

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

IN THE MATTER OF THE PETITION FOR
ARBITRATION OF AN INTERCONNECTION
AGREEMENT BETWEEN

LEVEL 3 COMMUNICATIONS, LLC.,

AND

CENTURYTEL OF WASHINGTON, INC.,

PURSUANT TO 47 U.S.C. § 252

DOCKET No. UT-023043

**BRIEF AND MEMORANDUM OF LAW OF
LEVEL 3 COMMUNICATIONS, LLC**

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SUMMARY

This Commission retains jurisdiction over the interconnection dispute between Level 3 Communication, LLC (“Level 3”), and CenturyTel of Washington, Inc. (“CenturyTel”). The Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“Act”), grants this Commission jurisdiction over Level 3’s disputed request for interconnection under §§ 251(a) (and also under 251(c), to the extent that CenturyTel is not a rural telephone company with an exemption pursuant to § 251(f) of the Act). The Federal Communications Commission (“FCC”) has in no way preempted this Commission from exercising jurisdiction over ISP-bound calls, except on the discrete issue of setting intercarrier compensation rates under § 251(b)(5) of the Act. As Level 3 has not sought reciprocal compensation under § 251(b)(5), the Commission may properly exercise jurisdiction over the interconnection dispute between Level 3 and CenturyTel. Accordingly, this Commission should reject CenturyTel’s jurisdictional challenge.

Level 3 will offer a telecommunications service to its customers by carrying traffic that originates on CenturyTel’s local networks between CenturyTel’s switches and the modem banks for Level 3’s Internet service provider (“ISP”) customers. Level 3’s proposed interconnection and delivery of traffic to customers is no different—from a functional perspective or the customer experience—than the kinds of foreign exchange or foreign exchange-like services that have been treated as local for years by regulators and incumbent local exchange carriers such as CenturyTel. CenturyTel nonetheless attempts to deprive this Commission of jurisdiction and to levy charges for originating access by characterizing the dispute as one of compensation. Level 3, however, has not requested reciprocal compensation under § 251(b)(5) of the Act. Moreover, CenturyTel is otherwise prohibited under the FCC’s rules from charging for

origination. In this Brief and Memorandum of Law, Level 3 makes five arguments in support of Commission jurisdiction over the interconnection dispute between Level 3 and CenturyTel.

First, §§ 251 and 252 of the Act govern all interconnection between telecommunications carriers. Section 251 imposes interconnection obligations on all telecommunications carriers in their provision of telecommunications services. These services include telecommunications services purchased by ISPs, as the FCC has treated ISP-bound calls as interstate only for purposes of intercarrier compensation. And § 252 grants to the state commissions the authority to approve or reject all interconnection agreements and to mediate and arbitrate all interconnection disputes involving incumbent local exchange carriers.

Second, with respect to ISP-bound calls, the state commissions are preempted only as to the setting of intercarrier compensation rates. The FCC has asserted jurisdiction and preempted only on the issue of intercarrier compensation rate-setting under § 251(b)(5). And the vast majority of state commissions themselves have concluded that they are preempted only on the issue of setting intercarrier compensation rates for ISP-bound traffic.

Third, the scope of §§ 251 and 252 is not limited to “intrastate” services, and the FCC has consistently rejected the interpretation that §§ 251 and 252 apply only to exclusively intrastate matters. Instead, the lines between FCC jurisdiction under § 201 and state commission jurisdiction under §§ 251 and 252 are fluid, with regulation of some aspects of certain services falling to the FCC and other aspects of the same services falling to the state commissions. The FCC has affirmed this hybrid approach in allowing telecommunications carriers requesting to use combinations of unbundled loop and transport network elements, obtained via interconnection agreements governed by §§ 251 and 252, to provide exchange access services (an interstate-

intrastate hybrid service), and in granting to paging carriers—which clearly provide interstate-intrastate hybrid service—the full panoply of §§ 251 and 252 interconnection rights.

Fourth, while this Commission has an ample statutory basis for asserting jurisdiction over the interconnection dispute between Level 3 and CenturyTel, it should also assert jurisdiction to promote important public policy interests. In failing to assert jurisdiction, this Commission would perversely disfavor a network architecture that would compete directly with CenturyTel for the same service for connectivity to ISPs. It would also discourage the availability of additional Internet connectivity and provider choice for rural consumers.

Fifth, CenturyTel’s argument about the “rural exemption” pursuant to § 251(f)(1) is not relevant to the issue of Commission jurisdiction over ISP-bound traffic. Level 3 agreed in its petition that to the extent that CenturyTel is a rural telephone company with a valid exemption pursuant to § 251(f)(1), CenturyTel may refuse interconnection pursuant to § 251(c). The § 251(f)(1) “rural exemption” touches only on the issue of *which obligations* apply to a rural incumbent LEC, and says nothing about the jurisdictional authority of a state commission to arbitrate, pursuant to §§ 251 and 252, an interconnection dispute involving a rural incumbent LEC. Moreover, a valid § 251(f)(1) “rural exemption” in no way exempts an incumbent LEC from other interconnection obligations, particularly under § 251(a).

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LEVEL 3 COMMUNICATIONS, LLC**

Pursuant to the orders, rules, and policies of this Commission, Level 3 Communications, LLC (“Level 3”), submits this Brief and Memorandum of Law to argue that this Commission clearly retains jurisdiction over the interconnection dispute between Level 3 and CenturyTel of Washington, Inc. (“CenturyTel”), pursuant to §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“Act”).¹ The Federal Communications Commission (“FCC”) has in no way preempted this Commission from exercising jurisdiction over Internet service provider (“ISP”)-bound calls, except on the discrete issue of setting intercarrier compensation rates under § 251(b)(5) of the Act. As Level 3 has not

¹ See Second Supplemental Order and Pre-Arbitration Conference Order, WUTC Docket No. UT-023043, at 2 ¶ 7 (Sept. 27, 2002) (“Second Supplemental Order”); *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, Statement Regarding negotiation, Mediation, Arbitration, and Approval of*

sought reciprocal compensation under § 251(b)(5), the Commission may properly exercise jurisdiction over the interconnection dispute between Level 3 and CenturyTel. This Commission should therefore reject CenturyTel’s jurisdictional challenge to Level 3’s petition.²

Level 3 had requested interconnection with CenturyTel and entered into interconnection negotiations with CenturyTel pursuant to § 251(a) of the Act, and to § 251(c) to the extent that CenturyTel is not a rural telephone company with an exemption pursuant to § 251(f)(1). Having failed to conclude an interconnection agreement with CenturyTel, Level 3 petitioned this Commission to arbitrate the interconnection dispute pursuant to the rules and policies of this Commission, the Revised Code of Washington, and the Act.³

BACKGROUND

Level 3 has requested interconnection on the trunk side of CenturyTel’s switches.⁴ By doing so, Level 3 will offer a telecommunications service to its customers by carrying traffic originating on CenturyTel’s local networks between CenturyTel’s switches and the modem banks for Level 3’s ISP customers. Level 3 is already a certificated telecommunications carrier serving the State of Washington and has filed with this Commission a tariff for the services contemplated by Level 3 under the proposed interconnection agreement.⁵

Agreements Under the Telecommunications Act of 1996, WUTC Docket No. UT-960269, at part II.C (June 1996) (“*WUTC Interconnection Statement*”); WAC 480-09-42, 480-09-770.

