

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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
CENTURYTEL OF WASHINGTON, INC.,

PURSUANT TO 47 U.S.C. § 252

POST-HEARING BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

Michael R. Romano
Director, State Regulatory Affairs
LEVEL 3 COMMUNICATIONS, LLC
8270 Greensboro Drive, Suite 900
McLean, Virginia 22102
+1 571 382 7447 tel
+1 571 382 7450 fax

Rogelio E. Peña
PEÑA & ASSOCIATES, LLC
1919 14th Street, Suite 330
Boulder, Colorado 80302
+1 303 415 0409 tel
+1 303 415 0433 fax

John T. Nakahata
Kent D. Bressie
Michael G. Grable
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036-2560
+1 202 730 1320 tel
+1 202 730 1301 fax

6 December 2002

COUNSEL FOR LEVEL 3 COMMUNICATIONS, LLC

TABLE OF CONTENTS

I.	THE PARTIES AND PROCEEDINGS	1
II.	BACKGROUND	3
III.	STANDARDS FOR ARBITRATION	7
IV.	ARGUMENT	9
A.	<u>ISSUE 1:</u> CENTURYTEL’S “INFORMATION ACCESS TRAFFIC EXCHANGE AGREEMENT” IS DISCRIMINATORY AND CONTRARY TO FCC AND COURT DECISIONS	9
B.	<u>ISSUE 2:</u> IN APPROVING A DEFINITION OF “LOCAL TRAFFIC” FOR THIS AGREEMENT, THE PANEL SHOULD DEFER ANY DETERMINATION OF THE REGULATORY STATUS OF INTERNET AND INTERNET PROTOCOL-BASED TELEPHONY	12
1.	ONE IS LEFT TO GUESS AT THE MEANING OF CENTURYTEL’S PROPOSED EXCLUSIONS	13
2.	THE COMMISSION SHOULD CONSIDER THE REGULATORY STATUS OF THE ENUMERATED SERVICES ON A CASE-BY-CASE BASIS, AS THE FCC HAS DETERMINED	14
3.	CENTURYTEL’S BROAD LANGUAGE WOULD LIKELY RESULT IN MISCLASSIFICATION OF TRAFFIC	16
4.	THIS COMMISSION SHOULD CONTINUE TO FOLLOW THE FCC’S CAUTIOUS, DELIBERATE APPROACH	17
C.	<u>ISSUE 3:</u> “VIRTUAL NXX” TRAFFIC IS THE FUNCTIONAL EQUIVALENT OF FOREIGN EXCHANGE TRAFFIC, AND THIS COMMISSION SHOULD THEREFORE REJECT CENTURYTEL’S ATTEMPT TO CHARGE LEVEL 3 FOR THE ORIGINATION OF SUCH TRAFFIC	20
1.	THE FCC’S BAN ON ORIGINATION CHARGES APPLIES TO ISP-BOUND TRAFFIC ORIGINATED BY CENTURYTEL’S CUSTOMERS	21
2.	LEVEL 3’S SERVICE IS FUNCTIONALLY EQUIVALENT TO INCUMBENT LEC FX AND FX-TYPE SERVICES, AND SHOULD BE TREATED IN A LIKE MANNER – I.E., NOT SUBJECT TO ACCESS CHARGES	23
A.	INCUMBENT LEC FX AND FX-LIKE SERVICE AND COMPETITIVE LEC FX OR VIRTUAL NXX SERVICE—SUCH AS LEVEL 3’S—PROVIDE THE SAME FUNCTIONALITY	24
B.	LEVEL 3’S SERVICE IS DISTINCT FROM 800 AND TOLL-FREE SERVICES	28

C. CENTURYTEL’S OTHER ARGUMENTS DISTINGUISHING VIRTUAL NXX SERVICES FROM TRADITIONAL FX SERVICES DEMONSTRATE THAT NO PRINCIPLED BASIS FOR DISTINCTION EXISTS	29
3. CENTURYTEL INCURS NO ADDITIONAL INCREMENTAL COST FOR ORIGINATING LEVEL 3 VIRTUAL NXX TRAFFIC THAN FOR ORIGINATING ITS OWN FX TRAFFIC.....	32
4. THE FCC HAS DETERMINED THAT BILL-AND-KEEP IS THE APPROPRIATE COMPENSATION METHOD FOR ISP-BOUND TRAFFIC	36
5. CENTURYTEL’S NUMBERING ARGUMENTS ARE DISINGENUOUS AND INVITE DISCRIMINATION AGAINST NEW COMPETITORS.	39
D. <u>ISSUE 4</u> : BILL-AND-KEEP COMPENSATION, DEFINED IN ACCORD WITH THE ISP ORDER ON REMAND, SHOULD APPLY TO ISP-BOUND TRAFFIC	40
V. CONCLUSION.....	42

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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
CENTURYTEL OF WASHINGTON, INC.,

PURSUANT TO 47 U.S.C. § 252

POST-HEARING BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (“Level 3”), by its attorneys, submits this post-hearing brief in the above-captioned proceeding.

I. THE PARTIES AND PROCEEDINGS

Level 3 is a facilities-based competitive local exchange carrier (“LEC”) that provides telecommunications services in Washington and throughout the United States. Level 3 is a Delaware limited liability company, with its principal place of business at 1025 Eldorado Boulevard, Broomfield, Colorado, 80021. The Washington Utilities and Transportation Commission (“Commission”) has certified Level 3 to provide all forms of switched and dedicated telecommunications service on a resale and facilities-based basis in the State of Washington.¹

¹ See Order Granting Registration Application & Authorizing the Provision of Interexchange Switched Intraexchange Telecommunications Services, Level 3 Communications, LLC Application for Registration as a Telecommunications Long Distance Reseller, Wash. UTC Docket No. UT-090491 (Apr. 22, 1998), amended by Order Granting Registration Application & Authorizing Provision of Interexchange Switched Intraexchange

1 Through its own network and interconnection with other LECs, Level 3 provides
2 customers local connectivity to packet-switched networks like the Internet. Level 3 does so by
3 providing its customers a Direct Inward Dial (“DID”) service, whereby the customer is provided
4 a local telephone number that directs the end-user’s calls from his/her local exchange carrier to
5 the Level 3 network. Level 3’s DID service requires that it “turn up” local numbers within its
6 target markets, through assignment of “NXX” codes specific to the geography of its target
7 market.²
8

9 CenturyTel of Washington, Inc. (“CenturyTel”) is an incumbent provider of local
10 exchange services within the State of Washington, authorized by the Commission to provide
11 service as telecommunications utilities. CenturyTel is, and has been at all relevant times, an
12 incumbent LEC within its serving area in the State of Washington, as defined by § 251(h) of the
13 Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively,
14 “Act”).³
15

16 On August 7, 2002, following unsuccessful negotiations on an interconnection
17 agreement, Level 3 served on CenturyTel and filed with the Commission the petition for
18 arbitration that initiated this proceeding. The petition raised 15 issues that Level 3 believed to be
19 in dispute. The Arbitrator assigned to the proceeding conducted an evidentiary hearing on
20 November 7, 2002. By the date of the hearing, the parties had reached agreement on all but four
21 of the issues originally in dispute.⁴
22

23 *Telecommunications Services*, Level 3 Communications, LLC Application to Amend Registration to Provide
24 Local Exchange Services, Wash. UTC Docket No. UT-980492 (Apr. 22, 1998).

25 ² See generally Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 7:13-17.

26 ³ See 47 U.S.C. § 251(h).

⁴ These remaining issues are denominated as Issue 1 (“Is ISP-bound Traffic subject to different interconnection requirements than Local Traffic under federal law such that it should be handled by separate agreement? (Art. I, par. 1; Art. II, Secs. 1.43, 1.49(a); Art. V, Secs. 1, 3.1, 4.2, 4.3; Art. VIII, Sec. 3)”) and Issue 2 (“What is the proper

II. BACKGROUND

The Arbitrator now has before him a set of issues that revolve around the appropriate compensation and terms for the exchange of traffic destined for Internet service providers (“ISPs”). The specific questions include:

- (1) Whether ISP-bound traffic must be segregated into a separate network architecture under a separate interconnection agreement from other local traffic;
- (2) How properly to define “Local Traffic”;
- (3) What is the proper treatment of foreign exchange or “virtual NXX” traffic for intercarrier compensation purposes; and
- (4) How to define “bill and keep.”

How the Arbitrator, and ultimately the Commission, answer these questions will determine the extent to which competition among ISPs continues to grow in rural Washington or whether that growth will be delayed—especially in independent territories. Given the impact of these decisions, it is important that all parties not lose sight of the underlying public policy goals of the federal and Washington telecommunications laws—the facilitation of competitive choices for consumers and deployment of innovative services. In light of those public policy goals, the Arbitrator should prepare an award in Level 3’s favor on each of these four issues, as the arbitration panel in a nearly identical dispute between CenturyTel and Level 3 in Wisconsin did four days ago.⁵

definition of Local Traffic? (Art. II, Sec. 1.58)”; Issue 3 (“What is the proper treatment of Foreign Exchange or “Virtual NXX” Traffic for intercarrier compensation purposes? (Art. II, Secs. 1.58, 3.2)”; and Issue 4 (“How should the Parties define Bill-and-Keep compensation to implement the FCC’s *ISP Order on Remand*? (Art. II, Sec. 1.11; Art. V, Sec. 3.2)”). See Level 3 Communications, LLC Petition for Arbitration to Establish an Interconnection Agreement with CenturyTel of Washington, Inc. (filed Aug. 8, 2002).

⁵ *Arbitration Award*, Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. § 252 of Interconnection Rates, Terms & Conditions with CenturyTel of Wisconsin, Wis. P.S.C. Docket No. 05-MA-130 (Dec. 2, 2002) (“*Wisconsin Arbitration Award*”).

1 The crux of the dispute centers on Issue Three: what is the correct intercarrier
2 compensation method to apply to locally dialed calls from a CenturyTel customer to an ISP
3 customer of Level 3, if that ISP customer does not maintain a physical presence in the rate center
4 with which the ISP's telephone number is associated? CenturyTel proposes a "heads I win, tails
5 you lose" world. CenturyTel's own locally dialed foreign exchange ("FX") service is rated as
6 local, and no access charges apply. But when Level 3 proposes a functionally similar virtual
7 NXX service, CenturyTel seeks to define it as telephone toll service and to collect access charges
8 from Level 3. Such a result is patently and unreasonably discriminatory. Indeed, CenturyTel
9 advances no principled basis for subjecting Level 3's FX-type service to access charges when
10 CenturyTel's own FX services are not.
11

12 Level 3 does not seek a "free ride" on CenturyTel's network, but instead seeks to
13 compete on a level playing field with CenturyTel's FX offerings in the CenturyTel territories.
14 Level 3 provides telecommunications to ISPs as a substitute for CenturyTel's FX services, and
15 Level 3's ISP customers can then sell their products to CenturyTel's end users in competition
16 with CenturyTel's own affiliated ISP. Under Level 3's proposed agreement, CenturyTel is not
17 losing existing revenue in its regulated operations; CenturyTel is only losing the opportunity to
18 expand the reach of its above-cost switched access charges to traffic that should not be subject to
19 access charges. Indeed, by not seeking to challenge CenturyTel's rural exemption, by agreeing
20 to interconnect within each CenturyTel incumbent serving area (and further within each local
21 calling area where it provides service within that serving area), and by agreeing to pay special
22 access rates for transport when leasing transport from CenturyTel to reach a point of
23 interconnection, Level 3 has minimized the impact of competitive entry on the CenturyTel
24 network. All Level 3 seeks in this proceeding is an opportunity to compete with CenturyTel on
25
26

1 reasonable terms and to define a co-carrier relationship that is non-discriminatory and complies
2 with state and federal law.

