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6 BEFORE THE
7 WASHINGTON UTILITIES AND
8 TRANSPORTATION COMMISSION

9 In the Matter of:

Docket No. UT-023043

10 The Petition for Arbitration of an Interconnection
11 Agreement Between:

12 LEVEL 3 COMMUNICATIONS, LLC,

13 And

14 CENTURYTEL OF WASHINGTON, INC.,

15 Pursuant to 47 U.S.C., Section 252

**ANSWER AND OPPOSITION OF
LEVEL 3 COMMUNICATIONS,
LLC, TO MOTION OF
CENTURYTEL OF WASHINGTON,
INC., TO AMEND ORDER
APPROVING INTERCONNECTION
AGREEMENT**

16 **I. RESPONDING PARTY**

17 1. Level 3 Communications, LLC (“Level 3”), located at 1025 Eldorado Boulevard
18 Broomfield, Colorado 80021, by through its counsel of record, hereby submits its Answer and
19 Opposition to Motion of Centurytel of Washington, Inc., to Amend Order Approving
20 Interconnection Agreement.

21 **II. INTRODUCTION**

22 2. Level 3, urges the Washington Utilities and Transportation Commission
23 (“Commission”) to deny the unprecedented motion of CenturyTel of Washington, Inc.
24 (“CenturyTel”), to amend this Commission’s order approving the interconnection agreement
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1 between Level 3 and CenturyTel.¹ The Commission should deny CenturyTel’s motion as
2 inconsistent with federal and Washington state law.

3 3. *First*, CenturyTel’s motion is inconsistent with federal law and the regulations of
4 the Federal Communications Commission (“FCC”), which grant this Commission the authority
5 to resolve contested or controversial issues arising under Section 251 of the Communications
6 Act of 1934, as amended (“Act”), and in no way require a state commission to defer final action
7 pending judicial review under Section 252(e)(6) of the Act. Federal law provides an exclusive
8 federal-court remedy for a party such as CenturyTel aggrieved by a state-commission order, and
9 the FCC’s own decisions and regulations in no way provide for any “true-up” remedy following
10 the issuance of a final order by a state commission, as this Commission has already done in this
11 case. The Commission’s decision here was in no way “interim,” but a final adjudication
12 regarding all outstanding issues. Essentially, CenturyTel’s motion asks the Commission to
13 second-guess its own authority as a final arbiter of disputes arising under Sections 251 and 252
14 of the Act. CenturyTel properly bears the burden of demonstrating to a reviewing court why it
15 should prevail against the Commission and why it should be entitled to any post-final-order
16 relief pending judicial review. CenturyTel has made no plausible showing of harm, especially
17 as CenturyTel’s own competing FX and FX-type services are not subject to access charges.
18 Finally, CenturyTel’s post-final-order “true-up” proposal is untimely under Section 252(b) of
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22 ¹ See CenturyTel of Washington, Inc., Motion to Amend Order Approving Interconnection Agreement, WUTC
23 Docket No. UT-023043 (filed Mar. 7, 2003) (“CenturyTel Motion”); Seventh Supplemental Order: Affirming
24 Arbitrator’s Report and Decision, WUTC Docket No. UT-023043 (Feb. 28, 2003); WAC 480-09-420(8), 480-09-
25 425(2), (3). Oddly, while CenturyTel appears to rely on the statutory provisions regarding reconsideration petitions
as the basis for its filing (citing RCW 35.05.470 [sic]), it has in fact filed a “motion to amend” the Commission’s
Seventh Supplemental Order. See CenturyTel Motion at 3; RCW 34.05.470 (providing for reconsideration in
adjudicative proceedings).

1 the Act, which required that CenturyTel raise the issue in its response to Level 3's petition for
2 arbitration. Yet at no point in the negotiation and arbitration process did CenturyTel ever
3 propose a post-final-order "true-up" in proposed language for the interconnection agreement or
4 as a component of an open issue, even though CenturyTel had ample opportunities to do so.

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6 4. *Second*, CenturyTel's motion is procedurally improper under Washington law
7 and this Commission's regulations, as it reargues the same law and facts and fails to satisfy the
8 Washington standards for reconsideration.