² See Response of CenturyTel of Washington, Inc., to Level 3’s Petition for Arbitration, WUTC Docket No. UT-023043 (filed Sept. 3, 2002) (“CenturyTel Response”).

³ See Petition of Level 3 Communications, LLC, for Arbitration Pursuant to 47 U.S.C. § 252 of Interconnection Rates, Terms and Conditions with CenturyTel of Washington, Inc., WUTC Docket No. 02B-408T (filed Aug. 7, 2002) (“Level 3 Petition”); *WUTC Interconnection Statement*, at part II.C; WAC 480-09-120, 480-09-420 (2002); RCW 81.01.40 (2002).

⁴ Letter from Rogelio E. Peña, Counsel for Level 3 Communications, LLC, to Harvey Perry, CenturyTel, Inc., General Counsel (Mar. 1, 2002), *attached to* Level 3 Petition as Exhibit A.

⁵ See *Level 3 Communications, LLC, Order Granting Registration Application and Authorizing the Provision of Interexchange and Switched Intraexchange Telecommunications*, WUTC Docket Nos. UT-980491 and UT-980492 (Apr. 22, 1998); *Final Order Granting Petition for Classification as a Competitive Telecommunications*

In its arbitration petition, Level 3 presented the following issue:

Issue 1: Is ISP-bound traffic subject to different interconnection requirements than local traffic under federal law such that it should be handled by separate agreement? (Art. II, Secs. 1.43, 1.49; Art. V, Secs. 1, 3.1, 4.2, 4.3; Art. VIII, Sec. 3).⁶

Issue 1 turns on whether this Commission has jurisdiction to approve, reject, mediate, or arbitrate a request for interconnection pursuant to §§ 251(a) and 251(c), or is preempted from asserting jurisdiction in light of the adoption of a rule by the FCC carving out ISP-bound traffic from the reciprocal compensation obligations of a local exchange carrier (“LEC”) under § 251(b)(5) of the Act. In its petition, Level 3 stated that ISP-bound traffic is subject to the same interconnection requirements as local traffic, except for the issue of reciprocal compensation, and that this Commission retains jurisdiction to review and arbitrate the interconnection dispute between Level 3 and CenturyTel. By asserting that the issue of interconnection relating to ISP-bound traffic must be addressed in a separate agreement—subject to the exclusive jurisdiction of the FCC under § 201 of the Communications Act of 1934, as amended—CenturyTel has sought to deprive this Commission of jurisdiction by arguing that the FCC has preempted all state commissions from regulating all matters involving ISP-bound traffic, including but not limited to rate-setting for reciprocal compensation.⁷

At its most basic level, the interconnection dispute between Level 3 and CenturyTel revolves around the appropriate regulatory treatment of interconnecting carrier networks that carry traffic between local service customers of one carrier and ISPs who purchase local service (or foreign exchange-type service) from another carrier. Functionally, Level 3 provides the same

Carrier, WUTC Docket No. UT-980578 (Oct. 14, 1998); Level 3 Communications, LLC, Initial Tariff WN U-2, at 40, WUTC Docket No. UT-981135.

⁶ Level 3 Petition, at 8.

⁷ See CenturyTel Response, at 3-5.

service to ISPs, whether it locates a modem bank at the point of interconnection with CenturyTel and the backhauls traffic from the modem bank or whether, as here, it backhauls traffic from the point of interconnection to the modem bank. From the perspective of CenturyTel's architecture and the functions CenturyTel carries out as an originating carrier, these arrangements are the same. Nor is Level 3's proposed interconnection and delivery of traffic to customers here any different—from a functional perspective or the customer experience—than the kinds of foreign exchange or foreign exchange-like services that have been treated as local for years by regulators and incumbent LECs such as CenturyTel.

The dispute is *not* about compensation for the exchange of traffic, as Level 3 is not seeking, and has not sought, reciprocal compensation from CenturyTel as part of the proposed interconnection arrangements. Nor is it one about charges for transport and termination of traffic by CenturyTel, as it is clearly Level 3 that bears the responsibility for transport and termination to its ISP customer of the traffic originated by CenturyTel's customers on CenturyTel's local network. And Level 3 is not seeking to recover from CenturyTel the costs of transporting and terminating CenturyTel-originated traffic. Nevertheless, CenturyTel has attempted to characterize the interconnection dispute with Level 3 as a compensation dispute because CenturyTel seeks compensation for originating access. As argued below, this Commission retains jurisdiction because the interconnection dispute is not about compensation, and because the FCC has preempted the state commissions only on the issue of setting compensation rates for ISP-bound traffic. And to the extent CenturyTel seeks compensation for origination, its demand is prohibited under the FCC's rules.

MEMORANDUM OF LAW

I. SECTIONS 251 AND 252 GOVERN ALL INTERCONNECTION BETWEEN TELECOMMUNICATIONS CARRIERS

Sections 251 and 252 govern interconnection, without limitation, between telecommunications carriers. The plain language of §§ 251 and 252 therefore does not limit interconnection to non-interstate calls, and it does not accord different treatment to, or exclude, ISP-bound traffic. Instead, §§ 251 and 252 apply to *all* telecommunications carriers, and the telecommunications services they provide. These include ISP-bound calls carried by the telecommunications carriers, which the FCC has treated as interstate only for purposes of intercarrier compensation. This statutory analysis is remarkably straightforward, although CenturyTel has tried to suggest otherwise in an attempt to deprive this Commission of jurisdiction over the instant interconnection dispute with Level 3. But the Act does not require that Level 3 address ISP-bound traffic in an agreement separate from its proposed interconnection agreement.

A. SECTION 251 IMPOSES INTERCONNECTION OBLIGATIONS ON ALL TELECOMMUNICATIONS CARRIERS

Section 251 is not limited to non-interstate calls, but instead applies to all interconnection arrangements between telecommunications carriers. Section 251(a) provides that “[e]ach telecommunications carrier has the duty—(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”⁸ A “telecommunications carrier” is “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services[.]”⁹

⁸ 47 U.S.C. § 251(a)(1). *See also* 47 C.F.R. § 51.100(a)(1).

