

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for	)	
Arbitration of an Interconnection	)	
Agreement Between	)	
	)	DOCKET NO. UT-023043
LEVEL 3 COMMUNICATIONS, LLC,	)	
	)	
and	)	
	)	
CENTURYTEL OF WASHINGTON,	)	SEVENTH SUPPLEMENTAL
INC.,	)	ORDER: AFFIRMING
	)	ARBITRATOR'S REPORT AND
	)	DECISION
Pursuant to 47 U.S.C. Section 252	)	
.....	)	

1     **SYNOPSIS:** *The Commission, ruling on CenturyTel’s Petition for Review, affirms the Arbitrator’s conclusions that: (1) ISP-bound traffic is not subject to different interconnection requirements than local traffic and does not require a separate agreement; (2) the term “local traffic” should be defined to exclude ISP-bound traffic only for the purpose of determining compensation for termination of the traffic ; (3) ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC’s ISP Order on Remand; and (4) the term “bill-and-keep” should be defined in a manner consistent with the FCC’s ISP Order on Remand and implemented by the parties’ interconnection agreement in a manner consistent with the FCC’s order.*

**SUMMARY**

2     **PROCEEDINGS:** Docket No. UT-023043 is a petition filed by Level 3 Communications, LLC, (Level 3) for arbitration pursuant to 47 U.S.C. §252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Telecom Act), of a proposed interconnection agreement between Level 3

and CenturyTel of Washington, Inc., (CenturyTel). Arbitrator Dennis J. Moss entered his Arbitrator's Report and Decision on January 2, 2003.

3 CenturyTel filed its Petition for Commission Review of Arbitrator's Report and Decision on January 21, 2003. Level 3 filed its Answer on January 31, 2003. The Washington Independent Telephone Association (WITA) and Verizon Northwest, Inc. (Verizon), filed an *amicus* brief on January 21, 2003, which the Commission agreed to consider on review.

4 **APPEARANCES:** Michael R. Romano, Level 3 Communications' Director, State Regulatory Affairs, McLean, Virginia, and Rogelio E. Peña, Peña & Associates, LLC, Boulder, Colorado, appeared for Level 3 Communications. Calvin K. Simshaw, corporate counsel for CenturyTel, Vancouver, Washington, appeared for CenturyTel. Richard A. Finnigan, attorney, Olympia, Washington, appeared for the Washington Independent Telephone Association (WITA) and Verizon Northwest, Inc. (Verizon), who participated as *amicus curiae* on review.

5 **COMMISSION:** The Commission affirms the Arbitrator's Report and Decision and requires the parties to file a fully executed interconnection agreement that conforms to the terms of that Report and Decision and this Order.

### MEMORANDUM

6 We have considered the parties' and the *amici's* briefs and arguments concerning the issues CenturyTel raises by its Petition, and the related issue raised by the parties' filing of separate, partially executed interconnection agreements. Our analyses, and decisions, based on these arguments and the record below, follow.

1) **Is Internet-bound traffic subject to bill-and-keep reciprocal compensation in all instances, or only when the ISP is in the local calling area?**

7 The fundamental issue in this arbitration is whether the FCC's reciprocal compensation rules for ISP-bound traffic, as established by the FCC's *ISP Remand*

*Order*,<sup>1</sup> apply when the ISP's premise (*i.e.*, modem bank) is outside the local calling area. CenturyTel and its *amici* read the *ISP Remand Order* narrowly and would apply it only to situations where the ISP is in the local calling area. Level 3 argues that the FCC decision applies to Internet-bound traffic without regard to the location of the ISP.

8 There is ample room for confusion on this point. When Congress established standards for local interconnection and compensation for local traffic, it also created an exception for exchange access service. The FCC subsequently created another exception for Internet-bound calls, requiring that they be terminated without compensation. The FCC's decision on Internet-bound calls, however, is a rule without a court-approved rationale, because the D.C. Circuit remanded the FCC's decision, but did not vacate the FCC's rule.<sup>2</sup> In fact, the courts have now twice rejected the FCC's formal explanation of why Internet-bound traffic should not be included in the local interconnection regime and should be subject to its own compensation rules.

