BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration with Whidbey Telephone Company	Docket No. UT-073031 RESPONSE OF SPRINT COMMUNICATIONS COMPANY, L.P. TO MOTION OF WHIDBEY TELEPHONE COMPANY FOR AN ORDER OF DISMISSAL FOR LACK OF JURISDICTION

1 Sprint Communications Company, L.P. ("Sprint") opposes the Motion of Whidbey Telephone Company ("Whidbey") for an Order Of Dismissal For Lack Of Jurisdiction. Whidbey moved to dismiss Sprint's Petition for Arbitration ("Petition"), claiming that the Washington Utilities and Transportation Commission ("Commission") lacks jurisdiction for four technical reasons.

2 First, Whidbey claims that Sprint did not timely file its Petition. Second, Whidbey claims Sprint failed to properly serve the Petition upon Whidbey. Third, Whidbey claims that the Petition was not properly verified. Finally, although it is not clear from Whidbey's "Statement of Issues," Whidbey contends that the Commission lacks jurisdiction under 47 U.S.C. Section 252 because a condition precedent -- voluntary negotiations under 47 U.S.C. Section 252(a) - has not occurred.

3 Whidbey is wrong on each claim, as a matter of fact and of law. As explained herein, there are no procedural defects to the Petition and the Commission has clear jurisdiction to entertain it. Whidbey's motion should be denied.

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I. BACKGROUND

4 More than ten years ago, Congress enacted sweeping reform of the telecommunications industry in the Telecommunications Act of 1996 (the "Act") [1] The Act was intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2]

5 Central to the new de-regulatory scheme was the establishment of a hierarchy of interconnection obligations for all telecommunications carriers, including incumbent local exchange carriers ("ILECs") like Whidbey and competitive local exchange carriers ("CLECs"), such as Sprint in this case. Section 251(a) imposes a general duty of interconnection on every telecommunications carrier. Section 251(b) creates additional obligations for ILECs relating to resale, number portability, dialing parity, access to rights of way and reciprocal compensation. Section 252 lays out the procedure for arbitration and approval of agreements between telecommunications carriers to implement their obligations under Section 251. Section 252 was constructed to encourage negotiation among parties, but provided a remedy for parties who could not reach agreement. This remedy, in Section 252(b)(1), allows a requesting carrier to enforce its rights under Section 251 by filing a petition for arbitration with the applicable state commission "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..." Section 252(b)(3)(c) requires a state commission to act within nine months from the date on which the local exchange carrier received a request for interconnection. The purpose for such short time lines was to forestall

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[1] Pub.L. 104-104, 110 Stat. 56 (1996) codified at 47 U.S.C. Section 251 *et seq.* Hereinafter, references to the Act will be by Section (i.e. Section 251 or 252).

[2] Conference report on S.652, p.1 (Report 104-458).

anticipated competitive delays as a result of the inevitable controversy between incumbents and new entrants.

6 The Federal Communications Commission ("FCC") issued its First Report and Order in August of 1996 to implement the Act.[3] Many of the provisions of the First Report and Order were incorporated into rules by the FCC.[4] In Washington, the Commission adopted an Interpretive Policy Statement in Docket No. UT-960269 regarding procedures for interconnection agreements, negotiation, mediation and arbitration. In 2003, the Commission adopted WAC 480-07-630 that specifically governs arbitrations under the Act.

7 Sprint properly followed the procedures of WAC 480-07-630 and Section 252 in filing its Petition, to invoke the remedy of arbitration as a result of Whidbey's refusal to negotiate an interconnection agreement.

