

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

**ANSWER AND OPPOSITION OF LEVEL 3 COMMUNICATIONS, LLC,
TO PETITION FOR REVIEW OF CENTURYTEL OF WASHINGTON, INC.**

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
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036-2560
+1 202 730 1337 tel
+1 202 730 1301 fax

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Counsel for Level 3 Communications, LLC

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Level 3 Communications, LLC (“Level 3”), urges this Commission to adopt the report and decision of the arbitrator in this proceeding and to deny the petition for administrative review filed by CenturyTel of Washington, Inc. (“CenturyTel”).¹ Consistent with the relevant provisions of the Communications Act of 1934, as amended (“the Act”), implementing decisions and regulations, court decisions, and the factual record developed in this proceeding, the arbitrator properly adopted Level 3’s proposed interconnection agreement language with respect to the four outstanding issues in this arbitration. CenturyTel’s petition simply repeats the same mistaken arguments rejected by the arbitrator as inconsistent with federal law and unsupported by the factual record; it also re-argues positions soundly rejected by the Commission itself regarding the Commission’s jurisdiction and authority. This Commission should deny

¹ See Arbitrator’s Report and Decision, Fifth Supplemental Order, WUTC Docket No. UT-023043 (Jan. 2, 2003) (“Arbitrator’s Report and Decision”); CenturyTel’s Petition for Commission Review of Arbitrator’s Report and Decision, WUTC Docket No. UT-023043 (Jan. 21, 2003) (“CenturyTel Petition for Review”); WAC 480-09-780(4).

CenturyTel's petition for the same reasons. To do otherwise would allow CenturyTel to inflate the costs of Level 3 and its ISP customers by collecting access charges, in effect forcing Level 3 to become CenturyTel's customer rather than its competitor while depriving this Commission of the ability to ensure the availability of competitive ISP services in Washington, particularly Washington's rural areas.

Level 3 has sought interconnection with CenturyTel (as a rural telephone company) under Sections 251(a) and (b) for purposes of exchanging calls placed by CenturyTel's end-user customers to Level 3's end-user Internet service provider ("ISP") customers. Level 3 is not seeking any payment from CenturyTel for calls originated by CenturyTel's customers to reach Level 3's customers. In particular, Level 3 has not sought to be paid per-minute, terminating reciprocal compensation from CenturyTel pursuant to Section 251(b)(5) of the Act.

Functionally, Level 3 will provide the same service to ISPs as CenturyTel does, carrying traffic between local service customers and ISPs who purchase local service or foreign-exchange ("FX") service from CenturyTel itself. In fact, Level 3 would compete directly with CenturyTel's own thriving ISP business—one which pays no access charges and therefore need not pass through any such charges to CenturyTel's ISP customers. Moreover, Level 3 seeks to compete by using a more efficient network architecture that need not rely on having a physical presence in every calling area—unlike the legacy facilities of incumbent LECs.

This Commission properly found that it had jurisdiction to arbitrate the interconnection dispute between Level 3 and CenturyTel. To do otherwise, as CenturyTel urged, would have perpetrated a regulatory anomaly by splitting jurisdiction over connectivity to ISPs—allowing state-commission jurisdiction over CenturyTel's own ISP-bound traffic while precluding state jurisdiction over ISP-bound traffic that originates with a CenturyTel customer and is transported

and terminated by Level 3. The Commission's prior decision to take jurisdiction in this matter has also been validated by an intervening Federal Communications Commission ("FCC") decision, in which the FCC made clear that state commissions are still the appropriate entities to resolve disputes involving interconnection for the exchange of ISP-bound traffic.² For these reasons, the Commission should also reaffirm its prior jurisdictional findings and dismiss CenturyTel's latest attempt to deprive this Commission of jurisdiction over the instant dispute.

In this opposition, Level 3 makes three points. *First*, the arbitrator correctly concluded that ISP-bound traffic is not subject to separate interconnection requirements under federal law. The FCC prohibits carriers from discriminating against ISP-bound traffic by attempting to collect more advantageous charges for such traffic, and it has also noted expressly that even if terminating compensation rates were modified in its Order on Remand, ISP-bound traffic remains subject to the same set of interconnection obligations applicable to local traffic. *Second*, the record below demonstrated clearly that FX-type services offered by a carrier such as Level 3 are the functional equivalent of FX services offered by incumbent LECs themselves, and that it should therefore not be subject to origination charges in the form of access or retail compensation. *Third*, the arbitrator properly concluded that pursuant to the FCC's *ISP Order on Remand*, all ISP-bound traffic is subject to "bill and keep," and that the parties are prohibited from charging each other for originating traffic on their own networks.

² *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, Memorandum Opinion and Order*, WC Docket No. 02-314, FCC 02-332, at ¶ 325 (rel. Dec. 23, 2002) ("*Qwest 271 Order*").

I. ISSUE 1: THE ARBITRATOR CORRECTLY CONCLUDED THAT ISP-BOUND TRAFFIC IS NOT SUBJECT TO SEPARATE INTERCONNECTION REQUIREMENTS UNDER FEDERAL LAW

The arbitrator correctly reiterated the Commission’s prior conclusion that ISP-bound traffic is not subject to separate interconnection requirements under federal law.³ Yet CenturyTel persists in arguing that this Commission lacks jurisdiction to arbitrate this interconnection dispute pursuant to Sections 251 and 252 of the Act—a position which this Commission soundly rejected in October.⁴ In doing so, CenturyTel simply ignores the plain language of the Act, the FCC’s recent jurisdictional pronouncement in granting Qwest authority to provide in-region interLATA services in nine western states, and the findings of most other state commissions. CenturyTel has further argued that even if the Commission retains jurisdiction over this arbitration, it should find that the FCC intended for ISP-bound traffic to be treated differently for all purposes, including but not limited to terminating compensation rates.⁵ CenturyTel contends that, as a result, interconnection for the exchange of ISP-bound traffic should be handled in a separate agreement or otherwise made subject to different interconnection terms and conditions applicable to local traffic.⁶ CenturyTel’s position is contrary to the limited scope of the FCC’s preemption in the *ISP Order on Remand*, is contradicted expressly by the plain language of that order, and also would result in discrimination vis-à-vis CenturyTel’s own exchange of ISP-bound traffic with other carriers.

³ Arbitrator’s Report and Decision ¶¶ 21, 22; Third Supplemental Order Confirming Jurisdiction, WUTC Docket No. UT-023043 (Oct. 25, 2002) (“Third Supplemental Order”).

⁴ See CenturyTel Petition for Review at 12; Third Supplemental Order ¶¶ 10-11.

⁵ See CenturyTel Petition for Review at 14-18.

⁶ *Id.*

A. The State Commissions Retain Jurisdiction over ISP-Bound Traffic Pursuant to Sections 251 and 252

The state commissions retain jurisdiction over ISP-bound traffic pursuant to Sections 251 and 252. And the FCC's recent pronouncement on the subject makes clear that CenturyTel's preemption argument to the contrary is mistaken.