3 Level 3's proposed terms comply fully with the requirements and objectives of the Act,
4 and CenturyTel's do not. To realize the local competition objectives of the Act, the Federal
5 Communications Commission ("FCC") has adopted rules—particularly 47 C.F.R. § 51.703(b)—
6 requiring the carrier that originates a call to bear the cost of facilities used to deliver
7 telecommunications traffic to the point of interconnection, rather than shift them to other
8 carriers. The FCC's primary rationale is that the facilities are part of the originating carrier's
9 network, and the originating carrier recovers the costs of those facilities, and often earns a profit,
10 through the rates it charges to its own customers for making calls.⁶ The FCC has found that this
11 scheme is necessary where the traffic is exclusively or predominantly one-way: Without a ban
12 on origination charges, the carrier originating the traffic would be able to "game the system" by
13 forcing interconnecting carriers such as Level 3 to bear the expense of carrying calls placed by
14 CenturyTel end users over the CenturyTel local network.⁷ The FCC viewed this competitive
15 scheme as the most efficient and least distortive, providing an incentive for carriers to bring their
16 traffic to the point of interconnection while requiring those carriers to recover their costs for
17 doing so from their customers rather through subsidies from other carriers.
18
19

20 The only exceptions to the rule requiring the originating carrier to bear its own costs in
21 carrying traffic to the point of interconnection are for "exchange access" and "information
22 access," as those terms are defined and interpreted under the Act. Although CenturyTel attempts
23

24 ⁶ See 47 C.F.R. § 51.703; *TSR Wireless, LLC v. U S WEST Communications, Inc.* Memorandum Opinion &
25 Order, 15 FCC Rcd. 11,166, 11,186 ¶ 34 (2000), *aff'd Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001); Tr.
26 97:21-98:9.

⁷ See *Qwest Corp.*, 252 F.3d at 467-68 (upholding the FCC's application of § 51.703(b)—which bans origination
charges—to LEC-paging carrier interconnection, where the LEC originated all traffic). Notwithstanding this

to argue that the origination of traffic bound for Level 3's virtual NXX service is both exchange access and information access, the precedent set by their own FX services undercuts their exchange access argument, as does the opinion of the D.C. Circuit in *Bell Atlantic v. FCC*.⁸ Moreover, the decision of the D.C. Circuit in *WorldCom v. FCC*⁹ precludes CenturyTel's information access argument. In fact, like CenturyTel's own FX services, Level 3's virtual NXX service is neither "exchange access" nor "information access."

It is particularly interesting that CenturyTel attacks Level 3's proposed offering as an 800-type service, even as CenturyTel then offers to sell to Level 3 an FX-like service similar to what Level 3 seeks to offer its own ISP customers.¹⁰ CenturyTel's proposal proceeds from a monopolistic premise and fails to recognize that Level 3 wants to compete with CenturyTel, rather than become its retail customer. Moreover, it makes quite clear that CenturyTel's concern is not the nature of the service, but only ensuring that CenturyTel receives a "cut" of any new business coming into the market.¹¹ By forcing Level 3 into the role of a customer, CenturyTel will eliminate Level 3's technical and economic advantages that stem from deploying a more efficient service arrangement. This means that the benefits of competition, especially with respect to price, will be held hostage to CenturyTel's cost structure. Such a result goes against the intent of Washington and federal telecommunications policy and will preclude the growth of competitive telecommunication services in Washington.

concern, Level 3 has agreed that it will "pick up" all traffic at a point of interconnection within each CenturyTel serving area by building or leasing transport to that point.

⁸ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

⁹ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

¹⁰ Direct Testimony of R. Craig Cook, Exhibit No. 12, at 32:17-33:9.

¹¹ *See* Tr. 216:17-21. ("Q: So on any call that a CenturyTel customer places to a Level 3 foreign exchange customer, CenturyTel in your opinion is always providing the open end? A: Yes.").

1 Finally, as this Commission has already found,¹² in preempting the state commissions
2 from establishing intercarrier compensation rates for ISP-bound traffic higher than FCC-
3 specified caps (and by requiring carriers such as Level 3 that enter new markets to exchange ISP-
4 bound traffic on a bill-and-keep basis only), the FCC noted that it was not disturbing or altering
5 any of the originating carrier's other interconnection obligations under Part 51, Subpart H, of the
6 FCC's rules. Thus, there is no FCC requirement that carriers enter into a separate agreement for
7 ISP-bound traffic.
8

9 III. STANDARDS FOR ARBITRATION

10 Section 252(c) of the Act specifies the standards that a state commission shall employ
11 when conducting an arbitration under the Act:

12 In resolving by arbitration under [§ 252(b)] any open issues and imposing
13 conditions upon the parties to the agreement, a State commission shall—

- 14 (1) ensure that such resolution and conditions meet the
15 requirements of section 251 of this title, including the
16 regulations prescribed by the [Federal Communications]
17 Commission pursuant to section 251 of this title;
- 18 (2) establish any rates for interconnection, services, or network
elements according to [§ 252(d)]; and
- (3) provide a schedule for implementation of the terms and
conditions by the parties to the agreement.¹³

19 This Commission also has discretion to impose additional requirements pursuant to §§
20 252(e)(3), 253(b), 261(b) and 261(c) of the Act, provided such requirements do not conflict with
21 valid federal regulation of the same subject matter. Section 252(e)(3) provides:
22
23
24

25 ¹² *Third Supplemental Order Confirming Jurisdiction, In re Petition for Arbitration of an Interconnection*
26 *Agreement Between Level 3 Communications, LLC & CenturyTel of Washington, Inc.*, Wash. UTC Docket No.
UT-023043, at ¶ 10-11 (Oct. 25, 2002) (“*Third Supplemental Order*”).

¹³ 47 U.S.C. § 252(c).

1 (3) PRESERVATION OF AUTHORITY. Notwithstanding paragraph (2),
2 but subject to section 253 of this title, nothing in this section shall prohibit
3 a State commission from establishing or enforcing other requirements of
4 State law in its review of an agreement, including requiring compliance
5 with intrastate telecommunications service quality standards or
6 requirements.¹⁴

7 Section 253(b) provides:

8 (b) STATE REGULATORY AUTHORITY. Nothing in this section shall
9 affect the ability of a State to impose, on a competitively neutral basis and
10 consistent with section 254 of this title, requirements necessary to preserve
11 and advance universal service, protect the public safety and welfare,
12 ensure the continued quality of telecommunications services, and
13 safeguard the rights of consumers.¹⁵

14 Section 261(b) and (c) provide:

15 (b) EXISTING STATE REGULATIONS. Nothing in this part [47 USCS
16 §§ 251 et seq.] shall be construed to prohibit any State commission from
17 enforcing regulations prescribed prior to [the date of enactment of the
18 Telecommunications Act of 1996], or from prescribing regulations after
19 [such date of enactment], in fulfilling the requirements of this part, if such
20 regulations are not inconsistent with the provisions of this part.

21 (c) ADDITIONAL STATE REQUIREMENTS. Nothing in this part [47
22 USCS §§ 251 et seq.] precludes a State from imposing requirements on a
23 telecommunications carrier for intrastate services that are necessary to
24 further competition in the provision of telephone exchange service or
25 exchange access, as long as the State's requirements are not inconsistent
26 with this part or the Commission's regulations to implement this part.¹⁶

27 In light of these statutory directives, Level 3 asks the Commission to resolve the four open issues
28 in this dispute and impose necessary conditions on the parties in accord with the following
29 arguments, to provide a schedule for implementation of the terms and conditions by the parties,
30 and to use its authority under Washington law to further competition in the provision of
31 telephone exchange service in Washington.

32 ¹⁴ *Id.* § 252(e)(3).

33 ¹⁵ *Id.* § 253(b).

34 ¹⁶ *Id.* § 261(b), (c).

IV. ARGUMENT

On the four issues presented, Level 3 urges the Commission to reach the following decisions:

- **ISSUE ONE:** Having already recognized that it retains jurisdiction over this dispute, this Commission needs only to reject CenturyTel's efforts to force ISP-bound traffic into a discriminatory "Information Access Traffic Exchange Agreement" framework, and instead require that ISP-bound traffic be exchanged with other locally dialed traffic under a single interconnection agreement;
- **ISSUE TWO:** This Commission should defer any decision on the regulatory status of "Internet Telephony" or "Internet Protocol-Based Telephony," because CenturyTel's proposed definitions are vague, subject to abuse, and contrary to what even CenturyTel's own witness recognized as the FCC's cautious, deliberate approach;
- **ISSUE THREE:** FX and FX-type traffic are functionally indistinguishable, and this Commission should subject them both to the same compensation mechanisms. Moreover, this Commission should acknowledge and respect the FCC's compensation mechanisms for ISP-bound traffic. CenturyTel incurs no costs in originating FX-type traffic that are any different from the origination of other local calls (including calls placed by FX and other virtual NXX means), and CenturyTel's stated concerns about numbering resources are unsupported and an invitation to discriminate against new entrants; and
- **ISSUE FOUR:** This Commission should adopt "bill-and-keep" compensation for ISP-bound traffic, and need only adopt the definition of "bill-and-keep" set forth in the *ISP Order on Remand*.

These issues are addressed in order below.

A. ISSUE 1: CENTURYTEL'S "INFORMATION ACCESS TRAFFIC EXCHANGE AGREEMENT" IS DISCRIMINATORY AND CONTRARY TO FCC AND COURT DECISIONS

In its *Third Supplemental Order*, this Commission already rejected CenturyTel's argument that the *ISP Order on Remand* preempted this Commission's jurisdiction under §§ 251 and 252 to arbitrate interconnection disputes involving ISP-bound traffic.¹⁷ Since that time, two other state commissions and one arbitration panel have also rejected virtually identical

¹⁷ *Third Supplemental Order* at ¶ 11.

1 preemption arguments by incumbent LECs.¹⁸ Despite the *Third Supplemental Order*,
2 CenturyTel may continue to insist that ISP-bound traffic must be exchanged not under a
3 traditional local interconnection agreement, but under a separate and distinct agreement called an
4 Information Access Traffic Agreement (“IATA”).¹⁹ There are, however, four significant
5 substantive problems with CenturyTel’s IATA.

