BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between LEVEL 3 COMMUNICATIONS, LLC and CENTURYTEL OF WASHINGTON, INC., Pursuant to 47 U.S.C. Section 252	)	DOCKET NO. UT-023043

REPLY BRIEF OF CENTURYTEL ON JURISDICTIONAL ISSUES

In the Arbitrator's Pre-arbitration Conference Order issued September 27, 2002 in this matter, the Parties were directed to file memoranda of law on the question of whether the Washington Utilities and Transportation Commission ("Commission" or "WUTC") has jurisdiction to conduct the requested arbitration proceeding. CenturyTel of Washington, Inc. ("CenturyTel") submits this reply brief in response to that directive.

I. INTRODUCTION.

Based on the well-established principle that jurisdictionally mixed communications fall within the Federal Communications Commission ("FCC")'s exclusive Section 201 authority under the Communications Act of 1934, as amended (the "Act"),[1] the FCC has preempted the states from regulating ISP-bound traffic under Sections 251 and 252. For this reason, this Commission lacks jurisdiction to arbitrate this matter. Moreover, because Level 3's traffic is

[1] 47 U.S.C. § 151 *et seq*.

properly characterized as interexchange traffic, Sections 251 and 252 are inapplicable. Level 3 has cited no proper authority for the Commission to arbitrate this dispute.

II. THE FCC HAS PREEMPTED THE STATES FROM REGULATING ISP-BOUND TRAFFIC.

As CenturyTel noted in its Response to Level 3's Petition for Arbitration, ISP-bound traffic is not subject to this Commission's review under Section 252 of the Act.[2] While it is true that the FCC preempted the states with respect to intercarrier compensation for ISP-bound traffic in the *ISP Order on Remand*,[3] the FCC did not stop there, as Level 3 would have this Commission to believe. With the express acknowledgement by the Eighth Circuit that the interstate and intrastate components of ISP-bound traffic "cannot be reliably separated,"[4] the FCC, applying its traditional end-to-end analysis,[5] concluded in the *ISP Order on Remand* that "ISP traffic is properly classified as interstate, and it falls within the [FCC's] section 201 jurisdiction."[6] Thus, contrary to Level 3's representation that "regulation of some aspects of certain services fall[s] to the FCC and other aspects of the same services fall[s] to the state commissions," the FCC has exclusive jurisdiction over the regulation of ISP-bound

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2 While CenturyTel has proposed separate agreements for Level 3's ISP-bound traffic and its non-ISP-bound traffic, CenturyTel has not insisted on separate agreements. If both ISP and non-ISP issues are addressed in a single agreement, however, the ISP issues must be excluded from arbitration because the state commission may not arbitrate ISP-related issues as a part of its Section 252 review.

3 *In re 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 (2001) ("*ISP Order on Remand*"). Although the D.C. Circuit remanded this order to the FCC, it did not vacate the FCC's decision. *See WorldCom, Inc. v. FCC*, No. 01-1218, slip op. (D.C. Cir., May 3, 2002).

4 *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (affirming the jurisdictionally mixed nature of ISP-bound traffic).

5 CenturyTel notes that, contrary to Level 3's representations, the D.C. Circuit did not vacate the FCC's end-to-end analysis. Level 3 ignores that the FCC applied the same end-to-end analysis in the *ISP Order on Remand* that it applied in its prior orders regarding the jurisdictional treatment of ISP-bound traffic. *ISP Order on Remand* at ¶¶57-64. This analysis was not disturbed by the D.C. Circuit on remand.

6 *ISP Order on Remand* at ¶52.

communications under its Section 201 authority.

Significantly, this conclusion is based on the well-established principle that, when communications are jurisdictionally mixed and cannot be separated, as has been determined to be the case with respect to ISP-bound traffic, the FCC has the exclusive authority to regulate such communications.[7] The FCC reaffirmed this principle in the *ISP Order on Remand* and did not limit its preemption ruling to simply intercarrier compensation issues. Rather, having noted that ISP-bound traffic should be classified as interstate communications, the FCC preempted the state commissions from exercising jurisdiction over all prospective interconnection matters[8] involving ISP-bound traffic.

In so doing, the FCC removed ISP-bound traffic from the obligations and duties of Sections 251 and 252 altogether, thereby leaving the state commissions without authority over interconnection issues related to ISP-bound traffic. Level 3 does not deny that ISP-bound is "largely interstate."[9] In arguing that the states retain jurisdiction over ISP-bound traffic through Sections 251 and 252 and the FCC's *ISP Order on Remand* does not extend beyond intercarrier compensation issues, Level 3 relies heavily on prior FCC orders addressing ISP-related issues.[10] Whether prior FCC orders on ISP-related issues did or did not remove ISP traffic from the Section 251/252 process is irrelevant, however. The FCC's *ISP Order on Remand* expressly did

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7 *See, e.g*., *Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 376 n.4 (1986) (stating that federal regulation of traffic is appropriate where it is not possible to separate the interstate and intrastate components of the asserted regulation); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 541-42 (holding that federal regulation of "jurisdictionally mixed" traffic is appropriate). The FCC has also determined that "special access lines carrying both interstate and intrastate traffic are subject to the [FCC's] jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction." *GTE Telephone Operating Cos.*, GTOC Tariff No. 1, GTOC Transmittal No. 1148, 13 FCC Rcd 22466, 22478-22481, ¶¶ 22-27 (1998).

8 The FCC concluded in the *ISP Order on Remand* that its decision "does not alter existing contractual obligations." *ISP Order on Remand* at ¶82.