The FCC recently reiterated the overarching role of the state commissions with respect to mediation, arbitration, and enforcement of interconnection agreements *involving ISP-bound traffic* in particular. In granting Qwest authority to provide in-region interLATA services in nine western states, the FCC stated:

[T]he 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes, and it authorizes federal courts to ensure that the results of the state arbitration process are consistent with federal law. We find that this issue [*i.e.*, who should pay for interconnection facilities used to transport ISP-bound traffic] is part of a carrier-to-carrier dispute that is appropriately addressed through state commission and federal court proceedings.⁷

The U.S. Court of Appeals for the Eleventh Circuit recently concurred, finding that Section 251 grants the state public utilities commissions jurisdiction to interpret and enforce interconnection agreements, including those covering ISP-bound traffic.⁸ And most state commissions addressing the issue have concurred with the FCC and the Eleventh Circuit.⁹

⁷ *Qwest 271 Order* ¶ 325. To the extent that the Colorado commission's recent decision in Docket 02B-408T to dismiss Level 3's petition for lack of jurisdiction stands for the proposition that the state commissions are preempted by the *ISP Order on Remand*, the decision conflicts with the FCC's own view in its *Qwest 271 Order*. See CenturyTel Petition for Review at 10-11. The Colorado commission has not yet issued its order.

⁸ *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 2003 U.S. App. LEXIS 358 (11th. Cir. 2003).

⁹ See, e.g., *In re Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, with Qwest Corp. Regarding Rates, Terms and Conditions for Interconnection*, Opinion and Order, Arizona Corporation Commission, Docket No. T-03654A-00-0882, T-01051B-00-0882, Decision No. 63550, (April 10, 2000); *In re Petition of Level 3*

With respect to ISP-bound calls, the FCC explicitly limited its preemption of the state commissions to the issue of setting rates for per-minute terminating reciprocal compensation for ISP-bound traffic.¹⁰ The FCC grounded its preemption of state-commission rate-setting authority on its unique and plenary authority to regulate rates under Section 201 of the Act.¹¹ But the FCC did not otherwise disturb state commission authority as granted explicitly by statute under Sections 251 and 252 of the Act—nor could it, without running afoul of the U.S. Supreme Court’s findings in *AT&T Corp. v. Iowa Utilities Board*.¹² Moreover, the FCC has specified that the state commissions retain the authority to enforce FCC-mandated reciprocal compensation

Communications, LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b), Order Accepting the Arbitrator’s Recommendation and Requiring Filed Interconnection Agreement, Minnesota Public Utilities Commission, Docket No. P-5733,421/IC-02-1372 (Dec. 23, 2002); *In re Level 3 Communications, LLC Interconnection Arbitration Award Application*, Order, North Dakota Public Service Commission, Case No. PU-2065-02-465, (Nov. 20, 2002); *In re Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin*, Arbitration Award, Wisconsin Public Service Commission, Docket No. 05-MA-130, (Dec. 2, 2002) (“Wisconsin Award”); *See also* Level 3 Brief and Memorandum of Law, WUTC Docket No. UT-023043 at 13-17 (Oct. 7, 2002) (“Level 3 Brief on Jurisdiction”); Level 3 Consolidated Reply Brief and Memorandum of Law, WUTC Docket No. UT-023043 at 24-25 (Oct. 15, 2002) (“Level 3 Reply Brief on Jurisdiction”).

¹⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151, 9187 ¶ 78 n.149 (2001) (“*ISP Order on Remand*”) (emphasis in original), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”). Indeed, the excerpts from the FCC’s *ISP Order on Remand* that appear in CenturyTel’s Petition for Review actually serve to demonstrate the limited scope of the FCC’s preemption, with each referencing only that the FCC intended to establish a “compensation” mechanism for ISP-bound traffic. *See CenturyTel Petition for Review* at 9.

¹¹ *See ISP Order on Remand*, 16 FCC Rcd. at 9157, 9181 ¶¶ 52, 65, 66.

¹² 525 U.S. 366, 385 (1999) (stating that “the 1996 Act entrusts state commissions with the job of approving interconnection agreements,” although it “do[es] not logically preclude the [FCC’s] issuance of rules to guide the state-commission judgments.”).

rates for ISP-bound traffic—further undercutting any argument that the FCC has simply preempted all state-commission jurisdiction with respect to ISP-bound traffic.¹³

To read the FCC’s preemption more broadly to infer an intent to preempt broadly *all* state-commission jurisdiction over *all* interconnection matters involving ISP-bound traffic would contradict the language of the statute and judicial pronouncements to the contrary.¹⁴ Most critically, it would fail to satisfy the U.S. Supreme Court standard for preemption of state law by a federal agency, namely that the agency must explicitly state its intent to preempt state law. “[W]e can expect that [federal agencies] will make their intentions clear if they intend for their regulations to be exclusive.”¹⁵ In footnote 149 of the ISP Order on Remand, the FCC made clear its intention not to preempt the state commissions with respect to other interconnection matters.

Finally, CenturyTel’s argument about jurisdictional separation is mistaken and deceptive.¹⁶ *First*, the FCC and the courts have found that ISP-bound traffic is jurisdictionally mixed, containing both intrastate and interstate components.¹⁷ But the D.C. Circuit in *Bell Atlantic* in fact struck down the FCC’s attempt to preempt the state commissions with respect to setting rates for terminating reciprocal compensation for ISP-bound traffic based on the interstate

¹³ See, e.g., *ISP Order on Remand*, 16 FCC Rcd. at 9187-88 ¶ 79.

¹⁴ See Level 3 Brief on Jurisdiction, at 5-13; Level 3 Reply Brief on Jurisdiction, at 4-14; Third Supplemental Order ¶ 18 (finding that “the FCC preempted state commission authority over compensation for ISP-bound traffic, and did *not* preempt state commission authority to arbitrate other issues relating to ISP-bound traffic.”).

¹⁵ *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985).

¹⁶ See CenturyTel Petition for Review at 9.

¹⁷ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd. 3689, 3704-05 ¶ 25 (1999) (“ISP Order”), *vacated and remanded Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (“*Bell Atlantic*”).

component of ISP-bound traffic.¹⁸ And the FCC itself later abandoned this jurisdictional analysis.¹⁹ *Second*, CenturyTel itself does separate its own ISP-bound traffic for FCC revenue-reporting purposes—and classifies such traffic as *local*.²⁰

B. Section 252 Grants This Commission the Authority to Arbitrate Disputes Arising Under Section 251(a)

Section 252 grants to the state commissions the authority to approve or reject the proposed agreement, to mediate or arbitrate a dispute between the parties, and to enforce both the interconnection obligations of Section 251 and the interconnection rules that the FCC may adopt.²¹ The only prerequisite for invoking state-commission arbitration under Section 252 is a request for interconnection made to an incumbent LEC under any subsection of Section 251.

Section 252(b) provides that a telecommunications carrier such as Level 3 may seek state-commission arbitration of an interconnection dispute with an incumbent LEC following “a request for negotiation under this section,” *i.e.*, Section 252.²² Section 252(a) defines the scope of such a request as “a request for interconnection, services, or network elements pursuant to section 251 of this title.”²³ As this Commission noted previously:

¹⁸ *Bell Atlantic*, 206 F.3d at 8.