II. LEGAL ANALYSIS

A. Sprint's Petition was Timely Filed.

8 The statutory timeline for requesting arbitration starts when a "request for interconnection" ("RFI") is received by the ILEC under Section 252(a)(1). Sprint's "request for interconnection with Whidbey Telephone Company," dated May 10, 2007, was received by Whidbey on May 11, 2007. (Petition, Exhibit A). This RFI started the time clock for negotiation of the interconnection agreement ("ICA"), not the May 2, 2007 letter from Sprint regarding local number portability ("LNP"), as Whidbey maintains. That LNP letter, as it states on its face, was not a request for interconnection but was submitted for a separate purpose under 47 C.F.R. § 52.23, which deals with "deployment of long-term database methods for number portability by LECs." Even though LNP may be an issue that may be addressed in an ICA, Whidbey's obligation to provide LNP does not depend upon an ICA.

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[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (rel. August 8, 1996).

[4] See 47 C.F.R. § 51.100, et seq.

Providing LNP is required irrespective of interconnection, subject to LNP-specified time limits under 47 C.F.R. § 52.23. The May 2, 2007 LNP letter clearly states that Whidbey must honor Sprint's LNP request even if there is no ICA and that it is not a RFI, which would be forthcoming.[5] The May 10, 2007 letter was then sent to Whidbey with its stated purpose of serving as an RFI. In addition, only the RFI was filed with the Commission as the formal RFI, according to the Interpretive and Policy Statement issued in Docket No. UT-960269.

9 Because Whidbey refused to provide the requested LNP to Sprint at the same time it was refusing to negotiate an ICA, Sprint prudently stated that both issues could be addressed during negotiations, if they ever were to occur. This does not mean that a request for LNP can be substituted for a formal request for interconnection, which is what is expressly required by Section 252(a)(1). Whidbey erroneously confuses these separate requests to manipulate the trigger date for arbitration when the record clearly establishes that May 11, 2007 – the date of the receipt of the RFI – is the trigger date. Therefore, Sprint's Petition was timely filed on the 160th day, October 17, 2007.

B. Sprint's Petition Was Timely Served.

10 WAC 48-07-630(4)(c) requires that a petition for arbitration be delivered "to the **other party or parties to the negotiation** on the same day that the petition is filed with the commission." Section 252(b)(2)(B) requires that a copy of the petition be provided to the "**other party or parties.**" Within the context of Section 252, this term refers to a "party to a negotiation." For the negotiation process the FCC requires ILECS to "designate a representative with authority to make binding representations."[6] This representative would

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[5] The letter states "Sprint plans to operate in the service area of and has sent or will be sending a request to negotiate an interconnection agreement with Whidbey Telephone Company. Please note, however, that there is no requirement that the interconnection agreement be completed prior to initiating the six-month timeline in 47 C.F.R. § 52.23(c). Specifically, the regulatory six-month time line begins on the date you receive this request."

[6] 47 C.F.R., § 51.301(7). First Report & Order, ¶ 154.

have to be a "party to the negotiation." No rule or statute defines the term "party to the negotiation." Under these circumstances, the Commission can refer to the common dictionary meaning of this term for guidance. Unless there is evidence of contrary legislative intent, words are to be given their ordinary, dictionary meaning. See *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). Webster defines a "party" as "a person or group that participates in some action, affair, plan, etc.; participant (emphasis supplied)."[7] "Negotiation" is defined as "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter."[8]

11 Whidbey designated Robert S. Snyder as its "point of contact," or representative for Sprint negotiations, through a letter dated June 5, 2007 from Whidbey Vice President Julia H. DeMartini to Sprint Contracts Negotiator William Sanfilippo. (Petition, Exh. D, p. 3). Mr. Snyder was thereafter the only "participant" or "party" in the negotiation process (or lack thereof) that followed. (Petition, Exhs. E – L) Whidbey never changed Mr. Snyder's designation.

12 Mr. Snyder clearly served as the negotiator for Whidbey, as its "representative with authority to make business representations." At no time did he maintain that he was serving as anything other than Whidbey's business representative for negotiations purposes. Indeed, the fact that Mr. Snyder does not represent Whidbey in this proceeding is evidence that Mr. Snyder's role in the Sprint negotiations was not as legal counselor, but as business negotiator.[9] Because Mr. Snyder was in fact a "party to the negotiation," providing a copy of the Petition and all accompanying documentation on the Commission filing date complied with WAC 480-07-630(4)(c) and Section 252(b).