9 5. CenturyTel has previously challenged this Commission's authority to arbitrate
10 and resolve the interconnection dispute between Level 3 and CenturyTel, claiming that the
11 Commission lacked jurisdiction in the first instance over all matters relating to ISP-bound
12 traffic.² The Commission has repeatedly rejected these arguments.³ Both the Arbitrator and the
13 Commission made extensive legal and factual findings regarding the nature of Level 3's ISP-
14 bound traffic and the appropriate treatment of such traffic under Section 251 and the FCC's
15 rules and decisions, i.e., that it is not subject to separate interconnection requirements and
16 cannot be split off into a separate interconnection agreement.⁴ But CenturyTel has now asked
17 that the Commission amend its final order so as to call into question, and ultimately undermine,
18 its prior legal conclusions and factual findings. Finally, CenturyTel has repeatedly sought to
19 delay and to increase the cost of Level 3's entry into CenturyTel's markets, where Level 3 will
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22 ² Brief of CenturyTel on Jurisdictional Issues, WUTC Docket No. UT-023043 (filed Oct. 7, 2002); Response of
23 CenturyTel of Washington, Inc., to Level 3's Petition for Arbitration, WUTC Docket No. UT-023043 (filed
24 Sept. 3, 2002).

25 ³ Third Supplemental Order Confirming Jurisdiction, WUTC Docket No. UT-023043, at ¶¶ 9-11, 16-22 (Oct. 25,
2002); Seventh Supplemental Order at ¶¶ 11-20.

1 compete by offering services which are functionally identical to services offered by CenturyTel
2 itself. Consistent with those prior findings, the Commission should now deny CenturyTel's
3 motion to amend the Commission's Seventh Supplemental Order as yet another attempt to
4 deprive this Commission of its arbitration authority under the Act and to stymie the entry of a
5 competitor into CenturyTel's markets.
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7 **III. THE COMMISSION SHOULD DENY CENTURYTEL'S MOTION AS**
8 **INCONSISTENT WITH FEDERAL LAW AND THE FCC'S ORDERS**
9 **AND REGULATIONS**

10 6. This Commission should deny CenturyTel's motion as inconsistent with federal
11 law and the FCC's orders and regulations. *First*, contrary to CenturyTel's suggestion that only
12 the federal courts have the authority to make final decisions regarding contested or controversial
13 issues arising under Section 251 of the Act, Section 252 explicitly grants to this Commission the
14 authority to interpret and enforce Section 251, and requires that this Commission use such
15 authority both to resolve open issues arising in interconnection arbitrations and to approve and
16 reject interconnection agreements. *Second*, for a party aggrieved by an arbitration decision of
17 the Commission, the Act provides an exclusive and sufficient remedy: judicial review pursuant
18 to Section 252(e)(6) of the Act. CenturyTel's proposal would undermine this statutory regime
19 by marginalizing the Commission's critical role in that regime. *Third*, CenturyTel has misread
20 the interim "true-up" provisions of the FCC's *Local Competition Order*, the timing provisions
21 and policy rationale of which have nothing to do with a post-final-order "true-up." *Fourth*,

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25 ⁴ See Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, at ¶¶ 34-35
(Jan. 2, 2003); Seventh Supplemental Order at ¶¶ 8-10.

1 CenturyTel’s post-final-order “true-up” is untimely under Section 252(b) of the Act, as the issue
2 of a “true-up” was neither negotiated nor arbitrated in this proceeding.

3 **B. Section 252 Grants to the State Commissions the Authority to Interpret**
4 **and Enforce Section 251 and Requires that They Use Such Authority Both**
5 **to Resolve Open Issues Arising in Interconnection Arbitrations and To**
6 **Approve and Reject Interconnection Agreements**

7 7. Section 252 of the Act grants to the state commissions—including this
8 commission—the authority to interpret and enforce Section 251 of the Act and requires the state
9 commissions to use such authority both to resolve open issues arising in interconnection
10 arbitrations and to approve and reject interconnection agreements. CenturyTel, however, has
11 challenged the authority of this Commission under the Act, claiming that the meaning of
12 Section 251 and the FCC’s implementation thereof is uncertain, and implying that only a federal
13 court has the authority to make final decisions regarding contested or controversial issues
14 arising under Section 251 of the Act—particularly those relating to ISP-bound traffic.⁵
15 CenturyTel is mistaken, as this Commission has the authority to resolve any uncertainties
16 arising under Section 251, and has done so in this case, consistent with its actions in other
17 arbitrations and with the arbitration decisions of other state commissions pursuant to
18 Section 252.
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20 8. Section 252(c) of the Act provides that:

21 In resolving by arbitration under subsection (b) any open issues and imposing
22 conditions upon the parties to the agreement, a State commission shall –

- 23 (1) ensure that such resolution and conditions meet the requirements
24 of Section 251, including the regulations prescribed by the Commission
25 pursuant to section 251;

⁵ See CenturyTel Motion at 1, 4-5.

1 (2) establish any rates for interconnection, services, or network
2 elements according to subsection (d); and

3 (3) provide a schedule for implementation of the terms and conditions
4 by the parties to the agreement.⁶

5 Thus, Section 252(c) explicitly grants this Commission the authority to resolve open issues and
6 impose conditions by interpreting and applying Section 251 and FCC regulations promulgated
7 pursuant to Section 251, and requires that the Commission use such authority.