¹⁹ *ISP Order on Remand*, 16 FCC Rcd. at 9164 ¶ 26.

²⁰ See Letter from Tonya Rutherford of Latham & Watkins, Counsel for CenturyTel, to the Colorado Public Utilities Commission, CPUC Docket No. 02B-408T, at 1 (filed Jan. 15, 2003) (“CenturyTel Classification Letter”) (stating that “[f]or separations purposes, CenturyTel reports to the FCC the charges from its incumbent local exchange carriers (“ILECs”) to its Internet Service Providers (“ISPs”) as local revenue.”).

²¹ See 47 U.S.C. § 252(e) (granting approval/rejection authority), § 252(a)(2) (granting mediation authority), § 252(b)(1) (granting arbitration authority); *AT&T v. Iowa Utilities Bd.*, 525 U.S. at 385 (noting that “the 1996 Act entrusts state commissions with the job of approving interconnection agreements,” although it “do[es] not logically preclude the [FCC’s] issuance of rules to guide the state-commission judgments”).

²² 47 U.S.C. § 252(b).

²³ 47 U.S.C. § 252(a).

While it is true that the only mandate for negotiation under Sections 251 and 252 is set forth in Section 251(c), this does not mean that state commission authority to conduct arbitrations pursuant to Section 252(b) is limited to arbitrating issues arising from Section 251(c). Section 252(a) provides for voluntary negotiations whereby an ILEC may negotiate an interconnection agreement without regard to the requirements of Sections 251(b) and (c). A request for an interconnection agreement under Section 251(a) is a request for an agreement without regard to the requirements of Sections 251(b) and (c).²⁴

Thus, a request for interconnection under any subsection of Section 251—Sections 251(a), (b), and/or (c), as Level 3 has made in this case²⁵—is sufficient for state-commission arbitration jurisdiction.

By its explicit language, Section 252 does not limit state-commission arbitration jurisdiction to requests for interconnection under subsection 251(b) or subsection 251(c). Had Congress so intended—as CenturyTel contends²⁶—Congress would have referred to “a request pursuant to subsection 251(b) or subsection 251(c).” But Congress did not, referring instead to “a request pursuant to Section 251 of this title.”²⁷ As this Commission noted previously:

²⁴ Third Supplemental Order ¶ 10.

²⁵ See Letter from Rogelio E. Peña, Counsel for Level 3 Communications, LLC, to Harvey Perry, CenturyTel, Inc., General Counsel (Mar. 1, 2002) (“Level 3 Arbitration Request”), *attached as* Exhibit A to Petition of Level 3 Communications, LLC, for Arbitration Pursuant to 47 U.S.C. § 252 of Interconnection Rates, Terms and Conditions with CenturyTel of Washington, Inc., WUTC Docket No. UT-023043 (filed Aug. 7, 2002) (“Level 3 Petition”).

²⁶ See CenturyTel Petition for Review at 11-13. To the extent that the Colorado commission’s recent decision in Docket 02B-408T to dismiss Level 3’s petition for lack of jurisdiction stands for the proposition that the state commissions lack jurisdiction to arbitrate interconnection disputes arising under Section 251(a) of the Act, the decision conflicts with the plain language of the Act, as well as the prior findings of this Commission. See Third Supplemental Order ¶¶ 9, 10. The Colorado commission has not yet issued its order.

²⁷ 47 U.S.C. § 252(a).

[T]he mechanisms for negotiation, mediation, and arbitration provided by Section 252 apply to requests to negotiate made under Section 251(a). Nothing in Section 252(a) limits the negotiation and arbitration processes to matters falling within Section 251(c). Therefore, we hold that the duty to interconnect set forth in Section 251(a) is enforceable through the arbitration provisions of Section 252(b).²⁸

This was also the conclusion—in a nearly identical proceeding between Level 3 and CenturyTel—of the Wisconsin commission.²⁹

C. CenturyTel’s Proposed Terms for the Exchange of ISP-Bound Traffic Would Discriminate Against ISP-Bound Traffic in Contravention of the FCC’s Rules

The arbitrator properly rejected CenturyTel’s efforts to treat ISP-bound traffic differently than local traffic for interconnection purposes as inconsistent with the FCC’s rules and this Commission’s previous conclusion that ISP-bound traffic is subject to the same requirements under Sections 251 and 252 as other telecommunications traffic, except on the issue of setting rates for per-minute, terminating reciprocal compensation.³⁰ The FCC’s rules expressly prohibit LECs from splitting off ISP-bound traffic to collect more advantageous charges.³¹

The FCC differentiates ISP-bound traffic for intercarrier compensation purposes *only*. Indeed, the FCC made this point explicit in adopting a new approach to intercarrier compensation for ISP-bound traffic, noting that its *ISP Order on Remand* “affects only the intercarrier *compensation* (*i.e.*, the rates) 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

²⁸ Third Supplemental Order ¶ 9.

²⁹ Wisconsin Award, at 8-13.

³⁰ See Arbitrator’s Report and Decision ¶¶ 20-22; Third Supplemental Order ¶¶ 19, 22.

³¹ As explained in part III below, the FCC’s rules also mandate the application of “bill and keep” to all ISP-bound traffic.

interconnection.”³² There would have been no reason for the FCC to insert this cautionary note as to the limited scope of its order if it then meant to treat ISP-bound traffic differently from local traffic in all respects, as CenturyTel suggests was the intent of the *ISP Order on Remand*. Moreover, by imposing a “mirroring” requirement, the FCC rejected the notion of terms and conditions for the exchange of ISP-bound traffic. In the *ISP Order on Remand*, the FCC stated its “unwilling[ness] to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic.”³³ The FCC did this largely to prevent incumbent LECs such as CenturyTel from dictating terms on interconnecting carriers: “Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to ‘pick and choose’ intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier.”³⁴ This Commission should therefore reject CenturyTel’s latest effort to carve out ISP-bound traffic for differential and discriminatory treatment.

The rationale behind the FCC’s approach—as endorsed by the arbitrator—is obvious. If allowed to impose separate terms and conditions for ISP-bound traffic, incumbent LECs such as CenturyTel would force Level 3 to pay for and construct an entirely separate interconnection network, regardless of the requirements of a typical local interconnection network.³⁵ Yet CenturyTel serves its own ISP customers out of its local service tariffs, and does not maintain a separate network to route calls to them.³⁶ Nor does CenturyTel establish separate trunks solely

³² *ISP Order on Remand*, 16 FCC Rcd. at 9187 n.149.

³³ *ISP Order on Remand*, 16 FCC Rcd. at 9194 ¶ 90.

³⁴ *Id.* at 9193 ¶ 89.

³⁵ *See* Rebuttal Testimony of William P. Hunt, Exhibit No. 10, at 4:22-5:6.

³⁶ *Id.* at 7:7-14.

for the exchange of ISP-bound traffic with other LECs.³⁷ 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.³⁸ Thus, requiring a competitive LEC to install a separate trunking network at additional expense just for the exchange of ISP-bound traffic would discriminate against competitive LECs and the ISPs they serve.³⁹ For these reasons as well, the Commission should adopt the arbitrator's award and deny CenturyTel's petition for review.