9 CenturyTel characterizes the policy behind the FCC's decision as one of concern about arbitrage, that is, concern about CLECs getting a windfall by collecting local switching revenues on large volumes of Internet-bound traffic. We think that is a reasonable reading of the FCC's intent; the FCC has just had a hard time coming up with a legal analysis that is supported by the statutes. However, given that policy, it is difficult to imagine why the FCC would have intended that even higher access charges should apply to Internet-bound traffic. Moreover, the FCC's larger rationale for different treatment of Internet-bound traffic is that it is not local traffic. That rationale applies at least as well when the ISP modem bank is outside the local calling area as it does when the ISP modem bank is inside the local calling area.

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<sup>1</sup> *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*, FCC 01-131 (2001) ("*ISP Order on Remand*"), remanded *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>2</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002); see also *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

10 CenturyTel argues that both the FCC and the D.C. Circuit Court decisions characterize the issue as one of proper compensation for calls to *local* ISPs. CenturyTel emphasizes the use of the word “local.” We believe CenturyTel reads too much into what are very general characterizations by the FCC and the appeals court of the issue before it. The substance of the decisions makes no distinction based on the location of the ISP’s modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic. We believe the arbitrator properly rejected CenturyTel’s argument.

**2) Is the WUTC preempted from arbitrating this dispute?**

11 CenturyTel continues to argue that the Commission lacks jurisdiction to arbitrate an interconnection agreement dispute concerning ISP-bound traffic under Section 252 of the Telecommunications Act of 1996, despite our prior decision and Order on this question. CenturyTel’s Petition, however, adds no new argument or authority that is persuasive on the point.

12 CenturyTel acknowledges that its “earlier briefs on the jurisdictional issues submitted in this docket” included its more detailed arguments.<sup>3</sup> CenturyTel would have us refer to those arguments again. Previously, we rejected CenturyTel’s arguments and summarized our holdings as follows:

The Commission’s jurisdiction to conduct arbitration proceedings is not limited to requests for arbitration regarding the obligations set forth in 47 U.S.C. § 251(c). The Commission holds it has jurisdiction to conduct arbitration proceedings involving the obligation of all telecommunications carriers to interconnect with other carriers set forth in 47 U.S.C. § 251(a). The Commission also holds that CenturyTel, as a rural carrier, is not exempt from the interconnection requirements of 47 U.S.C. § 251(a). Finally, the Commission determines that decisions by the FCC regarding compensation for traffic bound for Internet service providers do not divest the Commission of jurisdiction over this matter.

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<sup>3</sup> *CenturyTelPetition at 10.*

- 13 Our reasoning and result have been expressly acknowledged and followed in Wisconsin, where Level 3 and CenturyTel argued essentially the same case.<sup>4</sup> Other jurisdictions (*e.g.*, Arizona, Minnesota, and North Dakota) have reached the same result, according to Level 3.<sup>5</sup>
- 14 CenturyTel argues that we now should reverse our prior determination and follow the one jurisdiction, Colorado, where the state regulatory authority recently reached a different result. In Colorado, the ALJ below determined that the FCC, through its *ISP Order on Remand* preempted state commission jurisdiction over all issues concerning ISP-bound traffic. It is this recommended decision by the ALJ that CenturyTel cites in support of its preemption argument.<sup>6</sup>
- 15 The full commission in Colorado, however, did not sustain the ALJ's preemption determination and held "that the FCC has not preempted state commission jurisdiction under § 252 of all disputes relating to ISP-bound traffic."
- 16 On the other hand, the Colorado commission determined that § 252 "gives the Commission jurisdiction only over matters arising under §§ 251(b) and (c)" and not to matters arising under §251(a). Accordingly, the Colorado commission voted to dismiss the case.
- 17 This result is directly contrary to our determination that "the mechanisms for negotiation, mediation, and arbitration provided by Section 252 apply to requests to negotiate made under Section 251(a)."<sup>7</sup> The Colorado decision offers two reasons for its result: (1) that Section 252(a) "mentions §§ 251(b) and (c) specifically..., and makes no mention of §251(a);" and (2) "§ 252(a), according to its title, relates to interconnection agreements arrived at through negotiations [but] the duty to negotiate interconnection agreements . . . is itself a §§ 251(b) and

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<sup>4</sup> *In re Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin, Arbitration Award, Wisconsin Public Service Commission, Docket No. 05-MA-130, (Dec. 2, 2002).*

