

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

3 IN THE MATTER OF THE PETITION)Docket No. UT-023043
4 FOR ARBITRATION OF AN)Volume III
5 INTERCONNECTION AGREEMENT)Pages 249-297
6 BETWEEN)
7)
8 LEVEL 3 COMMUNICATIONS, LLC,)
9 AND)
10 CENTURYTEL OF WASHINGTON, INC.,)
11)
12 PURSUANT TO 47 U.S.C. SECTION)
13 252)
14 _____)

10 Oral argument in the above matter
11 was held on February 6, 2003, at 10:05 a.m., at 1300
12 Evergreen Park Drive, Southwest, Olympia, Washington,
13 before Commissioner RICHARD HEMSTAD, Commissioner
14 PATRICK OSHIE and Chairwoman MARILYN SHOWALTER.

15 The parties were present as
16 follows:

17 CENTURYTEL OF WASHINGTON, INC., by
18 Calvin Simshaw, Associate General Counsel, 805
19 Broadway, Vancouver, Washington 98660.

19 LEVEL 3 COMMUNICATIONS, LLC, by
20 Michael Romano, Director, State Regulatory Affairs,
21 8270 Greensboro Drive, Suite 900, McLean, Virginia
22 22102.

21 WASHINGTON INDEPENDENT TELEPHONE
22 ASSOCIATION and VERIZON NORTHWEST, INC., by Richard
23 A. Finnigan, Attorney at Law, 2405 Evergreen Park
24 Drive, S.W., Suite B-1, Olympia, Washington 98502.

24 Barbara L. Nelson, CSR
25 Court Reporter

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1 CHAIRWOMAN SHOWALTER: Let's be on the
2 record. This is a hearing in the matter of the
3 petition for arbitration of an interconnection
4 agreement between Level 3 Communications, L.L.C. and
5 CenturyTel of Washington, Inc. It's Docket
6 UT-023043. And before we begin, why don't we have
7 appearances.

8 MR. ROMANO: On behalf of Petitioner, Level
9 3 Communications, my name is Michael Romano, the
10 Director of State Regulatory Affairs for Level 3.

11 MR. SIMSHAW: Thank you, Your Honor. My
12 name is Calvin Simshaw. I am Associate General
13 Counsel for CenturyTel.

14 MR. FINNIGAN: Richard Finnigan, on behalf
15 of the Washington Independent Telephone Association
16 and Verizon Northwest, Incorporated.

17 CHAIRWOMAN SHOWALTER: All right. We've
18 agreed that CenturyTel and Level 3 will each take
19 half an hour, but we'll begin with a brief statement
20 by Mr. Finnigan first.

21 MR. FINNIGAN: Thank you, Your Honor. On
22 behalf of WITA and Verizon, I wanted to express our
23 appreciation that the Commission granted our motion
24 and is going to consider our comments filed in this
25 case. We do view this as a very important issue,

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1 which is why I wanted to make sure I got here this
2 morning to at least make that known.

3 The motion was granted on Tuesday, and
4 schedules being what they are, I'm not going to be
5 able to participate in the substantive portion of the
6 argument, but did want to let you know that we are
7 very interested in the outcome of this matter, and at
8 least make that appearance. And with that, I would
9 like to be excused.

10 CHAIRWOMAN SHOWALTER: Oh, okay. Yes.
11 Well, we do have your brief and have read it and
12 considered it and will consider it. Thank you.

13 MR. FINNIGAN: Thank you.

14 CHAIRWOMAN SHOWALTER: All right. Go
15 ahead.

16 MR. ROMANO: Thank you. Good morning,
17 Madam Chairwoman, Commissioners. Again, Michael
18 Romano, on behalf of Level 3 Communications. Before
19 launching into the substantive analysis of each
20 issue, let me begin just by providing a little bit of
21 context, very briefly.

22 This arbitration arose from Level 3's
23 effort to expand into less densely-populated serving
24 areas beginning early in 2002 and continuing through
25 2002 and now early into 2003. Level 3's goal is to

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1 become CenturyTel's competitor, not its customer,
2 delivering services initially to Internet service
3 providers. We view this as a platform for the
4 development and delivery of other services in the
5 future.

6 CHAIRWOMAN SHOWALTER: Excuse me. Can you
7 take your conversation out? Thank you. Go ahead.

8 MR. ROMANO: But, initially, we've agreed
9 and stated at the time during negotiation, as well,
10 that the agreement would be limited to the exchange
11 of Internet service provider, or ISP-bound traffic.

12 The services that Level 3 proposes to offer
13 in CenturyTel's territory initially are the
14 functional equivalent of services that CenturyTel and
15 other incumbent local exchange carriers, or ILECs,
16 have treated as local for decades. We propose that
17 they should be exchanged as such under the
18 interconnection agreement with CenturyTel at issue
19 here. However, CenturyTel has sought to treat this
20 traffic differently from the way it handles its own
21 traffic on its network and the way it exchanges
22 traffic with other incumbent local exchange carriers
23 who neighbor the CenturyTel serving area.

24 CenturyTel wants to impose, in some cases,
25 originating access, perhaps retail compensation

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1 collected from Level 3, or at least drive up the
2 trunk payments for the trunks associated with the
3 exchange of traffic between Level 3 and CenturyTel.

4 We'd submit that none of these measures are
5 justified in a competitive market and none is
6 reasonable in light of how CenturyTel, again, handles
7 these calls on its own network today and in
8 exchanging -- on interconnection facilities used to
9 exchange traffic with other carriers.

10 To be clear, Level 3 is not seeking a free
11 ride on CenturyTel's network. Level 3 tailored its
12 request for interconnection narrowly. Level 3 said
13 it would not challenge a rural exemption. Level 3
14 did not seek terminating compensation from CenturyTel
15 in any respect for the ISP-bound traffic in question.
16 Level 3 said it would interconnect in each Centurytel
17 local calling area so that CenturyTel would not bear
18 any originating costs greater than that for any other
19 local call it handles today.

20 We did all this in light of CenturyTel's
21 status as a rural telephone company in the state of
22 Washington and have, therefore, not pursued more
23 aggressive avenues of interconnection which might
24 apply to larger incumbents under Section 251(c) of
25 the Act.

1 I would also note that Level 3 may, in
2 fact, lease facilities from CenturyTel to
3 interconnect and that those facilities would not be
4 forward-looking-priced or TELRIC-priced, but would be
5 access-rated facilities to establish interconnection.
6 And where it does so, that Level 3's competition
7 would, in fact, result in an additional revenue
8 stream to CenturyTel.

9 Turning to the substantive issues, Issue
10 One, the first issue presented in this arbitration,
11 was a question regarding the treatment of ISP-bound
12 traffic. Over the course of the arbitration, this
13 effectively became two issues. First, does the
14 Commission have jurisdiction to arbitrate, and
15 second, if so, what are the appropriate terms and
16 conditions governing interconnection for the exchange
17 of ISP-bound traffic.