6 *First*, the IATA would treat ISP-bound traffic differently from local traffic for
7 interconnection purposes, in clear contravention of FCC rules and orders that prohibit LECs from
8 splitting off ISP-bound traffic to collect more advantageous charges. The FCC differentiates
9 ISP-bound traffic for intercarrier compensation purposes *only*.²⁰ As this Commission already has
10 recognized,²¹ the FCC made clear even in adopting new rules for ISP-bound intercarrier
11 compensation that carriers remain subject to interconnection obligations for ISP-bound traffic
12 under Section 251 of the Act. Moreover, by imposing a “mirroring” requirement, the FCC
13 rejected the notion of separate agreements, terms and conditions for ISP-bound traffic. In the
14 *ISP Order on Remand*, for example, the FCC stated its “unwilling[ness] to take any action that
15 results in the establishment of separate intercarrier compensation rates, terms and conditions for
16
17

18
19 ¹⁸ See *Order*, Level 3 Communications, LLC Interconnection Arbitration Application, North Dakota PSC Case
20 No. PU-2065-02-465 (Nov. 20, 2002) (adopting *Recommended Order of the Arbitrator Concerning SRT*
21 *Communications Cooperative’s Motion for Dismissal*, Level 3 Communications, LLC Interconnection
22 Arbitration Application, North Dakota PSC Case No. PU-2065-02-465 (Oct. 29, 2002)); *Wisconsin Arbitration*
23 *Award* at 8-10 (“The scope of [Section 251(a)(1)] is very broad. It is intended to reach all carriers. The statute
does not except any carrier from the reach of this provision.”); *Arbitrator’s Recommended Decision, In the*
24 *Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an*
25 *Interconnection Agreement with Qwest Communications*, Minn. PUC Docket No. P5733,421/IC-02-1372,
26 Decision No. 3-2500-15076-2 (Nov. 1, 2002). On November 21, 2002, the MPUC voted 5-0 to endorse the
ALJ’s decision, but it has not yet issued its own written order.

24 ¹⁹ See Direct Testimony of William H. Weinman, Exhibit No. 24, at 20-21.

25 ²⁰ The FCC clearly stated that the *ISP Order on Remand* “affects only the intercarrier *compensation* (*i.e.*, the rates)
26 applicable to the delivery of ISP-bound traffic. It does not alter carriers’ other obligations under our Part 51
rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points
of interconnection.” *ISP Order on Remand*, 16 FCC Rcd. at 9187 n.149.

²¹ *Third Supplemental Order* at ¶ 11.

1 local voice and ISP-bound traffic.”²² The FCC did this largely to prevent incumbent LECs such
2 as CenturyTel from dictating terms on interconnecting carriers: “Because we are concerned
3 about the superior bargaining power of incumbent LECs, we will not allow them to ‘pick and
4 choose’ intercarrier compensation regimes, depending on the nature of the traffic exchanged with
5 another carrier.”²³ CenturyTel should not be permitted to impose the terms of interconnection
6 for the exchange of ISP-bound traffic by pretending that such traffic is no longer subject to
7 Commission jurisdiction or governed by federal interconnection rules applicable to the exchange
8 of traffic between LECs.
9

10 *Second*, CenturyTel’s proposed IATA would allow it to impose unspecified originating
11 usage charges on ISP-bound calls. As is explained more fully in part IV.C.1 below, such
12 originating usage charges are contrary to the FCC’s directive that new entrants and incumbent
13 LECs that begin exchanging ISP-bound traffic after the first quarter of 2001 shall do so under a
14 “bill and keep” intercarrier compensation regime.²⁴ In other words, even as CenturyTel
15 misapplies the *ISP Order on Remand* in support of its erroneous jurisdictional conclusions, it
16 overlooks that *Order*’s specific intercarrier compensation requirements.²⁵
17

18 *Third*, as is discussed in greater detail in part IV.C.1 below, CenturyTel’s continued
19 assertion that Level 3’s ISP-bound traffic is “information access” is mistaken and
20 unsubstantiated, and it ignores the D.C. Circuit’s specific findings to the contrary.²⁶

21 *Fourth*, the IATA would be discriminatory. It would force Level 3 to pay for and
22 construct an entirely separate interconnection network, regardless of the requirements of a
23

24 ²² *ISP Order on Remand*, 16 FCC Rcd. at 9196-97 ¶ 90.

25 ²³ *Id.* at 9196 ¶ 89.

26 ²⁴ *Id.* at 9155 ¶ 6.

²⁵ Rebuttal Testimony of William P. Hunt, Exhibit No. 10, at 6:8-16.

1 typical local interconnection network.²⁷ By requiring a separate interconnection network for
2 ISP-bound traffic only, the Arbitrator would impose significant and unnecessary costs on
3 competitors.²⁸ CenturyTel serves its own ISP customers out of its local service tariffs, and does
4 not maintain a separate network to route calls to them.²⁹ Nor does CenturyTel establish separate
5 trunks just for the exchange of ISP-bound traffic with other LECs.³⁰ Thus, requiring a
6 competitive LEC to install a separate and higher-cost trunking network just for the exchange of
7 ISP-bound traffic would result in discrimination against the competitive LEC and the ISPs it
8 serves.³¹

9
10 For all of the foregoing reasons, the Arbitrator should decline CenturyTel's request to force
11 ISP-bound traffic into a segregated interconnection architecture under a separate interconnection
12 agreement.

13 **B. ISSUE 2: IN APPROVING A DEFINITION OF "LOCAL TRAFFIC" FOR THIS**
14 **AGREEMENT, THE PANEL SHOULD DEFER ANY DETERMINATION OF THE REGULATORY**
15 **STATUS OF INTERNET AND INTERNET PROTOCOL-BASED TELEPHONY**

16 CenturyTel proposes the following exclusion from the definition of "local traffic" in
17 Article II, § 1.58 of the Interconnection Agreement: "Information Access Traffic, including but
18 not limited to Enhanced Service Provider (ESP) and Internet Service Provider (ISP) traffic,
19 Internet, 900-976, etc., and Internet Protocol based long distance telephony."³² CenturyTel's

20 ²⁶ *Id.* at 6:17-7:3.

21 ²⁷ *See id.* at 4:22-5:5.

22 ²⁸ As explained in its testimony, Level 3 intends to expand its service offerings over the next several years, and is
23 concerned that a separate network just for the exchange of ISP-bound traffic would still be required once Level
24 3 expands its service offerings. *See id.* at 7 n.15.

25 ²⁹ *Id.* at 7:8-12.

26 ³⁰ Tr. 224:2-17. Indeed, CenturyTel does not even know which of its customers are ISPs at any given moment,
such that it could segregate the traffic over separate facilities. *Id.* at 223:18-224:1.

³¹ Rebuttal Testimony of William P. Hunt, Exhibit No. 10, at 7:12-15.

³² Response to Level 3 Communications, LLC, Petition for Arbitration on behalf of CenturyTel of Washington
(filed Sept. 3, 2002).

1 proposed exclusions are vague, and would preclude the cautious, case-by-case consideration of
2 these services that the FCC has endorsed. It is neither necessary nor appropriate to decide such
3 issues in this arbitration. Level 3 also objects to the second sentence CenturyTel proposes to
4 include in the “local traffic” definition, in an apparent attack on foreign exchange-type traffic.³³
5 The parties have separately addressed the question of foreign exchange-type traffic is addressed
6 as a separate issue (Issue 3) in this arbitration, so this part will focus on the terms “Internet” and
7 “Internet Protocol based long distance telephony.” If the Commission rules for Level 3 as to
8 Issue 3, however, this second sentence CenturyTel proposes to add must also be rejected.
9

10 **1. ONE IS LEFT TO GUESS AT THE MEANING OF CENTURYTEL’S PROPOSED**
11 **EXCLUSIONS**

12 CenturyTel proposes to exclude from “local traffic” such things as “Information Access
13 Traffic,” “Internet Service Provider traffic,” “Internet,” and “Internet Protocol based long
14 distance telephony.”³⁴ Yet the parties, and the Commission (which might be called upon to
15 enforce this Agreement), are left to guess just what those exclusions cover. As Level 3 witness
16 Hunt explained:

17 Nothing in the Agreement would indicate what “Internet” might mean as
18 compared to “Internet Protocol based long distance telephony” as
19 compared to “Information Access” as compared to ISP-bound traffic.
20 Given the importance to both Parties of defining Local Traffic correctly, it
is difficult to understand how CT could expect Level 3 to accept undefined
terms.³⁵

21 The Panel should reject CenturyTel’s proposed exclusions on grounds of vagueness alone, and
22 avoid this invitation to future disputes.
23

24
25 ³³ See *id.* (proposing language stating that “[t]raffic to or from an end user not within CenturyTel’s local calling
area will be subject to access charges to the extent it does not constitute Information Access Traffic”).

26 ³⁴ Direct Testimony of William P. Hunt, Exhibit No. 7, at 14:8-16.

³⁵ *Id.* at 14:18-24.

1 **2. THE COMMISSION SHOULD CONSIDER THE REGULATORY STATUS OF THE ENUMERATED**
2 **SERVICES ON A CASE-BY-CASE BASIS, AS THE FCC HAS DETERMINED**

3 Although the exact meaning of CenturyTel's proposed language is unclear, CenturyTel's
4 intent is clear: to capture through excessively broad language any and all Voice-Over-the-
5 Internet or Voice-Over-Internet-Protocol ("VOI" or "VOIP") services without considering the
6 nature of each service. In fact, nothing in the record of this proceeding supports any specific
7 pronouncements about VOI or VOIP; CenturyTel did not even mention them in any of its
8 prefiled testimony or in the hearing.

9 The FCC, meanwhile, has advocated a much more precise, fact-specific approach to the
10 subject than would be possible in this proceeding. As Level 3 witness Hunt explained:

11 [T]he FCC has taken a very cautious approach to how it will identify and
12 regulate these different kinds of voice services, indicating that a case-by-
13 case analysis is a better means of deciding the issue than a broad statement
 imposing switched access charges.³⁶

14 The FCC expressly *declined* to make any determination about whether phone-to-phone Internet
15 Protocol telephony is a telecommunications service, cautioning that it is not appropriate to make
16 any definitive pronouncements in the absence of a complete record focused on individual service
17 offerings:

18 We defer a more definitive resolution of these issues pending the
19 development of a more fully-developed record because we recognize the
20 need, when dealing with emerging services and technologies in
21 environments as dynamic as today's Internet and telecommunications
 markets, to have as complete information and input as possible.³⁷

22 Given that carriers can provide a wide array of services that can be provided using packetized
23 voice technology, the regulator must consider whether or not its definition of the service

24
25

³⁶ Direct Testimony of William P. Hunt, Exhibit No. 7, at 15:11-15.

26 ³⁷ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11,501, 11,544 (1998)
 ("Report to Congress").

1 “accurately distinguishes between phone-to-phone and other forms of IP telephony,” to avoid
2 being “quickly overcome by changes in technology.”³⁸ As Level 3 witness Hunt explained,
3 “[a]ny characterization of an evolving service for regulatory purposes without a detailed analysis
4 would be futile and prejudicial to the provider’s interests.”³⁹ Mr. Hunt further noted that Level
5 3’s proposed language would allow the parties to address services at the time technology came of
6 age, addressing developing services on a case-by-case basis, as the FCC has proposed.⁴⁰

7
8 A review of CenturyTel’s proposed contract language makes clear that it would result in
9 the very kind of “factual determinations” about which CenturyTel witness Wesley Robinson had
10 warned in prefiled testimony filed several weeks ago in a Texas arbitration between CenturyTel
11 and Level 3.⁴¹ CenturyTel’s proposed contract language would frustrate a careful, service-by-
12 service, fact-based approach, and rush immediately—without any factual basis—to CenturyTel’s
13 desired result of excluding all Internet and IP services from the definition of “local traffic” and
14 imposing switched access regulation instead. Such generic issues should be resolved in a
15 rulemaking rather than in an adjudicatory proceeding designed to resolve the particularized
16 issues of this arbitration. The dispute-specific record in an expedited proceeding does not
17 provide this Commission with a proper basis for determining the regulatory scheme for an
18 entirely new category of services.
19

20 Moreover, the extension of any “rule” from this adjudicatory proceeding to other carriers
21 and persons that did not participate would raise discrimination and due process concerns.
22 Excluding certain kinds of traffic from the definition of “local traffic” here (and thereby perhaps
23

24 ³⁸ *Id.*

25 ³⁹ Direct Testimony of William P. Hunt, Exhibit No. 7, at 16: 7-8.

