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September 16, 2002

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

Re: In Re Petition for Arbitration of an Interconnection Agreement
between Level 3 Communications, LLC and CenturyTel of
Washington, Inc. - Docket No. UT-023043 - Petition to Intervene

Dear Ms. Washburn:

Enclosed you will find the original and nineteen copies of the above-referenced Petition to Intervene. This Petition is filed for the Washington Independent Telephone Association. The Petition seeks to allow WITA to intervene on a limited issue -- the handling of VNXX.

A copy of this Petition has been sent to counsel for Level 3 Communications, LLC and counsel for CenturyTel of Washington, Inc.

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COMMISSION

Thank you for your attention to this matter.

Sincerely,



RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: Administrative Law Judge Dennis Moss
Rogelio Pena for Level 3 Communications, Inc.
Cal Simshaw for CenturyTel of Washington, Inc.
Clients (via e-mail)

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3 **BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION**
4 **COMMISSION**

5 In the matter of the Petition for) Docket No. UT-023043
6 Arbitration of an Interconnection)
7 Agreement between)
8 LEVEL 3 COMMUNICATIONS, LLC and) Washington Independent
CENTURYTEL OF WASHINGTON, INC.) Telephone Association
9 Pursuant to 47 U.S.C. § 252) Petition to Intervene
in Arbitration)
_____)

10
11 **INTRODUCTION**

12 COMES NOW the Washington Independent Telephone
13 Association ("WITA"), by and through its attorney of
14 record, Richard A. Finnigan, attorney at law, and files
15 with the Washington Utilities and Transportation Commission
16 (the "Commission") this Petition to Intervene in the
17 Arbitration proceeding between Level 3 Communications, Inc.
18 ("Level 3") and CenturyTel of Washington, Inc.
19 ("CenturyTel"). This document shall be referred to herein
20 as the "Petition to Intervene," and the Petition for
21 Arbitration of an Interconnection Agreement filed by Level
22 3 shall be referred to as the "Petition for Arbitration."
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FACTS

WITA is an association composed of individual incumbent local exchange carriers ("ILECs") operating in the state of Washington. Level 3 is a competitive local exchange carrier ("CLEC"). Under Section 252 of the Telecommunications Act of 1996 (the "Act"), a CLEC is entitled to seek an interconnection agreement via negotiation, mediation or arbitration from certain ILECs. On August 7, 2002, Level 3 filed its Petition for Arbitration seeking the Commission's help via arbitration in securing an interconnection agreement with CenturyTel, one of WITA's members.

Level 3 originally filed a request for mediation with the Commission that involved CenturyTel as well as Ellensburg Telephone Company ("Ellensburg"), YCOM Networks, Inc. ("YCOM"), Lewis River Telephone Company ("Lewis River") and Inland Telephone Company ("Inland"). The ILECs¹ responded, pointing out, in part, that Level 3 had not filed a proper request to trigger Section 252 of the Act, and even if a proper request were to be filed, the ILECs,

¹ Here, ILECs refers to Ellensburg, YCOM, Lewis River and Inland.

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1 as rural telephone companies under the Act, are exempt from
2 the requirements of Section 251(c), which incorporates
3 negotiation and arbitration provisions of Section 252. The
4 Commission declined the mediation request. Level 3
5 subsequently chose to only pursue its efforts to obtain an
6 interconnection agreement with CenturyTel.
7

8 One of the matters Level 3 has identified in its
9 Petition for Arbitration as an unresolved issue between it
10 and CenturyTel is the method by which the parties will
11 handle Virtual NXX ("VNXX") traffic.² See, Petition for
12 Arbitration, at 7. Recognizing this as an issue of
13 compelling public importance, WITA, on behalf of its
14 members, had earlier sought a declaratory ruling from the
15 Commission concerning how VNXX traffic should be handled.
16 See, In re the Petition of WITA for a Declaratory Order on
17 the Use of Virtual NPA/NXX Calling Patterns, Order
18 Declining to Enter Declaratory Order, Docket No. UT-020667,
19 ¶ 2, at 1 ("Commission Order"). This declaratory ruling
20 was sought before Level 3 filed its Petition for
21 Arbitration in this case. The Commission, however,
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26 ² In other states' decisions, this traffic is sometimes referred to as
27 virtual Foreign Exchange traffic.
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1 declined to issue a declaratory ruling. See, Commission
2 Order, at 8. However, the Commission recognized that this
3 is an issue of public importance. See, Commission Order,
4 ¶20, at 7.
5