18 The first issue, jurisdiction, the
19 Commission addressed this earlier in its Third
20 Supplemental Order in this matter. The reasoning
21 behind the Third Supplemental Order continues to hold
22 true today. The Commission has jurisdiction to
23 arbitrate disputes between carriers with respect to
24 ISP-bound traffic, the interconnection for exchange
25 of ISP-bound traffic. That is confirmed in several

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1 places, Footnote 149 of the ISP Order on Remand;
2 Paragraph 79 of that same order, where the FCC
3 indicated the state's continuing role in arbitrating
4 and enforcement of interconnection obligations; and
5 most recently in the 271 decision involving Qwest
6 Corporation, in which the FCC indicated that these
7 kinds of disputes were to go before the state
8 commissions in the first instance.

9 Another avenue of jurisdiction here is that
10 -- or another question with respect to jurisdiction
11 is whether Level 3's request for interconnection
12 under 251(a) falls within the 252 arbitration
13 process. Again --

14 CHAIRWOMAN SHOWALTER: Well, before you
15 leave that first point --

16 MR. ROMANO: Sure.

17 CHAIRWOMAN SHOWALTER: -- I think this
18 might be an appropriate time to ask you. If you can
19 find WITA's amicus brief.

20 MR. ROMANO: The one filed most recently?

21 CHAIRWOMAN SHOWALTER: Well, let me give
22 the -- actually, let's -- yes, the amicus brief. It
23 doesn't have a -- let's see if it has a date on it.
24 It's nine pages, and signed on the last page, dated
25 January 21st.

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1 MR. ROMANO: Yes, I do have that.

2 CHAIRWOMAN SHOWALTER: Do you have that?

3 I'll wait till other people find it.

4 COMMISSIONER HEMSTAD: What page?

5 CHAIRWOMAN SHOWALTER: Once you do find it,

6 if you could turn to page four.

7 MR. ROMANO: Yes, I'm there.

8 CHAIRWOMAN SHOWALTER: In lines 10 to 20,

9 or, actually, 10 to 17, the brief outlines the way --

10 the traditional way that certain calls are handled,

11 and then there's a step one, two, three, and I'll

12 give you time to read it.

13 Because my question, once you do read it,

14 is is what Level 3 does the same physical sequence,

15 but you think there's a different treatment, or it's

16 not the same physical treatment, so therefore it's a

17 different treatment? And I'll give you a little

18 chance to read it, unless you're really ready to

19 answer.

20 MR. ROMANO: I am familiar with it, so I'll

21 take a stab at it. There was much discussion of the

22 comparison of this between different kinds of

23 services on the record below. This example describes

24 what happens absent what the WITA and Verizon have

25 called a VNXX arrangement.

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1 CHAIRWOMAN SHOWALTER: Right. Of course,
2 we have a VNXX arrangement. So that's what I'm
3 trying to --

4 MR. ROMANO: Right, yes. In some cases, we
5 certainly will. And what is described here is a
6 little bit different than the call flow associated
7 with what Level 3 would be proposing in this case.
8 Instead of the customer making a one-plus toll call,
9 the call would be dialed locally to a local telephone
10 number.

11 CHAIRWOMAN SHOWALTER: So step one is
12 different because step one is there's a seven-digit
13 number called?

14 MR. ROMANO: Correct, or yeah, ten-digit
15 where there may be that requirement, but correct, a
16 locally dialed call.

17 Step two, there is no interexchange carrier
18 involved. The two carriers involved here are Level 3
19 and CenturyTel. Level 3 would interconnect with
20 CenturyTel somewhere on the CenturyTel network within
21 the local calling area of the originating party, so
22 it would never go to, say, an access tandem, where an
23 interexchange carrier-destined call would go. So it
24 would be over the dedicated trunk groups between
25 Level 3 and CenturyTel.

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1 And then, step two, I guess the second
2 portion of step two is, right, that Level 3 then
3 carries the call to the ISP, which is the termination
4 function, again, for which we're not seeking
5 terminating compensation.

6 And then, step three, that really refers to
7 the intercarrier compensation arrangements which are
8 at dispute under issue three in this proceeding.
9 That's the standard for a toll call. Our
10 understanding and interpretation of the FCC's ISP
11 Order on Remand and the one set forth in the Fifth
12 Supplemental Order finds that bill and keep is the
13 appropriate regime as pursuant to the FCC's ISP Order
14 on Remand. But -- and the end user would have that
15 call handled under their retail calling plan, local
16 calling plan with CenturyTel.

17 And I guess I would submit, just very
18 quickly, on this point -- we're sort of skipping
19 ahead to issue three a little bit, but the way that I
20 just described our service working is in function no
21 different than the FX service offered by CenturyTel
22 or Qwest or others in Washington today.

23 If a Qwest customer had a telephone number
24 in Aberdeen, but was physically located in Seattle,
25 CenturyTel today would send that call over a trunk

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1 group to Aberdeen as a local call, originating from
2 Ocosta, for example, which is within the same local
3 calling area as Aberdeen, or EAS area. That call
4 would go over local trunk groups, be settled locally
5 between the parties, and then taken by Qwest back to
6 the customer in Seattle, presumably.

7 So in that regard, FX always modifies what
8 one might see if one were otherwise to use a toll
9 dialing pattern. That's the essence of foreign
10 exchange service.

11 CHAIRWOMAN SHOWALTER: Say that one
12 sentence again.

13 MR. ROMANO: FX or FX-like services always
14 modify or are -- they allow customers who would
15 always have to dial a toll call to reach another
16 customer, they sometimes allow them to dial a local
17 call to do so. And I would note in this case, any
18 transport out of the CenturyTel local calling area
19 would be on Level 3's network, Level 3's
20 responsibility, Level 3's dime.

21 CHAIRWOMAN SHOWALTER: Okay. Thank you.

22 MR. ROMANO: So going back to 251 and 252,
23 the Arbitrator's report correctly found that -- and
24 actually, excuse me, the Third Supplemental Order of
25 the Commission correctly found that Section 252

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1 covers all requests for 251 interconnection, not just
2 251(b) or (c). The plain language of 252 supports
3 this. 252(a)(1) --

4 CHAIRWOMAN SHOWALTER: You might slow down
5 just a bit, just for our ears and the reporter's.

6 MR. ROMANO: I'm sorry. Sure, sure. The
7 plain language of 252 supports this conclusion. The
8 Section 252(a)(1) refers to requests under Section
9 251 without regard to the standards set forth in
10 subsections (b) and (c) of Section 251. Then, if you
11 go to Section 252(c), setting forth the standards for
12 arbitration, that requires the Commission to ensure
13 that resolution meets the requirements of, quote,
14 Section 251, end quote.

15 There's no reference to subsections of
16 Section 251, as there are in other parts of Section
17 252. Had Congress intended to limit the scope of 252
18 arbitration, it clearly knew how to do so.

