BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

AMICUS BRIEF OF WITA AND VERIZON

The Washington Independent Telephone Association ("WITA") and Verizon Northwest Inc. (Verizon) submit this amicus brief to address a fundamental mistake of law in the Arbitrator's Report and Order dated January 2, 2003 ("the Order"). Specifically, the Order concludes that the FCC's *ISP Order on Remand*[1] requires all ISP-bound traffic to be subject to bill and keep, including ISP-bound calls that are *interexchange*, such as those using virtual NXX ("V-NXX") arrangements. This conclusion is simply wrong – the *ISP Order on Remand* contains no such requirement; to the contrary, it says precisely the opposite. The FCC in the *ISP Order on Remand* made clear that its new rate regime for traffic to the Internet did not displace pre-existing interstate and intrastate access regimes. Neither Level 3 nor any other CLEC should be

[1] In the Matter of Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order (Rel. Apr. 27, 2001) [hereinafter *ISP Order on Remand]*.

permitted to bypass otherwise-applicable access charges for interexchange calls simply because Level 3's customer is an ISP. Accordingly, Verizon and WITA respectfully request that the Commission reverse the Arbitrator's decision on this point.

I. Background

Level 3 Communications ("Level 3") filed a petition for arbitration against CenturyTel, claiming that when it uses V-NXX arrangements to connect CenturyTel's customers to its Internet Service Provider customers ("ISPs"), the parties must employ a "bill and keep" compensation arrangement. The term V-NXX refers to the situation in which a carrier assigns telephone numbers to customers who are not located in the local calling area associated with the NXX codes, and perhaps not even in the same state. These V-NXX numbers are used so that the CLECs' out-of-area customers can receive calls that will be rated as local to the calling party (and thus are toll-free), even though they are in fact interexchange.[2] Essentially, these V-NXX products are substitutes for 1-800 services.[3] Thus, as CenturyTel explained, Level 3 must pay intrastate or interstate access charges for such calls because they are interexchange.

The facts are not in dispute. Indeed, the Arbitrator's Order expressly acknowledges that V-NXX calls cross exchange boundaries: "[W]hen a CenturyTel customer dials a seven-digit telephone number, using so-called virtual NXX capability, to connect to the customer's ISP[,] Level 3 routes the call over its network to the ISP's

[2] "[I]nterexchange" calls are calls that do not originiate and terminate in the same Commission-defined local calling area.

[3] V-NXX arrangements have been more attractive to CLECs than 1-800 or other toll-free calling products because V-NXX calls are not automatically recognized as interexchange by the originating carrier's switch; the number ordinarily cannot be distinguished from a local number unless the CLEC carrier that has assigned the V-NXX number provides that information. As a result, V-NXX numbers have been used as a scheme to avoid paying compensation to the underlying carriers (usually the ILEC, but potentially other CLECs) whose networks are being used to originate and haul the traffic.

modem bank *that may be physically located in another exchange or even in another state.*"[4]

Notwithstanding the fact that the V-NXX traffic is interexchange traffic, the Arbitrator concluded that intrastate access charges do not apply because the FCC's *ISP Order on Remand* preempts Washington's intrastate access charge regime: "The *ISP Order on Remand* takes from the Arbitrator's hands any decision regarding the appropriate compensation mechanism for the exchange of ISP-bound traffic. Bill-and-keep is what the FCC's order requires, at least on an interim basis."[5] As we explain below, the Arbitrator is wrong because the *ISP Order on Remand* expressly *preserves* existing intrastate access charge regimes.

II. Argument

The Arbitrator's Order ignores a key paragraph in the *ISP Order on Remand*; specifically, paragraph 39 makes clear that existing interstate and intrastate access charge regimes apply to *all* traffic, including ISP-bound traffic:

> Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g). These services thus remain subject to Commission jurisdiction under Section 201 (or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions) . . . . *This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic*. (emphasis added)

The FCC echoed this principle in other sections of its order. For example, in paragraph 37, the FCC explained that the reciprocal compensation provisions in §

[4] Order at 7, para. 18 (emphasis added).
[5] *Id*. at 15, para. 37.