II. ISSUE 3: THE ARBITRATOR PROPERLY CONCLUDED THAT FX-LIKE TRAFFIC IS THE FUNCTIONAL EQUIVALENT OF FOREIGN EXCHANGE TRAFFIC AND SHOULD NOT BE SUBJECT TO ORIGATION CHARGES

The arbitrator properly concluded that FX-like traffic is the functional equivalent of traditional foreign exchange traffic, and that the FCC did not limit *ISP Order on Remand* to any particular subset of ISP-bound traffic.⁴⁰ As the Commission itself concluded, Sections 251 and 252 apply to the exchange of traffic outside of a local exchange company's local calling area, and Level 3's service is not subject to separate treatment as interexchange traffic pursuant to Section 201 of the Act.⁴¹ CenturyTel's efforts to re-argue this point and characterize Level 3's FX-like services as interexchange services are nothing but a self-serving attempt to collect access charges from a competitor and would violate the FCC's ban on origination charges.⁴² As the arbitrator recognized and the record demonstrates, Level 3's FX services are functionally

³⁷ Tr. 224:2-17.

³⁸ *Id.* at 223:18-224:1. It is also noteworthy that CenturyTel does not know the location of any of the customers—ISP or otherwise—served by the other LECs with whom it exchanges traffic, nor does it ask other LECs for such information. *Id.* at 233:22-234:10 and 236:14-237:6.

³⁹ Rebuttal Testimony of William P. Hunt, Exhibit No. 10, at 7:12-15.

⁴⁰ See Arbitrator's Report and Decision ¶¶ 33-35.

⁴¹ Third Supplemental Order ¶¶ 20-22.

equivalent to incumbent LEC FX and FX-type services—including CenturyTel’s own FX services—none of which are subject to access charges when such traffic is exchanged between carriers. Moreover, the FCC and the courts have never treated ISP-bound traffic and similar FX-like services as purely interexchange traffic.

A. CenturyTel’s Attempt to Collect Access Charges from Level 3 for ISP-Bound Traffic Originated by CenturyTel’s Customers Would Violate the FCC’s Ban on Origination Charges

The arbitrator properly rejected CenturyTel’s attempt to collect access charges from Level 3 for ISP-bound traffic originated by CenturyTel’s customers, as the collection of such charges would violate the FCC’s ban on origination charges.⁴³ The FCC’s ban on origination charges applies to “telecommunications traffic,” including ISP-bound traffic, originated by CenturyTel’s customers. Section 51.703(b) of the FCC’s rules provides that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”⁴⁴

The FCC’s ban on origination charges ensures that the costs of facilities used to deliver telecommunications traffic to the point of interconnection are borne by the originating carrier as part of the originating carrier’s network, requiring that the originating carrier recover the costs of those facilities through the rates it charges to its own customers for making calls.⁴⁵ CenturyTel, like other LECs, charges a monthly fee to

⁴² See CenturyTel Petition for Review at 2-3.

⁴³ See Arbitrator’s Report and Decision ¶¶ 33-35.

⁴⁴ 47 C.F.R. § 51.703(b).

⁴⁵ See *Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc. and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, Memorandum Opinion and Order*, CC Docket Nos. 00-218, 00-249 and 00-251, DA 02-1731 at ¶ 52 (rel. Jul. 17, 2002) (“*Verizon Arbitration Order*”) (stating that “to the extent an incumbent LEC delivers to the

its customers for providing connectivity to other network operators, thereby recovering its costs and earning a profit.⁴⁶ So CenturyTel’s carriage of its customers’ traffic to the point of interconnection with Level 3—which in this case will *always* be within the CenturyTel local calling area where the call originates⁴⁷—is not a case of Level 3 imposing costs on CenturyTel to the sole benefit of Level 3. To the contrary, as the D.C. Circuit has noted, the ban on origination charges ensures that LECs such as CenturyTel do not “game the system” by forcing interconnecting carriers such as Level 3 to pay for dedicated facilities for traffic that LECs such as CenturyTel could conveniently carry at their own expense.⁴⁸

B. Level 3’s Service Is Functionally Equivalent to Incumbent LEC FX and FX-Type Services, and Should Likewise Be Exempted from Access Charges

The arbitrator properly concluded that Level 3’s service is functionally equivalent to incumbent LEC FX and FX-type services, and therefore should be treated like incumbent LEC FX and FX-type services in applying the FCC’s intercarrier compensation rules—including an exemption from access charges.⁴⁹ Nowhere does CenturyTel demonstrate that there is any difference in terms of functionality, cost, or other meaningful characteristics between the use of

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”).

⁴⁶ See, e.g., Transcript 97:3-8 (where Level 3 witness Gates testified that CenturyTel would be compensated for originating these calls via the local rates paid by the CenturyTel consumers who placed the calls).

⁴⁷ Level 3 has stated since the initiation of this proceeding that it would not dispute CenturyTel’s proposed language requiring interconnection with CenturyTel within each local calling area if the CenturyTel company in question is in fact a rural telephone company. See Petition for Arbitration at 7.

⁴⁸ *Qwest Corp. v. FCC*, 252 F.3d 462, 467 (2001).

⁴⁹ See Arbitrator’s Report and Decision ¶ 33-35.

the network to originate “local” ISP-bound traffic and the use of the network to originate FX-like ISP-bound traffic.⁵⁰ Moreover, the FCC and the state commissions have long treated incumbent-LEC FX and FX-type services as exchange services subject to the ban on origination charges and exempt from access charges.⁵¹ Indeed, as the arbitrator in the Level 3-CenturyTel Wisconsin arbitration concluded,

[t]he CenturyTel proposals taken as a whole would impose originating access charges on traffic that must be rated at bill-and-keep to conform to the *ISP Order on Remand*. The CenturyTel proposals would also have the undesirable effect of applying originating access charges to traffic terminated by Level 3 while applying local service rates for similar traffic terminated to CenturyTel’s ISP affiliate.⁵²

The service offered by Level 3 to certain customers is the functional equivalent of FX service, and should be subject to the same regulatory regime as FX service.

As the factual record in this proceeding demonstrates, incumbent LEC FX and FX-type services provide the same functionality as Level 3’s FX-like service: the provision of local service to a customer in an exchange where the customer has no physical presence. While carriers may employ different network technologies to provide such functionality, as state commissions around the country have found,⁵³ all of these services should be considered functional equivalents in terms of what they provide to customers. This Commission should

⁵⁰ See CenturyTel Petition for Review at 18-20.

⁵¹ See *Revised Arbitration Award, Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution re Inter-Carrier Compensation for “FX-Type” Traffic Against Southwestern Bell Tel. Co.*, PUC Docket No. 24015, at 31-32 (filed Aug. 28, 2002) (“*Texas Docket 24015 Revised Arbitration Award*”) (concluding that FX service, including the FX-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”).

⁵² *Wisconsin Arbitration Award* at 22.

reiterate its conclusion in the Third Supplemental Order and treat competitive and incumbent LECs in the same manner when they provide functionally equivalent services to their customers.