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[7] *Encyclopedic Unabridged Dictionary of the English Language*, 2001.

[8] *Black's Law Dictionary*, 7th ed., 1999.

[9] Sprint negotiations are instituted by a contract negotiator. In this case, William Sanfilippo commenced the interconnection negotiations with Whidbey.

13 Whidbey does not dispute that Mr. Snyder received the Petition on the same date it was filed, October 17, 2007. Nor does Whidbey contend that it did not receive actual notice of the Petition until Ms. Demartini, Vice-President for Whidbey, received her courtesy copy several days later.[10] Whidbey alleges no actual prejudice due to service upon Mr. Snyder.

Given the undisputed fact that Whidbey's designated representative, Mr. Snyder, was a "party to the negotiations," and that he was timely served, Whidbey's hyper-technical service argument must be rejected and the Commission should find that service on Mr. Snyder complied with the language of Section 252 and WAC 480-07-630(4)(b).

14 Furthermore, arbitration proceedings under Section 252 are not subject to the same procedural rules that would apply in adjudicative proceedings under the Washington Administrative Procedures Act or that govern general civil litigation.[11] Congress did not intend to require formal service of process, or it would have said so in Section 252(b)(2)(B), which adopts a more practical, informal approach --the petitioner need only "provide a copy" to the "other party". Accordingly, Whidbey's analogy to service rules that might apply in other non-arbitration contexts is immaterial. Even if the Commission relied upon such analogy, service would still be proper. The Washington Supreme Court has ruled that ambiguous language in a service statute is " to be liberally construed to effectuate service and uphold jurisdiction of the court. ..... [m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties." *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996)(citations omitted). In that case, the Court said "civil rules are meant to minimize miscarriages of justice on procedural grounds. ...[w]e do not apply a strict construction ... [r]ather, we so construe the statute as to give meaning to its

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[10] Ms. DeMartini directed Sprint to provide her with a copy of any correspondence to Mr. Snyder. Sprint complied with that request. She never stated to Sprint that she be the only person authorized to receive documents for Whidbey.

[11] See WAC 480-07-63(2).

spirit and purpose, guided by the principles of due process....". *Id* at 608. Substantial compliance with the direction of a service statute may be sufficient, where such a statute is to be liberally construed to uphold jurisdiction, particularly where (as here) the respondent receives actual notice that he or she is being served. Therefore, *arguendo*, should the Commission consider whether substantial compliance has been achieved and due process observed, there is no question that it has because Whidbey received actual notice and has not been prejudiced by service upon Mr. Snyder.

15 In addition, WAC 480-07-395(4), which directs the Commission to "effect justice among the parties" supports rejecting Whidbey's hyper-technical procedural arguments. Finally, the relief sought by Whidbey – dismissal for lack of jurisdiction – has no support in law. Whidbey has cited no case where such relief was imposed by any commission. Such a result would thwart the purpose of the Act, reward parties who stymie the negotiation process, and ultimately delay the entry of competition in the affected markets. That is what would happen in this case if the Commission agreed with Whidbey that timely service upon a designated agent who was an actual party in the negotiation process was insufficient.

16 In sum, the Commission clearly has the authority to interpret its own rule and its obligations under Section 252. In doing so it has ample authority to construe service upon Mr. Snyder as service upon a "party to the negotiations" in full compliance with the law.