9 Legal Brief of Level 3 Communications, LLC, filed September 23, 2002, at 8-10 ("Level 3 Brief").

10 *Id*. at 9-10.

so. The FCC's *ISP Order on Remand* prohibited any carrier from invoking Section 252(i) to opt into any existing interconnection agreement addressing ISP-bound traffic. Significantly, the FCC stated that Section 252(i) "applies only to agreements arbitrated pursuant to Section 252."[11] Furthermore, the D.C. Circuit's description of the FCC's holding in the *ISP Order on Remand* fully supports CenturyTel's position: "[T]he state regulatory commissions would no longer have jurisdiction over ISP-bound traffic as part of their power to *resolve LEC interconnection issues* under [section] 252(e) of the Act."[12] The *ISP Order on Remand*, therefore, makes undeniably clear that Sections 251 and 252 do not govern interconnection issues related to ISP traffic. Rather, the FCC has exclusive jurisdiction over such issues pursuant to its Section 201 authority.

In support of its conclusion that "ISP-bound traffic remains subject to the same interconnection rules as local traffic," Level 3 relies on footnote 149 found in the FCC's *ISP Order on Remand* which states that its "decision . . . does not alter carriers' other obligations under our Part 51 rules…"[13] The FCC did not, however, specify in the *ISP Order on Remand* what a carrier's obligations are for transporting ISP-bound traffic under its Part 51 rules. The obligation to transport ISP-bound traffic to points of interconnection with information access service providers simply does not exist under the FCC's Part 51 rules. Furthermore, even if such an obligation exists under the Part 51 rules, as CenturyTel points out below, it has no obligation under Section 251 of the Act to transport or terminate Level 3's proposed traffic that originates

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11 *ISP Order on Remand* at ¶82.

12 *WorldCom, Inc. v. FCC*, No. 01-1218, slip op. (D.C. Cir. May 3, 2002). Although the D.C. Circuit remanded the FCC's analysis that Section 251(g) provided the basis for excluding ISP-bound traffic from Section 251(b)(5), the D.C. Circuit declined to hold that such an exclusion could not be justified; indeed, the court expressed confidence that the FCC could identify an alternative basis of jurisdiction over intercarrier compensation for ISP-bound traffic. For this reason, the D.C. Circuit did not vacate the FCC's *ISP Order on Remand*.

13 Level 3 Communications Petition for Arbitration, at ¶13.

on CenturyTel's network.

III. CENTURYTEL HAS NO OBLIGATION UNDER ITS SECTION 251 INTERCONNECTION OBLIGATIONS TO TRANSPORT AND TERMINATE LEVEL 3'S PROPOSED ISP TRAFFIC.

Even if it is determined that the FCC did not remove all ISP-bound traffic from the Section 251/252 process, CenturyTel still would not be required to transport and terminate traffic that originates on CenturyTel's network and terminates to Level 3's ISP customers. Level 3 has sought interconnection with CenturyTel's network under two possible provisions: "under § 251(a) – and under § 251(c), to the extent that CenturyTel is not a rural company,"[14] neither of which obligates CenturyTel to transport and terminate (or, for that matter, to originate) Level 3's ISP traffic. First, as a matter of law, CenturyTel is exempt from interconnection obligations under Section 251(c), and its Section 251(a) obligations do not require CenturyTel to provide the service that Level 3 seeks on a "bill and keep" basis. Second, Level 3's traffic is interexchange, not local, and therefore outside of the purview of Section 251.

A. Section 251(c) Does Not Govern The Interconnection Level 3 Seeks In This Case.

1. CenturyTel Is Exempt From Section 251(c) Requirements.

As an initial matter, CenturyTel is a rural telephone company as defined in Section 153(37) of the Act[15] and therefore is exempt from the Act's Section 251(c) requirements. Under Section 251(f), rural telephone companies are exempt from the provision of Section 251(c) of the Act, until the state commission terminates the exemption in a Section 251(f)(1)(B) proceeding.[16] The Commission has not terminated CenturyTel's rural exemption status; thus, CenturyTel continues to be exempt from the interconnection duties imposed by Section 251(c).

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[14] Level 3 Brief at 6.

[15] 47 U.S.C. § 153(37).

[16] 47 U.S.C. § 251(f).

Additionally, Level 3 does not challenge CenturyTel's rural exemption status; therefore, even if Level 3 were to propose interconnection for traffic subject to Section 251(c) (which ISP-bound traffic is not), the rural exemption would apply, and CenturyTel would have no obligations to Level 3 under that provision of the Act.

2. Level 3's Proposed Service Does Not Fall Within The Meaning Of Telephone Exchange Service And Exchange Access.

Under the terms of Section 251(c)(2), any request for interconnection to an ILEC's network shall only be "for the transmission and routing of telephone exchange service and exchange access."[17] Level 3's proposed service is both an interstate and an interexchange service and therefore is not subject to Section 251(c)(2) interconnection for several reasons. According to the FCC, "[a]ll carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the *same telephone exchange* (*i.e.*, non-interexchange calls)."[18] Significantly, the FCC has concluded that "an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2)."[19] Moreover, an interexchange carrier may not obtain Section 251(c)(2) interconnection to terminate interexchange traffic if it does not offer excess access services to others.[20] Finally, according to the FCC, "[n]or does a carrier seeking interconnection of interstate traffic only – for

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17 47 U.S.C. § 251(c)(2).

18 *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd 15499, 15598 ¶ 190 ("*Local Competition Order*").

19 *Id*. at 15598 ¶ 191.