At the hearing in this proceeding, Level 3 witness Gates noted that incumbent LEC FX-type service offer functionality identical to that of Level 3's service and that such incumbent LEC FX-type services seem specifically targeted at Level 3's prospective ISP customers:

Now Level 3 I suppose could offer an 800 service, but that's not what these ISPs want. They want a local dial-up service, and [Level 3's proposed service] is a competitive response to that demand, very similar to foreign exchange service or IPRS, which is Internet protocol routing service, a Verizon service, or Omnipresence, or Qwest's wholesale dial service. All of these services provide the same functionality for these ISPs, a local dial-up presence in an exchange where they do not have a physical presence.⁵⁴

Level 3's proposed service provides the same functionality as incumbent LEC FX-type services, which are treated as local exchange services for classification and reciprocal compensation purposes. Level 3 intends to assign to its ISP customer a number or numbers from an exchange where it is authorized to provide service. The ISP will then make these numbers available to its customers for connecting to the Internet by making a local call. Each call will be routed to the point of interconnection that Level 3 will establish in each CenturyTel local calling area, and then Level 3 will be responsible for completion of the call to the ISP.⁵⁵ The ISP may or may not have a physical presence in the exchange area.⁵⁶ If not, Level 3 will provide the ISP customer a virtual presence in the local calling area.⁵⁷ As Level 3 witness Gates noted, ISPs will not market

⁵³ See, e.g., *Texas Docket 24015 Revised Arbitration Award* at 30.

⁵⁴ Tr. 100:1-10.

⁵⁵ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 11:1-6.

⁵⁶ Tr. 44:18-22.

⁵⁷ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 11:14-19. Level 3 has repeatedly and candidly stated that because it has not yet begun to offer this service, it cannot say with

their service except in areas where they have local numbers.⁵⁸ As Level 3 witness Gates noted, ISPs—whether served by incumbent or competitive LECs—will not market their service except in areas where they have local numbers.⁵⁹

The functionality of Level 3’s service is identical to that provided by CenturyTel to its own FX customers.⁶⁰ Both give a customer physically located in one exchange a telephone number in another exchange. As CenturyTel witness Weinman acknowledged at the hearing, CenturyTel’s own FX service “allow[s] a business to receive calls from callers who are not located within the business’ local calling area but in a manner where the caller would not incur toll charges for placing the call.”⁶¹ CenturyTel and other incumbent LECs have offered this functionality for many years.⁶² And CenturyTel’s own ISP affiliate uses 14,000 local dial-up numbers to support national and global roaming by its customers while permitting local dialing.⁶³

In spite of such functionality, however, CenturyTel—as Level 3 witness Gates pointed out—does not currently apply access charges to FX and FX-like service.⁶⁴ CenturyTel has no

absolute certainty whether or to what degree its ISP customers will have a physical presence in the local calling area. *See, e.g.*, Tr. at 161:5-8.

⁵⁸ *Id.* at 69:18-21, 70:4-8.

⁵⁹ *Id.*

⁶⁰ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 14:14-15:17.

⁶¹ Tr. 226:2-7.

⁶² Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 17:1.

⁶³ Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 37:8-10. The use by CenturyTel’s ISP affiliate of 14,000 local dial-up numbers supports the conclusions that the ISP market prefers to use local dial-up telephone numbers, and that 8XX services are not seen in that market as a reasonable substitute for local connectivity. Otherwise, CenturyTel’s ISP affiliate could have obtained a single 8XX number to provide its service throughout the entire United States and thereby avoided consuming thousands of local telephone numbers.

⁶⁴ *Id.* at 38:1-11.

way of knowing when these calls are made because they are locally dialed,⁶⁵ and CenturyTel has admitted that it does not ask other incumbent LECs for the physical location of their customers.⁶⁶ Thus, Qwest could very well be providing FX or FX-type service such as Wholesale Dial in Qwest local calling areas that have extended area service (“EAS”) arrangements with bordering CenturyTel exchanges, and CenturyTel would never know it.⁶⁷ Moreover, even though CenturyTel argues here that it is entitled to originating compensation on all calls going to another carrier’s FX or FX-type customer, in cases where CenturyTel itself offers FX service entirely within its own territory (without any “joint provider”), it does not pay originating access charges to Qwest for EAS calls placed by Qwest customers to the “open end” of those CenturyTel FX customers.⁶⁸

A 2002 Texas arbitration award succinctly summarized the functional equivalence of FX, FX-type, and virtual NXX services offered by incumbent and competitive LECs:

From the perspective of FX customers, ILEC-provided FX service and CLEC-provided FX-type service serve the same intended purpose. The end user in the foreign exchange is able to avoid toll calls to the FX customer and instead to place local calls to the FX customer physically located in a different exchange. While the Arbitrators recognize that FX and FX-type services are provisioned differently, due to differences 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.⁶⁹

⁶⁵ Tr. 227:4-228:1.

⁶⁶ *Id.* at 233:23-224:6.

⁶⁷ *Id.*; *see also* Rebuttal Testimony of Timothy J. Gates, Exhibit No. 3, at 10:14-11:5.

⁶⁸ Tr. 236:14-21.

⁶⁹ *Texas Docket 24015 Revised Arbitration Award* at 30.

The arbitrators subsequently concluded that SWBT's Virtual Point of Presence-Dial Access Service ("VPOP-DAS") is "functionally identical" to FX service.⁷⁰ The arbitrators also noted that incumbent LECs have never considered their own FX service as exchange access nor subject to access charges.⁷¹ This Commission should likewise recognize the functional equivalence of FX and FX-type services and endorse the arbitrator's award.

B. CenturyTel Offers No Other Principled Distinctions between Level 3's FX-Like Service and Incumbent LEC FX and FX-Type Services

CenturyTel's other arguments for treating Level 3's service as interexchange while treating its own and other ILECs' FX and FX-like services as local are mistaken. The Commission should therefore reject them and affirm the arbitrator's award.

First, CenturyTel's focus on local calling area boundaries only highlights the danger of imposing monopoly-era regulations on competitive and innovative network operators.⁷² The possibility that a competitive LEC might offer its FX-like service on a wider geographic scope than the incumbent LECs have in the past does not justify discriminating against the competitive LEC's service. Competitive LECs do not operate within the confines of incumbent serving areas or using incumbent LEC network architectures. The statutory term "exchange" is itself ambiguous in the context of modern networks and calling plans, harkening back to the era of switchboard operators physically connecting phones. Moreover, CenturyTel offers FX service that transcends local calling area boundaries, indicating that even incumbent LECs have moved beyond these constructs.⁷³ Level 3's service is therefore no different in function than an

⁷⁰ *See id.* at 35.

⁷¹ *Id.* at 34-35.

⁷² CenturyTel Petition for Review at 2-3, 18-20.

⁷³ Tr. at 226:2-8.

incumbent LEC FX or FX-type service. 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.