19 Another -- an additional reason that we
20 believe this Commission has jurisdiction with respect
21 to arbitration of this dispute is, again, the Qwest
22 271 order in which the FCC most recently said
23 disputes with respect to interconnection for the
24 exchange of ISP-bound traffic are properly before the
25 state commissions.

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1 CenturyTel, in our opinion, continues to
2 confuse jurisdiction with preemption. It says that
3 the Arbitrator erred in concluding and imposing bill
4 and keep in an arbitrating dispute in the first
5 instance because the ISP order in remand takes all
6 matters with respect to the exchange of ISP-bound
7 traffic away from the state.

8 The U.S. Supreme Court has said that the
9 standard for preemption of a state commission action
10 by a federal agency needs to be expressed by a clear
11 intent to preempt.

12 We submit that the Qwest 271 order and
13 Footnote 149 of the FCC's ISP Order on Remand, as
14 well as Paragraph 79, indicate a clear intent to the
15 contrary.

16 CHAIRWOMAN SHOWALTER: Just out of
17 curiosity, if a federal agency does express a very
18 clear intent to preempt and the state is preempted,
19 how does that fit with jurisdiction? I thought you
20 were drawing a distinction between preemption on one
21 hand and jurisdiction on the other.

22 MR. ROMANO: I think CenturyTel is saying
23 that the state cannot rule in this arbitration in the
24 first instance because it is preempted from doing so.
25 We're saying that the Commission still has

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1 jurisdiction because the FCC, to the contrary,
2 communicated an intent for the Commissions to have a
3 continuing jurisdictional role in handling these
4 kinds of disputes.

5 CHAIRWOMAN SHOWALTER: Okay. So the
6 confusion isn't -- according to you, the confusion
7 isn't between preemption on the one hand and
8 jurisdiction on the other; you're saying the FCC did
9 not clearly preempt; therefore, we still do have
10 jurisdiction.

11 MR. ROMANO: Right. And in fact, I'd say
12 the FCC clearly stated its intent not to preempt by
13 giving the states a continuing role.

14 CHAIRWOMAN SHOWALTER: Okay.

15 MR. ROMANO: Turning to the actual --
16 assuming that the Commission has jurisdiction, we
17 then have to turn to the question of what would --
18 how should ISP-bound traffic be treated under the
19 interconnection agreement.

20 The FCC has made clear that it was
21 concerned about incumbent local exchange carriers
22 gaming the system to treat ISP-bound traffic
23 differently than local traffic.

24 And as a result, in Paragraph 90 of the
25 order on remand, it indicated that it was trying to

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1 adopt a mirroring requirement in order to make sure
2 that ILECs do not game the system by treating
3 ISP-bound traffic differently than local traffic.

4 Again, Footnote 149 of that same order
5 makes it clear that the FCC intended to limit the
6 scope of its order to only compensation issues and
7 that other interconnection obligations with respect
8 to ISP-bound traffic remained in place.

9 CHAIRWOMAN SHOWALTER: I'm just going to
10 interrupt you. I'd just as soon not be distracted.
11 The microphones are working well enough, but I think
12 if you're going to be working here, it's too hard for
13 us to listen to the arguments. So we're doing all
14 right.

15 UNIDENTIFIED SPEAKER: Did you try turning
16 it down?

17 CHAIRWOMAN SHOWALTER: We did turn it down.
18 Thank you.

19 MR. ROMANO: Thank you. If the FCC had
20 intended to require that ISP-bound traffic be treated
21 differently for interconnection purposes, as well as
22 intercarrier compensation purposes, it presumably
23 would have adopted an interconnection regime specific
24 to ISP-bound traffic, as well, in the order on
25 remand. It did not. It only adopted an intercarrier

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1 compensation regime. Absent that, the FCC would have
2 left a vacuum.

3 Finally, we believe that ISP-bound traffic
4 should be treated the same as local traffic because
5 of discrimination issues in the market. The record
6 below indicated that CenturyTel doesn't even know
7 which of its customers are Internet service providers
8 today. It indicated that those customers purchased
9 local service out of local 1FB tariffs, I believe was
10 the reference in the record. It indicated that it
11 doesn't tell other ILECs or ask other ILECs which
12 customers, which calls, are ISP-bound going across
13 existing trunk groups.

14 To require that Level 3's ISP-bound traffic
15 be treated differently would seem discriminatory to
16 us and results in Level 3 effectively being punished
17 in the market, as compared to other carriers who
18 serve ISPs. At this point, I probably should segue
19 into a dispute that's arisen between the parties post
20 --

21 CHAIRWOMAN SHOWALTER: And I just was going
22 to let you know, you have about ten minutes. Do you
23 want to reserve any time or would you rather use your
24 time now?

25 MR. ROMANO: I have about ten minutes left?

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1 Let me see where I am in five minutes.

2 CHAIRWOMAN SHOWALTER: All right.

3 MR. ROMANO: Thank you. Very quickly,
4 there's a dispute right now --

5 CHAIRWOMAN SHOWALTER: Not too quickly, or
6 we can't process the information.

7 MR. ROMANO: Sure, sure, sure. CenturyTel
8 has refused to sign what Level 3 had prepared in
9 accordance with the Arbitrator's report claiming that
10 the Arbitrator did not specifically require the
11 inclusion of certain language in Section 4.2.

12 We would note that this section was clearly
13 identified as part of issue one in the arbitration.
14 Level 3 Witness Hunt discussed its concerns about --
15 his concerns about ISP-bound traffic being treated
16 differently than local traffic in several pages of
17 his testimony.

18 CenturyTel, in its own brief, post-hearing
19 brief prior to the Arbitrator's decision, page 14,
20 noted that it was concerned about having to treat
21 ISP-bound traffic differently than local traffic for
22 interconnection purposes. Section 4.2 was clearly
23 identified and CenturyTel lost on that point. We
24 submit that it should be required to include that
25 section, or Level 3's proposal for that section as

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1 part of the resolution of issue one in this
2 arbitration.

3 Let me move quickly to issue three, the
4 crux of the arbitration, the FX-like traffic issues.
5 CenturyTel would like to impose originating access
6 charges on Level 3 or otherwise secure retail
7 compensation for Level 3. As the Arbitrator found,
8 neither result is appropriate.

9 First, the ISP Order on Remand makes clear
10 that the one place in which the FCC has preempted
11 authority with respect to ISP-bound traffic is
12 intercarrier compensation. This is consistent. And
13 the Arbitrator's finding that bill and keep is
14 therefore the appropriate outcome is consistent with
15 the findings of many states that have looked at this,
16 and those states are cited in our brief.

17 It's also -- again, imposing originating
18 access would be discriminatory. Those charges do not
19 exist when ILECs exchange FX traffic between each
20 other's networks today. There's no additional cost
21 to CenturyTel associated with originating this
22 traffic. As we discussed, the calls always will, in
23 this case, come from the local calling area, be
24 handed off there.