20 *Id*.

the purpose of providing interstate services only – fall within the scope of the phrase 'exchange access.'"[21]

Level 3 attempts to recast CenturyTel's argument about the Commission's lack of jurisdiction over this matter into a discussion about whether the scope of Sections 251 and 252 is limited to purely intrastate services. Level 3 misconstrues CenturyTel's position. As CenturyTel has argued throughout this proceeding,[22] the service that Level 3 seeks to provide is both interstate *and* interexchange. First, it is an interstate service because Level 3 intends to carry ISP-bound traffic[23] which, as noted above, the FCC has unequivocally stated is interstate communications.

Second, Level 3's proposed service is an interexchange service because, exclusively through the use of virtual NXX codes, Level 3's proposed traffic will originate and terminate in *different* local calling areas. Indeed, Level 3 has never denied that its ISP customers will be located outside the CenturyTel customer's local calling area.[24] Furthermore, that Level 3 has been certified to provide local exchange services in Washington and has filed a tariff in the state does not demonstrate that Level 3's proposed service is local in nature. Level 3 has state-wide certification in Colorado; however, an administrative law judge of the Public Utilities Commission of Colorado recently denied Level 3's request to provide service within CenturyTel of Eagle's service area on the grounds that Level 3's proposed service did not constitute a local

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21 *Local Competition Order*, 11 FCC Rcd at 15598 ¶ 191.

22 CenturyTel's Response to Level 3's Petition for Arbitration at 4-5, 10-13.

23 Level 3 Brief at 3-4.

24 Reply Testimony of William Hunt (filed on Oct. 9, 2002 in Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. § 252 of Interconnection Rates, Terms, and Conditions with CenturyTel, Wisconsin Docket 05-MA-130) at 12 (stating that calls originated by a CenturyTel customer are destined for a Level 3 ISP customer who does not maintain a physical presence in the rate center associated with the ISP's telephone number).

exchange telecommunications service.[25] The judge specifically noted that "the mere placement of a telecommunications service offering in a local tariff does not, in and of itself, make the offering 'local' in nature."[26] The service that Level 3 proposes to provide in the State of Washington is the same as the service that was proposed in Colorado. Because Level 3's proposed traffic will originate and terminate in *different local* calling areas, the service clearly is interexchange and not subject to Section 251(c)(2) interconnection. In the words of the FCC, Level 3 is requesting interconnection "solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others."[27]

This debate need not stray from the facts in the instant case, as Level 3 would suggest, to whether Sections 251 and 252 extend to all interstate and intrastate traffic. The Commission need not decide such broad questions. As explained above, the FCC has removed ISP-bound traffic from the obligations of Sections 251 and 252 and held that interexchange traffic is not entitled to interconnection pursuant to Section 251(c)(2).[28] Because Level 3 does not propose to interconnect with CenturyTel for the purpose of originating or terminating local exchange traffic, but solely for the purpose of terminating its interexchange traffic, Level 3 is not entitled to interconnection pursuant to Section 251(c)(2) for such purposes.

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[25] In the Matter of the Declaration of Level 3 Communications, LLC's Intent to Serve Within Territory of Rural Telecommunications Provider, Recommended Decision of Administrative Law Judge Dale E. Isley Denying Declaration, Decision No. R02-1125, at 7.

[26] *Id*.

[27] *See supra* note 19.

[28] Because Level 3 has no right to Section 251(c)(2) interconnection, it also is precluded from seeking Commission action under the pricing and procedural rules of Section 252 that are incorporated by reference in Section 251(c)(2).

B. Section 251(a) Is Limited To The Physical Linking Of Networks.

Level 3 incorrectly states that "§§ 251 and 252 apply to *all* telecommunications carriers."[29] Indeed, the only provision in Section 251 that applies to all telecommunications carriers is subsection (a)(1), which expressly provides: "Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." As the FCC itself has stated, this section of the Act "imposes relatively limited obligations on all telecommunications carriers."[30] Notably, the term "interconnection," according to the FCC, "refers solely to the physical linking of two networks, and not to the exchange of traffic between networks."[31] Thus, to the extent that Section 251(a) applies to Level 3 and CenturyTel, the provision does not require CenturyTel to transport or terminate (or originate) Level 3's ISP-bound traffic.

IV. THIS COMMISSION LACKS AUTHORITY UNDER SECTION 252 TO APPROVE OR REJECT AN AGREEMENT BETWEEN CENTURYTEL AND LEVEL 3 FOR THE EXCHANGE OF LEVEL 3'S ISP-BOUND TRAFFIC OR TO ARBITRATE THIS DISPUTE.

Level 3 erroneously claims that Section 252 grants this Commission "authority to approve or reject all interconnection agreements and to mediate and arbitrate all interconnection disputes."[32] The broad question posed by Level 3 of whether all interconnection disputes between telecommunications carriers are governed by Sections 251 and 252 need not be decided here.[33] As explained above, the FCC has removed ISP-bound traffic from the duties and

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29 Level 3 Brief at 5.

30 *Total Telecommunications Services, Inc., and Atlas Telephone Co., Inc. v. AT&T Corp*., Memorandum Opinion and Order, 16 FCC Rcd 5726 ¶ 25 (2001).