8 9. Likewise, Section 252(e)(1) provides that “[a]ny interconnection agreement
9 adopted by negotiation or arbitration shall be submitted for approval to the State commission.
10 A State commission to which an agreement is submitted shall approve or reject the agreement,
11 with written findings as to any deficiencies.”⁷ The state commission may reject “an agreement
12 (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement
13 does not meet the requirements of section 251, including the regulations prescribed by the
14 Commission pursuant to Section 251, or the standards set forth in subsection (d) of this
15 section.”⁸ Thus, Section 252(e) also explicitly grants this Commission the authority to interpret
16 and apply Section 251 in approving or rejecting an interconnection agreement, and requires that
17 the Commission use such authority.
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22 ⁶ 47 U.S.C. § 252(c). *See also* 47 U.S.C. § 252(b)(4)(C) (providing that “[t]he State commission shall resolve each
23 issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement
24 subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not
later than 9 months after the date on which the local exchange carrier received the request under this section”).

25 ⁷ 47 U.S.C. § 252(e)(1).

⁸ 47 U.S.C. § 252(e)(2).

1 10. CenturyTel’s “uncertainty” argument is therefore specious.⁹ Although the
2 meaning of Section 251 was contested in the arbitration between Level 3 and CenturyTel, this
3 Commission properly relied on the authority explicitly granted to it under Section 252 to resolve
4 the four open issues in the underlying arbitration by interpreting Section 251, related FCC
5 decisions and regulations, and Washington law, and by making factual findings based on the
6 evidentiary record in the arbitration. This Commission properly issued a final arbitration order
7 binding Level 3 and CenturyTel to the Commission’s interpretation of Section 251 and
8 approving the interconnection agreement with Level 3’s language. The state of the law is
9 therefore in no respect “uncertain.” CenturyTel’s motion, however, would have the
10 Commission condition its own ability to interpret Section 251 and corresponding FCC decisions
11 and rules by leaving it to the federal court to decide what the law “really” requires in this case.
12 For these reasons, the Commission should reject CenturyTel’s invitation to undermine its prior
13 conclusions in its Seventh Supplemental Order, and should therefore deny CenturyTel’s motion.
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16 **C. Section 252 of the Act Provides an Exclusive and Sufficient Remedy for a**
17 **Party Aggrieved by the Arbitration Decision of a State Commission:**
18 **Judicial Review Pursuant to Section 252(e)(6) of the Act**

19 11. Section 252 provides an exclusive and sufficient remedy for a party aggrieved by
20 the arbitration decision of a state commission: judicial review pursuant to Section 252(e)(6) of
21 the Act. Section 252(e)(6) provides that “[i]n any case in which a State commission makes a
22 determination under this section, any party aggrieved by such determination may bring an
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⁹ See CenturyTel Motion at 3-5.

action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.”¹⁰

12. CenturyTel’s post-final-order “true-up” proposal is not contemplated in Section 252(e)(6)’s remedy, nor should it be. First, nowhere does the Act require that the Commission provide for post-final-order relief in anticipation of a reversal or remand by a reviewing court. To the contrary, CenturyTel, as the aggrieved party, bears a substantial burden in demonstrating under a deferential standard of review why it should prevail against the state commission.¹¹ And CenturyTel has made no plausible showing of harm.¹² To the contrary, CenturyTel’s own competing FX and FX-type services are not subject to access charges, and any failure to accord similar treatment to Level 3 would discriminate against Level 3. *Second*, if CenturyTel desires relief from the Commission’s final order during the pendency of any federal district court review, it must petition the federal district court to stay the Commission’s order. It is highly unlikely that CenturyTel would succeed in obtaining a stay from a federal court, given the high legal threshold for doing so, and this Commission should reject CenturyTel’s attempt to obtain from the Commission relief for which it would never qualify in federal court.¹³

¹⁰ 47 U.S.C. § 252(e)(6).

¹¹ See 47 U.S.C. § 252(e)(6); *MCI Telecomms. Corp. v. U S West Communications, Inc.*, 1998 U.S. Dist. LEXIS 22361 (W. Dist. Wash. July 21, 1998) (finding that a state commission’s factual findings “will be reviewed as to whether they are arbitrary or capricious”), *aff’d in part and rev’d in part on other grounds, U S West Communications, Inc. v AT&T Communications of the Pacific Northwest, Inc.*, 2000 U.S. App. LEXIS 3606 (9th Cir. Mar. 3, 2000); *MCImetro Access Transmission Services, Inc. v. GTE Northwest, Inc.*, 1998 U.S. Dist. LEXIS 11335 (W. D. Wash. Jul. 7, 1998) (“*MCImetro v. GTE*”) (finding that “substantial deference should be afforded to a state commission’s findings”).