⁹ 47 U.S.C. § 153(44).

Certain subsections of § 251 impose additional obligations for telecommunications carriers providing particular telecommunications services. Section 251(b) imposes additional obligations—resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation—on LECs.¹⁰ And § 251(c) imposes additional obligations—a duty to negotiate, more detailed interconnection requirements, unbundled access, more detailed resale requirements, notice of changes, and collocation—on incumbent LECs.¹¹ But these obligations are in addition to the general duty to interconnect, pursuant to § 251(a), and the negotiation and dispute resolution provisions of § 252 that govern the implementation of § 251(a).

Level 3 has sought interconnection with CenturyTel under § 251(a)—and under § 251(c), to the extent that CenturyTel is not a rural telephone company with an exemption pursuant to § 251(f)(1)—for purposes of exchanging calls placed by CenturyTel’s end user customers to Level 3’s end user ISP customers. It has not sought interconnection pursuant to § 251(b)(5), as it has not requested reciprocal compensation from CenturyTel. Any argument that CenturyTel may make about whether the FCC or the state commissions have the ultimate rate-setting authority regarding reciprocal compensation is therefore irrelevant to the present interconnection dispute.

B. SECTION 252 GRANTS TO THE STATE COMMISSIONS THE AUTHORITY TO APPROVE OR REJECT ALL INTERCONNECTION AGREEMENTS AND TO MEDIATE AND ARBITRATE ALL INTERCONNECTION DISPUTES INVOLVING INCUMBENT LECs

Section 252 grants to the state commissions the authority to approve or reject all interconnection agreements, to mediate and arbitrate all interconnection disputes, and to enforce both the interconnection obligations of § 251 and the interconnection rules that the FCC may

¹⁰ 47 U.S.C. § 251(b).

¹¹ 47 U.S.C. § 251(c).

adopt.¹² Thus, state commissions have an overarching role that encompasses interconnection generally under § 251, and one that is not limited to any particular subsection of § 251 or subset of LEC interconnection obligations.

The only prerequisite for invoking § 252 is a request for interconnection made to an incumbent LEC. Section 252(a)(1) provides:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 . . . an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section.¹³

Notably, § 252(a) refers only to a request for interconnection negotiations under § 251, without reference to any subsection of § 251. So a request for interconnection under §§ 251(a) and 251(c)—as Level 3 has made of CenturyTel in this case—is necessary and sufficient to give the relevant state commission jurisdiction over the interconnection agreement. This jurisdiction includes the authority to approve or reject the proposed agreement,¹⁴ to mediate a dispute between the parties,¹⁵ or to arbitrate a dispute between the parties.¹⁶ The only prerequisite to arbitration, other than compliance with certain timing requirements, is “a request for negotiation under this section [§ 252].”¹⁷ Thus, a telecommunications carrier seeking interconnection of any sort may properly seek state commission arbitration of an interconnection dispute.

¹² See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and vacated in part sub nom. AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (noting that “the 1996 Act entrusts state commissions with the job of approving interconnection agreements”).

¹³ 47 U.S.C. § 252(a)(1).

¹⁴ 47 U.S.C. § 252(e).

¹⁵ 47 U.S.C. § 252(a)(2).

¹⁶ 47 U.S.C. § 252(b).

¹⁷ 47 U.S.C. § 252(b)(1).

Level 3 has made such an interconnection request of CenturyTel, pursuant to §§ 251(a) and 251(c) (to the extent that CenturyTel is not a rural telephone company with an exemption pursuant to § 251(f)(1)). This Commission therefore has jurisdiction to approve or reject any proposed interconnection agreement, and to mediate and arbitrate the interconnection dispute between Level 3 and CenturyTel.

II. WITH RESPECT TO ISP-BOUND CALLS, THE STATE COMMISSIONS ARE PREEMPTED ONLY AS TO SETTING INTERCARRIER COMPENSATION RATES

With respect to ISP-bound traffic, the FCC has preempted state commission jurisdiction over the single, discrete issue of rate-setting for intercarrier compensation. The FCC has decreed that in all new markets, a carrier serving an ISP must interconnect with originating carriers under a “bill-and-keep” compensation arrangement, *i.e.*, with no compensation to be paid by the originating carrier.¹⁸ This narrow preemption is evident in the FCC’s own actions, the opinions of reviewing courts, and in the vast majority of state commission decisions. In any event, the preemption of the states with respect to intercarrier compensation for ISP-bound calls is irrelevant to the interconnection dispute between Level 3 and CenturyTel, as Level 3 has not sought reciprocal compensation from CenturyTel as the originating carrier.

A. THE FCC HAS ASSERTED JURISDICTION AND PREEMPTED ONLY ON THE ISSUE OF INTERCARRIER COMPENSATION RATE-SETTING UNDER § 251(B)(5)

The FCC has asserted jurisdiction and preempted the state commissions from regulating ISP-bound calls only with respect to intercarrier compensation. The FCC has stated repeatedly that its reciprocal compensation rules governing rate-setting for ISP-bound traffic are “carved

¹⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151, 9188, ¶ 81 (2001) (“*ISP Order on Remand*”), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)

out” of its general reciprocal compensation rules. And while reviewing courts have questioned the statutory basis for carving out ISP-bound calls from intercarrier compensation rules promulgated pursuant to § 251(b)(5), they have never suggested that the FCC was advancing a theory of jurisdiction for *all* interconnection matters involving ISP-bound traffic beyond setting intercarrier compensation rates, or preempting the states as to all interconnection matters involving ISP-bound traffic. CenturyTel’s claim that the state commissions lack jurisdictional authority under § 252(e)(1) to rule on the “issues related to ISP-bound traffic” is therefore incorrect.¹⁹

To remedy what it saw as a distorted result involving traffic imbalances, the FCC chose to treat ISP-bound calls differently under its reciprocal compensation rules. In its *ISP Order*, the FCC recognized the need for “a rule regarding intercarrier compensation for ISP-bound traffic.”²⁰ But the FCC did not otherwise disturb state-commission jurisdiction over interconnection matters.

As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to section 252 ‘extends to both interstate and intrastate matters.’ Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.²¹

(“*WorldCom*”). See also 47 C.F.R. § 51.703(b) (stating that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network”).

¹⁹ See CenturyTel Response, at 4.

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd. 3689, 3707, ¶ 28 (1999) (“*ISP Order*”), vacated and remanded *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (“*Bell Atlantic*”).

²¹ *ISP Order*, 14 FCC Rcd. at 3705, ¶ 25 (citations omitted).

Sections 251 and 252 “address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements.”²² And the state commissions retain general jurisdiction over interconnection involving both interstate and intrastate traffic.