31 *Id*. at ¶ 23

32 Level 3 Brief at 6.

33 CenturyTel notes that not all interconnection agreements are subject to Section 252 arbitration and review. Intrastate and interstate access arrangements, for example, are not subject to Section 252 arbitration and review. *See supra* notes 19-21 and associated text.

obligations set forth in those sections of the Act. Nevertheless, to the extent that this Commission has jurisdiction to arbitrate this dispute at all, it should focus on whether an interconnection agreement negotiated pursuant to a request for interconnection under Sections 251(a) and (c) is subject to state commission review. Section 252(a) contemplates that interconnection agreements subject to state commission review under Section 252(e) will address Section 251(b) and (c) interconnection issues. In this case, Level 3 only has sought interconnection pursuant to Section 251(a) and (c).

To the extent that this Commission concludes that Section 251(a) applies to Level 3's ISP-bound traffic, CenturyTel disagrees that Section 252 gives the state commissions authority to arbitrate an interconnection dispute involving Section 251(a) interconnection. Specifically, Level 3 claims that "Section 252(a) only refers to a request for interconnection negotiations under § 251, without reference to any subsection of § 251."[34] To the contrary, Section 252(a) makes specific reference to subsections (b) and (c) of Section 251. Section 252(a) provides, in relevant part, that:

> 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 . . . without regard to the standards set forth in *subsections 251(b) and (c) of Section 251*. . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section.[35]

Thus, Section 252(a) contemplates that interconnection agreements subject to state commission review under Section 252(e) will address Section 251(b) and (c) interconnection issues, even if the parties ultimately decide to enter into an arrangement that does not track the Act precisely. The provision makes no specific reference to interconnection pursuant to Section

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[34] Level 3 Brief at 7.

[35] 47 U.S.C. § 252(a).

251(a). Under the language of Section 252(a), the state commissions may arbitrate issues related to Section 251(b) or Section 251(c)-type interconnection.

The statutory language in Section 252(d) further supports this position. That provision sets forth pricing standards for interconnection made only pursuant to Sections 251(b)(5) and 251(c)(2)–(4).[36] None of these interconnection provisions applies to the current negotiations in which Level 3 has sought interconnection pursuant to Section 251(a). Notably, there are no pricing standards for Section 251(a) contained in Section 252(d). It was not contemplated that Section 251(a) interconnection agreements would be reviewed by a state commission under Section 252(e).

Even if the Commission were to read Section 252 more broadly and conclude that Section 252 gives state commissions authority to review an agreement involving Section 251(a) interconnection, such an agreement would be limited to terms regarding the physical linking of the carriers' networks. As CenturyTel explained above and in its initial response, Section 251(a) only requires telecommunications carriers to provide direct or indirect physical links between themselves and other carriers; nothing more.[37] As a result, any Section 251(a) interconnection agreement would be limited to issues involving the physical linking of CenturyTel's and Level 3's networks and would not address the exchange of traffic.

Level 3's claim that this Commission has jurisdiction to arbitrate this dispute pursuant to Section 251(c) also fails. Although it is true that Section 252 gives state commissions jurisdiction to arbitrate an interconnection dispute involving Section 251(c) interconnection, as CenturyTel already has demonstrated above, Section 251(c) interconnection obligations do not

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[36] 47 U.S.C. § 252(d).

[37] CenturyTel's Response to Level 3's Petition for Arbitration at 6.

apply to CenturyTel. It is therefore axiomatic that this state commission lacks jurisdiction to arbitrate this dispute pursuant to Section 251(c). Level 3 claims, however, that CenturyTel's rural exemption argument is irrelevant to the issue of whether this Commission has jurisdiction over ISP-bound traffic. Although Section 251(c) does not speak directly to the authority of a state commission to arbitrate an interconnection agreement involving a rural carrier, Section 252, through its express reference to Section 251(c), certainly does. Under Section 252, state commissions may arbitrate interconnection agreements adopted pursuant to Section 251(c). Because CenturyTel has a rural exemption in the state of Washington, however, Level 3 may not seek interconnection pursuant to Section 251(c), and the state commission therefore logically cannot arbitrate this dispute pursuant to Section 251(c).

V. STATE COMMISSIONS DO NOT HAVE JURISDICTION OVER ANY PROSPECTIVE ISP-BOUND TRAFFIC ISSUES.

Level 3 asserts that the "state commissions themselves have overwhelmingly concluded that they are preempted only on the issue of intercarrier compensation for ISP-bound traffic."[38] However, out of the 13 state commission decisions quoted, Level 3 has not cited a single instance in which a state commission extended its jurisdiction beyond intercarrier compensation issues for ISP-bound traffic.[39] This is because state commissions do not have jurisdiction to prospectively address any ISP-related issues. Many of the decisions cited by Level 3, as well as decisions by other state commissions, reflect this fact. The remaining cases on Level 3's list merely highlight the obvious – that in reliance on the FCC's *ISP Order on Remand*, the state

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[38] Level 3 Brief at 13.

[39] In the case of one of the thirteen decisions, Level 3 does not even cite a decision of a state commission, but a mere Order serving the Motions and Answer of the Respondent. *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. The North Carolina Utilities Commission has not made a decision in this matter.

commissions recognize that they are preempted from addressing intercarrier compensation for ISP-bound traffic, and only retain jurisdiction over agreements that existed prior to the *ISP Order on Remand*. These decisions simply do not support a theory that the FCC's preemption relates only to matters of intercarrier compensation.

A. Various State Commissions Support CenturyTel's Position That The FCC Retains Jurisdiction Over All Prospective ISP-Related Issues.

To the extent that the views of other states are relevant, CenturyTel has found the trend among states to be far different from what Level 3 describes. Not only have at least three state commission decisions cited by Level 3 used extremely broad language when addressing the FCC's jurisdiction over ISP-bound traffic, but other state commissions have even explicitly ceded jurisdiction to the FCC for ISP issues other than intercarrier compensation. These decisions demonstrate that state commissions generally concede they lack jurisdiction over all prospective ISP-bound traffic issues.