Second, the existence or absence of a modem bank in the local calling area is, contrary to CenturyTel's claims, simply irrelevant.⁷⁴ 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."⁷⁵

Third, the Commission should reject CenturyTel's attempt to analogize Level 3's FX-like service to 800 or toll-free services.⁷⁶ As Level 3 witness Gates explained, Level 3's services differs greatly from 800 and "toll-free" services, which are dialed as other toll calls are dialed. Toll-free service may originate in thousands of exchanges rather than just one exchange. Toll-free service is routed to an access tandem for additional routing and billing instructions. Toll-free service requires a database dip and number conversion. And extensive call detail is available for toll-free service. By contrast, virtual NXX and FX-type services lack each and all of these characteristics. Instead, virtual NXX and FX-type services are dialed, routed, and billed

⁷⁴ See CenturyTel Petition for Review at 2-3, 17.

⁷⁵ *ISP Order on Remand*, 16 FCC Rcd. at 9178 ¶ 59.

⁷⁶ See CenturyTel Petition for Review at 19; WITA-Verizon *Amicus* Brief at 4-5. See also Level 3 Post-Hearing Brief at 28-29.

like other local calls.⁷⁷ As the Wisconsin arbitrator noted in a substantially similar arbitration with Level 3 and CenturyTel,

Generally, toll-free calls are dialed on a ten-digit basis, generate a billing record, route through an access tandem and are carried by the terminating end user's presubscribed long distance carrier. All of these elements of a toll-free call contribute to the cost of the call. Level 3's network proposal would use none of these routing and billing arrangements. Thus, it is not the case that the Level 3 network proposal fails to compensate CenturyTel for an interexchange access service it is providing.⁷⁸

Finally, the record indicates—contrary to CenturyTel's claim⁷⁹—that FX service is not typically two-way in nature.⁸⁰ And although CenturyTel has claimed otherwise,⁸¹ Level 3's service is not distinct from traditional FX service on the grounds that the latter requires provisioning of a dedicated circuit between the home exchange and the foreign exchange, as new

⁷⁷ Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 23:20-27:2.

⁷⁸ *Wisconsin Arbitration Award* at 20 (citation omitted); *see also Florida Reciprocal Compensation Decision* at 28 (concluding that “virtual NXX is a competitive response to FX service, which has been offered in the market by ILECs for years”); *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order (Ky. PSC Mar. 14, 2001) at 7 (“Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called 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).

⁷⁹ *See* Direct Testimony of William H. Weinman, Exhibit No. 24, at 13.

⁸⁰ *See* Tr. 174:7-175:12; Level 3 Post-Hearing Brief at 30. As Level 3 witness Gates explained further, Qwest offers a FX-like product called “Wholesale Dial” that permits ISPs—who obviously need only one-way calling functionality—to obtain local access telephone numbers. Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 13:1-9.

⁸¹ *See* Direct Testimony of William H. Weinman, Exhibit No. 24, at 23.

network architectures such as Level 3's are simply more innovative and cost-effective, and need not rely on legacy facilities.⁸²

D. Incumbent LECs Incur No Additional Incremental Cost for Originating Level 3's FX-Like Traffic as Compared with Originating Any Other Local Call

Just as Level 3's virtual NXX service cannot be distinguished from incumbent LEC FX and FX-type services on functionality grounds, likewise it cannot be distinguished on the grounds that it imposes greater incremental costs on the incumbent LEC as compared with the incumbent LEC's origination of any other local call, including its own FX and FX-type traffic. The absence of a cost justification merely underscores the fact that CenturyTel's approach, if adopted, would discriminate against new competitors and penalize technical innovation by imposing access charges on Level 3's FX-like service without imposing such charges on CenturyTel's own FX and FX-type services.⁸³

CenturyTel incurs no additional cost when its end-user places a call to an ISP served by Level 3 that has a virtual presence in the rate center versus a Level 3 customer who is physically located in the rate center because all calls originating from a given area will flow through the same point of interconnection.⁸⁴ To the contrary, such an arrangement would reduce CenturyTel's costs by allowing CenturyTel to avoid the costs of using of its own network to terminate the calls. CenturyTel already recovers its costs for carrying their ISP-bound calls through its own local rates.⁸⁵

⁸² See Level 3 Post-Hearing Brief at 30-31. See also Tr. 206:18-207:6.

⁸³ See Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 41:9-18.

⁸⁴ Tr. 187:22-188:2.

⁸⁵ *Id.* at 112:7-11.

Moreover, CenturyTel exchanges FX and FX-type traffic with neighboring incumbent LECs without collecting access charges. CenturyTel neither collects access charges on traffic that it originates and exchanges with neighboring incumbent LECs,⁸⁶ nor does it pay access charges on traffic originated by neighboring incumbent LECs and terminated on CenturyTel's local networks.⁸⁷ Thus, in the case of ISP-bound traffic, the location of Level 3's ISP customer's modem banks either in the same exchange or multiple exchanges away should not matter for purposes of determining whether a FX call is to be treated as local or toll.⁸⁸

E. ISP-Bound Traffic Is a Hybrid, and Not Interexchange Traffic

As this Commission has previously recognized, ISP-bound traffic is a hybrid and not, as CenturyTel would have it, "interexchange traffic."⁸⁹ As a definitional matter, the courts have made clear the ISP-bound traffic is a hybrid, containing both a local and a long-distance component. And nowhere does the record support the characterization of Level 3's ISP-bound traffic as purely interexchange traffic. CenturyTel's characterizations of Level 3's traffic are also disingenuous, as CenturyTel treats its own ISP-bound traffic as local for FCC reporting purposes.⁹⁰

⁸⁶ *Id.* at 232:22-236:23 (with CenturyTel witness Weinman explaining that a CenturyTel exchange in Ocosta and a Qwest exchange in Aberdeen can call one another on an EAS basis, and that the carriers exchange traffic on a bill-and-keep basis, and that CenturyTel); *id.* (with CenturyTel witness Weinman explaining that CenturyTel would have no way of knowing whether Qwest customer physically located in Seattle purchased FX service in the Aberdeen exchange from Qwest, and that CenturyTel has never consulted with Qwest about imposing originating access charges on Qwest). *See also* Level 3 Post-Hearing Brief at 33-34.

⁸⁷ Tr. 236:14-21 (with CenturyTel witness explaining that under the reverse Qwest-CenturyTel scenario, Qwest would not collect access charges from CenturyTel). *See also* Level 3 Post-Hearing Brief at 34-35.

⁸⁸ *See* Direct Testimony of William P. Hunt, Exhibit No. 7, at 32:1-33:7.

⁸⁹ *See* CenturyTel Petition for Review at 2-3.

⁹⁰ *See* CenturyTel Classification Letter at 1.

First, CenturyTel continues to argue that ISP-bound traffic is interexchange traffic as a definitional matter.⁹¹ To the contrary, the FCC and the courts have long characterized ISP-bound traffic as a hybrid. In reviewing the original *ISP Order*, the D.C. Circuit considered whether ISP-bound traffic is local or long-distance, and concluded that “[n]either category fits clearly.”⁹²

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.⁹³

The FCC and the courts have consistently referred to ISP-bound traffic as a single category of hybrid, jurisdictionally mixed traffic.⁹⁴ Nowhere has the FCC or a court adopted CenturyTel’s distinction between “non-interexchange ISP-bound traffic” and “interexchange ISP-bound traffic.”⁹⁵ Such a distinction is, therefore, improper, as it has no basis in regulation or law. This Commission has already specifically rejected CenturyTel’s argument that ISP-bound traffic is interexchange traffic subject to exclusive FCC jurisdiction under Section 201 of the Act, and it

⁹¹ See CenturyTel Petition for Review at 2-3. See also *Amicus* Brief of Washington Independent Telephone Association and Verizon Northwest, Inc., WUTC Docket No. UT-023043, at 4-5 (filed Jan. 21, 2003) (“WITA-Verizon *Amicus* Brief”).

