

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02B-408T

IN THE MATTER OF THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR
ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS
ACT OF 1996 WITH CENTURYTEL OF EAGLE, INC. REGARDING RATES, TERMS,
AND CONDITIONS FOR INTERCONNECTION.

DECISION DENYING EXCEPTIONS

Mailed Date: January 30, 2003
Adopted Date: January 17, 2003

I. BY THE COMMISSION

A. Statement, Findings, and Conclusion

1. This matter comes before the Commission for consideration of Exceptions filed by Level 3 Communications, LLC. (Level 3) on November 21, 2002. The Exceptions were filed in response to Decision No. R02-1242 (Recommended Decision) which granted CenturyTel of Eagle, Inc.'s (CenturyTel) Motion to Dismiss Petition in this docket. Level 3, in its Petition for Arbitration pursuant to 47 U.S.C. § 252, requests interconnection with CenturyTel's network for the transport and termination of traffic to Internet Service Providers (ISPs) served by Level 3. In Decision No. R02-1242, the Administrative Law Judge (ALJ) determined that the Federal Communications Commission (FCC) has preempted state commission jurisdiction over all issues concerning ISP-bound traffic. As such, the ALJ concluded, this Petition for Arbitration by Level 3 must be dismissed.

2. CenturyTel filed its Response to the Exceptions. On January 3, 2003, we heard oral argument on the Exceptions and, in particular, the Commission's authority to arbitrate Level 3's request for interconnection with CenturyTel. Attorneys for Level 3 and CenturyTel presented

arguments and support for their positions in this matter. Now being duly advised, we grant the Exceptions, in part only. While we agree with Level 3 that the FCC has not preempted state commissions from arbitrating all matters concerning ISP traffic, we nevertheless agree with CenturyTel that, for reasons other than those cited by the ALJ, the Commission lacks jurisdiction over this Petition under 47 U.S.C. § 252.

B. Exceptions by Level 3

3. Level 3 argues that the ALJ erred in his conclusion that the Commission lacks jurisdiction to arbitrate the interconnection dispute between Level 3 and CenturyTel pursuant to §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act).¹ Level 3 states that the FCC has not preempted state commissions from exercising jurisdiction over ISP traffic, except on the discreet issue of setting intercarrier compensation rates under § 251(b)(5) of the Act.

4. According to Level 3, the Recommended Decision would inflate the costs for any ISP served by Level 3, because CenturyTel will charge originating access charges, thus forcing Level 3 to pay for dedicated facilities to carry traffic that CenturyTel should otherwise be obligated to carry at its own expense.² The FCC has stated that the ban on origination charges ensures that the costs of facilities used to deliver telecommunications traffic to the point of interconnection are borne by the originating carrier, and that the originating carrier recovers the costs of those facilities through the rates it charges to its own local customers.

¹ 47 U.S.C. §§ 251-252.

² 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.”).

5. The Exceptions suggest that the ALJ made three principal legal errors. First, the ALJ mischaracterized the scope of the FCC's preemption of state jurisdiction over ISP-bound traffic. Second, the ALJ's inference of broad FCC preemption over all interconnection matters relating to ISP-bound traffic is inconsistent with federal judicial preemption doctrine. Third, the ALJ erred by mischaracterizing ISP-bound traffic under the relevant FCC and judicial precedents by not finding that it is jurisdictionally mixed, with both local and long distance components, and that it is not "information access."

6. Level 3 asserts that the ALJ's findings were contrary to the FCC's *ISP Order on Remand*³ because in that order the FCC only preempted states with respect to setting intercarrier compensation rates for ISP-bound traffic. Level 3 states that, instead of relying on the plain language of §§ 251 and 252, which grant the state commissions jurisdiction to arbitrate all interconnection disputes between all telecommunications carriers, the ALJ relied on the jurisdictional analysis rejected by the U.S. Court of Appeals for the D.C. Circuit,⁴ and which the FCC has abandoned. Level 3 argues that §§ 251 and 252 "address both the interstate and intrastate aspects of interconnection, services and access to unbundled network elements."⁵

7. In arguing that the FCC has not preempted state commission jurisdiction over all ISP issues, Level 3 notes that the ALJ failed to address footnote 149 of the *ISP Order on Remand*. This footnote states that the FCC's interim intercarrier compensation regime for ISP-bound traffic:

[A]ffects 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.

³ *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 (FCC 2001) (*ISP Order on Remand*)

⁴ *Bell Atlantic v. Federal Communications Commission*, 206 F.3d 1 (D.C. Cir. 2000).

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15, 499, 15,547 ¶ 92 (FCC 1996)

8. Level 3 continues that this footnote clearly and unambiguously states that the FCC did not otherwise alter interconnection obligations with respect to ISP-traffic or remove state commission jurisdiction over arbitration and enforcement of those interconnection agreements. The ALJ did not address this footnote in his decision. Rather, the ALJ took the position that the *ISP Order on Remand* can be read either as limited to intercarrier compensation issues, or all ISP traffic issues encompassed by §§ 251 and 252. This inference, Level 3 argues, is contrary to the FCC's own clear statements on the issue.