<sup>5</sup> *Level 3 Answer at 5-6.*

<sup>6</sup> *CenturyTel Petition at p. 10, n. 15.*

<sup>7</sup> *Third Supplemental Order at ¶ 9.*

(c) obligation, not one arising under §251(a).” Our Third Supplemental Order states:

While it is true that the only mandate for negotiation under Sections 251 and 252 is set forth in Section 251(c), this does not mean that state commission authority to conduct arbitrations pursuant to Section 252(b) is limited to arbitrating issues arising from Section 251(c). Section 252(a) provides for voluntary negotiations whereby an ILEC may negotiate an interconnection agreement without regard to the requirements of Sections 251(b) and (c). A request for an interconnection agreement under Section 251(a) is a request for an agreement without regard to the requirements of Sections 251(b) and (c). Because negotiation for interconnection pursuant to Section 251(a) is voluntary, an ILEC may refuse to negotiate with a requesting carrier. However, after 135 days from the date negotiations are requested – whether or not negotiations take place – a party to the negotiation may request the state commission to arbitrate any open issues. *47 U.S.C. § 252(b)(1)*.

- 18 The Colorado commission’s “half-empty” perspective contrasts to our “half-full” perspective that: “Nothing in Section 252(a) limits the negotiation and arbitration processes to matters falling within Section 251(c). Therefore, we hold that the duty to interconnect set forth in Section 251(a) is enforceable through the arbitration provisions of Section 252(b).”<sup>8</sup>
- 19 The Colorado commission’s result leaves a regulatory gap with no regulatory agency clearly responsible for enforcement of the fundamental rights conferred by Congress under Section 251(a). Our analysis and result leave no such gap and are consistent, at least, with the FCC’s recent suggestion that state commissions should continue to arbitrate carrier-to-carrier disputes including disputes that involve ISP-bound traffic.<sup>9</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> See *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, Memorandum Opinion and Order, WC Docket No. 02-314, FCC 02-332, at ¶ 325 (rel. Dec. 23, 2002) (“Qwest 271 Order”)*.

20 CenturyTel also claims an inconsistency between the Arbitrator's Report and Decision and the Third Supplemental Order concerning jurisdiction. CenturyTel argues that the Commission previously concluded that it did not have jurisdiction over the question of compensation for Internet-bound traffic, yet the arbitrator ordered bill-and-keep compensation. We believe these decisions are consistent. The arbitrator determined that the calls between CenturyTel and Level 3 are subject to the FCC's rules for Internet-bound traffic. Once that decision was made, there was no discretion but to apply the FCC's required bill-and-keep compensation method. In other words, contrary to CenturyTel's arguments, it is the FCC and not the arbitrator who imposed bill-and-keep compensation on the parties to this proceeding. The arbitrator simply followed and applied the FCC's *ISP Remand Order*, thus assuring that the parties' interconnection agreement will comply with existing federal law.

**3) What contract language properly implements the arbitrator's decision?**

21 The parties' dispute about actual language to implement the Arbitrator's Report and Decision led them to file separate interconnection agreements rather than a single agreement. The only difference between the two agreements is at Article IV, Section 4.2 covering compensation for interconnection facilities. Level 3 asserts that the Arbitrator's Report and Decision requires that the words "and ISP-Bound Traffic" be inserted after the words "Only Local Traffic" in that provision. CenturyTel contends that the language Level 3 offers would conflict with the Commission's prior decisions excluding Internet-bound traffic from "relative use" calculations.

22 The Commission recently heard detailed argument on this same issue in an arbitration dispute between Level 3 and Qwest.<sup>10</sup> While that result does not necessarily bind us, we see no reason to depart from it here. Level 3 and CenturyTel must include Internet-bound traffic in "relative use" calculations.

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<sup>10</sup> *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation Pursuant to 47 U.S.C. Section 252, Docket No. UT-023042, Fourth Supplemental Order (February 5, 2003).*

Accordingly, we require that the version of the parties' interconnection agreement submitted by Level 3 be executed by both parties and filed with the Commission.

**4) Should the Commission defer a decision in this arbitration until after its interpretive and policy statement proceedings concerning virtual NXX (VNXX) are completed?**

23 CenturyTel argues that the Commission should defer its decision on treatment of Internet-bound traffic here until it completes the VNXX interpretive or policy statement proceeding in Docket No. UT-021569. In Docket No. UT-021569, the Commission is considering a possible interpretive or policy statement on the use of virtual prefixes.