III. SPRINT'S PETITION WAS PROPERLY VERIFIED.

17 Whidbey erroneously claims that the Petition required a verification rather than an attorney's signature. The clear language of the rule provides otherwise. WAC 480-07-630(8) states:

> **Verification**. The Petition, Answer, and all documentation filed must be verified as provided by WAC 480-07-395, or submitted by affidavit or declaration. (emphasis supplied)

18 Whidbey cites WAC 480-07-397(2) in its Motion (p. 11). This rule does not exist. The pertinent rule, WAC 480-07-395(2), states:

> **Verification**. All pleadings and motions, except complaints by the Commission or matters raised by the Commission on its own motion, must be dated and signed by at least one attorney or representative of record in his or her individual name, stating his or her address, or by the party, if the party is not represented. Parties who are not represented by an attorney must include a statement in any pleading that the facts asserted in the pleading are true and correct to the best of the signer's belief.... (emphasis supplied)

19 Sprint's Petition was signed by its attorneys of record. This signature complied with the above-listed rules. Sprint was not an unrepresented party, and therefore did not need to attach an attestation or declaration to its Petition. Accordingly, Whidbey has simply mis-read the applicable rules.

20 Furthermore, Sprint disputes Whidbey's claim that Sprint was untruthful in submitting its Petition. (Motion, pp. 13, 15-16) Indeed, Whidbey's discussion at pages 13-16 simply duplicates its correspondence to Sprint as if repetition validates its position. As demonstrated below, an ILEC is not permitted to refuse to negotiate until the requesting carrier has satisfied whatever conditions the ILEC has self-imposed. Finally, Whidbey's technical argument that Sprint failed to identify points of agreement and disagreement by highlighting the ICA's text, is simply inapplicable in a case where the parties never even reached the point of discussing specific terms of the agreement. Because no negotiations have taken place, there has been no way to separate agreed-upon terms from disputed terms. Sprint explained this clearly to the Commission in its Petition [Par.17].

IV. THE COMMISSION HAS FULL LEGAL AUTHORITY TO CONDUCT THIS ARBITRATION.

21 Whidbey makes the illogical, circular argument that the Commission cannot entertain a petition for arbitration until the parties have first conducted "voluntary" negotiations. This assertion was soundly rejected by the Commission in the Third Supplemental Order Confirming Jurisdiction in *In the Matter of the Petition for Arbitration of an Interconnection*

Agreement between Level 3 Communications and Century Tel of Washington, Docket No. UT-023043 (Attachment A). At paragraphs 9 and 10 the Commission stated:

> Therefore, we hold that the duty to interconnect set forth in Section 251(a) is enforceable through the arbitration provisions of Section 252(b)....
>
> A request for an interconnection agreement under Section 251(a) is a request for an agreement without regard to the requirements of Sections 251(b) and (c). Because the negotiation for interconnection pursuant to Section 251(a) is voluntary, an ILEC may refuse to negotiate with a requesting carrier. However, after 135 days from the date negotiations are requested – whether or not negotiations take place – a party to the negotiation may request the state commission to arbitrate any open issues. 47 U.S.C. § 252(b)(1). (emphasis supplied)

22 Here, the record demonstrates that Whidbey has effectively refused to enter into negotiations with Sprint because Whidbey has insisted upon resolution of "threshold issues" before negotiating an ICA. Whidbey has no legal right (and cites no legal authority) to insist upon such resolution as a condition precedent to negotiations. Whether Whidbey is entitled to delay negotiations until two bogus "threshold issues" are resolved is nothing but Whidbey's unilateral refusal to accept directly applicable law as a means of delay. The FCC , as well as several courts, have ruled in Sprint's favor on these threshold issues.[12] Sprint had every right to the remedy of arbitration after the 135th day. If the right to arbitration depended upon the fact of voluntary negotiations, a stubborn ILEC could delay arbitrations forever by simply refusing to "voluntarily" negotiate. If the Commission were to agree with Whidbey, its recalcitrance would be rewarded and Whidbey could continue to refuse to negotiate voluntarily and continue its pattern of intentional delay, as evidenced by the record in this case and by the filing of this baseless motion.