25 In terms of retail compensation, Level 3

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1 should not be forced into a role as a customer of
2 CenturyTel. Level 3 is performing all of the foreign
3 exchange functions, taking the call back to its
4 distant location. It's interesting that CenturyTel
5 says that Level 3 can't or shouldn't provide this,
6 but then suggests in Mr. Cook's testimony that it
7 could provide this to Level 3 as a retail customer if
8 Level 3 so chose.

9 In the end, the FCC order did not
10 distinguish between kinds of ISP-bound traffic. In
11 this case, all ISP-bound traffic should be subject to
12 bill and keep going forward, and we therefore would
13 submit that the Arbitrator's report should be
14 adopted. I'll reserve the rest of my time for
15 rebuttal. Thank you.

16 CHAIRWOMAN SHOWALTER: All right. Thank
17 you. Mr. Simshaw.

18 MR. SIMSHAW: Thank you, Your Honor. If I
19 may, I will be referring to some materials. At the
20 top of the package that I just distributed to
21 everyone is a diagram. That's very much on point
22 with the Chairwoman's discussion with Mr. Romano
23 about the example that's cited in Verizon's amicus
24 brief. And I'd like to start there with some factual
25 background before I get into the strictly legal

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1 arguments.

2 This diagram, and I've also got it up here
3 on the easel, was an exhibit at the hearing in this
4 matter. It was Exhibit 25. Depicted on the diagram
5 is the example that was discussed. It's a CenturyTel
6 customer placing a call, a CenturyTel customer, in
7 this case, in Forks, Washington, placing a call to a
8 Level 3 customer, an ISP located in Seattle.

9 And what you'll see on the diagram,
10 consistent with that earlier discussion, is that that
11 call would traverse over CenturyTel's network
12 initially. When the CenturyTel customer places the
13 call, it would go over the local loop serving that
14 customer, it would be switched in CenturyTel's Forks
15 central office. It would then go on some interoffice
16 facilities headed toward Seattle, and at some point
17 it would be exchanged with Level 3 facilities. And
18 then, as Mr. Romano mentioned, Level 3 would then
19 carry that call to Seattle and deliver it to its ISP.

20 Now, several things significant about this.
21 As the diagram shows, a CenturyTel customer in Forks
22 can also call today a customer in Seattle using many
23 other different services. And listed on here,
24 including 800 or regular one-plus toll dialing. And
25 when you look at the diagram to again trace a call

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1 from a CenturyTel Forks customer to a customer
2 located in Seattle, you'll notice that the function
3 that CenturyTel plays and the use of CenturyTel's
4 network is the same. That that Forks customer would
5 dial the call, it would go over CenturyTel's local
6 loop, it would be switched in CenturyTel's Forks
7 central office, it would go on CenturyTel's
8 interoffice facilities headed towards Seattle, it
9 would at some point be handed off, in this case, to
10 an IXC -- it could be Qwest performing as an IXC, it
11 could be AT&T, it could be any number of carriers --
12 who would then take that call on to the customer in
13 Seattle.

14 Now, we point this out because it raises a
15 serious concern about arbitrage that this Commission
16 is now taking up in their generic docket. And that
17 is Docket Number UT -- I think it's 031596 -- 69 --
18 I'm sorry, 021569, which is entitled In the matter of
19 developing an interpretive or policy statement
20 relating to the use of virtual NPA/NXX calling
21 patterns.

22 The arbitration that we're concerned about
23 -- well, let me back up one step first. I think Mr.
24 Romano mentioned he compared this to FX service.
25 Let's use this same diagram and look at the

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1 theoretical. I don't know if there is any FX from
2 Forks to Seattle. Theoretically, there could be. If
3 there was, that would be a jointly-provided service.
4 For example, it could be jointly provided --
5 CenturyTel would have to be involved, because it
6 starts with the ability of CenturyTel customers to
7 call an FX customer located in Seattle with a Forks
8 number, and that call, as I say, would be a
9 jointly-provided service in that CenturyTel would be
10 providing the open end.

11 In other words, all the loops to all the
12 customers that could call that FX service, CenturyTel
13 provides those.

14 The central office switch, where it would
15 first be switched, CenturyTel provides that. As I
16 said, most likely, Forks to Seattle would probably be
17 a joint service. You could have Qwest providing the
18 part from the boundary, exchange boundary, the meet
19 point, to get that call to the FX customer in
20 Seattle.

21 The point is that this is all about
22 compensation. In this FX -- jointly-provided FX
23 service, CenturyTel would be compensated for the use
24 of its facilities, its loops, its switch, this
25 interoffice facility by the FX customer in FX

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1 charges.

2 Let me back up one step. We earlier talked
3 about 800 and one-plus toll, again, using
4 CenturyTel's loops, the switch, the interoffice
5 facility. In each instance, you're talking about a
6 Forks customer dialing a call to a customer located
7 in Seattle. Under a one-plus call or an 800 call,
8 CenturyTel again would be compensated for the use of
9 its loops, its switch, its interoffice facility in
10 the form of access charges.

11 CHAIRWOMAN SHOWALTER: As long as you're
12 using that diagram, discuss another example, which is
13 CenturyTel connecting its customer with its own ISP,
14 and how that would work.

15 MR. SIMSHAW: CenturyTel connects to many
16 -- I call them mom and pop ISPs that have modem
17 banks. If we're using Forks, they have a modem bank
18 in Forks. CenturyTel's ISP in Forks has a modem
19 bank. It's a local service, it's a local connection
20 to a local customer, just like any other local
21 business. Just like this customer here. Any other
22 business customer, it's local.

23 CHAIRWOMAN SHOWALTER: And that's the only
24 kind of ISP that CenturyTel connects its customers
25 with? There's not some --

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1 MR. SIMSHAW: There may be some 1-800.
2 When a customer comes to us, they can -- an ISP can
3 order anything out of any of our tariffs. If an ISP
4 comes and says, I've got a modem bank here in Forks,
5 I'd like a 1FB or I'd like a centrex or I'd even like
6 a T1, they can buy that right out of the tariff.

7 Now, if an ISP came to us and says, you
8 know, I've got my modem banks in Seattle, what can
9 you do for me. I mean, CenturyTel's going to say,
10 Well, normally we have to connect with interexchange
11 carriers to get traffic to Seattle. And that's how
12 it would occur.

13 CHAIRWOMAN SHOWALTER: In other words,
14 CenturyTel would not be able to connect the Seattle
15 ISP without going through?

16 MR. SIMSHAW: We could suggest they get
17 1-800 service. We could theoretically establish this
18 jointly-provided foreign exchange service. I don't
19 know that we've had ISPs approach us for that. As I
20 mentioned, just jointly-provided FX, if CenturyTel
21 provides it, we're providing the open end here, but
22 we're being compensated. There's FX charges and
23 there's charges for this circuit that connects the FX
24 customer to the remote central office serving, giving
25 the dial tone. We would be compensated. And it is

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1 compensatory. FX rates are compensatory. In fact,
2 it can very quickly become very expensive. That's
3 why you don't see a lot of FX service.