Washington. As CenturyTel alluded to in its response, this Commission has determined that it does not have jurisdiction over ISP-bound traffic.[40] Contrary to Level 3's assertions that the state commissions have only acknowledged preemption for intercarrier compensation issues,[41] the 24th Supplemental Order only addressed the WUTC's jurisdiction over ISP-bound traffic in a discussion of the local use restrictions imposed by Qwest for extended enhanced loops.[42] Notably, the 24th Supplemental Order does not contain a single mention of intercarrier

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40 CenturyTel's Response to Level 3's Petition for Arbitration at 5.

41 Level 3 Brief at 16.

42 *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*, Washington Utilities & Transportation Commission, Docket No. UT-003022; Docket No. UT-003040 (Wa. UTC, Dec. 20, 2001), 2001 Wash. UTC LEXIS 459 ("24th Supplemental Order").

compensation. Notwithstanding the fact that it was reviewing ISP-bound traffic outside the context of intercarrier compensation, the WUTC still acknowledged that it did not have jurisdiction over ISP-bound traffic issues generally.[43]

Level 3 attempts to diminish the holding of this case by pointing to concerns regarding potential inequities between CLECs and ILECs, in addition to maintaining that certain statements by the WUTC were mere dicta.[44] It is true that the WUTC noted in dicta that "ISP-bound traffic must be treated as interstate for the purpose of *determining local use of the facilities* in question," and that it expressed concerns about the potential inequities that could result between CLECs and ILECS.[45] Despite these concerns, however, Level 3 neglects to mention that the WUTC *held in its Conclusions of Law* that "[t]he FCC, through its ISP Remand Order, has preempted the Commission's jurisdiction to determine the jurisdictional treatment of ISP-bound traffic."[46] Level 3 also tries to dismiss the findings of the WUTC in the 24th Supplemental Order by alleging that it was "superceded by a subsequent order in the same proceeding."[47] As we discuss *infra* in Section V.B., the WUTC decision cited by Level 3 (25th Supplemental Order) does not hold that "the FCC's preemption extended *only* to discrete matter

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43 *Id.* at *16 (emphasis added).

44 Level 3 Brief at 16.

45 *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*, Washington Utilities & Transportation Commission, Docket No. UT-003022; Docket No. UT-003040 (Wa. UTC, Dec. 20, 2001), 2001 Wash. UTC LEXIS 459 at *16-*17.

46 *Id*. at *25.

47 Level 3 Brief at 16 (citing *In re Investigation into US West Communication, 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*, Washington Utilities & Transportation Commission, Docket No. UT-003022, Docket No. UT-003040 (Wa. UTC, Feb. 8, 2002), 2002 Wash. UTC LEXIS 3 at *1).

of setting intercarrier compensation rates…" as Level 3 asserts,[48] but merely that it is *one* of the ISP-related matters over which the WUTC ceded jurisdiction to the FCC.

Iowa. Similarly addressing issues beyond intercarrier compensation,[49] the Iowa Utilities Board (the "Board") recently rejected tariffs[50] involving ISP-bound traffic for lack of jurisdiction.[51] The Board specifically noted that "[t]he Federal Communications Commission (FCC) has determined that dial-up calls to ISPs are jurisdictionally interstate calls, not intrastate. As such, the Board has no direct jurisdiction over calls to ISPs."[52] Again, the Board's broad choice of language, "calls to ISPs," as well as the lack of any discussion of intercarrier compensation, concedes that state commissions do not have jurisdiction over any prospective issues related to ISP-bound traffic.

Florida. In an investigation into the appropriate methods to compensate carriers for exchange of traffic subject to Section 251, the Florida Public Service Commission ("PSC") also appears to adhere to the belief that ISP-bound traffic is entirely within the jurisdiction of the FCC. It noted that "If the FCC or the courts subsequently rule that ISP-bound traffic is not *entirely* within the jurisdiction and control of the FCC," the parties agreed that further

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48 Level 3 Brief at 17 (emphasis added).

49 In that case, Level 3 proposed tariffs that did "not include any business or residential local exchange service rates or access charges" and would have only provided dial-up access service to Internet Service Providers. *In re: Level 3 Communications, L.L.C.* Docket Nos. TF-02-54; TF-02-55 (TCU-99-1) (Iowa Util. Bd., February 25, 2002), 2002 Iowa PUC LEXIS 60 at *1.

50 In that case, Level 3 proposed tariffs that did "not include any business or residential local exchange service rates or access charges" and would have only provided dial-up access service to Internet Service Providers. *In re: Level 3 Communications, L.L.C.* Docket Nos. TF-02-54; TF-02-55 (TCU-99-1) (Iowa Util. Bd., February 25, 2002), 2002 Iowa PUC LEXIS 60 at *1.

51 *Id*.