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[12] See *In the Matter of Time Warner Cable Request for Declaratory Ruling*, FCC, WC Docket No. 06-55, (Rel. March 1, 2007 (Petition, Exhibit H); *Consolidated Comm Fort Bend v. Public Util.Com'n*, 497 F.Supp. 2d 836 (W.D. Tex. 2007); *Sprint Communications Co., L.P. v. Nebraska Public Service Com'n*, 2007 WL 2682181, (D.Neb.) September 07, 2007 (No. 4:05CV3260); and *Berkshire Telephone Corp. v. Sprint Communications Co., L.P.*, 2006 WL 3095665, (W.D.N.Y) October 30, 2006 (No. 05-CV-6502 CJS).

23 Congress provided the Commission with a tool to bring parties to the table, when voluntary negotiations fail to occur, on a timely basis. Sprint urges the Commission to use that tool and expeditiously proceed to arbitration.

V. CONCLUSION

24 For the foregoing reasons, Whidbey's Motion to Dismiss should be denied in its entirety.

Respectfully submitted this 13th day of November, 2007.

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Attachment A

[Service Date October 25, 2002]

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 CENTURYTEL OF WASHINGTON, INC., Pursuant to 47 U.S.C. Section 252	DOCKET NO. UT-023043 THIRD SUPPLEMENTAL ORDER CONFIRMING JURISDICTION

1 **Synopsis:** The Commission decides that it has jurisdiction to conduct an arbitration proceeding between Level 3 Communications and CenturyTel of Washington, Inc.

2 **Procedural history:** By petition dated August 7, 2002, Level 3 Communications, LLC., (Level 3) requested that the Commission arbitrate a proposed interconnection agreement between Level 3 and CenturyTel of Washington, Inc., (CenturyTel) pursuant to 47 U.S.C. § 252(b)(1). In its response to the petition, CenturyTel challenged on several grounds the Commission's jurisdiction to conduct the arbitration.

3 On September 24, 2002, the Commission convened a prehearing conference in this docket at Olympia, Washington before Arbitrator Dennis J. Moss. Level 3 was represented by Rogelio Peña, Peña and Associates, Boulder, Colorado; CenturyTel was represented by Calvin K. Simshaw, Associate General Counsel, Vancouver, Washington; WITA, *amicus curiae*, on the issue of jurisdiction, was represented by Richard A. Finnigan, Attorney at Law, Olympia, Washington.

4 During the prehearing conference Arbitrator Moss noted CenturyTel's argument that the Commission lacks jurisdiction over this matter and required the parties to file briefs on the jurisdictional issues. The Washington Independent Telephone

Association (WITA) petitioned to intervene in the proceeding. Without acting on WITA's petition, the arbitrator permitted WITA to file an *amicus curiae* brief on the jurisdictional issue. The parties filed simultaneous opening briefs on October 7, 2002, and responsive briefs on October 15, 2002.

MEMORANDUM

1. Does the Commission have jurisdiction to arbitrate interconnection disputes brought to enforce the interconnection obligation of 47 U.S.C. § 251(a)?

5 Level 3 requested arbitration under 47 U.S.C. §§ 251(a) and (c). CenturyTel argues that the Commission has no authority to arbitrate the interconnection issues between the two companies because the arbitration provisions of Section 252(b) "can only be triggered by the issuance and receipt of a valid request for negotiation." *Brief of Century Tel at 2.* Section 251(c) obligates incumbent local exchanges companies (ILECs) to enter into good faith negotiations over terms and conditions of agreements to fulfill the duties set forth in Sections 251(b) and (c)(1)-(5). Section 252(a) provides that an ILEC may voluntarily enter into negotiations with other carriers to reach an agreement that does not comply with the standards set forth in Section 251. Section 252(b) authorizes a state commission to arbitrate at the behest of any party to a negotiation any unresolved issue following a request for negotiation under Section 252(a). CenturyTel argues that Level 3 cannot make a valid request to negotiate with it because it is exempt from the provisions of Section 251(c). *Brief of CenturyTel at 7-9 (citing 47 U.S.C. § 251(f)).*

6 WITA makes a similar argument. WITA states that the "only section of the Act that imposes the obligations of Section 252 on ILECs is Section 251(c). . . . Section 252 is only mentioned in Sections 251(c)(1) and 252(c)(2). Thus, the requirements of Section 252 are only triggered by the language of Section 251(c)."