¹² See CenturyTel Motion at 4-5 (asserting a right to collect access charges from Level 3).

¹³ See, e.g., *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.) (stating that “[i]n this circuit there are two interrelated legal tests for the issuance of a preliminary injunction. These tests are ‘not separate’ but rather represent ‘the outer reaches “of a single continuum.”’ ... At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. At the other end of the

1 **D. Contrary to CenturyTel’s Claim, the FCC’s Local Competition Order**
2 **Contemplates No Post-Final-Order “True-Up”**

3 13. The FCC’s *Local Competition Order* contemplates no post-final-order “true-up.”
4 CenturyTel has misconstrued the interim “true-up” provision of the FCC’s Local Competition
5 Order, which is based on a policy rationale and adopts timing requirements that are wholly
6 inapplicable to a final order, as in the instant case.¹⁴ The FCC adopted a true-up provision in its
7 Local Competition Order to address its concern that:

8 a new entrant that has already constructed facilities may have a relatively weak
9 bargaining position [vis-à-vis the incumbent LEC] because it may be forced to
10 choose either to accept transport and termination rates not in accord with these
11 rules or to delay its commencement of service *until the conclusion of the*
*arbitration and state approval process.*¹⁵

12 The FCC went on to:

13 order incumbent LECs upon request from new entrants to provide transport and
14 termination of traffic, on an interim basis, *pending resolution of negotiation and*
arbitration regarding transport and termination prices, and approval by the state
15 *commission.* A carrier may take advantage of this interim arrangement only after
16 it has requested negotiation with the incumbent LEC. *The interim arrangement*
shall cease to be in effect when one of the following occurs: (1) an agreement has
17 *been negotiated and approved; (2) an agreement has been arbitrated and*
approved; or (3) the period for requesting arbitration has passed with no such
18 *request.*¹⁶

19 _____
20 continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of
21 hardships tips sharply in its favor. ‘The relative hardship to the parties’ is the ‘critical element’ in deciding at which
point along the continuum a stay is justified.” (citations omitted)), *rev’d in part on other grounds* 463 U.S. 1328
(1983).

22 ¹⁴ See CenturyTel Motion at 3.

23 ¹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and*
Order, 11 FCC Rcd. 15,499, 16,029–1065 (1996) (“*Local Competition Order*”) (emphasis added), *aff’d in part and*
24 *vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff’d in*
part and vacated in part sub nom. Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and rev’d*
25 *in part sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

¹⁶ *Local Competition Order*, 11 FCC Rcd. at 16,029 ¶ 1065 (emphasis added).

1 Thus, the FCC stated clearly that the “true-up” was available only during the pendency of the
2 interconnection negotiation and arbitration process. The FCC never suggested that the interim
3 “true-up” possibility should extend beyond the issuance of a final order following the
4 conclusion of the negotiation and arbitration process, or during any appeal process. Moreover,
5 the FCC contemplated that the requesting carrier – and not the incumbent IEC – could invoke
6 the “true-up.”
7

8 14. The *Local Competition Order*’s interim “true-up” provision is wholly
9 inapplicable in the present case. *First*, this Commission has already arbitrated and approved the
10 interconnection agreement between Level 3 and CenturyTel, meaning that the period during
11 which the interim “true-up” identified by the FCC is even available has expired. *Second*, as
12 CenturyTel is not the carrier requesting interconnection, it could not elect a “true-up,” even if
13 the FCC had provided for such a post-final-order remedy, which it clearly did not. *Third*, the
14 FCC’s policy rationale for the interim “true-up” in the *Local Competition Order* simply does
15 not apply here. CenturyTel is not a new entrant seeking a “true-up” in order to shore up a weak
16 bargaining position vis-à-vis an incumbent LEC where it would otherwise force it to choose
17 between accepting transport and termination rates not in accord with the FCC’s rules or else
18 delay commencement of service pending negotiation and arbitration of an interconnection
19 agreement. To the contrary, it is Level 3, as a new entrant, that seeks interconnect and compete
20 with CenturyTel, an incumbent LEC.
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23 **E. CenturyTel’s Post-Final-Order “True-Up” Proposal Is Untimely Under**
24 **Section 252(b) of the Act**

25 15. CenturyTel’s post-final-order “true-up” proposal is untimely under Section
252(b) of the Act, which required CenturyTel to raise the “true-up” issue in its response to

1 Level 3’s petition for arbitration. Section 252(b)(1)(4)(A) provides that a state commission
2 arbitrating an interconnection dispute “shall limit its consideration of any petition under
3 [Section 252(b)(1)] (and any response thereto) to the issues set forth in the petition and in the
4 response, if any, filed under [Section 252(b)(3)].”¹⁷ Such a response is due within 25 days of
5 the state commission’s receipt of the petition.¹⁸ Issues and matters beyond the scope of the
6 petition and response therefore fall outside a state commission’s arbitration authority.
7