251(b)(5) of the Act – which specifically include bill and keep – do *not* apply to ILEC access services, and that Congress "did not intend to disrupt these pre-existing [access] relationships." And, in the following paragraph, the FCC summarized the Eighth Circuit's decision in *Competitive Telecommunications Ass'n v. FCC*, where the court held that "LECs will continue to provide exchange access . . . for long-distance service, and continue to receive payment, under pre-Act regulations and rates."[6] Thus, the FCC makes clear in its *ISP Order on Remand* that state commissions continue to have authority to impose access charges on intrastate interexchange calls where they had that authority before, including in the case of Internet-bound calls.

A simple hypothetical best illustrates how the FCC's order is intended to operate when an end-user calls an ISP located in a different exchange. Suppose a CenturyTel residential customer in Forks, Washington calls an ISP served by Level 3 in Seattle. Absent a V-NXX arrangement, here's what happens: (1) The customer makes a "1+" toll call; (2) CenturyTel carries the call from the end-user to the end-user's preferred interexchange carrier (IXC), the IXC carries the call to Level 3, and Level 3 carries the call to the ISP; and (3) The end-user pays its IXC for the toll call, the IXC pays originating access to CenturyTel, and the IXC pays terminating access to Level 3.

This is the way all such calls are handled today, and nothing in the FCC's *ISP Order on Remand* changes this access arrangement; in fact, as noted above, the order expressly *preserves* this arrangement. The Arbitrator's Order, however, leads to the

[6] 117 F.3d 1068, 1073 (8th Cir. 1997). Furthermore, the FCC left intact paragraph 1035 of its *Local Competition Order*, which preserves state authority to establish local calling areas and to assess access charges on calls that cross exchange boundaries. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order at ¶ 1035, CC Docket Nos. 96-98 and 95-185 (Rel. Aug. 8, 1996).

illogical conclusion that intrastate access charges no longer apply to the "1+" toll call described above because it is "ISP-bound." Indeed, under the Arbitrator's reasoning, a call from an end-user in Washington State to an ISP in Texas would not be subject to *interstate* access charges. (We do not believe the Arbitrator intended such a result, but that is where his reasoning leads.)

Now let's apply our hypothetical to the instant case: the *same* customer is calling the *same* ISP, i.e., the customer is making the same call, but Level 3 has disguised the "1+" toll call as a local call through the use of a V-NXX arrangement. Should Level 3 be allowed to bypass originating access charges simply by assigning telephone numbers in this manner? Of course not. Nothing in the *ISP Order on Remand* permits this regulatory arbitrage, and the Commission should not allow it. Indeed, the principal purpose of the FCC's *ISP Order on Remand* is to *prohibit* CLECs from engaging in regulatory arbitrage with respect to locally-rated ISP-bound calls.[7] Ironically, the Arbitrator's Order allows CLECs to engage in a different – but equally damaging – form of arbitrage. As CenturyTel explained in its brief, the purpose of the V-NXX arrangement is to trick the originating carrier's network into treating what are really interexchange calls as "local," while at the same time the originating carrier's network is being used to haul the traffic without compensation. Put simply, CenturyTel does the work for free and the CLEC gets all the benefit. This is not what the FCC intended.

Finally, the Arbitrator's reasoning also runs afoul of paragraph 87 of the *ISP Order on Remand*. There, the FCC explained that its order "is fully consistent with the

[7] *ISP Order on Remand* ¶ 6 (recognizing that ILEC reciprocal compensation payments to CLECs created a "substantial opportunity for regulatory arbitrage").

manner in which the [FCC] has directed ILECs to recover the costs of serving ISPs" in the FCC's *ESP Exemption Order*.[8] Under that order, the FCC affirmed its earlier policy of allowing enhanced service providers ("ESPs"), of which ISPs are a subset, to pay ILECs local business line rates from intrastate tariffs in lieu of interstate access charges.[9] Thus, if the ISP is located in the same exchange as its customer, the call is treated as a "local" call and no toll or access charges are assessed, even though a call to the Internet through an ISP is actually an interstate call. But if the ISP is located in a different exchange, the call is treated like any other interexchange call, i.e., toll and access charges are assessed. Our analysis is consistent with the *ESP Exemption Order*; the Arbitrator's is not.

In sum, the *ISP Order on Remand* did two things: it set up a bill and keep compensation scheme for "locally rated" ISP calls, i.e., calls that originate and are delivered to an ISP modem in the same local calling area, and it reaffirmed the application of existing intrastate and interstate access charge regimes to all other ISP-bound traffic. In this way, the FCC addressed the regulatory arbitrage associated with reciprocal compensation payments where the ISP is in the *same* local calling area as the calling party, but preserved existing intrastate and interstate access charge regimes where the ISP is located in a *different* local calling area. The Arbitrator's Order must be revised to reflect these principles.[10]

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[8] Amendments of Part 69 of the Commission's rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631 (1988) [hereinafter *ESP Exemption Order*].

