 611, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994).

Level 3 attempts to read Sections 251(a)-(c) and 252 in a vacuum, without reference to the "rural exemption" of Section 251(f), and as though Section 251(a) imposes the same obligations for interconnection that Section 251(c) imposes. See, Level 3 Brief, at 5 claiming that Sections 251 and 252 "apply to *all* (emphasis in original) telecommunications carriers, and the telecommunications

⁴ 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, affirmed, MCI Metro Access Transmission Services, Inc. v. GTE Northwest, Inc., 1998 U.S. Dist. LEXIS 11335 (W.D. WA., 1998).

services they provide," without making any provision for the different levels of obligations imposed by different subsections on different carriers. As demonstrated above, this argument is completely defeated by the Commission's ruling in GTE Northwest.⁵

In addition to overlooking GTE Northwest, Level 3 fails to mention any of the other states that have used the same rationale in holding that a rural ILEC is not obligated to arbitrate an interconnection agreement unless and until the "rural exemption" defined in Section 251(f) is first eliminated. See, WITA Amicus Brief, at 8-13 (citing Commission orders and rules from Oregon, Idaho, Maine, Virginia, California, Illinois, Colorado and Kentucky).

The only obligation imposed on a rural ILEC, like CenturyTel and WITA's other members, via Section 251(a) is "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Level 3 is attempting to expand these basic obligations by acting as though the obligations of Section 251(c) and Section 252

⁵ This effort to "blend" various sections of the Act to obtain a result that fits its purpose despite a wealth of case law to the contrary is also manifested in Level 3's arguments concerning preemption under Section 201 of the Act. See, Level 3 Brief, at 8-18.

are incorporated into Section 251(a). See, Level 3 Brief, at 4-8. This Commission in GTE Northwest, and all of the other state commissions listed above, have rejected Level 3's interpretation.

2. Level 3's reliance on the "compensation" aspect of ISP traffic is misplaced.

In the Level 3 Brief, Level 3 spends most of its time trying to distinguish all of the cases that discuss preemption of state commissions' ability to deal with ISP-bound traffic.⁶ However, Level 3 draws too fine a line.

The basic premise for the FCC's preemption order on ISP-bound traffic is the exercise of the FCC's authority under Section 201. The FCC concluded that ISP-bound traffic is "information access" subject to the FCC's authority under Section 201 and not within the scope of Section 251(c)(2).⁷

If ISP-bound traffic is interexchange in nature and thus subject to the FCC's jurisdiction under Section 201, it

⁶ Level 3 Brief beginning at page 8.

⁷ In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, FCC 01-131, at ¶s 38, 39, 55-64 (2001), remanded, WorldCom, Inc. v. FCC, No. 01-1218, slip op. (DC Cir. 2002). It is important to note that the FCC Order addresses the issue in the context of local traffic (i.e. an ISP within the local calling area). It would seem self evident that traffic to an ISP outside the local calling area is interexchange traffic.

is not subject to Section 251 and the state commissions' authority related to arbitration. Section 251(b) and (c) and Section 252 all relate to local traffic.

Level 3 seems to argue that any interconnection under Section 251(a) is subject to arbitration. However, the duty to interconnect, directly or indirectly, under Section 251(a) applies to all carriers. Most often, interexchange traffic exchanged between an interexchange carrier and a local carrier is accomplished through tariffs, not negotiated agreements. While in some cases there may be agreements between interexchange carriers and the local carrier for the exchange of such traffic, those are in the distinct minority. Level 3's argument fails by the weight of experience.

Level 3 brings to the table in this case only the issue of ISP-bound traffic. Since this traffic is not local in nature and since the FCC has preempted state jurisdiction over ISP-bound traffic in an intraexchange context, Level 3's arguments fail and this Commission does not have jurisdiction to arbitrate an agreement related to ISP-bound traffic between Level 3 and CenturyTel.

CONCLUSION

Level 3 has attempted to wrest an interpretation from the Act that meets its needs. This interpretation, however, is directly counter to the language of the Act and the various state commission case law on this topic. Level 3 does not discuss any of the applicable cases that interpret Sections 251(c), 251(f) and 252 because to do so would be to acknowledge the novelty of its argument, despite its claims that its interpretation is "remarkably straightforward." In reality, Level 3 has misapplied the statutes in its effort to force arbitration of an interconnection agreement on CenturyTel.

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