7 Level 3 argues that *all* telecommunications carriers are required to interconnect with each other pursuant to 47 U.S.C. § 251(a). Level 3 argues that this duty is in addition to the duties imposed on local exchange carriers (LECs) under Section 251(b) on ILECs under Section 251(c). *Brief of CenturyTel at 5-6.*

8 Level 3 further argues that the only prerequisite for invoking the negotiation, mediation, and arbitration provisions of Section 252 is a request for interconnection, services, or network elements under Section 251. Level 3 notes that Section 252 itself states that carriers may request negotiation with incumbent ILECs pursuant to 251, without listing any particular subsection of Section 251. Therefore, the provisions of Section 252 are not limited to requests made under Section 251(c). *Brief of CenturyTel at 6-7.*

9 The Commission agrees with Level 3 that Section 251(a) imposes a duty on all telecommunications carriers to interconnect with other carriers. We also agree that the mechanisms for negotiation, mediation, and arbitration provided by Section 252 apply to requests to negotiate made under Section 251(a). Nothing in Section 252(a) limits the negotiation and arbitration processes to matters falling within Section 251(c). Therefore, we hold that the duty to interconnect set forth in Section 251(a) is enforceable through the arbitration provisions of Section 252(b).

10 While it is true that the only mandate for negotiation under Sections 251 and 252 is set forth in Section 251(c), this does not mean that state commission authority to conduct arbitrations pursuant to Section 252(b) is limited to arbitrating issues arising from Section 251(c). Section 252(a) provides for voluntary negotiations whereby an ILEC may negotiate an interconnection agreement without regard to the requirements of Sections 251(b) and (c). A request for an interconnection agreement under Section 251(a) is a request for an agreement without regard to the requirements of Sections 251(b) and (c). Because negotiation for interconnection pursuant to Section 251(a) is voluntary, an ILEC may refuse to negotiate with a requesting carrier. However, after 135 days from the date negotiations are requested—whether or not negotiations take place—a party to the negotiation may request the state commission to arbitrate any open issues. *47 U.S.C. § 252(b)(1).*

11 Therefore, we hold that Section 252(b)(1) gives the Commission jurisdiction to arbitrate a request for interconnection brought pursuant to Section 251(a).

2. Is CenturyTel exempt, as a rural telephone company, from arbitration proceedings brought to enforce the interconnection duty set forth in Section 251(a)?

12 CenturyTel is a rural telephone company as defined in 47 U.S.C. § 153(37). Rural companies, like CenturyTel, are exempt from the interconnection, unbundled access, resale, collocation, and duty to negotiate provisions of Section 251(c). *47 U.S.C. § 251(f)(1)(A).* CenturyTel argues that the Commission does not have jurisdiction to arbitrate this matter because it is exempt from the provisions of Section 251(c), and therefore exempt from the provisions of Section 252. *Brief of CenturyTel* at 6-9.

13 Level 3 argues that while CenturyTel is exempt from the requirements of Section 251(c), it is not exempt from the interconnection requirement of Section 251(a). *Brief of Level 3 at 24-25.*

14 The rural exemption set forth in 47 U.S.C. § 251(f) applies only to the requirements of Section 251(c). Rural companies remain obligated to comply with the provisions of Sections 251(a) and (b). Therefore, rural companies are not required to provide interconnection at any technically feasible point on the network as set forth in 47

U.S.C. § 251(c)(2)(B), but they must interconnect with requesting carriers pursuant to 47 U.S.C. § 251(a).