In reviewing the original *ISP Order*, the D.C. Circuit never even reached the jurisdiction and preemption issues, noting that “[w]e do not reach the objections of the incumbent LECs—that § 251(b)(5) preempts state commission authority to compel payments to the competitor LECs.”²³ Instead, the D.C. Circuit found only that the FCC failed to support its conclusions (1) that LEC traffic terminated to ISPs was not local, and (2) that such traffic is “exchange access” rather than “telephone exchange service.”²⁴ Nevertheless, the court did make some observations regarding the nature of ISP-bound traffic generally. These observations confirm the jurisdictionally mixed nature of ISP-bound traffic. On the issue of whether ISP-bound traffic is local or long-distance, the court stated that “[n]either category fits clearly.”²⁵ “Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.”²⁶ But “[c]alls to ISPs appear to fit [the definition of “telecommunications traffic”]: the traffic is switched by

²² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15,499, 15,547, ¶ 92 (1996) (“*Local Competition Order*”), *aff’d in part and 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 in part sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

²³ *Bell Atlantic*, 206 F.3d at 9.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.*

the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the ‘called party.’”²⁷

Responding to the D.C. Circuit’s remand in *Bell Atlantic* in its *ISP Order on Remand*, the FCC stated again that it was “interpreting the relevant scope of section 251(b)(5)” and no more.²⁸

The FCC clarified that its interim intercarrier compensation regime for ISP-bound traffic:

affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers’ other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.²⁹

The FCC could not have been more explicit in stating that its carve-out of intercarrier compensation for ISP-bound traffic and consequent preemption of the state commissions on the compensation issue in no way affected state-commission jurisdiction over interconnection matters generally, as established by the Act and the FCC’s rules. The carve-out simply does not address any aspect of interconnection arrangements, interconnection agreements, or interconnection disputes involving matters other than rate-setting for intercarrier compensation—*i.e.*, the overwhelming majority of interconnection issues. Rather, the FCC was careful to emphasize that its decision went only to “*compensation*,” and not to the rules governing matters such as where carriers interconnect and who is responsible for getting the traffic to that point.

In reviewing the *ISP Order on Remand*, the D.C. Circuit considered only the narrow issue of “whether § 251(g) provided authority claimed by the Commission for not applying § 251(b)(5),” *i.e.*, carving out ISP-bound traffic from its reciprocal compensation rules.³⁰ Again, the court refused to decide “whether handling calls to ISPs constitutes ‘telephone exchange

²⁷ *Id.* at 6.

²⁸ *See ISP Order on Remand*, 16 FCC Rcd. at 9164, ¶ 26.

²⁹ *Id.* at 9189, ¶ 78 n.149 (emphasis in original).

service’ or ‘exchange access’” or “whether those terms cover the universe to which such calls might belong.”³¹

Most tellingly, the D.C. Circuit in *WorldCom* identified the most promising jurisdictional bases for the FCC’s preferred “bill-and-keep” method of intercarrier compensation, noting “there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(2)(B)(i)).”³² As noted above, § 251(b)(5) sets forth the reciprocal compensation obligations of LECs.³³ Section 252(d)(2)(B)(i) provides that nothing in § 252(d)(2)—which governs charges for transport and termination of traffic—shall be construed “to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements).”³⁴ Thus, the provisions identified by the D.C. Circuit as appropriate jurisdictional bases make clear that the FCC rule at issue is one of intercarrier compensation only. Neither § 251(b)(5) nor § 252(d)(2)(B)(i) would be sufficient to support a general theory of exclusive FCC jurisdiction over interconnection for ISP-bound traffic—or in fact over any other interconnection matter other than setting rates for intercarrier compensation.

Admittedly, in the wake of the D.C. Circuit’s remand in *WorldCom v. FCC*, the jurisdictional basis for the FCC’s carve-out is an open question. But it is also an irrelevant one, as the issue has no bearing on the jurisdictional basis for the general duty to interconnect, or even for other more specific LEC and incumbent LEC interconnection obligations.

³⁰ *WorldCom*, 288 F.3d at 432.

³¹ *Id.*

³² *Id.* at 434.

³³ 47 U.S.C. § 251(b)(5).

³⁴ 47 U.S.C. § 252(d)(2)(B)(i).

Finally, the D.C. Circuit in *WorldCom* did not—contrary to CenturyTel’s somewhat confusing claim—call into question the obligations of a LEC to interconnect for ISP-bound calls in its discussion of “information access.”³⁵ First, the D.C. Circuit expressly rejected the FCC’s justification of setting intercarrier compensation rates for ISP-bound calls by characterizing transport and termination of ISP-bound calls as “information access” and therefore subject to § 251(g).³⁶ Second, the D.C. Circuit had considered whether any *pre-Act* obligations—coupled with the authority to set interim rules under § 251(g)—could justify the FCC’s setting of intercarrier compensation rates for ISP-bound calls.³⁷ It found that there were no such obligations. But as discussed in part I.A above, the Act imposes on LECs *new* obligations to do so, pursuant to §§ 251(a), 251(b), and 251(c).

B. THE STATE COMMISSIONS HAVE GENERALLY CONCLUDED THAT THEY ARE PREEMPTED ONLY ON THE ISSUE OF SETTING INTERCARRIER COMPENSATION RATES FOR ISP-BOUND TRAFFIC

The state commissions themselves have overwhelmingly concluded that they are preempted only on the issue of intercarrier compensation for ISP-bound traffic. The state-commission decisions cited by CenturyTel—including one by this Commission—in no way support its claim that the FCC has asserted jurisdiction over interconnection involving ISP-bound traffic—other than for intercarrier compensation.

³⁵ See CenturyTel Response, at 7-8. CenturyTel consistently mischaracterizes its role under the proposed interconnection arrangements. CenturyTel would in no case be transporting or terminating ISP-bound calls. CenturyTel would instead be originating calls on its own local networks. By contrast, Level 3 would transport and terminate those calls to its ISP customers.

³⁶ *WorldCom*, 206 F.3d at 433 (noting that “[h]aving found that § 251(g) does not provide a basis for the Commission’s action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes ‘telephone exchange service’ or ‘exchange access’ . . . or neither, or whether those terms cover the universe to which such calls might belong.”).