52 *Id*.

proceedings would be reinitiated.[53] The PSC proceeds to state that "Upon consideration, we agree that the ISP Remand Order does classify ISP-bound traffic as interstate and, therefore, under the jurisdiction of the FCC."[54]

Illinois. The Illinois Commerce Commission ("ICC") decision cited by Level 3, which involved the provision of service to ISPs and virtual NXX traffic, is factually similar to the case at hand.[55] In addition to concluding that the ICC did not have jurisdiction to address *compensation* issues between LECs that cooperate to route a virtual NXX call to an ISP, [56] it also agreed with the more sweeping statement that "ISP bound *calls* are without the [state]'s jurisdiction in this case."[57] Specifically, the ICC "concluded that it is without authority to reach a decision relating to ISP bound *calls* using [virtual] NXX rating and routing codes."[58]

Furthermore, the ICC concluded that the FCC retains jurisdiction over compensation where an ISP is located in an exchange outside of the local calling area.[59] "Because the [Illinois] Commission concludes that it is without authority to determine disputes over compensation for ISP bound calls [where the calling party and called party are in two different local calling areas],

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53 *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.. May 7, 2002), 2002 Fla. PUC LEXIS 348 at *3 (emphasis added).

54 *Id*. *4.

55 *Essex Telcom, Inc. vs. Gallatin River Communications, L.L.C.; Complaint and Request for Dispute Resolution of Essex Telcom, Inc. against Gallatin River Communications, L.L.C. pursuant to Section 13-514 and Section 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 *1.

56 *Id*. at *5.

57 *Id*. at *7 (Argument raised by Essex)(emphasis added); *Id*. at *19 (The Commission states that "we agree with all of the arguments raised above by Essex and will not reiterate them here.").

58 *Id*. at *20 (emphasis added).

59 *Id*. at *18 (Argument raised by Essex); *Id*. at *19 (The Commission states that "we agree with all of the arguments raised above by Essex and will not reiterate them here.").

Essex should address any concerns over the manner in which Gallatin intends to charge it for costs associated with ISP bound calls to the FCC…"[60] As a result of this lack of jurisdiction, the ICC refused "to reach a decision relating to its proposed imposition of access charges in this context."[61] Similarly, in the present case, where Level 3's NXX calls that are destined for an ISP would originate and terminate in two different local calling areas, the FCC has jurisdiction over the imposition of access charges on Level 3 for its ISP-bound calls.

Connecticut. In a request for a Declaratory Ruling, the Connecticut Department of Public Utility Control ("DPUC") affirmed the FCC's *ISP Order on Remand*, noting that "because the FCC has exercised its authority pursuant to § 201 of the Telcom Act to determine the appropriate intercarrier compensation for ISP-bound traffic, state commissions have been preempted from addressing this issue on a prospective basis."[62] Ironically, in this proceeding, Level 3 argues that all ISP-bound traffic is subject to the FCC's preemption order. The DPUC summarized Level 3's argument in the following manner:

> Level 3 also claims that the ISP Order does not distinguish 'local' ISP-bound traffic from 'non-local' ISP-bound traffic, making the issue of whether ISP-bound traffic using virtual NXX arrangements is 'local' or 'non-local' moot. *All ISP-bound traffic falls within the scope of the FCC's preemption ruling*, including traffic to ISPs using virtual NXX arrangements.[63]

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60 *Id*. at *19-*20.

61 *Id*. at *20.

62 *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. PUC, Jan. 30, 32002), 2002 Conn. PUC LEXIS 23 at *118.

63 *Id.* at *65 (emphasis added).

Just as Level 3 conceded in that case that all ISP-bound traffic falls under the FCC's jurisdiction,[64] it should similarly acknowledge this position in the present case.

B. The State Commissions Have Not Asserted Jurisdiction Over Any Issues Extending Beyond Intercarrier Compensation for ISP-Bound Traffic.

Although many of the state commission decisions cited by Level 3 do hold that the FCC's preemption relates to matters of intercarrier compensation, that is far from holding that the FCC's preemption relates *only* to matters of intercarrier compensation. In fact, at least nine of the thirteen cases cited in no way address any ISP-bound traffic issues other than compensation, nor do they explicitly limit the reach of the FCC's decision to intercarrier compensation matters.

Arizona. In its cursory discussion of reciprocal compensation, the Arizona Corporation Commission ("ACC") merely reiterated the holding of the *ISP Order on Remand* that "state commissions will no longer have authority to address this issue [reciprocal compensation]" and therefore removed all testimony and did not decide the issue in this case.[65] The ACC did not exercise jurisdiction over any other ISP-bound traffic-related matters, and in no way held that the FCC's preemption relates *only* to matter of intercarrier compensation.

California. In this decision, the California Public Utilities Commission ("CPUC") merely solidified the distinction made by the FCC between existing agreements in place prior to the implementation of the *ISP Order on Remand* and those created after the implementation of

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64 CenturyTel disagrees, however, that bill-and-keep applies to non-local ISP-bound traffic. *See infra* at section VI.

65 *In re Investigation unto 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.

the order.[66] Level 3 cites to a "Finding of Fact" where the CPUC is merely affirming the *ISP Order on Remand*, hardly a showing, as Level 3 claims, that "the FCC's preemption relating to ISP-bound traffic extends only to matters of intercarrier compensation."[67] Furthermore, there is no question that the present case involves the creation of a *new* interconnection agreement, for which the FCC has not left jurisdiction with the state commissions.

Florida. In this case, the PSC states that "the applicability of the interim compensation rates is not a matter over which we can exert jurisdiction, since the FCC has deemed ISP traffic subject to its section 201 authority."[68] Although it speaks to interim compensation rates, the PSC uses the term "ISP traffic" generally, and does not claim jurisdiction over any other issues related to ISP traffic.

Kansas. In an investigation to determine whether reciprocal compensation should be paid for traffic destined for an ISP, this Kansas Corporation Commission Order ("KCC") merely provided its interpretation of the *ISP Order on Remand*, noting that it no longer had authority over intercarrier compensation.[69] Again, however, the KCC did not exercise jurisdiction over any other part of ISP-bound traffic.