4 CHAIRWOMAN SHOWALTER: You're making the
5 point that functionally different arrangements are
6 equivalent to one another and, therefore, should be
7 compensated in a similar manner.

8 MR. SIMSHAW: Right.

9 CHAIRWOMAN SHOWALTER: But how do you deal
10 with actual rules and orders of the FCC, which select
11 out certain things, such as ISP traffic, bill and
12 keep? In other words, if we were inventing the
13 rules, you might be arguing these things, but don't
14 you have to look to the text of the 1996 Act, the FCC
15 rules, and what the FCC has said, and see what
16 category a particular arrangement fits into or if
17 there really is any discretion that we have as a
18 policy matter or not?

19 MR. SIMSHAW: Yes, you do, Your Honor. The
20 ISP order obviously -- the ISP Remand Order, we have
21 differences of opinion on interpretation. CenturyTel
22 reads that same order, and you look at what the FCC
23 was trying to address, it was the gaming of the
24 system on local ISP traffic.

25 The district court -- circuit court judge,

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1 when he was reviewing the ISP Remand Order, he
2 started out, and it's quoted in our brief, by saying,
3 What I have in front of me is the FCC carving out
4 this one category of traffic which has to do with ISP
5 calls directed to an ISP whose modem bank is located
6 within the local calling area. That's all they
7 addressed in that order.

8 ISP calls that go outside the local calling
9 area are subject to access. They always have been.
10 You read the ISP Remand Order and they still are.
11 They were dealing with the arbitrage problem, the
12 gamesmanship that all these CLECs had done when they
13 came in and they started collecting all that
14 reciprocal comp on those local ISP calls.

15 But, yes, there are many categories, and
16 it's very confusing. I'd be the first to admit that
17 ISP Remand Order and everything to do with virtual
18 NXX and ISP traffic is extremely muddled right now.
19 That's why we think that your generic docket on
20 virtual NXX is critical.

21 And let me jump back to that real quickly.
22 The FX that -- or the service that Level 3's
23 proposing is like a CenturyTel jointly-provided FX in
24 that, again, CenturyTel would be relied upon to
25 provide all the loops, the central office switching,

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1 this part of the interoffice facility, just like if
2 it was a CenturyTel-Qwest jointly-provided FX service
3 to a customer in Seattle. The same thing, but in
4 this instance, free.

5 Level 3 would get all the revenue from the
6 FX customer, even though CenturyTel is providing the
7 very critical open end, the hardest part of the whole
8 service. It's these arbitrage issues, again, that we
9 think are more appropriately considered by this
10 Commission in their virtual NXX docket.

11 Now, I got on the Web site and I looked --
12 last Friday, I think, was the filing date in that
13 generic docket. And I looked and I noted Level 3
14 filed comments, CenturyTel filed comments, but the
15 Commission also got comments from ten other
16 submissions, representing 17 other parties. It would
17 be even more if you counted all the WITA members
18 separately. But, obviously, this strikes a nerve.
19 It's a critical issue for the entire industry.

20 CHAIRWOMAN SHOWALTER: Well, but we have
21 this arbitration in front of us, and I believe we
22 have a deadline to decide it. Aren't the parties in
23 this proceeding owed and entitled to a resolution of
24 the dispute, the contractual dispute between them?

25 MR. SIMSHAW: Let me address that, Your

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1 Honor. It is our position that, no, this particular
2 proposed service is not subject to a 252 arbitration.
3 And let me go to that legal argument right now. This
4 Commission, when they issued the Third Supplemental
5 Order asserting jurisdiction relied entirely upon the
6 provisions of 251(a), as Mr. Romano mentioned. We
7 believe that there's now an -- we disagreed with
8 that.

9 Since that decision was issued by the
10 Commission, a couple of things have happened. The
11 Colorado Commission took up the same issue and
12 determined that, based on this particular service by
13 Level 3 and the fact that you're dealing with rural
14 telephone companies, that you cannot rely on 251(c),
15 that there was no basis for jurisdiction.

16 And to quote from that order, and it's
17 included in the package that I distributed, I --

18 CHAIRWOMAN SHOWALTER: What page are we
19 looking at, or do you know?

20 MR. SIMSHAW: Well, on paragraph 34, for
21 instance, they state that, We conclude that a state
22 commission's 252 authority is limited to requests for
23 interconnection agreements implicating 251(b) and (c)
24 obligations. As such, a state commission has no
25 arbitration authority over 251(a) matters.

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1 Now, as noted in your Third Supplemental
2 Order, Level 3 brought this petition and asked for
3 arbitration under 251(a) and 251(c). As we've
4 already disposed of 251(c), that leaves you with
5 251(a).

6 CHAIRWOMAN SHOWALTER: And just -- and how
7 did you dispose of 251(c) in shorthand?

8 MR. SIMSHAW: Because it's acknowledged
9 that CenturyTel is a rural telephone company with a
10 rural exemption and is not subject to any provisions
11 under 251(c), as Level 3 acknowledges.

12 Now, I wouldn't presume to suggest that
13 this Commission should reverse itself on asserting
14 jurisdiction just because a sister commission reached
15 a different conclusion, although I do think that the
16 Colorado order, if you go through it, is very well
17 reasoned.

18 Instead, when you've got a conflict, I
19 think, between sister commissions, for instance, what
20 you need to do is you need to look to a higher
21 authority, and that very typically is going to be the
22 courts.

23 I've also included in the package a very
24 recently issued -- I think it's within the last two
25 weeks -- D.C. Circuit Court -- yes, it's January 24th

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1 -- decision that speaks directly to the relationship
2 between 251(a), which this Commission has relied on,
3 and 252, which of course is the arbitration
4 provision. So it's right on point. It's
5 interpreting the connection between the two, if there
6 is one.

7 Let me point -- direct your attention.
8 I've marked a couple of passages.

9 COMMISSIONER HEMSTAD: What is the title of
10 that case?

11 CHAIRWOMAN SHOWALTER: We've got it here.

12 MR. SIMSHAW: It's an AT&T and Atlas
13 Telephone Company.

14 COMMISSIONER HEMSTAD: Okay. I'll find it.

15 MR. SIMSHAW: It's in the package that I --

16 COMMISSIONER HEMSTAD: Okay. I have it.

17 MR. SIMSHAW: And I have marked a couple
18 passages that deal directly with this issue about
19 251(a) and 252. One of them, it starts in Section 3
20 of the order; which is entitled 251(a) Interconnect.
21 And in the first paragraph of that section, it first
22 reiterates that in the order the Commission
23 interpreted this duty to interconnect as referring
24 solely to the physical linking of two networks and
25 not to the exchange of traffic between the two

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1 networks.