³⁷ *Id.*

The trend among state commissions—including this Commission—is to recognize that the FCC’s preemption relating to ISP-bound traffic extends only to matters of intercarrier compensation—and not to other interconnection matters. Specifically, states have made the following findings:

- **Arizona:** “In its order *addressing reciprocal compensation for internet traffic*, the FCC has recently ruled that such traffic is interstate in nature”³⁸
- **California:** “FCC by its Order released on April 27, 2001 established rules under which carriers could *implement a rate structure for intercarrier compensation in handling calls to ISPs*.”³⁹
- **Connecticut:** “[P]ursuant to the *ISP Order*, state commissions no longer have authority to address *intercarrier compensation* for ISP-bound traffic. ... [S]tate commissions have been preempted from addressing *this issue* on a prospective basis.”⁴⁰
- **Florida:** “The FCC’s intent to preempt a state commission’s authority *to address reciprocal compensation* for ISP-bound traffic is clear.”⁴¹ “The overall intent of FCC 01-131 *was to establish a compensation regime* for ISP-bound traffic.”⁴²
- **Illinois:** “[W]ith the adoption of the *ISP Remand Order*, the [Illinois] Commission has been divested of jurisdiction *to determine compensation issues* as they relate to ISP bound calls.”⁴³

³⁸ *In re Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements & Resale Discounts*, Arizona Corporation Commission, Docket No. T-00000A-00-0194, Decision No. 64922 (Az. A.C.C., June 12, 2002), 2002 Ariz. PUC LEXIS at *127 (emphasis added).

³⁹ *Order Instituting Rulemaking on the Commission’s Own Motion into Reciprocal Compensation for Telephone Traffic Transmitted to Internet Services Providers Modems*, California Public Utilities Commission, Decision No. 01-11-067, Rulemaking No. 00-02-005 (Ca. P.U.C., Nov. 29, 2001), 2001 Cal. PUC LEXIS 1039 at *21 (emphasis added).

⁴⁰ *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried over Foreign Exchange Service Facilities*, Connecticut Department of Public Utility Control, Docket No. 01-01-29 (Ct. P.U.C., Jan. 30, 2002), 2002 Conn. PUC LEXIS 23 at *14-*15, *115 (emphasis added).

⁴¹ *In re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Florida Public Service Commission, Docket No. 000075-TP(PHASE I), Order No. PSC-02-0634-AS-TP (Fl. P.S.C., May 7, 2002), 2002 Fla. PUC LEXIS 348 at *4 (emphasis added).

⁴² *In re Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications & Information Systems, Inc.*, Florida Public Service Commission, Docket No. 001305-TP, Order No. PSC-02-0413-FOF-TP (Fl. P.S.C., Mar. 26, 2002), 2002 Fla. PUC LEXIS 232 at *129 (emphasis added).

- **Kansas:** “[T]he FCC has expressly stated state commissions no longer have authority to address appropriate intercarrier compensation for ISP-bound traffic ...”⁴⁴
- **Massachusetts:** “In its *Order on Remand*, the FCC affirmed its conclusion ... that ISP-bound traffic was not subject to reciprocal compensation”⁴⁵
- **New York:** “The FCC held that Internet service provider-bound traffic is not subject to the reciprocal compensation obligations of § 251(b)(5), and established a new cost recovery mechanism for the delivery of such traffic.”⁴⁶
- **North Carolina:** “In the *ISP Remand Order*, the FCC reconsidered the proper treatment for purposes of intercarrier compensation telecommunications traffic delivered to Internet Service Providers (‘ISPs’).”⁴⁷
- **Ohio:** “[T]he Commission finds that the *ISP Remand Order* created a comprehensive new compensation scheme for inter-carrier compensation of ISP-bound traffic.”⁴⁸
- **Rhode Island:** “In the *ISP Remand Order*, ... the FCC determined ISP traffic to be exempt from reciprocal compensation. Specifically, the FCC found that the

⁴³ *Essex Telecom, Inc. vs. Gallatin River Communications, LLC; Complaint & Request for Dispute Resolution of Essex Telecom, Inc. Against Gallatin River Communications, LLC Pursuant to § 13-514 & § 13-515 of the Public Utilities Act*, Illinois Commerce Commission, Docket No. 01-0427 (Il. C.C., July 24, 2002), 2002 Ill. PUC LEXIS 703 at *18-*19 (emphasis added).

⁴⁴ *In re General Investigation to Determine whether Reciprocal Compensation Should Be Paid for Traffic to an Internet Service Provider*, Kansas Corporation Commission, Docket No. 00-GIMT-1054-GIT (Ks. C.C., Oct. 4, 2001), 2001 Kan. PUC LEXIS 1264 at *21 (emphasis added).

⁴⁵ *Complaint of MCI WorldCom, Inc. against New England T&T Co. d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered into under §§ 251 & 252 of the Telecommunications Act of 1996*, Massachusetts Department of Telecommunications & Energy, D.T.E. 97-116-F (Ma. D.T.E., Aug. 29, 2001), 2001 Mass. PUC LEXIS 76 at *8 (emphasis added).

⁴⁶ *Petition of Choice One Communications of New York Inc. Pursuant to §§ 252(b) & 252(i) of the Telecommunications Act of 1996 for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, New York Public Service Commission, Case No. 01-C-0864 (N.Y. P.S.C., Oct. 25, 2001), 2001 N.Y. PUC LEXIS 798 at *6-*7 (emphasis added).

⁴⁷ *In re ALEC, Inc., Complainant v. Carolina T&T Co. & Central Telephone Co. (collectively, Carolina), Respondent*, North Carolina Utilities Commission, Docket No. P-7, SUB 995, Docket No. P-10, SUB 633 (N.C. U.C., Apr. 3, 2002), 2002 N.C. PUC LEXIS 329 (emphasis added).

⁴⁸ *In re Allegiance Telecom of Ohio, Inc.’s Petition for Arbitration of Inter-connection Rates, Terms & Conditions, & Related Arrangements with Ameritech Ohio*, Public Utilities Commission of Ohio, Case No. 01-724-TP-ARB (Oh. P.U.C., Oct. 4, 2001), 2001 Ohio PUC LEXIS 712 at *20 (emphasis added).

provisions of section 251(b)(5) of the 1996 Telecommunications Act do not extend to ISP-bound traffic.”⁴⁹

- **Washington:** “Pursuant to the FCC’s *ISP Order on Remand*, compensation for traffic delivered to an ISP is subject to the FCC’s jurisdiction under § 201, not subject to the reciprocal compensation provisions of section 251(b)(5).”⁵⁰

Thus, state commissions have consistently viewed the *ISP Order on Remand* as a compensation decision, and not a broad preemption of state-commission jurisdiction over non-compensation interconnection issues, including the authority to oversee interconnection at all.

The two state-commission decisions cited by CenturyTel in no way support its sweeping claim that the state commissions have interpreted the FCC’s *ISP Order on Remand* to mean that the FCC retains exclusive and general jurisdiction over ISP-bound traffic.⁵¹ In fact, they actually undermine CenturyTel’s position.