26 ⁴⁰ *Id.* at 16:15-18.

placing it within the category of exchange access traffic), without the benefit of a record that could be established in a generic proceeding open to all service providers—LECs, interexchange carriers, and Internet Protocol telephony providers—should not be allowed in an arbitration against a single carrier; if this issue is truly of concern to the Commission, it can address it in a generic proceeding devoted to this topic, or monitor and participate in the FCC’s consideration of this issue.⁴²

The classification of Internet-based services raises many issues with implications far beyond access charges.⁴³ As Level 3 witness Hunt explained:

What might be considered subject to access charges under CT’s definition could in fact come in many different flavors—such as a phone-to-phone, IP-enabled-phone-to-phone, computer-to-phone, phone-to-computer, or computer-to-computer transmission delivered to a World Wide Web address, an Internet Protocol address not on the World Wide Web, or a North American Numbering Plan number. Yet this proceeding does not permit the Commission to consider the host of other regulatory requirements that would be imposed on Internet Protocol telephony service providers based on a telecommunications classification.⁴⁴

If the Commission elects to consider these issues before the FCC completes its investigation, the Commission must at least examine all relevant issues in a proceeding open to all affected parties before determining that Internet Protocol telephony is a telecommunications service subject to access charges.

3. CENTURYTEL’S BROAD LANGUAGE WOULD LIKELY RESULT IN MISCLASSIFICATION OF TRAFFIC

⁴¹ See *id.* at 22:13-23:5 (describing the Texas testimony of CenturyTel witness Wesley Robinson, which warned that the Texas Public Utility Commission “could not make any factual determinations in this proceeding regarding the appropriate regulatory treatment of such services”).

⁴² Direct Testimony of William P. Hunt, Exhibit No. 7, at 22:8-12.

⁴³ See “Powell: Time to ‘Retool’ the FCC,” *ZDNet: eWEEK*, Mar. 29, 2001; Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session - WTPF (Mar. 7, 2001) (emphasis added) (“Ness Remarks”), included as Attachments 2 and 3 to Direct Testimony of William P. Hunt, Exhibit No. 7.

⁴⁴ Direct Testimony of William P. Hunt, Exhibit No. 7, at 18:23-19:9.

1 The Commission must also consider that CenturyTel's broad and vague language would
2 likely result in a misclassification of traffic. For example, while CenturyTel's definition would
3 exclude "Internet" from "local traffic," its applicability to a call that is placed through a
4 consumer's modem to a party located (either physically or by virtue of foreign exchange-type
5 service) in the same local calling area is uncertain at best. IP-related telephony is a broad and
6 varied category, yet CenturyTel does not explain why, for example, a call placed over an IP-
7 enabled cable modem to the florist down the street should be summarily excluded from the
8 category of "local traffic," as it apparently would be under CenturyTel's proposed definition.
9

10 The potential misclassification of hybrid services is particularly important because new
11 services carried over IP-based networks are likely to be hybrids, *e.g.*, voice service with the
12 "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or
13 making available information in the form of faxes, e-mails, voicemail, and video."⁴⁵ This
14 Commission should not hastily exclude such innovative services from a "local traffic" definition.
15 Bringing them under a "switched access" umbrella will prevent their development, and may end
16 up simply being wrong as a matter of law in light of facts that have yet to be examined.
17 CenturyTel's proposal, however, would simply mandate that regulatory treatment without further
18 consideration.
19

20 **4. THIS COMMISSION SHOULD CONTINUE TO FOLLOW THE FCC'S CAUTIOUS,**
21 **DELIBERATE APPROACH**

22 The FCC has had several opportunities to revisit the question of how IP-enabled services
23 should be regulated. In early 1999, Qwest (then U S West) requested that the FCC issue a
24 declaratory ruling that phone-to-phone IP telephony is subject to switched access charges.⁴⁶ The
25

26 ⁴⁵ *Id.* at 17:9-12.

⁴⁶ *Petition of U S West, Inc., for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed Apr. 5, 1999).

1 FCC has not taken *any* action on the Qwest filing whatsoever—the petition has sat on the shelf
2 for over three years, without so much as a public notice inviting comment. The FCC’s silence on
3 the Qwest petition—a request that largely mirrors the one put forth by CenturyTel here—
4 demonstrates precisely the cautious and restrained approach the FCC had advocated in the
5 *Report to Congress*.⁴⁷

6 While letting the Qwest petition sit, the FCC has clarified its “hands-off” stance with
7 respect to IP telephony in several other proceedings. For example, when the FCC consolidated a
8 number of worksheets carriers complete to support various federal programs, it removed
9 language that would have required carriers to report revenue from “calls handled using Internet
10 technology as well as calls handled using more traditional switched circuit techniques,”⁴⁸
11 explaining:
12

13 We note that the Commission, in the Report to Congress, specifically
14 decided to defer making pronouncements about the regulatory status of
15 various forms of IP telephony until the Commission develops a more
16 complete record on individual service offerings. We, accordingly, delete
language from the instructions that might appear to affect the
Commission’s existing treatment of Internet and IP telephony.⁴⁹

17 As Level 3 witness Hunt observed, the FCC referred to its “existing treatment of Internet and IP
18 telephony.”⁵⁰ That treatment is the exemption of Internet services and IP telephony services
19
20

21
22 ⁴⁷ Direct Testimony of William P. Hunt, Exhibit No. 7, at 19:21-20:6.

23 ⁴⁸ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with*
Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number
Portability, and Universal Service Support Mechanisms, Notice of Proposed Rulemaking & Notice of Inquiry,
13 FCC Rcd. 19,295, 19,366 (1998).

24 ⁴⁹ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with*
Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number
Portability, and Universal Service Support Mechanisms, Report & Order, 14 FCC Rcd. 16,602, 16,614 ¶ 22
25 (1999) (footnotes omitted).
26

⁵⁰ Direct Testimony of William P. Hunt, Exhibit No. 7, at 21:5-11.

1 from access charges, which continues today.⁵¹ The FCC, in its *Intercarrier Compensation*
2 *NPRM*, confirmed that IP telephony “is exempt from the access charges that traditional long-
3 distance carriers must pay.”⁵² The Commission should decline CenturyTel’s invitation to rush to
4 judgment here on these complex issues.

5 Level 3 therefore recommends that the Commission, like other state commissions that
6 have considered this issue,⁵³ defer any blanket judgment on the regulatory classification of
7 “Internet,” “Internet Protocol,” and like terms until it can develop a more complete record with
8 benefit of the FCC’s further examination of the issues. In fact, AT&T has filed a petition for
9 declaratory ruling at the FCC, requesting that the FCC consider the proper treatment of IP
10 telephony services now in light of how such services have been deployed over the past several
11 years.⁵⁴ The Commission should not rush to judgment on how all IP telephony and Internet
12 services are to be considered—it should certainly not find, as CenturyTel suggests, that all such
13
14

15 ⁵¹ See *id.*; see also Testimony of Chairman Patrick Wood, Texas Public Utility Commission, before the Texas
16 House of Representatives Committee on State Affairs, Subcommittee on Cable and Broadband, Transcript of
17 Proceedings, at 32-34 (May 2, 2000) (“The FCC has said that [Voice Over Internet] does not pay access
charges” at least until such time as a large percentage of “all the voice traffic in America [goes] over the
Internet.”).

18 ⁵² *In re Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd.
9610, 9657-58 ¶ 133 (2001) (“*Intercarrier Compensation NPRM*”).

19 ⁵³ See, e.g., *In re Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the*
20 *Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Communications, Inc.*,
Docket No. 00B-601T, Decision No. C01-312, Initial Commission Decision, (Colo. PUC Mar. 30, 2001);
21 *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West*
22 *Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 00B-
103T, Initial Commission Decision, Decision No. C00-858, at 8 (Colo. PUC, Mailed Aug. 7, 2000); *Petition of*
23 *BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia*
24 *Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P-55,
Sub 1178, Recommended Arbitration Order, 23-25 (N.C.U.C. June 13, 2000); *Petition of BellSouth*
25 *Telecommunications, Inc. for Arbitration of an Interconnection Agreement with Intermedia Communications,*
26 *Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 11644, Order, (Ga. P.S.C.
Sept. 28, 2000); *In re Investigation into appropriate methods to compensate carriers for exchange of traffic*
subject to Section 251 of the Telecommunications Act of 1996, Docket No. 000075-TP (Phases II and IIA),
Order on Reciprocal Compensation, at 36 (Fla. P.S.C. Sept. 10, 2002) (“*Florida Reciprocal Compensation*
Decision”).

⁵⁴ See *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from*
Access Charges, filed with the Federal Communications Commission on Oct. 18, 2002.

1 services are automatically excluded from the definition of “local traffic”—while this matter is
2 still being considered on a national policy level by the FCC.

3 **C. Issue 3: “Virtual NXX” Traffic Is the Functional Equivalent of Foreign Exchange**
4 **Traffic, and this Commission Should Therefore Reject CenturyTel’s Attempt to**
5 **Charge Level 3 for the Origination of Such Traffic**

6 Various terms have been used—such as “FX,” “FX-type” and “Virtual NXX”—to
7 describe the same basic functionality: the provision of local service to a customer in an
8 exchange where the customer has no physical presence. While the network technologies
9 employed may be different, as state commissions around the country have found,⁵⁵ all of these
10 services should be considered functional equivalents in terms of what they provide to customers.
11 For this reason and the reasons that follow, the Commission should therefore treat competitive
12 and incumbent LECs the same in the context of delivering these services to customers, and it
13 should decline to follow CenturyTel’s arguments that these services as provided by Level 3
14 justify different treatment—treatment that would result in unwarranted revenue flows to
15 CenturyTel.

16 *First*, § 51.703(b) of the FCC’s rules bars LECs from charging other LECs for costs
17 associated with the origination of “telecommunications traffic” as defined by the FCC. As ISP-
18 bound traffic is “telecommunications traffic,” the exceptions to the ban on origination charges—
19 for exchange access and information access—do not apply here. *Second*, virtual NXX and other
20 FX-like services—such as Level 3’s service—are functionally equivalent to incumbent LEC FX
21 services for intercarrier compensation purposes, and none of CenturyTel’s mistaken analogies
22 serves to distinguish Level 3’s service from other FX-type services, most critically CenturyTel’s
23 own FX and FX-type services. *Third*, the FCC and state arbitrators have found that the
24
25
26

1 appropriate compensation method for the exchange of ISP-bound traffic in the circumstances
2 presented here is bill-and-keep. *Fourth*, CenturyTel's attempt to impose originating access
3 charges on services that compete with incumbent LEC FX service would discriminate against
4 new competitors and penalize technical innovation. *Fifth*, CenturyTel's numbering arguments
5 are disingenuous and likewise discriminate against new competitors such as Level 3. Indeed,
6 CenturyTel admitted that it had not taken account of rate center consolidation or even
7 CenturyTel's own number utilization in considering numbering resource impacts.⁵⁶

8
9 **1. THE FCC'S BAN ON ORIGATION CHARGES APPLIES TO ISP-BOUND TRAFFIC
ORIGINATED BY CENTURYTEL'S CUSTOMERS**

10 The FCC's ban on origination charges applies to "telecommunications traffic," including
11 ISP-bound traffic, originated by CenturyTel's customers. Section 51.703(b) of the FCC's rules
12 provides that "[a] LEC may not assess charges on any other telecommunications carrier for
13 telecommunications traffic that originates on the LEC's network."⁵⁷ The FCC's rules define
14 "telecommunications traffic" as:
15

16 Telecommunications traffic exchanged between a LEC and a
17 telecommunications carrier other than a CMRS provider, except for
18 telecommunications traffic that is interstate or intrastate exchange access,
information access, or exchange services for such access (see [*ISP Order*
on Remand]).⁵⁸

19 The § 51.703(b) ban on origination charges ensures that the costs of facilities used to
20 deliver telecommunications traffic to the point of interconnection are borne by the originating
21 carrier as the originating carrier's network, and the originating carrier recovers the costs of those
22

23 ⁵⁵ See, e.g., *Revised Arbitration Award, Consolidated Complaints and Requests for Post-Interconnection Dispute*
24 *Resolution re Inter-Carrier Compensation for "FX-Type" Traffic Against Southwestern Bell Tel. Co.*, PUC
Docket No. 24015 (filed Aug. 28, 2002) ("*Texas Docket 24015 Revised Arbitration Award*"), at 30.