15 The rural exemption set forth in 47 U.S.C. § 251(f) does not divest the Commission of jurisdiction over this matter because CenturyTel is required to interconnect with Level 3 pursuant to 47 U.S.C. § 251(a). Because we hold that the interconnection obligation of Section 251(a) is enforceable through the arbitration provisions of Section 252(b), we hold that the Commission has jurisdiction to arbitrate this matter.

3. Do the provisions of 47 U.S.C. §§ 251 and 252 apply to agreements providing for the exchange of ISP-bound traffic?

16 CenturyTel and WITA argue that the Commission does not have jurisdiction to arbitrate this matter because the traffic involved is traffic bound for Internet service providers (ISPs). CenturyTel argues that the FCC has preempted state commission jurisdiction over ISP bound traffic. *Brief of CenturyTel at 11 (citing In re Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001)*, remanded *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (ISP Remand Order)). CenturyTel argues that the ISP Remand Order placed ISP-bound traffic within the FCC's regulatory authority under Section 201 of the Act, and removed it from the duties set forth in Sections 251 and 252. *Id.*

17 Level 3 argues that CenturyTel and WITA have mischaracterized the FCC's preemption of state commission authority regarding ISP-bound traffic. Level 3 states that the FCC's ISP Remand Order addresses only the narrow issue of compensation for ISP-bound traffic and does not preempt state authority to make non-compensation-related decisions with respect to that traffic. *Brief of Level 3 at 11-13 (citing ISP Remand Order, ¶ 82).*

18 We agree with Level 3 that the FCC preempted state commission authority over compensation for ISP-bound traffic, and did not preempt state commission authority to arbitrate other issues relating to ISP-bound traffic.

19 The Commission determines that the FCC's ISP Remand Order does not preempt our jurisdiction to arbitrate issues regarding CenturyTel's obligation to interconnect with Level 3 to facilitate ISP-bound traffic. The FCC preempted only the Commission's authority to arbitrate the compensation for ISP-bound traffic.

4. Do the provisions of 47 U.S.C. §§ 251 and 252 apply to the exchange of traffic outside of a local exchange company's local calling area?

20 CenturyTel and WITA argue that the Commission has no authority to arbitrate this matter because Level 3 intends to provide service to customers located outside of CenturyTel's local calling area. *See Brief of Century Tel at 3.* CenturyTel argues that this traffic is interexchange traffic, and is not subject to the local competition provisions of 47 U.S.C. §§ 251 and 252. *Id. at 3-5.* The company argues instead that this traffic is subject to the FCC's jurisdiction over interexchange traffic under 47 U.S.C. § 201, and the Commission has no jurisdiction to arbitrate the matter under 47 U.S.C. § 252. *Id. at 3.*

21 Level 3 argues that the provisions of 47 U.S.C. §§ 251 and 252 are not limited to intrastate services. Level 3 argues "the lines between FCC jurisdiction under § 201 and state commission jurisdiction under §§ 251 and 252 are fluid, with regulation of some aspects of certain services falling to the FCC and other aspects of the same services falling to the state commissions." *Brief of Level 3 at 18.*

22 The Commission rejects CenturyTel's argument that because the traffic is interstate, it is, therefore, not subject to the arbitration provisions of 47 U.S.C. § 252. We hold that the provisions of 47 U.S.C. §§ 251 and 252 apply to both interstate and intrastate services. The obligations of 47 U.S.C. § 251(a) apply to all telecommunications carriers. The duties set forth in 47 U.S.C. §§ 251(b) and (c) apply to "local exchange companies," which include carriers that provide telephone exchange service or exchange access. *47 U.S.C. § 153(26).* "Exchange access" is "the offering of access to telephone exchanges services or facilities for the purpose of origination or termination of telephone toll services." *47 U.S.C. § 153(16).* Therefore, a local exchange company may provide both intrastate and interstate services and fall within the obligations of 47 U.S.C. § 251. State commissions, therefore, are authorized to consider both intrastate and interstate service when arbitrating issues that arise from 47 U.S.C. § 251.