The WUTC decision cited by CenturyTel is superceded by a subsequent order in the same proceeding.⁵² The *24th Supplemental Order* noted in *dicta* that although the WUTC would not treat ISP-bound traffic as local traffic for the purposes of deciding whether US West’s Statement of Generally Available Terms included excessive restrictions on local usage restrictions for enhanced extended loops, the decision “has no practical effect” because the

⁴⁹ *In re Complaint of Global NAPs Inc. Against Bell Atlantic – Rhode Island Regarding Reciprocal Compensation*, Rhode Island Public Utilities Commission, Docket No. 2967 (R.I. P.U.C., Feb. 20, 2002), 2002 R.I. PUC LEXIS 8 (emphasis added).

⁵⁰ *In re Investigation into US West Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996; In re US West Communications, Inc.’s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, 25th Supplemental Order*, Washington Utilities & Transportation Commission, Docket Nos. UT-003022, UT-003040 (WUTC, Feb. 8, 2002), 2002 Wash. UTC LEXIS 3 at *27-*28 (“*25th Supplemental Order*”) (emphasis added).

⁵¹ CenturyTel Response, at 5.

⁵² *See In re Investigation Into U.S. West Communications, Inc.’s Compliance With § 271 of the Telecommunications Act of 1996; In re U.S. West Communications, Inc.’s Statement of Generally Available Terms Pursuant to § 252(f) of the Telecommunications Act of 1996, 24th Supplemental Order*, Washington Utilities & Transportation Commission, Docket No. UT-003022; Docket Nos. UT-003022, UT-003040 (WUTC, Dec. 20, 2001), 2001 Wash. UTC LEXIS 459 at *16 (“*24th Supplemental Order*”); CenturyTel at 5.

WUTC had already banned *all* US West local-usage restrictions.⁵³ But in the *25th Supplemental Order*, the WUTC subsequently explained that the FCC’s preemption extended only to discrete matter of setting intercarrier compensation rates pursuant to § 251(b)(5), stating that “[p]ursuant to the FCC’s *ISP Order on Remand*, compensation for traffic delivered to an ISP is subject to the FCC’s jurisdiction under § 201, not subject to the reciprocal compensation provisions of section 251(b)(5).”⁵⁴ Thus, this Commission made clear that it was preempted as to a matter of rate-making, and not to regulation of interconnection or ISP-bound traffic generally.

In fact, even the *24th Supplemental Order* makes plain the perverse result should a state commission choose *not* to exercise jurisdiction. Complete federal preemption “will result in an inequity between the CLECs and the ILECs, who can continue to provide ISP customers with local exchange service,”⁵⁵ and “[t]he disparity that results from charging CLECs special access rates for service to ISP customers while excluding those charges from Qwest’s own rates raises concerns about anti-competitive effects of Qwest’s rates, both to ISPs that it serves directly and to its own retail customers who call ISPs.”⁵⁶

The Colorado Public Utilities Commission decision cited by CenturyTel is taken out of context. Although the decision notes in an inadvisably sweeping statement that “the FCC has made the determination that ISP-bound traffic is interstate in nature,” a review of the decision

⁵³ *24th Supplemental Order*, 2001 Wash. UTC LEXIS 459 at *16.

⁵⁴ *25th Supplemental Order*, 2002 Wash. UTC LEXIS 3 at *27-*28 (emphasis added). *See also In the Matter of Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination, Thirty-Second Supplemental Order*, WUTC Docket No. UT-003013 (June 21, 2002), 2002 Wash. UTC LEXIS 99 at *46-*47 (noting that the WUTC “[s]taff interprets the ISP Remand Order to bar the Commission from action concerning reciprocal compensation for ISP-bound traffic for three years, unless the ISP Remand Order is stayed or overturned” and that “[w]e agree that the FCC ISP Remand Order does not directly preempt our authority to establish reciprocal compensation rates for non-ISP-bound local traffic that falls within Section 251(b)(5) of the Act.”).

⁵⁵ *24th Supplemental Order*, 2001 Wash. UTC LEXIS 459 at *17.

⁵⁶ *Id.*, n.10.

itself reveals that the Colorado PUC was actually deciding only the question of intercarrier compensation for ISP-bound traffic under § 251(b)(5) in making that broad statement.⁵⁷

III. THE SCOPE OF §§ 251 AND 252 IS NOT LIMITED TO “INTRASTATE” SERVICES

There is, contrary to CenturyTel’s apparent belief,⁵⁸ no immutable rule that any given telecommunications service must fall entirely within federal jurisdiction or entirely within state jurisdiction. Instead, the lines between FCC jurisdiction under § 201 and state commission jurisdiction under §§ 251 and 252 are fluid, with regulation of some aspects of certain services falling to the FCC and other aspects of the same services falling to the state commissions. CenturyTel’s argument that this Commission lacks jurisdiction because Level 3’s service is not exclusively intrastate is therefore unavailing.

The FCC has rejected the interpretation that §§ 251 and 252 apply only to exclusively intrastate matters. Indeed, the FCC itself succinctly and correctly described the blurred lines between federal and state jurisdiction in its U.S. Supreme Court briefing for the *Iowa Utilities Board* case:

[I]n assigning authority to implement the terms of Sections 251 and 252, Congress divided responsibility between the FCC and the state commissions along lines of legislative and adjudicatory *function*, ... not along lines of separate ‘interstate’ and ‘intrastate’ *subject matter*. For example, in authorizing the state commissions to arbitrate disputes concerning unbundled elements often used for access to the interstate long-distance network, Congress extended the jurisdiction of the state commissions into the interstate sphere, while simultaneously directing

⁵⁷ *In re Colorado Public Utilities Commission’s Recommendation to the Federal Communications Commission regarding Qwest Corporation’s Provision of In-Region, Inter-LATA Services in Colorado*, Colorado Public Utilities Commission, Decision No. C02-718 (Co. P.U.C., June 13, 2002), 2002 Colo. PUC LEXIS 636 at *52-*53 (concluding that “[w]e remain confident that ... ‘bill and keep’ will become the prevalent way of dealing with ISP-bound traffic, be it through FCC interstate jurisdiction or our own intrastate jurisdiction.”). Thus, the Colorado PUC also recognized that ISP-bound traffic is jurisdictionally mixed.