Massachusetts. In an Order addressing the impact of the *ISP Order on Remand* on issues of reciprocal compensation for telecommunications traffic bound for Internet Service

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66 *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. PUC Nov. 29, 2001), 2001 Cal. PUC LEXIS 1039.

67 Level 3 Brief at 13.

68 *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. PSC, Mar. 26, 2002), 2002 Fla. PUC LEXIS 232 at *131.

69 *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.

Providers, the Massachusetts Department of Telecommunications and Energy ("Department") similarly reiterates findings of the Commission related to the jurisdiction of the FCC over reciprocal compensation issues.[70] Note that even in this discussion, however, the Department states that "the Order on Remand limits the Department's participation in parties' actions with regard to interconnection agreements [generally, not just compensation issues] on a going-forward basis."[71]

New York. In this decision, Choice One filed a petition for arbitration related to its interconnection negotiations with Verizon. Despite the *ISP Order on Remand*'s determination that ISP-bound traffic is not subject to reciprocal compensation and the corresponding prohibition against carriers opting in to rates in an existing interconnection agreement, the New York Public Service Commission determined that, because the opt-in provision was invoked by Choice One a month before the *ISP Order on Remand*, Choice One was able to opt in to the interconnection agreement.[72] Level 3 merely cites to a restatement of the law established by the *ISP Order on Remand*.[73]

Ohio. In this case, Allegiance filed a petition for arbitration with the Public Utilities Commission of Ohio ("PUCO") regarding its interconnection negotiations with Ameritech.[74]

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70 *Compliant 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, DTE 97-116-F (Ma. DTE, Aug. 29, 2001), 2001 Mass. PUC LEXIS 76.

71 *Id.* at *25-*26.

72 *Petition of Choice One Communications of New York Inc. Pursuant to Sections 252(b) and 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 01-C-0864 (N.Y. PUC, October 25, 2001), 2001 N.Y. PUC LEXIS 798 at *3.

73 Level 3 Brief at 15.

74 *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. PUC, Oct. 4, 2001), 2001 Ohio PUC LEXIS 712.

Although resolving a dispute over the reach of the *ISP Order on Remand* in a reciprocal compensation discussion, the PUCO merely reaffirms the FCC's holding in the context of compensation and does not extend state commission jurisdiction to other matters. In fact, the PUCO ceded jurisdiction over the ISP-bound traffic to the FCC and only addressed calls that are "not ISP-bound."[75]

Rhode Island. The Rhode Island Public Utilities Commission ("RIPUC") was required to determine whether the *ISP Order on Remand* fulfilled a contract condition requiring resolution of the issue of reciprocal compensation for ISP-bound traffic "by the FCC or a court."[76] The RIPUC held that the condition was satisfied by the *ISP Order on Remand*, merely restating the FCC's holding without any mention of the state's jurisdiction over other ISP matters.[77]

Washington. In connection with the WUTC's review of Qwest's compliance with the requirements of Section 271, the WUTC held that compensation for traffic delivered to an ISP is subject to the FCC's jurisdiction. Nowhere in the decision, however, does it state that compensation is the only issue under the FCC's jurisdiction.[78]

Not only has Level 3 failed to cite a state commission decision explicitly refusing to extend the FCC's *ISP Order on Remand* to ISP issues beyond intercarrier compensation, it has similarly failed to cite a single example of a state commission exercising its jurisdiction over any

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75 *Id*. at *20.

76 *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. PUC, Feb. 20, 2002), 2002 R.I. PUC LEXIS 8 at p.4-5.

77 *Id.* at p.5.

78 *In re Investigation into US West Communication, 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*, Washington Utilities & Transportation Commission, Docket No. UT-003022, Docket No. UT-003040 (Wa. UTC, Feb. 8, 2002), 2002 Wash. UTC LEXIS 3 at *27.

other ISP issue. In light of this scant record, as well as decisions where state commissions refused to exercise jurisdiction over non-intercarrier compensation ISP issues, CenturyTel maintains that Level 3 has failed to identify a basis for this Commission to exercise jurisdiction to arbitrate any issues involving Level 3's ISP-bound traffic.

VI. CONTRARY TO LEVEL 3'S REPRESENTATION, THIS DISPUTE CONCERNS COMPENSATION.

Despite Level 3's naked representation to the contrary, this dispute merely concerns compensation. The dispute is simple: CenturyTel maintains that it is entitled to be compensated for the cost of origination of Level 3's ISP-bound traffic because such traffic is interexchange, while Level 3 contends that such traffic is subject to "bill-and-keep" under the *ISP Order on Remand*. In an attempt to avoid paying CenturyTel access charges on what is clearly interexchange traffic, Level 3 argues that CenturyTel may not seek compensation for traffic that originates on CenturyTel's network under Section 51.703(b) of the FCC's rules. Level 3's reliance on Section 51.703(b), however, is misplaced because that provision only applies to telecommunications traffic that is "local" in nature and not to access traffic.[79]

Level 3's view is misguided for a couple of reasons. First, Section 51.703 pertains to reciprocal compensation obligations and was promulgated pursuant to the FCC's authority under Section 251(b)(5) of the Communications Act.[80] The FCC concluded in the *ISP Order on Remand*, however, that "ISP-bound traffic is not subject to the reciprocal compensation

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[79] *See* 47 C.F.R. § 51.701(b)(1). Level 3 maintains that its proposed service is functionally equivalent to FX or "FX-like" services that have been treated as local. CenturyTel reiterates, for the reasons outlined in its Response to Level 3's Petition for Arbitration, that Level 3's proposed service is not similar to foreign exchange service. Level 3's proposed service should not be treated as local traffic because virtual NXX calls do not originate and terminate within the same local calling area. For these reasons, Level 3 should be required to pay CenturyTel originating access. CenturyTel's Response to Level 3's Petition for Arbitration at 10.