⁹² *Bell Atlantic*, 206 F.3d at 5.

⁹³ *Id.*

⁹⁴ This characterization renders CenturyTel’s argument about the unavailability of Section 251(c)(2) interconnection further irrelevant. See CenturyTel Petition for Review at 4-5. As a hybrid, ISP-bound traffic is, by definition, not subject to the FCC’s longstanding prohibition on IXC evasion of access charges. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers & Commercial Mobile Radio Service Providers*, First Report & Order, 11 FCC Rcd. 15,499, 15,598 ¶ 191 (1996) (“*Local Competition Order*”) (concluding that “an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC’s network is not entitled to receive interconnection pursuant to section 251(c)(2).”). But more fundamentally, CenturyTel’s characterization has no bearing on Level 3’s request for interconnection pursuant to Section 251(a).

⁹⁵ See CenturyTel Petition for Review at 1, 6, 7, 10, 11, 13, 15-18, 21, 22. See also WITA-Verizon *Amicus* Brief at 6.

should reaffirm that conclusion in adopting the arbitrator’s award.⁹⁶ The Commission should therefore reject CenturyTel’s claim that the arbitrator has removed Level 3’s traffic from the access charge regime,⁹⁷ as the FCC and the courts have never classified it as such in the first place. *Second*, CenturyTel asserts that this particular arbitration has established that Level 3’s ISP-bound traffic is purely interexchange in nature.⁹⁸ Setting aside the fact that the FCC and the courts have defined ISP-bound traffic as a hybrid and do not distinguish between subcategories of ISP-bound traffic—thus rendering CenturyTel’s approach legally improper—nowhere does CenturyTel actually cite in its petition for review any sections of the record to support this assertion.⁹⁹ Instead, CenturyTel attempts to recharacterize its failure to demonstrate that Level 3’s traffic is exclusively interexchange in nature as an attempt by Level 3 to deceive the arbitrator and this Commission.¹⁰⁰ To the contrary, the record shows that Level 3 has made clear repeatedly that it intends to offer a service that is FX-like in nature to certain customers, and that when it provides such service, that service will be functionally equivalent to FX and FX-type services such as Wholesale Dial, which have long been treated and continue to be treated as “local” services.¹⁰¹ And as noted in part II.B above, Level 3’s FX-like service is functionally very different from traditional interexchange services, such as 800 and toll-free services. Perhaps most significantly, the arbitrator found the interexchange or non-interexchange nature of

⁹⁶ Third Supplemental Order ¶¶ 20-22.

⁹⁷ See CenturyTel Petition at 5.

⁹⁸ See CenturyTel Petition for Review at 2-3.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See discussion in part II.A above.

ISP-bound traffic to be irrelevant, concluding instead that the FCC’s *ISP Order on Remand* subjects all ISP-bound traffic to the bill-and-keep regime.¹⁰²

Finally, consistent with its approach to Issue 3, CenturyTel has argued—with respect to Issue 2—for a definition of “local traffic” riddled with vague and sweeping exceptions designed to exclude any voice-over-the-Internet and voice-over-Internet-protocol-type services.¹⁰³ The arbitrator soundly rejected CenturyTel’s proposed definition as (1) attempting to cover services that Level 3 does not even seek to implement through an interconnection agreement at this time, (2) lacking any factual basis in the record, and (3) an improper attempt to extend legacy network dominance and thwart innovative and competitive technologies.¹⁰⁴ But most tellingly, the arbitrator noted that the FCC itself has stated that the term “local traffic” is impracticable as a basis for defining parties’ respective rights and obligations under Section 251.¹⁰⁵ Indeed, the FCC abandoned the local-nonlocal distinction as a basis for defining intercarrier compensation obligations with respect to ISP-bound traffic following the D.C. Circuit’s remand in *WorldCom*.¹⁰⁶ Yet CenturyTel has mistakenly focused its entire approach in this arbitration on trying to characterize Level 3’s service as encompassing only non-local traffic—an approach entirely at odds with that of the FCC and the courts.

¹⁰² Arbitrator’s Report and Decision ¶ 37.

¹⁰³ See Direct Testimony of William P. Hunt, Exhibit No. 7, at 13:15-14:2 (noting that CenturyTel proposes to exclude from “local traffic” such things as “Information Access Traffic,” “Internet Service Provider traffic,” “Internet,” and “Internet Protocol based long distance telephony”).

¹⁰⁴ Arbitrator’s Report and Decision ¶¶ 28-30

¹⁰⁵ *Id.* ¶ 29 citing *ISP Order on Remand*, 16 FCC Rcd. at 9167 ¶ 34.

¹⁰⁶ See *id.* at 9164 ¶ 26 (finding that “[u]pon further review, we find that the Commission erred in focusing on the nature of the service (*i.e.*, local or long distance)”; *Bell Atlantic*, 206 F.3d at 8. The FCC also deleted the word “local” from the definition of “telecommunications traffic” in Section 51.701(b)(1) of its rules. See 47 C.F.R. § 51.701(b)(1).

F. The Commission Should Not Delay Resolution of FX-Like Issues in This Arbitration Pending the Conclusion of a Generic Proceeding Addressing All FX and FX-Like Issues for All Carriers

The Commission should not delay resolution of the FX issues in this arbitration pending the conclusion of a generic proceeding addressing all FX, FX-like, FX-type, and Virtual NXX issues for all carriers. Contrary to the claims of CenturyTel, the Washington Independent Telephone Association (“WITA”), and Verizon Northwest, Inc. (“Verizon”), the Commission will not disadvantage or prejudice third parties by resolving the FX issues in this proceeding.¹⁰⁷ Given the mistaken legal and policy bases for CenturyTel’s FX-like arguments—already rejected by this Commission in the Third Supplemental Order¹⁰⁸—a decision to delay resolution of the issues in this arbitration would needlessly force Level 3 to pay access charges to CenturyTel in the interim, even while carriers such as CenturyTel, Verizon, and Qwest continue to exchange their own FX and FX-like traffic today *without* assessment of access charges.

This arbitration is a bilateral proceeding that binds only Level 3 and CenturyTel.¹⁰⁹ A resolution in this arbitration will in no way preclude or prejudge the outcome of the generic proceeding, which will necessarily address a broader range of issues and involve a broader range of interested parties who may present different facts and different arguments in support of their positions.¹¹⁰ Moreover, if the Commission eventually decides to adopt policies or rules in the

¹⁰⁷ See CenturyTel Petition for Review at 20-21; WITA-Verizon *Amicus* Brief, at 8-9.

