

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

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.