[9] *Id*. at 2635, n.8.

[10] The *ISP Order on Remand* remains binding even though the D.C. Circuit remanded it back to the FCC in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Moreover, nothing in the court's decision changes the intrastate access regime at issue here; indeed, as CenturyTel explained in its brief, the court's decision makes clear that the FCC's order addresses only those calls made to ISPs that are "located within the caller's local calling area." 288 F.3d at 429.

A recent decision by the Massachusetts commission is directly on point. There, Global NAPs, Inc. ("GNAPs") filed a petition for arbitration against Verizon seeking a declaration that GNAPs was not required to pay Verizon access charges when it used V-NXX service to deliver Internet-bound calls. GNAPs argued that the *ISP Order on Remand* "changed everything" regarding inter-carrier compensation and the distinctions between local and toll traffic.[11] GNAPs also argued that it "plays a major role in providing local dial-up access for Massachusetts ISPs, and if GNAPs was not permitted to offer its customers locally-rated calls, through the use of V-NXX, hundreds of thousands of residences and small businesses would lose access to dial-up internet access until their ISPs migrate to another carrier."[12]

The Massachusetts commission rejected GNAPs' argument, holding that the *ISP Order on Remand* did not change or preempt the commission's findings regarding local calling areas. The commission explained that the FCC's order "explicitly recognized that intrastate access regimes in place prior to the Act remain unchanged until further state commission action" and "continues to recognize that calls that travel to points beyond the local exchange are access calls."[13]

Moreover, in response to GNAPs' argument that its customers would suffer if GNAPs were required to pay access charges, the commission found that GNAPs' ability to serve ISPs –

> is the result of merely shifting transport costs to other LECs and of billing reciprocal compensation for calls that are properly rated as toll. . . . GNAPs' VNXX would

[11] Petition of Global NAPS, Inc. for arbitration with Verizon Massachusetts, D.T.E. 02-45, Final Order at 29 (Mass. Dep't of Telecommunications and Energy).
[12] *Id*. at 34.
[13] *Id*. at 29.

> artificially shield GNAPs from the true cost of offering the service and will give GNAPs an economic incentive to deploy as few new facilities as possible.[14]

(A copy of the Massachusetts order is attached.)

An administrative law judge in Vermont reached this same conclusion in a GNAPs/Verizon arbitration. The judge rejected GNAPs' claim that the ISP Order on Remand required all ISP-bound traffic to be subject to bill and keep, holding that the FCC's order "focused on calls to ISPs within a local calling area for which the terminating party would otherwise receive reciprocal compensation payments," and that the order did *not* apply to ISP-bound traffic that originates outside this area.[15] The judge noted that under GNAP's logic, the CLEC "could declare the entire nation to be its local calling area" and thereby eliminate all access and toll charges.[16]

These decisions are directly no point: here, as there, a CLEC is attempting to engage in regulatory arbitrage by using V-NXX arrangements to bypass access charges. The Commission should not permit this.

III. Relief Requested

The Arbitrator's Order must be reversed, because it misreads the FCC's *ISP Order on Remand*, and it allows CLECs to bypass intrastate access charges through the use of V-NXX schemes. Alternatively, the Commission should abate this proceeding until it completes its recently opened docket to develop an interpretive or policy statement relating to the use of V-NXX (Docket No. UT-021569). Written comments are

[14] *Id*. at 41.
[15] Petition of Global NAPS, Inc. for Arbitration with Verizon Vermont, Docket No. 6742, Arbitrator's Order at 22-23 (Vermont Public Service Board Oct. 25, 2002).
[16] *Id*. at 23, n.43.

due in that docket by January 31, 2003, and a workshop is scheduled for February 18. The principal issue in that docket – carriers' use of V-NXX arrangements – is similar (if not identical) to the issues presented here. For example, in this docket, Level 3 made various arguments comparing its V-NXX scheme to FX service. The Arbitrator did not rely on these arguments in rendering his decision, and therefore Verizon and WITA do not address them. These arguments are, however, wrong, and this subject is likely to be addressed in the generic V-NXX docket.

Respectfully submitted,

THE WASHINGTON INDEPENDENT
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