⁵⁸ *See CenturyTel Response*, at 4, 6.

them to follow “the regulations prescribed by the Commission pursuant to section 251.”⁵⁹

In other words, Congress intended for the FCC and state commissions such as this one to share jurisdiction over hybrid interstate and intrastate services such as ISP-bound traffic, and an FCC assertion of jurisdiction over compensation issues does not deprive this Commission of jurisdiction over all other aspects of the regulation of ISP-bound traffic. Consequently, both the FCC and the courts have noted that ISP-bound traffic is jurisdictionally mixed, thereby contradicting CenturyTel’s claims that ISP-bound calls are purely interstate and therefore exempt from the requirements of § 251(a) and § 251(c)(2).⁶⁰

Analogous examples of dual FCC and state-commission jurisdiction over hybrid inter- and intra-state services are easy to find. For example, since late 1999, the FCC has explicitly affirmed the ability of requesting telecommunications carriers to use combinations of unbundled loop and transport network elements, obtained via interconnection agreements governed by §§ 251 and 252, to provide exchange access services, which are typically a hybrid of inter- and intrastate service.⁶¹ So long as an interexchange carrier or a competitive LEC uses the unbundled network elements to provide a “significant amount” of local exchange service, it is

⁵⁹ Opening Brief for the Federal Petitioners, *FCC v. Iowa Utilities Board*, United States Supreme Court No. 97-831 (filed Apr. 1998), at 37 (quoting 47 U.S.C. § 252(c)(1)); *see also* Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents, *FCC v. Iowa Utilities Board*, United States Supreme Court No. 97-826 (filed June 1998), at 9 (“The 1996 Act adopts a new jurisdictional approach that simultaneously extends federal authority into the intrastate sphere *and* extends state authority into the interstate sphere—an approach under which federal and state authorities work together in complementary rulemaking and adjudicatory capacities in apply federal law to the same subjects.”). *See also* *ISP Order*, 14 FCC Rcd. at 3705, ¶ 25; *Local Competition Order*, 11 FCC Rcd. at 15,546-47 (noting that § 251(i) “merely affirms that the Commission’s preexisting authority under section 201 continues to apply for purely interstate activities. It does not act as a limitation on the agency’s authority under section 251.”).

⁶⁰ *ISP Order*, 14 FCC Rcd. at 3705, ¶ 25; *Bell Atlantic*, 206 F.3d at 5; CenturyTel Response, at 6-7.

⁶¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order*, 15 FCC Rcd. 1761 (1999).

free to also provide interstate exchange access service using the same unbundled network elements—and subject to state commission jurisdiction—under §§ 251 and 252.⁶²

The FCC explicitly declined to preempt state jurisdiction over exchange access services, and it did so with full knowledge that “[t]he exchange access market occupies a different legal category from the market for telephone exchange services; indeed, at the highest level of generality, Congress itself drew an explicit statutory distinction between those two markets.”⁶³ In other words, even though “telephone exchange service” is defined as service within a single, local exchange (or its equivalent),⁶⁴ and “exchange access” includes access for interstate telephone service,⁶⁵ *both* services can be offered under §§ 251 and 252 and, therefore, under state-commission jurisdiction.

Likewise, the FCC has found that paging carriers—which clearly provide interstate-intrastate hybrid service⁶⁶—are entitled to the full panoply of §§ 251 and 252 interconnection rights.⁶⁷ And the Ninth Circuit affirmed a California Public Utility Commission decision granting interconnection rights to one-way paging carriers, despite the fact that—like ISPs—one-way paging carriers initiate no calls and originate no traffic for termination on the incumbent LEC’s network.⁶⁸

⁶² *Id.* at ¶ 2.

⁶³ *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, 15 FCC Rcd. 9587, 9594 (2000), *clarified* 15 FCC Rcd. 9587 (2000).

⁶⁴ 47 U.S.C. § 153(47).

⁶⁵ *Id.* § 153(16).

⁶⁶ *See In re TSR Wireless, LLC v. US West Communications, Inc., Memorandum Opinion & Order*, 15 FCC Rcd. 11,166, 11,184, ¶ 31 (2000) (noting that LECs must deliver traffic to paging and other CMRS providers anywhere within a given MTA, and that MTAs “typically are large areas that may encompass multiple LATAs, and often cross state boundaries”).

⁶⁷ *Id.* at 11,166, ¶ 1 (finding that “pursuant to the Commission’s rules and orders, LECs may not charge paging carriers for delivery of LEC-originated traffic.”).

⁶⁸ *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999).

Thus, neither the hybrid interstate-intrastate nature of ISP-bound traffic, nor the fact that ISPs initiate little or no traffic, means that *all* aspects of ISP-bound traffic must be deemed to be entirely and exclusively within federal jurisdiction.

IV. THIS COMMISSION SHOULD ASSERT JURISDICTION TO PREVENT DISPARATE REGULATORY TREATMENT OF LEVEL 3 AND TO PROMOTE INTERNET ACCESS AND COMPETITION IN RURAL AREAS

This Commission has an ample statutory basis—outlined above—for asserting jurisdiction over the interconnection dispute between Level 3 and CenturyTel. But this Commission should also assert jurisdiction to promote important Washington State public policy interests. In failing to assert jurisdiction, this Commission would perversely disfavor a network architecture that would compete directly with CenturyTel for the same service for connectivity to ISPs. It would also discourage the availability of additional Internet connectivity and provider choice for rural consumers.

A. THIS COMMISSION SHOULD ASSERT JURISDICTION TO AVOID DISPARATE REGULATORY TREATMENT OF LEVEL 3 AND OF NEW NETWORK ARCHITECTURES

This Commission must assert jurisdiction over the interconnection dispute between Level 3 and CenturyTel to prevent disparate regulatory treatment of competitive providers of connectivity to ISPs. CenturyTel has argued that only the FCC has jurisdiction—under § 201 of the Act—to regulate the charges to be paid by Level 3 for interconnecting to CenturyTel’s local network.⁶⁹ CenturyTel’s position is unsurprising, as CenturyTel seeks to force Level 3 to pay switched and special access rates for carrying to ISPs traffic originating on CenturyTel’s network. This will have the effect of inflating the costs for any ISP that is served by Level 3,

⁶⁹ CenturyTel Response, at 4, 5.

because for the ISPs that CenturyTel serves directly, CenturyTel pays no access charges and therefore need not pass through any such charges to its customers.⁷⁰

Thus, CenturyTel has sought to create a regulatory anomaly by splitting jurisdiction over connectivity to ISPs—allowing state-commission jurisdiction over its own ISP-bound traffic while precluding state jurisdiction over ISP-bound traffic that originates with a CenturyTel customer and is transported and terminated by Level 3. This is not only an attempt to deprive this Commission of jurisdiction, but also an impermissible attempt to charge Level 3 for origination—a practice clearly and correctly prohibited by the FCC.⁷¹

B. THIS COMMISSION SHOULD ASSERT JURISDICTION TO PROMOTE INTERNET ACCESS AND LOCAL COMPETITION, PARTICULARLY IN RURAL AREAS

This Commission is well aware of the need for federal-state cooperation over the matters that have been entrusted to both the FCC and state commissions under §§ 251 and 252. This Commission endorsed in its *Triennial Review* reply comments the positions of the National Association of Regulatory Utility Commissioners (“NARUC”), in which NARUC highlighted the importance of state commission’s more direct knowledge of competitive effects in local markets.⁷²

⁷⁰ CenturyTel, for its part, has a blossoming business serving ISPs, and even acts as an ISP itself. *See* 2001 Annual report of CenturyTel, Inc., at 3 (noting that “[a]t the end of 2001, more than 60 percent of our access lines were DSL capable, and we provided services to approximately 25,500 DSL customers and 121,500 dial-up Internet subscribers. We believe the demand for data services will continue to grow, and CenturyTel is focused on expanding and utilizing our high quality network infrastructure to become the dominant broadband provider in the markets we serve.”), *available at* <http://www.centurytel.com/Investor_Relations/Financial_Publications/images/01_annual_report.pdf>. CenturyTel recognizes that the profitability of these services depend in part on a lack of competitors. *See id.* at 4 (noting that “[s]ince we face fewer competitors in our non-urban markets, we can continue to increase our focus on the customer relationship and drive lifetime value by further penetration of our products and services.”).