[80] *Local Competition Order*, at Appendix B (Final Rules).

provisions of Section 251(b)(5);"[81] therefore, Section 51.703 likewise is inapplicable to ISP-bound traffic. Indeed, Level 3 itself states that it does not seek reciprocal compensation from CenturyTel.[82]

Furthermore, as CenturyTel has argued throughout this proceeding, Level 3's proposed traffic is not "local," but rather interexchange, because it does not originate and terminate within the same exchange.[83] In this case, when a CenturyTel customer calls an ISP served by Level 3, the call does not terminate within the exchange because the ISP is physically located outside the CenturyTel customer's local calling area. CenturyTel is permitted to seek compensation from Level 3 for the origination of such interexchange calls. Such compensation is not prohibited under the FCC's or this Commission's access rules.[84]

Finally, FCC and D.C. Circuit decisions support the viewpoint that the *ISP Order on Remand* only addresses compensation for ISP-bound calls that terminate within the local calling area.[85] Because Level 3's ISP-bound traffic is interexchange, it is subject to the access charge regime. Bill-and-keep is required by the *ISP Order on Remand* only for "local" traffic, and is not an appropriate compensation mechanism for Level 3's proposed interexchange traffic. While

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81 *ISP Order on Remand* at ¶ 35. As noted above, the D.C. Circuit rejected the FCC's Section 251(g) holding and remanded the *ISP Order on Remand* to the FCC for further findings on the question of a jurisdictional basis for excluding ISP-bound traffic from Section 251(b)(5), but noted that the FCC was likely to find such a basis elsewhere in the Act, and therefore did not vacate the *ISP Order on Remand*. *See supra* note 12.

82 Level 3 Brief at 4.

83 *See* discussion *supra* Section III.A.2.

84 CenturyTel's Response to Level 3's Petition for Arbitration at 13-14.

85 *See ISP Order on Remand* at ¶ 13, ("the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by a competing LEC. [Footnote omitted.] The Commission determined at that time that resolution of this question turned on whether ISP-bound traffic 'originates and terminates' within a local area"); *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. May 3, 2002) ("In the order before us the Federal Communications Commission held that under section 251(g) of the Act it was authorized to 'carve out' from section 251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area"); *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d. 1 at 2 (D.C. Cir. 2000) (the FCC "considered whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves 'local'").

Level 3 has acknowledged that it clearly "bears the responsibility for transport and termination to its ISP customer of traffic originated by CenturyTel's customers on CenturyTel's local network,"[86] it fails to acknowledge that it also is responsible for paying CenturyTel originating access. For this reason, compensation remains a central issue in this dispute to be resolved under the relevant state or federal access rules.

VII. LEVEL 3'S PUBLIC INTEREST ARGUMENTS CANNOT EMPOWER THE STATE WITH JURISDICTION OVER THIS MATTER.

In a final attempt to improperly empower this Commission with jurisdiction, Level 3 proposes that the Commission unlawfully assert jurisdiction over interconnection matters over which this Commission has no authority to arbitrate, purportedly to "promote important Washington State public policy interests."[87] Specifically, Level 3 claims that this Commission must intervene in order to avoid the alleged "disparate regulatory treatment of competitive providers of connectivity to ISPs."[88] In fact, by proposing that it use CenturyTel's loop and switch in the same manner as an interexchange carrier without paying originating access, Level 3 itself seeks special regulatory treatment that runs counter to the current federal and state access charge regime and that would result in discrimination on CenturyTel's part vis-à-vis other competitive providers of connectivity to ISPs. Imposing originating access charges on Level 3 simply ensures that all interexchange carriers are similarly treated.

Level 3 cites to comments filed by this Commission and various other state regulatory commissions in the FCC's *Triennial Review* proceeding in support of its argument that the state regulatory commissions have knowledge of competitive effects in *local* markets and must play a

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86 Level 3 Brief at 4.

87 *Id*. at 21.

88 *Id*.

role in implementing sections 251 and 252.[89] CenturyTel recognizes that state commissions have specialized knowledge with respect to local markets; however, the service that Level 3 seeks to provide is not local. Furthermore, although CenturyTel acknowledges that state commissions generally have a role with respect to the Section 251/252 interconnection process, the FCC has removed ISP-bound traffic from the obligations and duties of Sections 251 and 252; therefore, jurisdiction over connectivity to ISPs is not split between jurisdictions, as Level 3 claims. Pursuant to the FCC's *ISP Order on Remand*, the FCC has *exclusive* authority to review and rule upon ISP interconnection issues.

As an ILEC dedicated to serving rural markets, CenturyTel fully supports the promotion of internet access and competition in rural areas; however, the efforts of carriers, such as Level 3, to gain preferential regulatory treatment vis-à-vis their competitors, to avoid paying legitimate access charges for interexchange traffic, and to otherwise game the regulatory system do not serve the public interest, and this Commission should not be hoodwinked into unlawfully asserting jurisdiction to further these efforts.

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[89] *Id*. at 23.

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VIII. CONCLUSION.

For the reasons described above, CenturyTel respectfully requests that the Commission dismiss Level 3's Petition.

Respectfully submitted,

CenturyTel of Washington, Inc.

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