2 So in other words, the FCC had said 251(a)
3 only applies to the linkage, not -- not to the
4 exchange of traffic.

5 Then you drop down a couple of paragraphs,
6 where they get to the real meat of comparing the two
7 sections, and this is the court speaking. As the
8 Commission points out, both the text of Section
9 251(a)(1) --

10 CHAIRWOMAN SHOWALTER: Just where are you
11 reading?

12 MR. SIMSHAW: I'm sorry.

13 COMMISSIONER HEMSTAD: At the bottom of
14 page eight.

15 CHAIRWOMAN SHOWALTER: I see it. Okay.
16 All right.

17 MR. SIMSHAW: As the Commission points out,
18 both the text of Section 251(a) and the structure of
19 252 strongly indicate that to interconnect and to
20 exchange traffic have distinct meanings. So in other
21 words, they're looking at these two sections and
22 determining they have distinct meanings.

23 The former -- again, this is the Court.
24 The former section, that would be 251(a), refers only
25 to facilities and equipment, not to the provision of

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1 any service. Then let me jump ahead to the middle of
2 the paragraph.

3 The latter section, and that would be 252,
4 which enables pricing standards for agreements
5 between carriers, provides separately for
6 interconnection and network elements and for charges
7 for transport and termination. And then they
8 conclude, Section 252 thus contemplates the very
9 distinction between physical linkage and exchange of
10 traffic the Commission applied in the order.

11 In summary, what -- the Court has looked at
12 these two provisions and said one of them deals with
13 linkage and one of them deals with exchange of
14 traffic. There's no overlap. They're two completely
15 different concepts. And in other words, you can't
16 rely on 251(a) to implement a 252 arbitration. 252
17 deals with completely different matters.

18 And as a consequence, we would submit that
19 the Colorado decision is consistent with this D.C.
20 Circuit Court's interpretation of these two sections,
21 whereas this Commission's assertion of jurisdiction
22 under 251(a) is not.

23 CHAIRWOMAN SHOWALTER: All right. I just
24 want to make sure I understand. If you are right and
25 Colorado was right and we were wrong, and we don't

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1 have jurisdiction to arbitrate this, where does it
2 lead in terms of dispute between the parties? What
3 happens if we decide that that's the case?

4 MR. SIMSHAW: Yeah, I don't mean to
5 overstate the lack of 252 jurisdiction. It just
6 means you don't arbitrate it as an interconnection
7 agreement under 252. CenturyTel still has an
8 obligation to link its network with Level 3's
9 network. It's all about the compensation. And since
10 we're dealing with compensation relating to virtual
11 NXX traffic, I think it leads you right into your
12 generic docket.

13 CHAIRWOMAN SHOWALTER: So you mean -- so
14 that you would say we should simply reserve judgment
15 on this until we've completed our VNXX docket?

16 MR. SIMSHAW: Yes, we are, for two reasons,
17 Your Honor. Number one, this involves very critical
18 issues and the entire sustainability of access
19 charges versus other forms of compensation to all the
20 incumbent LECs. You see the interest it generated
21 from the other parties, as well, when you look at
22 your generic docket and the comments you've received.
23 So just as a policy matter, that's where it belongs.
24 And as a legal matter, that's where it belongs,
25 because you can't get to 252 via 251(a).

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1 CHAIRWOMAN SHOWALTER: And then what
2 happens between the parties pending that? You just
3 -- you would have a trueup at the end of our VNXX
4 proceeding? How would your current dispute be either
5 resolved or carried?

6 MR. SIMSHAW: Obviously, Level 3 could
7 approach us, as any other interexchange carrier does,
8 to pass off this traffic, to use our loops, our
9 switch, or our interoffice facilities to get traffic
10 to Seattle. Lots of carriers use us for that purpose
11 today.

12 CHAIRWOMAN SHOWALTER: Well, aren't you
13 then saying that you prevail pending our resolution
14 in the VNXX docket?

15 MR. SIMSHAW: Yes, it's interexchange
16 traffic subject to access charges. But you're right,
17 that is the issue in the VNXX dockets, is to say,
18 Well, this is traffic that's not originating,
19 terminating in the same local exchange, but it's
20 VNXX. Is that different? If so, how should the
21 compensation be different, how do you identify it.

22 All the state commissions have struggled
23 with this. Vermont and Massachusetts, two very
24 recent decisions, have rejected the whole ISP
25 approach and said, no, that didn't address this

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1 traffic. This is -- you're talking about local
2 calling areas, that's something the state commissions
3 define. You're talking intrastate access, you're
4 talking the whole access charge regime.

5 And I admit, it is all about where do you
6 draw the line between where access charges apply and
7 where something else applies. And it's muddled.
8 We'd submit that a two-party 252 arbitration
9 proceeding is not the place to just throw the access
10 charges out the window. And besides that, there's no
11 legal basis to even open that 252 proceeding.

12 COMMISSIONER HEMSTAD: Well, I take it you
13 would agree with Mr. Romano's conceptual description
14 of it, then, that -- in categorization of Level 3 as
15 a competitor or a customer. It would seem, in this
16 circumstance, they are a customer.

17 MR. SIMSHAW: I don't view them as a
18 competitor. To be a competitor, they would have to
19 be trying to serve some of our customers, some of
20 CenturyTel's customers. They're not. CenturyTel
21 serves mom and pop ISPs, who have modem banks in our
22 local areas, in Forks, in Ritzville, in Raymond,
23 wherever. That's not who Level 3 wants to serve.
24 They want to serve AOL or MSN, who has their modem
25 banks in Seattle and Denver and Chicago and Dallas.

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1 CHAIRWOMAN SHOWALTER: But isn't that
2 difficult to define competitors on that basis? I
3 assume CenturyTel could, if it wanted, serve the AOL
4 modem bank in Seattle, and I assume Level 3 could, if
5 it wanted, serve the mom and pop modem in
6 CenturyTel's territory.

7 MR. SIMSHAW: If they want to serve the mom
8 and pop modem bank in CenturyTel's Forks exchange,
9 that would be great. We'd be very happy to do a 252.

10 CHAIRWOMAN SHOWALTER: I mean, do we need
11 to be -- wouldn't it be very difficult to make a
12 distinction along that basis? You'd have to --
13 mechanically or administratively, how would you go
14 about making this determination of just what kind of
15 ISPs Level 3 or somebody similar was serving?

16 MR. SIMSHAW: Your Honor, I would submit
17 it's the same as the traditional distinction this
18 Commission has drawn for a long time on traffic. And
19 that is, what customer is calling what other customer
20 and where are they and is it within the local calling
21 area or is it not within the local calling area.
22 It's as easy to Forks-to-Forks versus
23 Forks-to-Seattle.

24 CHAIRWOMAN SHOWALTER: Well, a different
25 kind of easy is a seven-digit number or, you know, a

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1 local call versus a 1-800 or other kind of number.