24 The VNXX proceeding will not produce a legally binding determination by the Commission. Moreover, the results in that proceeding may have no specific relevance here. The Commission, for example, may issue a policy statement that addresses questions about how numbering resources (NXXs) should be used for Internet-bound calls without saying anything about the regulatory treatment of those calls. Finally, we are concerned that deferring a decision would deny Level 3 its right under federal law to a timely arbitration decision.

25 We reject CenturyTel's suggestion that we defer our ruling in this proceeding. We note, however, that should future proceedings result in a change of law concerning the treatment of VNXX, or Internet-bound calls, the parties' interconnection agreement includes a "change-of-law" provision that could require them to file an amendment to their agreement.

**FINDINGS OF FACT**

26 The Commission makes the following summary findings of fact, having discussed above the evidence concerning all material matters and having stated our more detailed findings of fact. Those portions of the preceding discussion



pertaining to the Commission's ultimate findings in this matter are incorporated by this reference.

- 27 (1) The Washington Utilities and Transportation Commission ("Commission") is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.
- 28 (2) The Telecommunications Act of 1996 ("Act") authorizes the Commission to arbitrate and approve interconnection agreements between telecommunications carriers, pursuant to Section 252 of the Act. The Commission is specifically authorized by state law to engage in that activity. *RCW 80.36.610.*
- 29 (3) CenturyTel is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Act.
- 30 (4) Level 3 is a Competitive Local Exchange Carrier that wishes to establish local interconnection to provide direct inward dialing capability to its Internet Service Provider customers in Washington.
- 31 (5) On March 4, 2002, Level 3 commenced negotiations with CenturyTel with the intention to achieve an Interconnection Agreement between Level 3 and CenturyTel in the state of Washington. The parties could not resolve certain issues by negotiation and Level 3 requested arbitration.
- 32 (6) The essential facts pertinent to the Arbitrator's Report and Decision and the Commission's consideration of the issues on review are not disputed.

#### CONCLUSIONS OF LAW

- 33 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties to this proceeding.

- 34 (2) This arbitration and approval process is conducted pursuant to and in  
compliance with 47 U.S.C. § 252 and RCW 80.36.610
- 35 (3) The Commission should affirm the Arbitrator's Report and Decision with  
respect to each of the issues decided, as follows:

ISP-bound traffic is not subject to different interconnection requirements than local traffic and does not require a separate agreement; (b) the term "local traffic" should be defined to exclude ISP-bound traffic only for the purpose of determining compensation for termination of the traffic; (c) ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand; and (d) the term "bill-and-keep" should be defined in a manner consistent with the FCC's ISP Order on Remand and implemented by the parties' interconnection agreement in a manner consistent with the FCC's order.

- 36 (4) The parties must conform their interconnection agreement to provide that  
ISP-bound traffic will be included in relative-use calculations, as discussed in  
the body of this Order.
- 37 (5) The negotiated and arbitrated terms of the parties' interconnection  
agreement, as established by this Order, are consistent with the public  
interest and do not discriminate against any other telecommunications  
carrier.
- 38 (6) The arbitrated provisions of the parties' interconnection agreement meet the  
requirements of Section 251 of the Act, including the regulations prescribed  
by the FCC pursuant to Section 251, and the pricing standards set forth in  
Section 252(d) of the Act, or otherwise established by law.
- 39 (7) The laws and regulations of the state of Washington, and Commission orders  
shall govern the construction and interpretation of the parties'

interconnection agreement. The parties' interconnection agreement is subject to the jurisdiction of the Commission and Washington courts.

**V. ORDER**

THE COMMISSION ORDERS:

- 40 (1) The Arbitrator's Report and Decision, which is the Fifth Supplemental Order, entered in this proceeding on January 2, 2003, is affirmed.
- 41 (2) Level 3 and CenturyTel must submit a fully executed interconnection agreement reflecting: (a) the agreed on language in the interconnection agreement filed with the Commission by both parties on January 31, 2003, and (b) the resolutions in this arbitration proceeding of the disputed issues in accordance with this Order.

DATED at Olympia, Washington and effective this \_\_\_\_ day of February 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**