25 ⁵⁶ See Tr. 178:2-10; 183:24-185:16.

26 ⁵⁷ 47 C.F.R. § 51.703(b).

⁵⁸ *Id.* § 51.701(b)(1).

1 facilities through the rates it charges to its own customers for making calls.⁵⁹ CenturyTel, like
2 other LECs, provides connectivity to other network operators and charges a monthly fee to its
3 customers for doing so, recovering its costs and earning a profit. So CenturyTel's carriage of its
4 customers' traffic to the point of interconnection with Level 3 is not a case of Level 3 imposing
5 costs on CenturyTel to the sole benefit of Level 3. To the contrary, as the D.C. Circuit has noted,
6 the ban on origination charges ensures that LECs such as CenturyTel do not "game the system"
7 by forcing interconnecting carriers such as Level 3 to pay for dedicated facilities that LECs such
8 as CenturyTel could conveniently carry at their own expense.⁶⁰

10 CenturyTel has asserted that Level 3's ISP-bound traffic falls into either the exception for
11 "exchange access" or the exception for "information access." This argument is unavailing,
12 because it ignores that the D.C. Circuit has firmly rejected any characterization of ISP-bound
13 traffic as exchange access or information access. In *Bell Atlantic*, the D.C. Circuit explicitly
14 rejected the FCC's characterizations of ISP-bound traffic as exchange access or information
15 access, noting that ISP-bound traffic looks like a local exchange telecommunications service.⁶¹
16 And in *WorldCom*, the D.C. Circuit again rejected the FCC's argument that ISP-bound traffic
17 exchanged between LECs was information access subject to § 251(g) of the Act. *WorldCom*
18 considered whether any obligations *predating* the Telecommunications Act of 1996—coupled
19 with the authority to set interim rules under § 251(g)—could justify the FCC's setting of
20

22 ⁵⁹ See *Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc. and AT&T Communications of Virginia Inc.,*
23 *Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia*
24 *State Corporation Commission, Memorandum Opinion and Order*, CC Docket Nos. 00-218, 00-249 and 00-
25 251, DA 02-1731 at ¶ 52 (rel. Jul. 17, 2002) ("*Verizon Arbitration Order*") (stating that "to the extent an
26 incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal
compensation, the incumbent LEC is required to bear financial responsibility for that traffic").

25 ⁶⁰ *Qwest Corp. v. FCC*, 252 F.3d 462, 467 (2001).

26 ⁶¹ *Bell Atlantic*, 206 F.3d at 6 ("Calls to ISPs appear to fit [the definition of "telecommunications traffic"]: the
traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the
'called party.'").

1 intercarrier compensation rates for ISP-bound calls.⁶² Although § 251(g) refers to “information
2 access”—the only reference in the Act to “information access”—the court rejected the FCC’s
3 argument that the exchange of ISP-bound traffic between LECs was the provision of
4 “information access” by the originating LEC within the scope of § 251(g).⁶³ Although the
5 present arbitration does involve telecommunications traffic that may be ultimately delivered to
6 an ISP that is physically located outside of the caller’s local calling area via virtual NXX service,
7 such traffic is no different from an FX-type arrangement and, like CenturyTel’s FX services,
8 should be treated as telephone exchange service in applying the FCC’s rules.
9

10 **2. LEVEL 3’S SERVICE IS FUNCTIONALLY EQUIVALENT TO INCUMBENT LEC FX AND**
11 **FX-TYPE SERVICES, AND SHOULD BE TREATED IN A LIKE MANNER – I.E., NOT**
SUBJECT TO ACCESS CHARGES

12 Level 3’s service is functionally equivalent to incumbent LEC FX and FX-type services,
13 and therefore should be treated like incumbent LEC FX and FX-type services in applying the
14 FCC’s intercarrier compensation rules. In short, neither service should be subject to access
15 charges.
16

17 CenturyTel utterly fails to offer any principled basis to distinguish Level 3’s service from
18 the FX and FX-type services of incumbent LECs—including CenturyTel. There is no
19 meaningful difference between the use of the network to originate ISP-bound traffic over an
20 incumbent LEC FX service and the use of the network to originate ISP-bound traffic over Level
21 3’s VNXX service. Moreover, CenturyTel’s analogies of virtual NXX and other FX-type
22 services to 800 or “toll-free” services are mistaken, and seek only to circumvent the FCC’s ban
23 on origination charges. In fact, the FCC and the state commissions have long treated incumbent-
24

25 ⁶² See *WorldCom*, 288 F.3d at 433; Level 3 Consolidated Reply Brief and Memorandum of Law on Jurisdiction
26 (filed Oct. 15, 2002), at 15.

⁶³ See *WorldCom*, 288 F.3d at 434.

1 LEC FX and FX-type services as exchange services subject to the ban on origination charges and
2 exempt from access charges.⁶⁴ Indeed, the Arbitration Award issued earlier this week in the
3 Level 3-CenturyTel Wisconsin arbitration concluded that

4 [t]he CenturyTel proposals taken as a whole would impose originating
5 access charges on traffic that must be rated at bill-and-keep to conform to
6 the *ISP Order on Remand*. The CenturyTel proposals would also have the
7 undesirable effect of applying originating access charges to traffic
8 terminated by Level 3 while applying local service rates for similar traffic
9 terminated to CenturyTel's ISP affiliate.⁶⁵

10 Thus, Level 3's virtual NXX service is indistinguishable from FX service, and should be subject
11 to the same regulatory regime as FX service.

12 **a. Incumbent LEC FX and FX-Like Service and Competitive LEC FX or
13 Virtual NXX Service—Such as Level 3's—Provide the Same
14 Functionality**

15 In a Texas arbitration award announced in August, a panel of arbitrators determined that

16 [f]rom the perspective of FX customers, ILEC-provided FX service and
17 CLEC-provided FX-type service serve the same intended purpose. The
18 end user in the foreign exchange is able to avoid toll calls to the FX
19 customer and instead to place local calls to the FX customer physically
20 located in a different exchange. While the Arbitrators recognize that FX
21 and FX-type services are provisioned differently, due to differences
22 between ILEC and CLEC network architectures and local calling scopes,
the Arbitrators are not persuaded that the differences in provisioning
methods should mandate different classification and/or compensation.⁶⁶

23 Applying this analysis, the arbitrators concluded that SWBT's Virtual Point of Presence-Dial
24 Access Service ("VPOP-DAS") is "functionally identical" to FX service.⁶⁷ The arbitrators also

25 ⁶⁴ See *Texas Docket 24015 Revised Arbitration Award* at 31-32 (concluding that FX service, including the FX-
26 type service offered by competitive LECs, "is a retail service offering purchased by customers which allows
such customers to obtain exchange service from a mandatory local calling area (a.k.a. an exchange service area
or local calling area) other than the mandatory local calling area where the customer is physically located").

⁶⁵ *Wisconsin Arbitration Award* at 22.

⁶⁶ *Texas Docket 24015 Revised Arbitration Award* at 30.

⁶⁷ See *id.* at 35.

1 noted that incumbent LECs have never considered their own FX service as exchange access nor
2 subject to access charges.⁶⁸

3 At the hearing, Level 3 witness Gates further described incumbent LEC FX-type service
4 as offering functionality identical to that of Level 3's service, noting that it seems specifically
5 targeted to Level 3's prospective ISP customers:

6 Now Level 3 I suppose could offer an 800 service, but that's not what
7 these ISPs want. They want a local dial-up service, and [Level 3's
8 proposed service] is a competitive response to that demand, very similar to
9 foreign exchange service or IPRS, which is Internet protocol routing
10 service, a Verizon service, or Omnipresence, or Qwest's wholesale dial
11 service. All of these services provide the same functionality for these
12 ISPs, a local dial-up presence in an exchange where they do not have a
13 physical presence.⁶⁹

14 Level 3's proposed service provides the same functionality as incumbent LEC FX-type
15 services, which are treated as local exchange services for classification and reciprocal
16 compensation purposes. Level 3 intends to assign to its ISP customer a number or numbers from
17 an exchange where it is authorized to provide service. The ISP will then make these numbers
18 available to its customers so that they can connect to the Internet with a local call. Each call will
19 be routed to the appropriate CenturyTel central office based on the LERG instructions associated

20 ⁶⁸ *Id.* at 34-35. CenturyTel claims that Level 3's proposed service is not analogous to the virtual NXX services
21 approved by the Texas arbitrators, but rather to a rejected AT&T proposal. *See* Reply Testimony of R. Craig
22 Cook, Exhibit No. 18, at 27:7-9. This argument is without merit. AT&T did not propose any specific kind of
23 service in that Texas case, but rather it proposed a *policy* to govern intercarrier compensation arising from the
24 exchange of FX and FX-like traffic. Specifically, AT&T had proposed "to use the rate center to which an NPA-
25 NXX is assigned to rate calls for [reciprocal] compensation purposes." *Texas Docket 24015 Revised*
26 *Arbitration Award* at 36. The arbitrators rejected this proposal because they feared that AT&T and other
carriers could dramatically increase the amount of reciprocal compensation paid to them by an incumbent LEC
by "assign[ing] NPA-NXXs to customers geographically outside of the mandatory local calling area, yet
reap[ing] reciprocal compensation on such calls even though such calls did not originate and terminate within
the mandatory local calling area." *Id.* The FCC's *ISP Order on Remand* fully addressed this "regulatory
arbitrage" concern, bringing the effective compensation rate for ISP-bound traffic to zero for new entrants such
as Level 3 in order to eliminate the incentive. Moreover, in contrast to the AT&T policy proposal in Texas,
Level 3 has never sought per-minute, terminating reciprocal compensation from CenturyTel. Instead, Level 3
proposes interconnection on a "bill-and-keep" basis consistent with the *ISP Order on Remand*.

⁶⁹ Tr. 100:1-10.