⁷¹ *See* 47 C.F.R. § 51.703(b) (stating that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network”).

⁷² Reply Comments of the Washington Utilities and Transportation Commission, FCC CC Docket Nos. 01-338, 96-98, 98-147, at 2 (filed July 16, 2002); Comments of the National Association of Regulatory Utility Commissioners, FCC CC Docket Nos. 01-338, 96-98, 98-147, at 5 (filed Apr. 5, 2002).

Other state-commission comments in the FCC's *Triennial Review* proceeding reiterated the need for a prominent state role in the ongoing implementation of §§ 251 and 252. The Texas Public Utilities Commission noted that "federal and state cooperation is essential to determine the effects upon end users and to ensure that end users fully participate in the benefits of competition."⁷³ The California Public Utilities Commission noted that Congress "recognized in section 251(d)(3) the unique and desired role that states necessarily play in tailoring interconnection obligations to the specific conditions within particular local markets."⁷⁴ And the Illinois Commerce Commission opined that "States must continue to have the power to take proactive measures when barriers to entry frustrate the pro-competitive provisions of the 1996 Act."⁷⁵ Although the *Triennial Review* proceeding was focused on the specific issue of the continued availability of unbundled network elements, the basic message was the same: there must be a continuing, meaningful role for state commissions in the implementation of §§ 251 and 252.

The issues of Internet access and competition in rural areas remain acute. And the role of state commissions is particularly critical in assessing local conditions in rural markets, where consumers are underserved in terms of Internet access and often have little, if any, choice to make among providers. And the U.S. Department of Commerce's National Telecommunications and Information Administration has echoed those concerns, reporting that with respect to

⁷³ Reply Comments of the Public Utility Commission of Texas, FCC CC Docket Nos. 01-338, 96-98, 98-147, at 19 (filed May 2, 2002).

⁷⁴ Comments of the People of California & the California Public Utilities Commission, FCC CC Docket Nos. 01-338, 96-98, 98-147, at 23 (filed Apr. 5, 2002).

⁷⁵ Initial Comments of the Illinois Commerce Commission, FCC CC Docket Nos. 01-338, 96-98, 98-147, at 4 (filed Apr. 5, 2002).

telephone and computer access, the data “demonstrate that there are still pockets of ‘have nots’ among the low-income, minorities, and the young, particularly in rural areas and central cities.”⁷⁶

This Commission has far better access to and awareness of the peculiarities and details of rural Washington telecommunications markets than does the FCC. This Commission should recognize that by promoting new network architectures, like that of Level 3, it will enhance both access and competition in rural markets. To do so, it should exercise jurisdiction pursuant to §§ 251 and 252—as the Act and the FCC’s rules allow it to do—to ensure that new network architectures are not disfavored through selective exercise of jurisdiction. For these reasons as well, this Commission should reject CenturyTel’s jurisdictional challenge.

V. CENTURYTEL’S ARGUMENT ABOUT THE “RURAL EXEMPTION” PURSUANT TO § 251(F)(1) IS NOT RELEVANT TO THE ISSUE OF COMMISSION JURISDICTION OVER ISP-BOUND TRAFFIC

CenturyTel’s argument about the “rural exemption” pursuant to § 251(f)(1) is not relevant to the issue of Commission jurisdiction over ISP-bound traffic or the merits of Issue 1 as presented in the Level 3 Petition.⁷⁷ This argument merely highlights CenturyTel’s failure to address the Act’s plain language regarding jurisdiction, particularly with respect to § 251(a) interconnection obligations.

As noted in the Level 3 Petition, Level 3 agrees that to the extent that CenturyTel is a rural telephone company with a valid exemption pursuant to § 251(f)(1), CenturyTel may refuse interconnection pursuant to § 251(c).⁷⁸ The § 251(f)(1) “rural exemption” touches only on the

⁷⁶ See *Falling Through The Net II: New Data on the Digital Divide*, National Telecommunications & Information Administration (July 1998), available at <<http://www.ntia.doc.gov/ntiahome/net2/falling.html>>.

⁷⁷ Here, Level 3 simply notes the irrelevance of these arguments to jurisdiction and Issue 1. Level 3 reserves the right to address other aspects of CenturyTel’s “rural exemption” claims in its testimony and post-hearing brief. See Level 3 Petition, at 20-23.

⁷⁸ See *id.*, at 20 (requesting interconnection “where [CenturyTel] is subject to Section 251(c)).

issue of *which obligations* apply to a rural incumbent LEC.⁷⁹ It says nothing of the authority of a state commission to arbitrate an interconnection dispute pursuant to §§ 251 and 252 involving a rural incumbent LEC.

Moreover, a valid § 251(f)(1) “rural exemption” in no way exempts an incumbent LEC from other interconnection obligations, particularly under § 251(a) (or, for that matter, any obligations in § 251(b)). As the FCC noted in clarifying the number portability obligations of rural LECs, “Section 251(f)(1) applies only to rural LECs, and offers an exemption only from the requirements of Section 251(c).”⁸⁰

⁷⁹ See 47 U.S.C. § 251(f)(1).

⁸⁰ *In the Matter of Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration*, 12 FCC Red. 7236, 7303 (1997).

CONCLUSION

For the reasons stated above and in the Level 3 Petition, this Commission reject CenturyTel's jurisdictional challenge, and assert jurisdiction, pursuant to §§ 251 and 252 of the Act, over the interconnection dispute between Level 3 and CenturyTel.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that the original and seven (7) copies of the foregoing BRIEF AND MEMORANDUM OF LAW OF LEVEL 3 COMMUNICATIONS, LLC in WUTC Docket No. UT-023043, including diskette of same in Word and Adobe format, was sent via electronic, facsimile and FedEx Priority Overnight on this 7th day of October, 2002, addressed to the following:

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