8 16. At no point in the negotiation and arbitration process – whether in negotiating
9 proposals, pleadings, or testimony – did CenturyTel ever propose a post-final-order “true-up” in
10 proposed language for the interconnection agreement or as a component of an open issue, even
11 though CenturyTel had ample opportunities to do so.¹⁹ And CenturyTel certainly did not raise
12 the issue of a post-final-order “true-up” in its response to Level 3’s petition. CenturyTel’s
13 proposal is therefore untimely under Section 252(b)(4) of the Act, and the Commission has no
14 authority under Section 251(b)(4)(A) to consider the proposal.²⁰
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17 ¹⁷ 47 U.S.C. § 252(b)(4)(A).

18 ¹⁸ 47 U.S.C. § 252(b)(3).

19 ¹⁹ As noted during oral argument, the subject interconnection agreement contains a clause requiring the parties to
20 renegotiate affected provisions of the agreement to incorporate subsequent changes in law. Hearing Transcript, vol.
21 III, at 295:2-16 (Feb. 6, 2003). Specifically, Article III, Section 35 of the agreement (“Change in Legal
22 Requirements”) provides that “CenturyTel and LEVEL 3 further agree that the terms and conditions of this
23 Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was
24 produced. Any modifications to those requirements will be deemed to automatically supersede any prior terms and
25 conditions of this Agreement.” CenturyTel had the opportunity to seek a special “true-up” provision during the
approximately 160 days of negotiations with Level 3, which began on March 1, 2002. But CenturyTel did not.
And neither party raised any concerns with respect to the negotiated change-in-law language during the arbitration
process.

²⁰ Although CenturyTel’s motion requests modification of the Commission’s Seventh Supplemental Order, it
would also require modification of the language of the interconnection agreement in order to effect any “true-up”
proposal. As discussed in part II.D below, however, there appears to be a disconnect between CenturyTel’s claim
of Commission authority and CenturyTel’s requested relief.

1 17. In MCImetro v. GTE, the U.S. District Court for the Western District of
2 Washington rejected a similar attempt to modify an interconnection agreement to reflect
3 language that the parties did not explicitly arbitrate.²¹ GTE had sought to include a binding
4 arbitration provision in the parties' interconnection agreement.²² The court, however, rejected
5 the provision on the basis that the parties did not agree to arbitrate such provision, holding that
6 "the Act does not permit commissions to impose nonconsensual arbitration of claims arising out
7 of or relating to interconnection agreements."²³ In the instant proceeding, CenturyTel must not
8 be allowed to insert into the proceeding an issue that the parties did not either agree to or
9 actually arbitrate.

11 18. CenturyTel's motion seeks to achieve the outcome expressly prohibited in
12 MCImetro v. GTE: modification of an interconnection agreement to address an issue that was
13 neither negotiated or arbitrated. As such, this Commission must deny CenturyTel's motion.

15 **IV. THE COMMISSION SHOULD DISMISS CENTURYTEL'S**
16 **UNPRECEDENTED MOTION AS IMPROPER UNDER WASHINGTON**
17 **LAW**

18 19. The Commission should dismiss CenturyTel's unprecedented motion to revise
19 the order approving the interconnection agreement between Level 3 and CenturyTel as improper
20 under Washington law. CenturyTel's motion reargues the same law and facts at issue in the
21 arbitration below, and would fail to satisfy the Washington standards for petitions for
22 reconsideration had it been filed as such. And contrary to CenturyTel's assertions, there is no

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24 ²¹ MCImetro v. GTE, 1998 U.S. Dist. LEXIS 11335.

25 ²² *Id.* at *10.

²³ *Id.*

1 Commission precedent for ordering a post-final-order “true-up” remedy pending judicial review
2 pursuant to Section 252(e)(6). Finally, CenturyTel’s reliance on RCW 80.16.050 is entirely
3 misplaced. Chapter 80.16 of the Revised Code of Washington addresses affiliated-company
4 contracts and has nothing whatsoever to do with the Commission’s authority to approve an
5 interconnection agreement between competing carriers. And in any event, it would not provide
6 any basis for the relief sought by CenturyTel: modification of the Commission’s Seventh
7 Supplemental Order.
8

9 **B. This Commission Should Deny CenturyTel’s Motion as a Back-Door**
10 **Attempt to Obtain Reconsideration**