1 with the number, and then directed to Level 3 for completion.⁷⁰ The ISP may or may not have a
2 physical presence in the exchange area.⁷¹ If not, Level 3 will provide the ISP customer a virtual
3 presence in the local calling area.⁷²

4 *This is exactly the functionality CenturyTel provides its own FX service customers. As*
5 *CenturyTel witness Weinman acknowledged at the hearing, CenturyTel's FX service "allow[s] a*
6 *business to receive calls from callers who are not located within the business' local calling area*
7 *but in a manner where the caller would not incur toll charges for placing the call."*⁷³ Both
8 *CenturyTel's and Level 3's services give a customer physically located in one exchange a*
9 *telephone number in another exchange. As Level 3 witness Gates noted, ISPs will not market*
10 *their service except in areas where they have local numbers.*⁷⁴

12 Moreover, CenturyTel's own tariffed Remote Call Forwarding service provides similar
13 functionality.⁷⁵ The bottom line is that Level 3's service is in no manner unprecedented or
14 unique. Incumbent LECs, including CenturyTel itself, have offered this functionality for many
15 years,⁷⁶ and as Level 3 witness Gates also pointed out, CenturyTel does not currently apply
16 access charges to FX-like service.⁷⁷ CenturyTel has no way of knowing when these calls are
17 made because they are locally dialed,⁷⁸ and CenturyTel has admitted that it does not ask other
18
19
20

21 ⁷⁰ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 11:1-6.

22 ⁷¹ Tr. 44:18-22.

23 ⁷² Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 11:14-17.

24 ⁷³ Tr. 226:2-7.

25 ⁷⁴ *Id.* at 69:18-21, 70:4-8.

26 ⁷⁵ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 15:14-17.

⁷⁶ *Id.* at 17:4.

⁷⁷ Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 38:1-11.

⁷⁸ Tr. 227:4-228:1.

1 incumbent LECs for the physical location of their customers.⁷⁹ Thus, Qwest could very well be
2 providing FX or FX-type service in Qwest local calling areas that have extended area service
3 (“EAS”) arrangements with bordering CenturyTel exchanges, and CenturyTel would never know
4 it.⁸⁰ Moreover, even though CenturyTel argues here that it is entitled to originating
5 compensation on all calls going to another carrier’s FX or FX-type customer, in cases where
6 CenturyTel itself offers FX service entirely within its own territory (without any “joint
7 provider”), it does not pay originating access charges to Qwest for EAS calls placed by Qwest
8 customers to the “open end” of those CenturyTel FX customers.⁸¹
9

10 If this Arbitrator were to grant CenturyTel’s unwarranted request for access charges, the
11 resulting discrimination against competitive LEC service offerings would also penalize
12 innovative network architectures and limit consumer choice. FX-like services provided by
13 incumbent LECs and competitive LECs alike permit business customers to serve more of their
14 customers without establishing a physical presence in every local calling area.⁸² From a
15 consumer perspective, this allows cheaper and easier access to businesses—consumers will
16 rarely dial a toll call to talk to a business about its products, or to connect with the Internet.
17 Instead, they select providers who can offer local dialing.⁸³ And Level 3 has designed a service
18 where customer location is less important than it may have been in a circuit switched
19 environment—although even Washington incumbent LECs themselves offer virtual NXX-type
20 services (and plain old FX service) that render customer location less important than it might
21 have been forty years ago.
22

23
24 ⁷⁹ *Id.* at 233:23-224:6.

25 ⁸⁰ *Id.*; *see also* Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 10:14-11:5.

26 ⁸¹ Tr. 236:14-21.

⁸² *Id.* at 117:4-8; 226:2-8.

⁸³ *Id.* at 100:1-10.

1 American consumers and businesses—including those in Washington—increasingly rely
2 on the Internet to manage investments, communications, education and training, research for
3 work and school, and for general information and connectivity. Because of the frequent and
4 regular access to the Internet, local flat-rate calling for access to the Internet is essential. And the
5 FCC has consistently recognized the need to encourage the ubiquitous availability of the Internet
6 to consumers and businesses, and for that reason has exempted enhanced service providers
7 (“ESPs”) from access charges.⁸⁴ For these reasons, as Level 3 witness Gates explained—and as
8 CenturyTel’s ISP affiliate’s own use of 14,000 local dial-up numbers to support national and
9 global roaming by its customers helps to demonstrate⁸⁵—local dialing is the industry standard for
10 ISPs.⁸⁶

11
12 **b. Level 3’s Service Is Distinct from 800 and Toll-Free Services**

13 Level 3’s service is distinct from 800 and toll-free services. CenturyTel’s mistaken
14 analogy of virtual NXX and other FX-type services to 800 or “toll-free” services serves only to
15 circumvent the FCC’s ban on origination charges.

16 Numerous other state commissions and arbitrators have rejected the analogy of virtual
17 NXX and other FX-type services to 800 and “toll-free” services, including the arbitrators who
18 issued the *Wisconsin Arbitration Award* between Level 3 and CenturyTel earlier this week:
19

20 Generally, toll-free calls are dialed on a ten-digit basis, generate a billing
21 record, route through an access tandem and are carried by the terminating
22 end user’s presubscribed long distance carrier. All of these elements of a
23 toll-free call contribute to the cost of the call. Level 3’s network proposal
24 would use none of these routing and billing arrangements. Thus, it is not

25 ⁸⁴ *ISP Order*, 14 FCC Rcd. at 3702-03 ¶ 20.

26 ⁸⁵ Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 36:26-37:4.

⁸⁶ Tr. 100:1-10.

1 the case that the Level 3 network proposal fails to compensate CenturyTel
2 for an interexchange access service it is providing.⁸⁷

3 As Level 3 witness Gates explained, Level 3's services differs greatly from 800 and "toll-
4 free" services, which are dialed as other toll calls are dialed. Toll-free service may originate in
5 thousands of exchanges rather than just one exchange. Toll-free service is routed to an access
6 tandem for additional routing and billing instructions. Toll-free service requires a database dip
7 and number conversion. And extensive call detail is available for toll-free service. By contrast,
8 virtual NXX and other FX-type services lack each and all of these characteristics. Instead,
9 virtual NXX and other FX-type services are dialed, routed, and billed like other *local* calls.⁸⁸
10 Consistent with the state-commission decisions cited above, this Commission should therefore
11 reject CenturyTel's mistaken 800/"toll-free" analogy.
12

13 **c. CenturyTel's Other Arguments Distinguishing Virtual NXX Services**
14 **from Traditional FX Services Demonstrate that No Principled Basis for**
15 **Distinction Exists**

16 CenturyTel's other arguments distinguishing virtual NXX services from traditional FX
17 services are mistaken.
18
19

20 ⁸⁷ *Wisconsin Arbitration Award* at 20 (citation omitted); *see also Florida Reciprocal Compensation Decision* at 28
21 (concluding that "virtual NXX is a competitive response to FX service, which has been offered in the market by
22 ILECs for years"); *Petition of Level 3 Communications, LLC for Arbitration with BellSouth*
23 *Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the*
24 *Telecommunications Act of 1996*, Case No. 2000-404, Order (Ky. PSC Mar. 14, 2001) at 7 ("Both utilities offer
25 a local telephone number to a person residing outside the local calling area. BellSouth's service is called
26 foreign exchange ("FX") service and Level 3's service is called virtual NXX service."); *Texas Docket 24015*
Revised Arbitration Award at 37 (noting that toll-free service is distinct from virtual NXX service because,
unlike virtual NXX or FX service, toll-free service "allows end users to place calls that would otherwise incur
toll charges to an 8YY customer from any location outside of the terminating 8YY customer's mandatory local
calling area without incurring such toll charges"); Direct Testimony of William P. Hunt, Exhibit No. 7, at
26:12-18 (citing *September 2001 New York Order* at 4) ("[F]oreign exchange service should not be defined by
'call completion technology,' but rather foreign exchange service should be defined 'operationally, i.e, making
local service possible in an exchange where the customer has no physical presence.'") (emphases added).

⁸⁸ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 23:20-27:2.

1 First, CenturyTel argues that FX service is “typically” two-way in nature.⁸⁹ But a
2 CenturyTel customer is not precluded from purchasing CenturyTel’s FX service for one-way
3 use. Indeed, CenturyTel witness Cook acknowledged that “just the majority” of CenturyTel’s
4 FX service may be two-way, and that a “minority” may use it for one-way service.⁹⁰ He also
5 indicated that he had reviewed no data and no studies to confirm that the usage was in fact two-
6 way in most cases.⁹¹ And CenturyTel’s speculation about the two-way nature of FX service is
7 also contrary to specific findings by other state arbitrators that “FX service can also be used by
8 an FX customer to make outbound calls but the service is primarily characterized by high
9 volumes of in-bound calling.”⁹² The hypothetical capability to use FX for two-way calling
10 therefore provides no principled basis for distinguishing the one-way use of FX to deliver ISP-
11 bound traffic from the one-way use of virtual NXX to deliver ISP-bound traffic.
12

13 Second, CenturyTel asserts that Level 3’s service must be distinguished from traditional
14 FX service because the latter requires provisioning of a dedicated circuit between the home
15 exchange and the foreign exchange.⁹³ This argument proceeds from a flawed premise and would
16 result in bad policy. Competitors should not be required to mirror incumbent LEC networks or
17 the manner in which services are provisioned from a technical perspective. As Mr. Gates
18 explained, “technology-specific rulings” would in the end “only deter investment and innovation
19 by rewarding those who observe the status quo.”⁹⁴ Even CenturyTel witness Cook admitted at
20
21

22 ⁸⁹ Direct Testimony of William H. Weinman, Exhibit No. 24, at 13.

23 ⁹⁰ Tr. 174:7-175:12.

24 ⁹¹ *Id.* at 174:18-22.

25 ⁹² *Texas Docket 24015 Revised Arbitration Award* at 56 n.289.

26 ⁹³ Direct Testimony of William H. Weinman, Exhibit No. 24, at 23.

⁹⁴ Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 19:4-20; *see also Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates (N.Y.P.S.C. Sept. 7, 2001),

1 the hearing—in contrast to his prefiled testimony on this same issue—that a carrier’s use of a
2 common facility versus a dedicated facility between the foreign exchange and the home
3 exchange should not matter in determining whether a service is FX or not.⁹⁵ Indeed, Level 3’s
4 architecture reduces costs through greater efficiency, which in turn allows ISPs to offer local
5 dial-up service in a broader geographic area.

6 *Third*, CenturyTel has implied that because Level 3 might offer services to ISP customers
7 with modem banks physically located in remote sites, Level 3’s service might differ from
8 traditional incumbent LEC FX services. Of course, at this pre-service stage, Level 3 has no idea
9 who all of its customers might be, nor where they are located.⁹⁶ But more importantly, the
10 possibility that a competitive LEC might offer its FX-like service on a wider geographic scope
11 than the incumbent LECs have in the past does not justify discriminating against the competitive
12 LEC’s service.⁹⁷ Competitive LECs do not operate within the confines of incumbent serving
13 areas or using incumbent LEC network architectures. Indeed, the statutory term “exchange” is
14 itself ambiguous in the context of modern networks and calling plans. The term harkens back to
15 the era of switchboard operators connecting phones, and is nothing more than an increasingly
16 outdated regulatory construct.
17
18

20 2001 N.Y. PUC LEXIS 696 (“*September 2001 New York Order*”), at 5 (adopting technology-neutral regulations
21 that consider the functionality delivered to consumers, and noting that regulators should not require competitive
22 LECs to duplicate outmoded incumbent LEC systems); *Florida Reciprocal Compensation Decision* at 28
(holding that “the question of regulation “should not hinge upon how carriers provision/route virtual NXX/FX
traffic, or upon the retail services purchased by end users.”).