SUMMARY

23 The Commission's jurisdiction to conduct arbitration proceedings is not limited to requests for arbitration regarding the obligations set forth in 47 U.S.C. § 251(c). The Commission holds it has jurisdiction to conduct arbitration proceedings involving the obligation of all telecommunications carriers to interconnect with other carriers set forth in 47 U.S.C. § 251(a). The Commission also holds that CenturyTel, as a rural carrier, is not exempt from the interconnection requirements of 47 U.S.C. § 251(a). Finally, the Commission determines that decisions by the FCC regarding compensation for traffic bound for Internet service providers do not divest the Commission of jurisdiction over this matter.

FINDINGS OF FACT

24 Having discussed all matters material to our decision, and having stated general findings, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decision of the Commission are incorporated by this reference.

25 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to conduct actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996, P.L. 104-104 (110 Stat. 56). *RCW 80.36.610.* The Commission also has jurisdiction over telecommunications companies under Title 80. RCW.

26 (2) CenturyTel and Level 3 are telecommunications carriers as defined by 47 U.S.C. § 153(44).

27 (3) CenturyTel is an incumbent local exchange company as defined by 47 U.S.C. § 252(h).

28 (4) CenturyTel is a rural telephone company as defined by 47 U.S.C. § 153(47).

29 (5) Level 3 requested CenturyTel to negotiate an interconnection agreement pursuant to 47 U.S.C. § 252(a)

30 (6) Level 3 requested that the Commission arbitrate its request for interconnection with CenturyTel pursuant to 47 U.S.C. §§ 251(a) and (c) – to the extent that CenturyTel is not exempt from interconnecting with Level 3 under 47 U.S.C. § 251(f).

CONCLUSIONS OF LAW

31 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and Parties to, this proceeding. *RCW 80.36.610; Title 80 RCW.*

32 (2) CenturyTel is obligated to interconnect with Level 3 pursuant to 47 U.S.C. § 251(a).

33 (3) CenturyTel, as a rural telephone company, currently is exempt from the obligations set forth in 47 U.S.C. § 251(c).

34 (4) CenturyTel, as a rural telephone company, is not exempt from the duty to interconnect with Level 3 under 47 U.S.C. § 251(a).

35 (5) The Commission has jurisdiction to arbitrate the interconnection matter between Level 3 and CenturyTel pursuant to 47 U.S.C. 252(b).

36 (6) The Federal Communications Commission has not preempted the Commission from considering non-compensation issues relating to ISP-bound traffic when arbitrating interconnection agreements under 47 U.S.C. § 252(b).

37 (7) The provisions of 47 U.S.C. §§ 251 and 252 apply to both intrastate and interstate service.

ORDER

38 The Commission has jurisdiction to arbitrate the interconnection matter between Level 3 and CenturyTel.

DATED at Olympia, Washington , and effective this ____ day of October, 2002.

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

APPENDIX

The following statutory provisions are most central to our discussion and decision:

47 U.S.C. § 251 Interconnection.

(a) General duty of telecommunications carriers.— Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255 or 256 of this title.

(c) Additional obligations of incumbent local exchange carriers.—In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate.— The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1)through (5)of subsection(b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(f) Exemptions, suspensions, and modifications.—

(1) Exemption for certain rural telephone companies.—

(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 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 252 Procedures for negotiation, arbitration, and approval of agreements.

(a) Agreements arrived at through negotiation.—

(1) Voluntary negotiations.—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation.—Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.—

(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.

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration with Whidbey Telephone Company	Docket No. UT-073031 CERTIFICATE OF SERVICE

I certify that I have this day served the attached Response of Sprint to Whidbey's Motion for an Order of Dismissal for Lack of Jurisdiction upon all parties of record in this proceeding by sending a copy by electronic mail and U.S. mail, unless otherwise specified, to the following interested parties:

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DATED this 13th day of November, 2007.

GRAHAM & DUNN PC

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