11 20. This Commission should deny CenturyTel’s motion as a back-door attempt to
12 obtain reconsideration, as CenturyTel reargues the exact same legal and factual points that it
13 made in the arbitration below.²⁴ As an attempt to obtain reconsideration, however,
14 CenturyTel’s motion fails to state a colorable basis on which the Commission could grant
15 reconsideration. And regardless, the grant of a petition for reconsideration cannot suspend or
16 delay the effectiveness of a Commission order. CenturyTel’s proposed “true-up” ignores the
17 presumption under Washington law that a Commission order is valid absent a reviewing court’s
18 finding to the contrary.
19

20 21. CenturyTel fails to provide any reasonable justification for the Commission to
21 reconsider or otherwise question its order such that modification is warranted. The
22 Commission’s rules provide that a party seeking reconsideration must “clearly identify each
23 portion of the challenged order that the petitioner contends is erroneous or incomplete, must cite
24

25 ²⁴ As noted above, it is not clear if CenturyTel’s motion is a petition for reconsideration or something else.

1 those portions of the record and each law or rule of the commission that the petitioner relies
2 upon to support the petition, and must present brief argument in support of the petition.”²⁵ At
3 most, CenturyTel claims that this Commission’s finding that Level 3’s traffic is not
4 interexchange traffic subject to access charges conflicts with “the findings of several other
5 states.”²⁶ This assertion does not constitute an allegation of legal or factual error, or incomplete
6 legal or factual analysis sufficiently strong to reverse or modify the order. Moreover,
7 CenturyTel made the exact same arguments to the Arbitrator and the Commission – which
8 rejected them.²⁷ Finally, CenturyTel’s assertion about the “findings of several other states” is
9 undermined by the fact that the vast majority of state commissions to consider the specific
10 question of FX-like ISP-bound traffic have found, as this Commission did, that access charges
11 should not apply.²⁸
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14 22. Washington law makes plain that the process of reconsideration cannot suspend
15 or delay the effectiveness of a Commission final order. “Filing of a petition for reconsideration
16 does not stay the effectiveness of the order.”²⁹ Yet CenturyTel’s post-final-order “true-up”
17 would essentially suspend and delay the effectiveness of the Commission’s order by providing
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19 ²⁵ WAC 480-09-810(3).

20 ²⁶ CenturyTel Motion at 4.

21 ²⁷ See Brief of CenturyTel on Jurisdictional Issues, WUTC Docket No. UT-023043 at 13-14 (filed Oct. 7, 2002);
22 See also CenturyTel’s Petition for Commission Review of Arbitrator’s Report and Decision, WUTC Docket
23 No. UT-023043, at ¶¶ 10-11, 17 (filed Jan. 2, 2003); Fifth Supplemental Order at ¶¶ 34-35; Seventh Supplemental
24 Order at ¶¶ 8-10.

25 ²⁸ See *In the Matter of Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of
26 Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin, LLC; Order Approving an
27 Interconnection Agreement*, Docket No. 05-MA-130 (Wisc. PSC, mailed Feb. 17, 2003); Post-Hearing Brief of
28 Level 3 Communications, LLC, Docket UT-023043, at 23-32 (filed December 6, 2002) (citing to decisions of the
29 Texas, Wisconsin, Kentucky, and Florida state commissions).

²⁹ WAC 480-09-810(8).

1 for the possibility of requiring Level 3 to pay access charges to CenturyTel. A post-final-order
2 “true-up” would deprive Level 3 of the certainty and benefits of the Commission’s order by
3 requiring recordkeeping consistent with the assessment and collection of such charges – an
4 outcome that this Commission has expressly rejected. To the contrary, as the aggrieved party,
5 CenturyTel should bear the burden of challenging the Commission’s order on appeal and
6 demonstrating how the Commission erred in interpreting Section 251 and corresponding FCC
7 rules and orders. This Commission should therefore reaffirm its prior conclusions and deny
8 CenturyTel’s motion.
9

10 23. Finally, Washington law presumes that a Commission order is valid absent a
11 reviewing court’s finding to the contrary.³⁰ CenturyTel’s motion is wholly inconsistent with
12 this presumption and should therefore be denied.
13

14 **C. The Commission Has Previously Found that Post-Final-Order “True-Ups”
15 Are Inconsistent with Commission Practice and Procedure**

16 24. As with the FCC’s treatment of an interim “true-up” remedy, CenturyTel
17 misconstrues this Commission’s use of such an interim “true-up” mechanism so as to apply in a
18 post-final-order context. In fact, CenturyTel’s motion to amend the order approving the
19 interconnection agreement with Level 3 is contrary to Commission precedent. In a contested
20 arbitration and a contested adjudicative proceeding, the Commission has refused to order a post-
21 final-order “true-up” in light of claimed uncertainties arising from rate fluctuations or from
22 judicial review.
23

24 _____
25 ³⁰ RCW 34.04.473 provides that “[u]nless a later date is stated in the order or a stay is granted, an order is effective when entered.”