6 The final resolution of the VNXX issue will likely
7 have a significant impact on Ellensburg, YCOM, Lewis River,
8 Inland and all other ILECs in Washington, including other
9 WITA members. Because this is an important issue of
10 general concern, it should not be resolved in an
11 arbitration proceeding which is generally designed to
12 resolve a specific contract issue between only two parties.
13

14 Several states have addressed this issue with
15 differing and often totally contradictory outcomes. The
16 Federal Communications Commission ("FCC") has not yet
17 issued a decisive ruling on this topic. Given the impact
18 this issue will have on the citizens of Washington and on
19 WITA's members, as well as the contradictory rulings issued
20 in other jurisdictions, this is an issue of compelling
21 public interest.
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ARGUMENT

The Commission's general policy on intervention is that:

The Commission interprets the Act as contemplating that arbitrations involve only the parties to the negotiation. Others may ask to participate but will be allowed to do so only upon a showing of compelling public interest.

See, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration and Approval of Agreements under the Telecommunications Act of 1996, Docket No. UT-960269 (June 28, 1996) (emphasis added) (the "Policy Statement"). The standard, therefore, for demonstrating that a party should be entitled to intervene in an arbitration proceeding such as this one, is to demonstrate some "compelling public interest."

WITA has found only one previous case has been decided by the Commission involving this "compelling public interest" standard. See, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated, et al., Order on Sprint's Petition

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1 to Intervene and to Establish Generic Pricing Proceedings,
2 Docket Nos. UT-960307, UT-960309, UT-960310, UT-960323, UT-
3 960326 and UT-960332 (Oct. 23, 1996) (the "Sprint
4 Intervention Order"). In the Sprint Intervention Order,
5 Sprint sought to intervene "for the limited purpose of
6 urging initiation of a generic proceeding." See, Sprint
7 Intervention Order, at 5. The Commission interpreted
8 Sprint's Motion as a request to establish a generic pricing
9 proceeding, rather than a motion to intervene in all of the
10 proceedings of the arbitration. See, Sprint Intervention
11 Order, at 5.
12
13

14 Because the Commission decided to accept Sprint's
15 suggested procedure, it saw no need to grant any further
16 involvement to Sprint, and therefore denied the Petition
17 for Intervention. See, Sprint Intervention Order, at 10.
18 In reality, however, the Commission's denial had the same
19 effect as granting the Petition for Intervention because
20 the Commission adopted Sprint's desired relief. Thus, it
21 is not without precedence for a party to be allowed to
22 intervene in an arbitration proceeding before the
23 Commission.
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2 The central issue in the Commission's determination of
3 whether to grant WITA's Petition for Intervention is
4 whether the previously undecided issue of handling VNXX
5 traffic is a matter of "compelling public interest." The
6 term "compelling public interest" has been used in other
7 contexts that lend weight to the position that this VNXX
8 issue is, in fact, of compelling public interest.
9

10 For example, in In Re Detention of G.V., 124 Wn.2d
11 288, 297, 877 P.2d 680 (1994), the Supreme Court evaluated
12 whether involuntary treatment of a sex offender was
13 authorized under a compelling public interest standard.
14 The standard called for an evaluation of whether the
15 detainee would be a harm to himself or the "public."
16 Obviously, the detainee could not be a harm to every
17 citizen of the state of Washington. Thus, a compelling
18 public interest need not affect the entire public, only a
19 segment of it.
20

21 A compelling public interest need not be one involving
22 life or death situations. For example, in Seattle v.
23 Larkin, 10 Wn. App. 205, 516 P.2d 1083 (1973), the Court
24 found a compelling public interest in a Seattle ordinance
25 outlawing hitchhiking. In United States v. Chalk, 441 F.2d
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2 1277 (4th Cir. 1971), the court upheld an ordinance
3 authorizing a curfew to curtail "civil disorder" as a
4 compelling public interest.

5 The issue of VNXX traffic is both "compelling" and of
6 "public interest." The Commission's final decision on this
7 issue will directly affect how WITA's members treat VNXX
8 traffic for routing and rating purposes. It will affect
9 how the public switched network is constructed and who
10 bears the cost for the traffic travelling that network.
11 Currently, the use of VNXX arrangements allows CLECs to use
12 the public switched network at the expense of ILECs,
13 shifting the cost of building and reinforcing the network
14 to the ILECs without compensation from the CLECs.
15

16
17 It is also important to note that if this matter were
18 brought before a court instead of the Commission under CR
19 24(a), WITA would be entitled to intervene as a matter of
20 "right." Under CR 24, WITA:

21
22 claims an interest relating to the property or
23 transaction which is the subject of the action
24 and [it] is so situated that the disposition of
25 the action may as a practical matter impair or
26 impede [it's members'] ability to protect that
27 interest
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1 CR 24(a). In Dioxin/Organochlorine v. Department of
2 Ecology, 119 Wn.2d 761, 837 P.2d 1007 (1992), an
3 organization representing members interested in the
4 enforcement of certain ecological rules were allowed to
5 intervene as a matter of right under CR 24(a), even though
6 other similar organizations were already parties to the
7 suit.
8

9
10 Level 3 may claim that WITA and its members do not
11 have an interest that is "so situated that the disposition
12 of the action may as a practical matter impair or impede"
13 their interests. This argument is disingenuous unless Level
14 3 is willing to commit to refrain from using any decision
15 in this docket concerning VNXX as binding precedent for
16 future disputes with WITA's members involving VNXX.
17 Without such a commitment, it is clear that WITA's members
18 have a very real and immediate interest in the outcome of
19 this issue.³ Such an argument should also be dismissed in
20 light of Level 3's position that a declaratory ruling was
21 not the proper method to handle the VNXX issue because all
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26 ³ Even if Level 3 were willing to make such a commitment, the Commission
27 surely is not willing to continuously relitigate this issue.

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1 parties affected would not be included in the declaratory
2 ruling.⁴ See, Commission Order, ¶¶ 13-18, at 4-5.

3
4 Even with a commitment from Level 3, the WITA members
5 could be bound by the Commission's decision on how to
6 handle VNXX traffic due to the principle of *stare decisis*.
7 See, McClaskey v. United States Department of Energy, 720
8 F.2d 583, 587 (9th Cir. 1983) ("[G]enerally, an agency must
9 follow its own precedent or explain its reasons for
10 refusing to do so in a particular case."); Vergeyle v.
11 Employment Security Department, 28 Wn. App. 399, 404, 623
12 P.2d 736 (1981) ("[A]gencies may not 'treat similar
13 situations in dissimilar ways.'"), quoting, Jones v.
14 Califano, 576 F.2d 12, 20 (2nd Cir. 1978). As a result,
15 WITA, on behalf of its members, should be entitled to
16 intervene in the Petition for Arbitration on this limited
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23 ⁴ This "backdoor" approach is also unfair in light of the fact that the
24 Commission Order gave the parties thirty (30) days to agree on the
25 proper procedural vehicle to resolve these issues. See, Commission
26 Order, at 9. That thirty-day time limit expires on September 20, 2002.
27 Instead of attempting to deal with VNXX issues in a manner agreeable to
28 all interested parties, as recommended by Level 3 at the hearing on
WITA's Petition for Declaratory Ruling, Level 3 has chosen to attempt
to bypass the Commission's direction by pursuing a private arbitration
proceeding.

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1 issue of how VNXX traffic should be handled.
2

3 Finally, in light of whether WITA should be allowed to
4 intervene in this arbitration, it cannot be overemphasized
5 that WITA seeks only to intervene on the limited and
6 singular issue of how VNXX traffic should be handled
7 between ILECs and CLECs. Of the fifteen unresolved issues
8 listed on pages six and seven of Level 3's Petition for
9 Arbitration, the only one WITA wishes to address is the
10 VNXX issue. WITA is willing to abide by any restriction
11 the Commission may impose upon its full participation in
12 the arbitration proceeding as long as it is allowed to
13 fully address the legitimate concerns associated with
14 treating VNXX traffic for routing and rating purposes.
15
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18 CONCLUSION

19 The issue of how to bill for VNXX traffic is of
20 compelling public interest. WITA does not seek to
21 intervene on any issue identified in Level 3's Petition for
22 Arbitration other than this issue involving VNXX traffic.
23 Under these limited circumstances, and given the compelling
24 public interest, the Commission should grant
25 WITA's Petition for Intervention.
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2 In the alternative, the Commission should give force
3 to its direction in the Commission Order by addressing the
4 VNXX issue in a broader proceeding.⁵ See, generally, Sprint
5 Intervention Order. If it must address the VNXX issue in
6 this proceeding, WITA respectfully requests that the
7 Commission hold that its decision in the arbitration is
8 interim and subject to revision once the Commission makes a
9 final decision in a more generic proceeding.
10

11
12 DATED this 16th day of September, 2002.

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15 

16 RICHARD A. FINNIGAN, WSBA #6443
17 Attorney for the Washington
18 Independent Telephone Association
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26 ⁵ Such a broader proceeding might be a complaint case, in which
27 interested parties are given the opportunity to intervene, or a
28 Commission-initiated investigation.

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