¹⁰⁸ See Third Supplemental Order ¶¶ 20-22.

¹⁰⁹ *Implementation of Certain Provisions of the Telecommunications Act of 1996, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration and Approval of Agreement Under the Telecommunications Act of 1996*, WUTC Docket No. UT-960269, at part II.C (June 28, 1996).

¹¹⁰ See Fourth Supplemental Order, Denying Petition to Intervene, WUTC Docket No. UT-023043, at ¶ 6 (Oct. 31, 2002) (finding that there was no “compelling public interest” for intervention by WITA because the Commission’s generic proceeding provided a suitable forum for WITA to raise its members’ interests). For the same reasons, the Commission

generic proceeding which differ from the provisions of the interconnection agreement between Level 3 and CenturyTel, those subsequent policies and rules will govern the arrangements between Level 3 and CenturyTel. The interconnection agreement already contains a change-of-law clause requiring that any Commission rule or policy changes “automatically supersede” the relevant provisions of the agreement.¹¹¹ For these reasons, the Commission should reject the efforts of CenturyTel, WITA, and Verizon to hold the resolution of this arbitration hostage to a generic proceeding.

III. ISSUE 4: THE ARBITRATOR PROPERLY CONCLUDED THAT ALL ISP-BOUND TRAFFIC IS SUBJECT TO “BILL AND KEEP”

The arbitrator properly concluded that pursuant to the FCC’s *ISP Order on Remand*, all ISP-bound traffic is subject to “bill and keep.”¹¹² The arbitrator’s conclusion regarding the applicability of “bill and keep” to ISP-bound traffic is consistent with the finding of this Commission that its authority under Sections 251 and 252 of the Act extends to all ISP-bound traffic, and is not limited to the exchange of ISP-bound traffic where the ISP is in the local calling area.¹¹³

First, the *ISP Order on Remand* provides that new entrants and incumbent LECs that begin exchanging ISP-bound traffic after the first quarter of 2001 under a “bill-and-keep” intercarrier compensation regime.¹¹⁴ It makes no distinctions among various subcategories, as CenturyTel would have it, of ISP-bound traffic, such as “noninterexchange ISP-bound” and

should deny the WITA-Verizon motion to intervene to file an *amicus* brief in this proceeding.

¹¹¹ See Level 3 Petition, Exhibit B, art. III, § 35.

¹¹² See Arbitrator’s Report and Decision ¶¶ 36-37.

¹¹³ See Third Supplemental Order ¶¶ 20-22.

¹¹⁴ *ISP Order on Remand*, 16 FCC Rcd. at 9155 ¶ 6.

“interexchange ISP-bound.”¹¹⁵ As the D.C. Circuit noted in considering whether ISP-bound traffic is local or long-distance, and concluded that “[n]either category fits clearly.”¹¹⁶

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.¹¹⁷

But nowhere did the D.C. Circuit state that there were *two* categories of ISP-bound traffic subject to separate regulatory interconnection or intercarrier compensation regimes.

Second, CenturyTel’s argument that the arbitrator improperly “imposed” intercarrier compensation on ISP-bound traffic by mandating bill-and-keep for all ISP-bound traffic reflects CenturyTel’s fundamental misunderstanding of the respective roles of the FCC and the state commissions with respect to Sections 251 and 252.¹¹⁸ As the U.S. Supreme Court has stated, “the 1996 Act entrusts state commissions with the job of approving interconnection agreements,” although it “do[es] not logically preclude the [FCC’s] issuance of rules to guide the state-commission judgments.”¹¹⁹ Yet CenturyTel continues to confuse the concept of jurisdiction with the concept of preemption. The FCC has long acknowledged that it shares non-exclusive

¹¹⁵ See CenturyTel Petition for Review at 1, 6, 7, 10, 11, 13, 15-18, 21, 22. See also WITA-Verizon *Amicus* Brief at 6.

¹¹⁶ *Bell Atlantic*, 206 F.3d at 5.

¹¹⁷ *Id.*

¹¹⁸ CenturyTel Petition at 13-18.

¹¹⁹ *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999).

jurisdiction with the state commissions under Sections 251 and 252,¹²⁰ as evidenced by its treatment of services such as one-way paging services.¹²¹

Flatly contradicting CenturyTel, the FCC has stated explicitly that the state commissions retain the authority to *enforce* FCC-mandated reciprocal compensation rates for ISP-bound traffic.¹²² Going forward, the FCC has specified a “bill-and-keep” regime for ISP-bound traffic, effectively mandating a reciprocal compensation rate of zero. But the FCC’s guidance in no way infringes on the statutory role of the state commissions to approve and reject, arbitrate, and interpret interconnection agreements pursuant to Sections 251 and 252.

CenturyTel’s attempts to evade the clear language of the ISP Order on Remand regarding “bill-and-keep” are consistent with CenturyTel’s continuing quest to collect access charges from Level 3 for ISP-bound traffic. This Commission should affirm the arbitrator’s award and reject CenturyTel’s arguments as a legally improper attempt to disadvantage a competitor and charge it for origination of calls by CenturyTel’s own customers.

¹²⁰ *ISP Order*, 14 FCC Rcd. at 3705 ¶ 25 (stating that “state commission authority over interconnection agreements pursuant to section 252 ‘extends to both interstate and intrastate matters.’ Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process” (citation omitted)).

¹²¹ *See TSR Wireless, LLC v. US West Communications, Inc., Memorandum Opinion & Order*, 15 FCC Rcd. 11,166, 11,184, ¶ 31 (2000), *aff’d Qwest Corp. v. FCC*, 252 F.3d 462, 467 (2001). *See also* Level 3 Brief on Jurisdiction at 19-22; Level 3 Reply Brief on Jurisdiction at 10-11.

¹²² *See, e.g., ISP Order on Remand*, 16 FCC Rcd. at 9187-88 ¶ 79.

CONCLUSION

For the reasons discussed above and elsewhere in the record in this proceeding, Level 3 urges the Commission to deny CenturyTel's petition for review and to adopt the arbitrator's Report and Decision.

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
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036-2560
+1 202 730 1337 tel
+1 202 730 1301 fax

Counsel for Level 3 Communications, LLC

31 January 2003

CERTIFICATE OF SERVICE

I hereby certify that the original and seven (7) copies of the foregoing *Answer and Opposition of Level 3 Communications, LLC, to Petition for Review of CenturyTel of Washington, Inc.*, in WUTC Docket No. UT-023043, including diskettes of same in Word and Adobe format, was sent via electronic mail and Legal Messenger on this 31st day of January 2003, properly addressed to the following:

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 31st day of January 2003, properly addressed to the following:

Calvin K. Simshaw Assoc. General Counsel - Regulatory CENTURYTEL OF WASHINGTON, INC. 805 Broadway Vancouver, WA 98660 <i>Counsel for CenturyTel of Washington, Inc.</i>	Karen Brinkmann Tonya Rutherford LATHAM & WATKINS 555 11th Street, N.W. Washington, D.C. 20004-1304 <i>Counsel for CenturyTel of Washington, Inc.</i>
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Gretchen Elizabeth Eoff
Industry Specialist, ATER WYNNE LLP