1 25. In an arbitration between AirTouch Paging and U S West, the Commission
2 rejected a “true-up” proposal premised on a claim that the rates for terminating reciprocal
3 compensation might change due to some future event.³¹ The Commission concluded that
4 adopting such a “true-up” would be inconsistent with Commission’s practice and policy, finding
5 that:

6 an interim rate means that a temporary rate remains in effect until a permanent
7 rate is established. The permanent rate may result in a rate change, but it does not
8 involve a true-up. Therefore, the decision by the Arbitrator providing for a true-up
9 of the local traffic termination compensation rate is reversed, and the Agreement
must be modified accordingly.³²

10 The Commission therefore rejected the arbitrator’s decision to subject the rate for terminating
11 reciprocal compensation payable to AirTouch Paging subject to a “true-up.”³³

12 26. In a generic costing and pricing proceeding, the Commission rejected a “true-up”
13 proposal premised on a claim that the FCC’s pricing rules might be rejected at some point in the
14 future.³⁴ Verizon had argued that the Commission should adopt any cost and pricing rules
15 subject to a “true-up” because the FCC’s then-current pricing rules were in flux and under
16 review by the U.S. Supreme Court.³⁵ According to the Commission, however:

17 The current docket is not an interim proceeding. During this part of the
18 proceeding each party has put forth its case in accordance with applicable law.
19

20 ³¹ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AirTouch Paging, and U*
21 *S West Communications, Inc. Pursuant to 47 U.S.C. Section 252, Commission Order Modifying Arbitrator’s*
Report, and Approving Interconnection Agreement with Modifications, WUTC Docket No. UT-990300, at ¶ 18
(July 1, 1999) (“*AirTouch Arbitration Order*”).

22 ³² *Id.*

23 ³³ *Id.* at 7, 28-31.

24 ³⁴ *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and*
Termination, Thirteen Supplemental Order, WUTC Docket No. UT-003013, 2001 Wash. UTC LEXIS 217 at *234-
35 (Jan. 31, 2001) (“*UNE Costing and Pricing Order*”).

25 ³⁵ *Id.* at *232-33.

1 Therefore, the Commission contemplates that the prices established by the
2 Commission in Part A of this proceeding will go into effect as permanent prices,
3 unless expressly noted otherwise. Should the law change, parties may seek to
4 establish new prices based on that change, which will apply prospectively. The
5 Commission denies Verizon's request for a true-up.³⁶

6 The Commission therefore rejected Verizon's proposal.

7 27. Consistent with the *AirTouch Arbitration Order* and the *UNE Costing and*
8 *Pricing Order*, the Commission should deny CenturyTel's motion. In spite of the
9 Commission's final order approving an interconnection agreement resolving the open issues in
10 Level 3's favor, CenturyTel has argued that "true-up" is necessary in light of its belief that it
11 will prevail in its attempt to collect access charges from Level 3 following judicial review of
12 that order. But as the Commission has found previously, a final decision by the Commission
13 precludes the use of a "true-up" remedy, particularly where the possibility of future change
14 stems from judicial review of the Commission's final action. The Commission should therefore
15 deny CenturyTel's request for such a remedy in the present case, as the Commission's order is
16 final, rather than interim, and presumed valid.

17 28. To support its case for a post-final-order "true-up," CenturyTel also misconstrues
18 the Commission's actions in approving an interconnection agreement between Sprint and U S
19 West.³⁷ In that case, the Commission approved an interim "true-up" provision negotiated
20 voluntarily by the parties pending the finalization of rates in a separate generic rate proceeding
21

22
23 _____
24 ³⁶ *Id.* at *234-35.

25 ³⁷ See CenturyTel Motion at 3; *Request for Interconnection by Sprint Communications to U S West, Commission Order Approving Interconnection Agreement with Modification*, WUTC Docket No. UT-960347, 1997 Wash. UTC LEXIS 47 (July 18, 1997).

1 then pending before the Commission.³⁸ Given the pendency of the generic proceeding, “[t]he
2 Commission stated that rates adopted in the pending arbitrations would be interim rates,
3 pending the completion of the generic proceeding.”³⁹ By contrast, there is no generic
4 proceeding in the instant case that would necessitate any interim action with respect to the
5 interconnection agreement between Level 3 and CenturyTel. Accordingly, the Commission
6 should deny CenturyTel’s motion.
7

8 **D. CenturyTel’s Reliance on RCW 80.16.050 Is Misplaced**

9 29. CenturyTel’s reliance on RCW 80.16.050 is misplaced.⁴⁰ RCW 80.16.050
10 provides no general authority that could be used by the Commission to revise and amend the
11 terms and conditions of an interconnection agreement previously approved by final order.
12 Moreover, RCW 80.16.050 pertains only to the modification of contracts – a form of relief
13 which CenturyTel has not even requested in its motion.
14