2 MR. SIMSHAW: Admittedly, virtual NXX is
3 new and it complicates everything, because it tries
4 to trick the network into thinking Forks and Seattle
5 are right next to each other or they're the same
6 place. And those are the kind of issues -- I admit
7 they are very troublesome issues. Those are the type
8 of issues that are teed up in your virtual NXX
9 generic inquiry. And there are some hard decisions
10 to be made on that. Maybe it does make a difference.
11 I think you're going to see us submit that it really
12 doesn't.

13 You can't turn a cross-country call into a
14 local call just by playing with the numbers. That's
15 our position. Others feel differently, and you'll
16 hear from them in that docket.

17 We asked Level 3 at the hearing whether
18 they would assign any Forks numbers to a customer in
19 Denver, and they said they might. I mean, so you
20 really reach the point of I guess everything's all
21 one giant local calling area, as the Vermont
22 Commission speculated. And what does that do to the
23 whole access charge regime and the reliance that this
24 Commission and others place on the recovery of
25 network costs from access charges, because

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1 admittedly, the very network that Level 3 and these
2 other CLECs want to rely on, which is the CenturyTel
3 loops, the CenturyTel switch in Forks, for instance,
4 is supported in large part by access charges.

5 Now, that's fine, if, in the long run, this
6 Commission or the FCC or whoever decides access
7 charges aren't the right way to recover the costs of
8 that network. It's got to be done in a very
9 deliberate and studied manner and it's got to be
10 replaced with some other form of cost recovery, not
11 just free-ride bill and keep. That won't do it.

12 CHAIRWOMAN SHOWALTER: Well, one of the
13 issues I think this case raises is what should adapt
14 to what? That is, do we have a compensation scheme
15 that's a given and so we fit new arrangements into
16 it, or do you have to accept new technology for what
17 it is and adapt compensation arrangements to those
18 new technological arrangements? I'm not sure either
19 one is a given, but the one that's inevitable is
20 technological changes, and the one that can be
21 changed administratively, I think more easily,
22 somewhat easily, are the compensation arrangements.

23 MR. SIMSHAW: Right, and but we would
24 submit, Your Honor, that today, it has always been
25 the case that Forks to Seattle, those calls are not

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1 local, they're not completed within the local calling
2 area, they're interexchanged, they've always been
3 subject to access charges. So it's Level 3 who's
4 trying to -- and you know, we haven't determined
5 whether things should change, but it is Level 3 who
6 is trying to change them.

7 CHAIRWOMAN SHOWALTER: Yes, but if you
8 look, for example, at wireless, there's a different
9 definition of what is a non-special charge call, and
10 we can be certain that the technology will make all
11 of that possible. It's just that maybe the
12 regulatory compensation scheme needs to catch up with
13 it.

14 MR. SIMSHAW: And I think that's one of the
15 purposes of your generic docket, is to examine where
16 has technology brought us. How has it changed the
17 underlying thinking that had created the existing
18 compensation mechanisms. That's a fair endeavor.

19 I think the one other point that I did want
20 to respond to was Mr. Romano quoted the Qwest FCC 271
21 proceeding decision as somehow supporting this
22 Commission's assertion of jurisdiction over this
23 proposal. And we disagree. In fact, I've attached
24 the cited provision of that Qwest 271 order, I think
25 it's Paragraph 325, in the package that I've

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1 distributed to the Commissioners.

2 And if you'd bear with me one moment, I'd
3 like to refer specifically to some language in that
4 paragraph. I've included the entire paragraph 325,
5 because Level 3 only quoted a portion of it in their
6 pleading.

7 First of all, a comment. I don't see any
8 reference to 251(a) in that paragraph or in that
9 order. What I do see in that paragraph is I do see
10 some -- even the FCC expressing some confusion over
11 its own ISP Remand Order, its own rules, how they
12 affect all of this.

13 But I would like to direct the Commission's
14 attention to the second to the last sentence in
15 Paragraph 325, where they say, quote, We note that
16 Level 3 may raise these issues in another commission
17 proceeding, such as the intercarrier compensation
18 NPRM, which would provide a more appropriate forum
19 for Level 3's concerns.

20 And we would submit to the Commission that
21 that's pretty consistent, I think, with CenturyTel's
22 position here, in that these are some complex issues,
23 and they really need to be reviewed in a generic
24 docket that takes into account, as Your Honor
25 mentioned, technological advances, among other

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1 things.

2 CHAIRWOMAN SHOWALTER: Well, and just on
3 that point, I'm not saying there's not benefit to
4 more parties and viewpoints, but why haven't -- why
5 isn't it the case that the parties here haven't
6 brought to bear in front of us what we need to know
7 in order to make this determination, assuming it's
8 validly in front of us?

9 MR. SIMSHAW: Well, we had a very
10 interesting hearing and I think a very good record
11 developed from very knowledgeable witnesses. I
12 assume most, if not all of that, will be brought into
13 the generic proceeding, as well as you point out the
14 viewpoints of others who may agree with some of that,
15 may disagree with some of that, may have different
16 perspectives. Level 3's not the only one out there
17 trying to use virtual NXX, and it's not used
18 exclusively for ISP-bound traffic.

19 COMMISSIONER HEMSTAD: Well, so I
20 understand your position, your position first is we
21 don't have jurisdiction to address it at all, but
22 that if we do have jurisdiction or if we assert
23 jurisdiction, we should still decide the matter how?
24 Or is your position essentially that we don't have
25 jurisdiction?

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1 MR. SIMSHAW: It's not that you don't have
2 jurisdiction at all; it's that you don't have
3 jurisdiction to deal with this in a 252 proceeding.
4 I think you have plenty of jurisdiction to assert in
5 the virtual NXX docket. You assert jurisdiction
6 daily when you determine local calling areas, when
7 you enforce intrastate access charges. A lot of the
8 underlying regulatory paradigm that we start with,
9 you're exercising every day. And the purpose of the
10 generic docket is to reexamine those and see if they
11 need to be tweaked.

12 COMMISSIONER HEMSTAD: I want to come back
13 to the point that the Chair raised. Would you state
14 again where the parties will be left if we agree with
15 your position?

16 MR. SIMSHAW: Well, I don't want to speak
17 for Level 3. But, again, I think if they have a need
18 to utilize CenturyTel facilities in order to allow
19 CenturyTel customers to call their customer in
20 Seattle, for example, there are many ways to get at
21 that. We will connect with them for that purpose.

22 COMMISSIONER HEMSTAD: Okay. They will
23 simply come to you as a customer and ask your
24 service?

25 MR. SIMSHAW: As any -- well, no, as a

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1 carrier.

2 COMMISSIONER HEMSTAD: As a carrier, excuse
3 me.

4 MR. SIMSHAW: As any other carrier serving
5 Seattle customers would come to us and say, Look, we
6 need people to be able to call from Forks from
7 Seattle. And they could do that, as I say, they
8 could order up access out of the tariff. I think
9 we'd even entertain if they wanted to come to us,
10 like Qwest would, and say, you know, we got a
11 customer in Seattle who wants a Forks number. Let's
12 provide him some joint FX. You provide the open end
13 and we'll provide the closed end, and we'll somehow
14 share the revenue, in recognition that we're both
15 providing the facilities to provide that service.
16 Those avenues are available.