23 ⁹⁵ Tr. 209:21-210:6 (“Q: Well assume that rather than have the customer having a dedicated line all the way out to
24 the Level 3 switch in Ocosta [the foreign exchange], the FX customer in Seattle having a dedicated line all the
25 way . . . to the Level 3 switch in Ocosta, the calls that the customer places or receives with respect to Ocosta
where it has a foreign exchange number ride over a common transport facility. Does that change your analysis
of whether this customer is buying foreign exchange service from Level 3? A: I don’t believe so.”); *see also id.*
at 206:25-207:12.

26 ⁹⁶ *Id.* at 161:5-8.

⁹⁷ Level 3’s service is not as widespread as CenturyTel’s rhetoric implies. *See* Tr. 102:2-13.

Moreover, any FX call is going to involve transport across a calling area boundary and a modification to what otherwise might have been the local calling structure. Mr. Weinman admitted that CenturyTel offers FX service that transcends local calling area boundaries.⁹⁸ Level 3's service, then, is in fact no different than an incumbent LEC who might offer FX or virtual NXX service to one of its own customers for one or more exchanges in a LATA, or another competitive LEC who might sell its own customers FX-type service for multiple exchanges. All of these services give customers the ability to establish virtual presences by obtaining telephone numbers in one or more exchanges in which they do not maintain a physical presence, and nothing prevents an interested customer from seeking to purchase such services from any incumbent or competitive LEC for multiple exchanges if desired.

Finally, the Commission should note that all traffic at issue in this proceeding would be ISP-bound in nature,⁹⁹ and that the FCC has expressly noted that a focus on the location of the modem banks to determine jurisdiction would be an odd result: "Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists."¹⁰⁰ CenturyTel fails entirely to justify such a distinction—except as a "heads I win, tails you lose" proposition. Thus, as discussed further below, all ISP-bound traffic exchanged between the parties should be considered subject to the compensation regime established by the FCC in its *ISP Order on Remand*.

3. CENTURYTEL INCURS NO ADDITIONAL INCREMENTAL COST FOR ORIGINATING LEVEL 3 VIRTUAL NXX TRAFFIC THAN FOR ORIGINATING ITS OWN FX TRAFFIC

CenturyTel's attempt to impose originating access charges on services that compete with incumbent-LEC FX service would also discriminate against new competitors and penalize

⁹⁸ *Id.* at 226:2-8.

⁹⁹ Tr. 133:20-21.

1 technical innovation, because CenturyTel lacks a cost justification for collecting such charges
2 when it does not impose or collect such charges from FX traffic bound for other incumbent
3 LECs.¹⁰¹

4 *First*, because all calls originating from a given area will flow through the same point of
5 interconnection, CenturyTel simply incurs *no* additional cost when its end-user places a call to an
6 ISP served by Level 3 that has a virtual presence in the rate center versus a Level 3 customer
7 who is physically located in the rate center.¹⁰² Indeed, the only impact on CenturyTel's costs of
8 carrying these ISP-bound calls is to *reduce* CenturyTel's costs, because CenturyTel avoids the
9 use (and corresponding cost) of its own network to terminate the calls and has no obligation to
10 compensate the party—Level 3—whose network will provide the terminating functions.
11 CenturyTel's customers are already compensating the company for carrying their ISP-bound
12 calls, in the form of CenturyTel local rates.¹⁰³ CenturyTel consumers should not be deprived of
13 these additional competitive choices for local access to an ISP because CenturyTel is looking for
14 an access charge windfall.
15

16 *Second*, even though CenturyTel seeks to collect access charges from Level 3,
17 CenturyTel presently exchanges FX and FX-like traffic with neighboring incumbent LECs
18 without collecting access charges. For example, at the hearing, Mr. Weinman discussed an
19 example involving a CenturyTel customer in Ocosta and a Qwest customer in Aberdeen.¹⁰⁴
20 These two exchanges can call one another on an EAS basis, and the carriers exchange traffic on a
21
22
23

24 ¹⁰⁰ *ISP Order on Remand*, 16 FCC Rcd. at 9178-79 ¶ 59.

25 ¹⁰¹ *See* Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 41:9-21.

26 ¹⁰² Tr. 187:22-188:2.

¹⁰³ *Id.* at 112:7-11.

¹⁰⁴ *Id.* at 232:22-236:23.

1 bill-and-keep basis.¹⁰⁵ Mr. Weinman acknowledged that in that case, the call would go over the
2 EAS trunk groups between Ocosta and Aberdeen.¹⁰⁶ But when asked how CenturyTel would
3 react if a Qwest customer physically located in Seattle purchased FX service in the Aberdeen
4 exchange from Qwest, Mr. Weinman indicated that CenturyTel would have no way of knowing
5 whether the Qwest customer was physically located in Seattle, because CenturyTel has never
6 asked Qwest for the physical location of its customers or to identify FX customers.¹⁰⁷ Mr.
7 Weinman also admitted that CenturyTel has never consulted with Qwest about imposing
8 originating access charges on Qwest.¹⁰⁸ Thus, in the case of ISP-bound traffic, the location of
9 Level 3's ISP customer's modem banks either in the same exchange or three exchanges away or
10 in Seattle should not matter for purposes of determining whether a FX call is to be treated as
11 local or toll.¹⁰⁹

13 *Third*, CenturyTel does not pay access charges to other incumbent LECs for its own FX
14 and FX-type services. Under the reverse scenario from the one described above, CenturyTel
15 would not, according to Mr. Weinman, pay originating access charges to Qwest.¹¹⁰ Thus,
16 CenturyTel is targeting FX-like services offered by competitors such as Level 3 for
17 discriminatory treatment, even as it treats its own FX services as local and does not pay or
18 receive originating access from Qwest in the exchange of this kind of traffic.¹¹¹ In fact,
19 CenturyTel's own ISP operation touts the availability of 14,000 local dial-up telephone numbers
20

21
22 ¹⁰⁵ *Id.* at 232:4-9.

23 ¹⁰⁶ *Id.*

24 ¹⁰⁷ *Id.* at 233:22-234:6.

25 ¹⁰⁸ *Id.*

26 ¹⁰⁹ *See* Direct Testimony of William P. Hunt, Exhibit No. 7, at 32:1-33:7.

¹¹⁰ Tr. 236:14-21.

¹¹¹ Although CenturyTel claims that it might reexamine the way in which it hands off FX traffic with other incumbent LECs, *see id.* at 236:24-237:15, there is no proof to substantiate this ad hoc speculation.

1 for its customers to use to access the Internet when they travel.¹¹² Recognizing these facts, the
2 arbitrators in the Wisconsin dispute between CenturyTel and Level 3 observed that “[t]he
3 CenturyTel Internet access service is similar in purpose, jurisdiction and operation to that
4 proposed by Level 3. The two services should be rated the same.”¹¹³

5 *Fourth*, CenturyTel is not entitled to collect access charges or some other level of retail
6 compensation for “sharing” in the provision of FX-type services. While in a monopoly
7 environment, it is true that CenturyTel would be assisting *all* retail customers in the completion
8 of calls and would therefore be entitled to retail revenues, CenturyTel fails to grasp that another
9 provider can provide a complete retail solution for customers in a competitive environment. As
10 Mr. Gates explained during the hearing, in the exchange of FX-type traffic between CenturyTel
11 customer and Level 3 customers, Level 3 would be responsible for carrying traffic originated by
12 CenturyTel end users from the point of interconnection in the CenturyTel local exchange back to
13 the Level 3 switch. Mr. Gates explained that Level 3 would be providing all aspects of the FX-
14 like service—it would be providing the open end, it would be providing the FX number out of its
15 Seattle switch, and it would be willing and able to provide transport from the POI back to the
16 Level 3 switch.¹¹⁴ These calls would go from the CenturyTel end office in Forks for routing to
17 the POI—just like any other local call, whether the call was going to the local Domino’s, an aunt
18 across the street, or the local school.¹¹⁵ Mr. Gates also testified that CenturyTel would be
19 compensated for originating these calls via the local rates paid by the CenturyTel consumers who
20 placed the calls.¹¹⁶

21
22
23
24 ¹¹² Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 36:26-37:4.

25 ¹¹³ *Wisconsin Arbitration Award* at 22 (citations omitted).

26 ¹¹⁴ Tr. 87:11-25.

¹¹⁵ *Id.* at 97:21-98:9.

¹¹⁶ *Id.* at 97:3-8.

1 **4. THE FCC HAS DETERMINED THAT BILL-AND-KEEP IS THE APPROPRIATE**
2 **COMPENSATION METHOD FOR ISP-BOUND TRAFFIC**

3 The FCC has determined conclusively that bill-and-keep is the appropriate compensation
4 method for ISP-bound traffic.¹¹⁷ And as noted in part IV.A above, CenturyTel may not split off
5 ISP-bound traffic into a separate agreement in order to collect more advantageous charges for
6 ISP-bound traffic.

7 The FCC and the courts have determined on several occasions that ISP-bound traffic is
8 largely, but not exclusively, interstate in nature.¹¹⁸ Consequently, the physical location of an ISP
9 simply does not matter in determining the intercarrier compensation mechanism that applies to
10 an ISP-bound call. As the FCC recognized:

11 Most Internet-bound traffic traveling between a LEC's subscriber and an
12 ISP is indisputably interstate in nature when viewed on an end-to-end
13 basis. . . . The "communication" taking place is between the dial-up
14 customer and the global computer network of web content, e-mail authors,
game room participants, databases, or bulletin board contributors.¹¹⁹

15 The location of the ISP's modem banks is irrelevant to what Level 3 and CenturyTel pay each
16 other for exchanging traffic. The FCC has determined that the exchange of traffic between
17 CenturyTel and new entrants like Level 3 is subject to "bill-and-keep" compensation, with
18 neither the originating carrier nor the terminating carrier entitled to seek further compensation
19 from the other.¹²⁰ CenturyTel, however, is asking the Arbitrator to ignore the FCC's findings.
20 For example, CenturyTel witness Weinman testified that so long as a call originates in a local
21

22
23
24 ¹¹⁷ See *ISP Order on Remand*, 16 FCC Rcd. at 9179 ¶ 59.

25 ¹¹⁸ See, e.g., *Bell Atlantic*, 206 F.3d at 5 (noting that Internet-related traffic is "not quite local" and "not quite long
distance").

26 ¹¹⁹ *ISP Order on Remand*, 16 FCC Rcd. at 9178-79 ¶¶ 58, 59.

¹²⁰ *Id.* at 9153 n.6 ¶ 2, 9187 ¶ 78, and 9188-89 ¶ 81.

1 calling area and is terminated to a modem bank in the same local calling area, regardless of
2 where the call is ultimately transmitted by the ISP, CenturyTel regards the call as local.¹²¹

3 The FCC did *not* limit this treatment to ISPs physically located in the local calling area.
4 As noted above, the FCC considered the physical location of the modem banks irrelevant, and
5 for good reason. As Mr. Hunt explained:

6 [I]t would be illogical to conclude that traffic destined for an ISP
7 physically located in the local calling area is interstate in nature (because it
8 goes onto the Internet) and therefore subject to bill-and-keep, while
9 concluding that traffic destined for an ISP located *farther away* is
10 intrastate in nature (regardless of the fact that the call also goes onto the
11 Internet) and therefore is subject to originating access charges. Focusing
upon the modem bank locations to determine intercarrier compensation
would be contrary to the very reasoning by which the FCC found this
traffic to be interstate in the first instance.¹²²

12 The vast majority of states to consider this specific question in the wake of the *ISP Order*
13 *on Remand* have reached the same conclusions—that the FCC has taken jurisdiction over the
14 setting of intercarrier compensation rates for ISP-bound traffic and that the FCC’s decision and
15 the compensation structure it established applies to “all ISP-bound traffic, whether provisioned
16 via an FX/FX-type arrangement or not.”¹²³ As the Wisconsin arbitrators observed, “CenturyTel
17
18
19

20 ¹²¹ Direct Testimony of William H. Weinman, Exhibit No. 24, at 8-9.