15 30. Chapter 80.16 of the Revised Code of Washington, which sets forth RCW
16 80.16.050, addresses affiliated company contracts, and has nothing to do with the Commission’s
17 authority to approve or reject an interconnection agreement under the Act. For RCW 80.16.050
18 to apply in the present case, the Commission would have to find that Level 3 is affiliated with
19 CenturyTel – an amusing possibility given the contentious nature of the arbitration. But under
20 the statutory definition for affiliation, it is clear that Level 3 and CenturyTel are not affiliated,
21 and that the power to revise and amend affiliated company contracts cannot be used in this case.
22

23 _____
24 ³⁸ *Id.* at *6.

25 ³⁹ *Id.* at *5.

⁴⁰ *See* CenturyTel Motion at 2.

1 31. An “affiliated interest” includes the owning directly or indirectly five percent of
2 the voting securities of a public service company engaged in any intrastate service in the state of
3 Washington.⁴¹ As Level 3 noted in its’ petition for arbitration, Level 3 is a Delaware limited
4 liability company who’s sole member is (i) Structure, Inc., also a Delaware corporation and
5 which in turn is a wholly-owned subsidiary of Level 3 Communications, Inc., a publicly traded
6 Delaware corporation.⁴² Nowhere does Level 3 suggest that it is in any way affiliated with
7 CenturyTel, nor does CenturyTel make such an allegation in its response to Level 3’s petition.
8 Thus, while RCW 80.16.050 may give the Commission “continuing supervisory control” over
9 affiliated company contracts and arrangements, the statute is simply inapplicable in the context
10 of an arbitration brought pursuant to the Act involving two unaffiliated telecommunications
11 carriers.
12
13
14
15

16 ⁴¹ The Revised Code of Washington defines “affiliated interest” as:

17 “Every corporation and person owning or holding directly or indirectly five percent or more of the voting
18 securities of any public service company engaged in any intrastate business in this state;

19 “Every corporation and person, other than those above specified, in any chain of successive ownership of
20 five percent or more of voting securities, the chain beginning with the holder of the voting securities of
21 such public service company;

22 “Every corporation five percent or more of whose voting securities are owned by any person or
23 corporation owning five percent or more of the voting securities of such public service comp any or by any
24 person or corporation in any such chain of successive ownership of five percent or more of voting
25 securities;

 “Every corporation or person with which the public service company has a management or service
contract; and

 “Every person who is an officer or director of such public service company or of any corporation in any
chain of successive ownership of five percent or more of voting securities.”

RCW 80.16.010.

⁴² See Petition of Level 3 Communications, LLC, for Arbitration, WUTC Docket No. UT-023043 at ¶¶ 1 & 2
(filed Aug. 8, 2002).

1 32. Even if RCW 80.16.050 did provide the Commission with broad authority to
2 modify previously approved agreements – clearly it does not – it would not provide a basis for
3 CenturyTel’s requested relief. CenturyTel has requested only that the Commission amend its
4 Seventh Supplemental Order. And while, in Level 3’s view, CenturyTel’s requested relief
5 would also necessitate revision of the previously approved interconnection agreement,
6 CenturyTel has not requested such relief, thus further highlighting the procedural impropriety of
7 CenturyTel’s motion.
8

9 **V. CONCLUSION**

10 33. For the reasons stated above, the Commission should deny CenturyTel’s motion
11 to amend the Commission’s Seventh Supplemental Order.

12 RESPECTFULLY SUBMITTED this 14th day of March, 2003.

13 LEVEL 3 COMMUNICATIONS, LLC

14
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the original and seven (7) copies of the foregoing document,
3 including diskette of same in Word and Adobe format, was delivered via the methods noted
4 below, properly addressed as follows:

4 Carole Washburn XX Hand Delivered
5 Executive Secretary _____ U.S. Mail (first-class, postage prepaid)
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7 TRANSPORTATION COMMISSION _____ Facsimile
8 1300 South Evergreen Park Drive SW _____ Email
9 Olympia, WA 98504-7250

8 I hereby certify that one copy of the foregoing document was delivered via the methods
9 noted below, properly addressed as follows:

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13 Calvin K. Simshaw _____ Hand Delivered
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21 hington, D.C. 20004-1304 _____ XX Email

20 I declare under penalty of perjury under the laws of the State of Washington that the
21 foregoing is true and correct.

22 DATED this 14th day of March, 2003, at Seattle, Washington.

23 _____
24 Susan Arellano
25 Assistant to Arthur A. Butler, Ater Wynne LLP