17 CHAIRWOMAN SHOWALTER: Okay. I think your
18 time is up.

19 MR. SIMSHAW: Oh.

20 CHAIRWOMAN SHOWALTER: Are you done?

21 MR. SIMSHAW: The only other -- real
22 quickly, your order says that the FCC ISP Remand
23 Order preempted only the arbitration of compensation
24 for IS -- for this traffic, for ISP-bound traffic.
25 And we would submit that the arbitration decision, in

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1 spite of that, went ahead and arbitrated it. You've
2 got one party saying it should be bill and keep, you
3 have another party saying it should be access
4 charges. The Arbitrator ruled for the first party.
5 He arbitrated the question, in spite of this
6 Commission's language in its Third Supplemental Order
7 that said the FCC did preempt that one area, which is
8 the arbitration of the compensation for ISP-bound
9 traffic. With that, I would conclude.

10 CHAIRWOMAN SHOWALTER: All right. You have
11 some rebuttal time. And I hope that you can cover --
12 there are three things I picked up that I hope you
13 can respond to. One is to either distinguish or
14 refute the Colorado decision and distinguish or
15 refute the court of appeals decision, and then also
16 maybe answer the question if we find that this is not
17 the appropriate forum for arbitrating this issue,
18 where does that leave the parties? You could answer
19 the same question we asked.

20 MR. ROMANO: Those are three of the four
21 points I actually did want to raise on rebuttal, so
22 thank you.

23 First, with respect to the Colorado case,
24 several -- several points there. One, we think, just
25 quite simply, Colorado holds contrary to the plain

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1 language of the statute. If one goes back into 252
2 and parses it, we don't think that one arrives at the
3 result that Colorado did.

4 Two -- and there are other commissions who
5 have held contrary to Colorado. Colorado was the
6 first commission we know of to hold this way.

7 Two, Colorado never had an evidentiary
8 proceeding, so there was no opportunity to show why
9 our service was functionally equivalent to local
10 services offered by CenturyTel and why it might be
11 entitled to interconnection accordingly. In fact, I
12 would submit that Colorado, quite frankly, contrary
13 to how most motions to dismiss are handled, viewed
14 the facts in the light most favorable to the moving
15 party, rather than the nonmoving party.

16 CHAIRWOMAN SHOWALTER: Was the Colorado
17 case before or after some of the other state
18 commissions that went your way?

19 MR. ROMANO: After.

20 CHAIRWOMAN SHOWALTER: After.

21 MR. ROMANO: After.

22 CHAIRWOMAN SHOWALTER: Thank you.

23 MR. ROMANO: With respect to the other
24 court opinion that Mr. Simshaw presented, a couple of
25 points in rebuttal. First of all, that was not an

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1 arbitration case. That was a dispute between an ILEC
2 and an interexchange carrier brought in a complaint
3 proceeding, it would appear, before the Federal
4 Communications Commission.

5 Second, the sections of the 252, to which
6 the court refers in discussing the difference between
7 251 and 252, are sections that -- the sections are
8 252(d)(1) and 252(d)(2). Both of those deal with
9 pricing obligations under 251(c), which are not at
10 issue here.

11 Third, I don't believe that this -- third,
12 I would note that this decision -- there really isn't
13 a change in law. I don't know if I made this clear,
14 but this decision just upholds an FCC decision that
15 was in place at the time the Commission rendered its
16 Third Supplemental Order. So this is not as if it's
17 a novel development; this is just restating an FCC
18 position already adopted prior to this -- prior to
19 this.

20 In terms of where we're left, if the
21 Commission says we're just going to go to the
22 generic, I don't know. I don't know. I mean, we've
23 been trying to get into the CenturyTel serving area,
24 CenturyTel of Washington serving area for a year, and
25 we're not there yet. And if this is left in limbo,

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1 I'm not sure where we go next.

2 I would note that the agreement in question
3 contains a change of law provision. The Commission
4 can arbitrate this dispute, resolve the questions
5 presented, and then, if the generic proceeding, based
6 upon the input of all the good and knowledgeable
7 parties who are involved, requires reaching a
8 different result, I believe the terms of the
9 interconnection agreement require, quote,
10 automatically supersede, unquote -- that the decision
11 would automatically supersede conflicting provisions
12 of the existing interconnection agreement.

13 As a result, I don't think the Commission
14 needs to hold off. It can just note that the
15 parties, pursuant to the change in law clause, would
16 move to whatever the generic docket outcome is.

17 CHAIRWOMAN SHOWALTER: Can I ask a
18 question?

19 MR. ROMANO: Sure.

20 CHAIRWOMAN SHOWALTER: If we do have -- if
21 this is an appropriate forum, if the arbitration is
22 appropriate to address this issue, are you then
23 entitled to resolution of the issue in the
24 arbitration? Do we need to give an answer or could
25 we say we don't want to give an answer, we'll tell

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1 you later.

2 MR. ROMANO: I always hate to say a state
3 commission shall or should or must, but I think 252
4 does require a determination by the state commission
5 in request to a petition for arbitration. I don't
6 have all of the relevant language in front of me, but
7 I believe there's that reference.

8 So if you don't give a result, I'm --
9 again, I think we're in a legal gray area.

10 And then, one final point. Mr. Simshaw
11 used some -- I'd say pejorative terms, like trick the
12 network. And he also used the phrase a couple times
13 always been subject to access. That's simply not
14 true.

15 There are interexchange calls today
16 exchanged between Mr. Simshaw's company and other
17 carriers and on Mr. Simshaw's own network that are
18 not treated as toll. Those are foreign exchange
19 services and FX-like services discussed in the record
20 below, such as wholesale dial and several services
21 offered by Verizon that are not subject to
22 originating access charges today. It would be
23 discriminatory to impose those charges on Level 3.

24 Should the Commission determine in the
25 generic proceeding that a different compensation

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1 structure should apply to all such services, Level 3
2 would abide by that. But, for the time being, we
3 would view it as a barrier to entry to require us to
4 pay one thing while other carriers providing similar
5 or functionally identical services are subject to a
6 different compensation. Thank you.

7 CHAIRWOMAN SHOWALTER: Thank you very much.
8 Thank you for your arguments. Interesting and
9 illuminating.

10 MR. ROMANO: Thank you, thank you.

11 CHAIRWOMAN SHOWALTER: If there is a
12 deadline on this case, and I believe there is, we
13 will meet it.

14 MR. ROMANO: Thank you.

15 MR. SIMSHAW: Thank you.

16 CHAIRWOMAN SHOWALTER: We'll be off the
17 record.

18 (Proceedings adjourned at 11:06 a.m.)

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