21 ¹²² Direct Testimony of William P. Hunt, Exhibit No. 7, at 32:23-33:7.

22 ¹²³ *Texas Docket 24015 Revised Arbitration Award* at 31 (“[A]ll ISP-bound traffic, whether provisioned via an
23 FX/FX-type arrangement or not, is subject to the compensation mechanism contained in the FCC’s *ISP Order*
24 *on Remand*.”); *Allegiance Telecom of Ohio, Inc.’s Petition for Arbitration of Interconnection Rates, Terms, and*
25 *Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award,
26 2001 Ohio PUC LEXIS 712, at 9 (Oct. 4, 2001); *Petition of Global NAPs, Inc. for Arbitration of*
Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of
Ohio d/b/a Sprint, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB, 2002 Ohio PUC LEXIS 426 (May 9, 2002);
DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange
Service Facilities, Dkt. No. 01-01-29, 2002 Conn. PUC LEXIS 21, at 41-42 (Jan. 30, 2002); *TDS Metrocom,*
Inc., Case No. U-12952, Opinion and Order, 2001 Mich. PSC LEXIS 332 (Mich. P.S.C. Sept. 7, 2001); *Florida*
Reciprocal Compensation Decision at 26; *Essex Telecom, Inc. v. Gallatin River Communications, L.L.C.*,
Docket No. 01-0427, Order, 2002 Ill. PUC LEXIS 703, at 8 (Ill. C. C. July 24, 2002).

1 will not lose revenue to which it is entitled. Rather, Level 3 proposes to interconnect with
2 CenturyTel in a manner that is both feasible and consistent with state and federal law.”¹²⁴

3 Mr. Gates also described a recent arbitration in which the FCC’s Wireline Competition
4 Bureau considered whether calls to FX numbers would be entitled to reciprocal compensation or
5 whether access charges should apply. In that proceeding, Verizon made many of the same argu-
6 ments that CenturyTel makes here, principally, that intercarrier compensation should be based on
7 the actual originating and terminating endpoints of the call and that originating access should be
8 paid where a call originates in one calling area and terminates in a different area, even if the
9 NPA/NXX of the called party is associated with the same local calling area as the NPA/NXX of
10 the calling party. The Wireline Competition Bureau rejected Verizon’s arguments entirely,
11 stating:
12

13 We agree with the petitioners that Verizon has offered no viable
14 alternative to the current system, under which carriers rate calls by
15 comparing the originating and terminating NPA-NXX codes. We
16 therefore accept the petitioners’ proposed language and reject Verizon’s
17 language that would rate calls according to their geographical end points.
18 Verizon concedes that NPA-NXX rating is the established compensation
19 mechanism not only for itself, but industry-wide. The parties all agree that
20 rating calls by their geographical starting and ending points raises billing
21 and technical issues that have no concrete, workable solutions at this
22 time.¹²⁵

23
24
25 ISP-bound traffic should simply not be subjected to originating access charges as CenturyTel
26 would choose to do through its proposed versions of Art. II, Sec. 1.58, and Art. V, Sec. 3.2 of the
Interconnection Agreement.

¹²⁴ *Wisconsin Arbitration Award* at 21.

¹²⁵ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 35:21-36:6 (quoting *Verizon Arbitration Order* at ¶ 286).

1 **5. CENTURYTEL'S NUMBERING ARGUMENTS ARE DISINGENUOUS AND INVITE**
2 **DISCRIMINATION AGAINST NEW COMPETITORS.**

3 CenturyTel's numbering arguments are disingenuous and invite discrimination against
4 new competitors. Level 3's use of numbers complies in all respect with industry numbering
5 guidelines, and CenturyTel's vague assertions of impropriety are baseless and an attempt to
6 discriminate against a new competitor. Moreover, CenturyTel's claims are inconsistent with its
7 own numbering practices.

8 Contrary to CenturyTel's suggestions,¹²⁶ there is no prohibition against the assignment of
9 a number from one rate center to a customer physically located in a different rate center.¹²⁷
10 Indeed, that is precisely how FX service is designed to work. The record shows that Level 3
11 abides by national numbering guidelines,¹²⁸ and that Level 3 has made great strides in number
12 conservation, as Level 3 witness Hunt described:

13 Level 3 has also worked over the past several years to develop a local
14 number portability ("LNP") solution for softswitch networks when no
15 solution was commercially available, thereby allowing us to participate in
16 number pooling conservation efforts.¹²⁹

17 *Any* carrier providing *any* local service—traditional FX service, virtual NXX service, or plain old
18 local service—must obtain numbers in every rate center in which a customer asks for service.
19 Indeed, if Level 3 were (inefficiently) to locate modem banks in every rate center, it would need
20 the same amount of numbers as it uses today to provide its FX-type service. To provide service
21 in a rate center, a competitive LEC generally has no choice but to obtain a block of 10,000
22

23 ¹²⁶ Direct Testimony of R. Craig Cook, Exhibit No. 12, at 8:14-18.

24 ¹²⁷ Rebuttal Testimony of William P. Hunt, Exhibit No. 10, at 21:3-22:2.

25 ¹²⁸ *Id.*; *see also* Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 28:4-29:2.

26 ¹²⁹ Rebuttal Testimony of William P. Hunt, Exhibit No. 10, at 25:12-16. Mr. Hunt also explained how Level 3
 assigns numbers from the first 1000 block with no utilization of new blocks until at least 75% of the current
 block is assigned, to ensure that other thousand blocks are preserved for number pooling efforts. *Id.* at 25:17-
 23.

1 numbers, although Level 3 participates in number pooling and obtains blocks of only 1000
2 numbers where possible.¹³⁰ And within that framework, Level 3 has complied with industry
3 numbering guidelines.¹³¹

4 CenturyTel's vague and unsupported claims of numbering-resource abuses by Level 3 are
5 also inconsistent with use of numbering resources by CenturyTel and other incumbent LECs.
6 CenturyTel itself holds assignments of 10,000 number blocks for exchanges that may have far
7 fewer lines. For example, throughout Washington, CenturyTel is only using about 21 percent of
8 the numbers it has been allocated.¹³² And the numbering guidelines attached to Mr. Cook's
9 Direct Testimony provide that "[r]esource conservation, in and of itself, should not inhibit or
10 otherwise impede, the ability to obtain NXXs."¹³³

12 The numbering rules by which incumbent and competitive LECs alike must abide—
13 rather than any one carrier's service offerings or service area—result in misallocations of
14 numbering resources. Thus, CenturyTel's numbering resources arguments are irrelevant to this
15 arbitration, and certainly should not be invoked to disadvantage new entrants.

16
17 **D. ISSUE 4: BILL-AND-KEEP COMPENSATION, DEFINED IN ACCORD WITH THE ISP**
18 **ORDER ON REMAND, SHOULD APPLY TO ISP-BOUND TRAFFIC**

19 Level 3 has proposed using the definition of "bill and keep" as used in the most recent
20 decision with respect to this issue—footnote 6 of the FCC's *ISP Order on Remand*. CenturyTel
21
22

23 ¹³⁰ Tr. 148:13-149:10.

24 ¹³¹ See *Wisconsin Arbitration Award* at 22 ("Level 3 has complied with ... the number conservation program now
25 in effect. Level 3 is not required to do more.").

26 ¹³² *Id.* at 185:6-9.

¹³³ Direct Testimony of R. Craig Cook Attachment RCC-3 at § 3.8, Exhibit No. 14 (Central Office Code Assignment Guidelines).

1 would limit bill-and-keep to ISP-bound traffic terminating to a modem bank physically located in
2 the same local calling area as the dialing customer.¹³⁴

3 CenturyTel's position seems to be based upon the same arguments that it presents with
4 respect to Issue 3—that the FCC's *ISP Order on Remand* only governs the exchange of ISP-
5 bound traffic where the ISP is in the local calling area, and that therefore the "bill and keep"
6 mechanism under that order is inapplicable to the exchange of foreign exchange-type ISP-bound
7 traffic with Level 3. CenturyTel's position is without merit for the reasons discussed above
8 under Issue 3: It is absurd for CenturyTel to argue that the location of the ISP modem banks do
9 not matter for reciprocal compensation and jurisdictional purposes, but to then argue that
10 CenturyTel's own compensation should be determined based upon the location of those same
11 modem banks; second, CenturyTel's position ignores the fact that the FCC has determined that
12 the jurisdictional nature of this traffic depends upon the Internet as the destination of the traffic
13 rather than where the modem banks fall into place before that.¹³⁵

15 If the parties' Interconnection Agreement is going to have a definition of "bill and keep"
16 in it for any reason, it would make sense to look to the FCC's definition, regardless of whether it
17 ultimately applies to the exchange of ISP-bound traffic between the parties or not.
18
19
20
21
22
23
24
25

26 ¹³⁴ Direct Testimony of William P. Hunt, Exhibit No. 7, at 32:1-23.

¹³⁵ *Id.* at 32:1-33:7.

V. CONCLUSION

For the reasons discussed above, in Level 3's Petitions and testimony, and in Level 3's briefs on jurisdiction, Level 3 urges the Arbitrator to adopt in its arbitration award Level 3's proposed language for Issues One, Two, Three, and Four.

Respectfully submitted,

LEVEL 3 COMMUNICATIONS, LLC

By: _____

Michael R. Romano
Director, State Regulatory Affairs
LEVEL 3 COMMUNICATIONS, LLC
8270 Greensboro Drive, Suite 900
McLean, Virginia 22102
+1 571 382 7447 tel
+1 571 382 7450 fax

Rogelio E. Peña
PEÑA & ASSOCIATES, LLC
1919 14th Street, Suite 330
Boulder, Colorado 80302
+1 303 415 0409 tel
+1 303 415 0433 fax

John T. Nakahata
Kent D. Bressie
Michael G. Grable
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036-2560
+1 202 730 1320 tel
+1 202 730 1301 fax

COUNSEL FOR LEVEL 3 COMMUNICATIONS, LLC

6 December 2002

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

Carole Washburn
Executive Secretary
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

Dennis J. Moss
Arbitrator
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

And I hereby certify that a true and correct copy of same has been served via electronic mail and FedEx Priority Overnight on this 6th day of December, 2002, properly addressed to the following:

<p>Calvin K. Simshaw Assoc. General Counsel - Regulatory CENTURYTEL OF WASHINGTON, INC. 805 Broadway Vancouver, WA 98660 <i>COUNSEL FOR CENTURYTEL OF WASHINGTON, INC.</i></p>	<p>Karen Brinkmann Tonya Rutherford LATHAM & WATKINS 555 11th Street, N.W. Washington, D.C. 20004-1304 <i>COUNSEL FOR CENTURYTEL OF WASHINGTON, INC.</i></p>
---	---

GRETCHEN ELIZABETH EOFF
INDUSTRY SPECIALIST, ATER WYNNE LLP