9. Likewise, Level 3 states that the ALJ ignored the plain meaning of §§ 251 and 252, which grants the state commission jurisdiction to arbitrate all interconnection disputes between all 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 carrier.” A “telecommunications carrier” is not limited to providers of exclusively local or intrastate telecommunications services, but rather encompasses interstate services as well. Level 3 has sought interconnection with CenturyTel under §§ 251(a) and (b), and under § 251(c) to the extent CenturyTel is not a rural telephone company with an exemption under § 251(f)(1). Level 3 contends that § 252 grants to state commissions the authority to approve or reject proposed interconnection agreements, to mediate or arbitrate disputes, and to enforce obligations falling under §§ 251 (a), (b), and (c). The ALJ mistakenly concluded that the scope of §§ 251 and 252 is limited to intrastate services. By extension, Level 3 contends that the ALJ erroneously claims that the interstate nature of ISP-bound traffic precludes state commissions from asserting jurisdiction over interconnection disputes involving ISP traffic.

10. Level 3 further disagrees with the ALJ's reliance on the FCC's end-to-end analysis of ISP traffic to justify that ISP traffic is interstate in nature. Level 3 notes that the D.C. Circuit vacated this rationale, stating that the FCC erred in focusing on the nature of the service (*i.e.*, local or long

distance).⁶ Level 3 argues that this traffic, is in fact, jurisdictionally mixed with components of both intrastate and interstate traffic. Because of this hybrid nature, it is not traditional interexchange traffic such as WorldCom, Inc., or AT&T Communications of the Mountain States, Inc., carry. In the *Bell Atlantic* decision, the D.C. Circuit confirmed the jurisdictionally mixed nature of ISP-bound traffic stating:

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.

Level 3 asserts that this statement neutralizes the ALJ's conclusions that rely on a pure interstate classification.

11. Level 3 also asserts that the ALJ's inference of broad FCC preemption over all interconnection matters relating to ISP traffic is inconsistent with federal preemption doctrine. According to Level 3, a federal agency's intent to preempt state regulation must be explicit and unambiguous. In this case, the FCC did not state with clarity that it is preempting states with respect to ISP traffic. On the contrary, the FCC stated it was not preempting state commission jurisdiction over anything, but setting intercarrier compensation rates for ISP-bound traffic. Again, Level 3 claims that footnote 149 of the *ISP Order on Remand* supports this contention.

12. Level 3 then argues that the ALJ mistakenly concluded that ISP-bound traffic is an information service. Level 3 points to the *Bell Atlantic* decision, which rejected the FCC's characterization of ISP-bound traffic as exchange access or information access, and noted that ISP-bound traffic appears to be a telecommunications service. Similarly, in *WorldCom*⁷ the D.C. Circuit rejected the FCC's argument that ISP-bound traffic was information access subject to § 251 (g) of the

⁶ *Bell Atlantic Telephone Cos. v. FCC*, 206 F. 3d 1 (D.C. Circuit 2000)

⁷ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Act and that the exchange of ISP-bound traffic between local exchange carriers (LECs) was the provision of “information access” by the originating LEC within the scope of § 251(g).

13. Finally, Level 3 contends that the ALJ mistakenly claimed that the Court in *WorldCom* found that the state commissions would no longer have § 251(e)(1) authority over interconnection for ISP-bound traffic. Level 3 asserts that the Court, *supra.* at 431-32, was simply summarizing the FCC’s position – one that was rejected by the Court when it reversed and remanded the order. The ALJ’s finding that the Court “appears” to have concluded that the FCC’s preemption extended to all interconnection matters involving ISP-bound traffic is therefore erroneous.

14. In summary, Level 3 requests that we grant its Exceptions and assert jurisdiction over this arbitration, or, if we adopt the ALJ’s decision, that we clarify that we are ceding jurisdiction over this proceeding to the FCC pursuant to § 252(e)(5) of the Act.⁸

C. CenturyTel's Response

15. In its Response, CenturyTel argues that the Commission lacks jurisdiction to arbitrate this matter, and, therefore, Level 3’s Exceptions should be denied and the Recommended Decision adopted.

16. According to CenturyTel, ISP-bound traffic is not subject to this Commission’s review under § 252 of the Telecom Act. The FCC, in the *ISP Order on Remand* (paragraph 52), not only preempted states with respect to intercarrier compensation for ISP-bound traffic, but also concluded that ISP-bound traffic is properly classified as interstate traffic. As such, it falls within the FCC’s § 201 jurisdiction.⁹ CenturyTel agrees with the ALJ’s finding that the FCC has exclusive

⁸See § 252(e)(5) (“if a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.”)

⁹ 47 U.S.C. § 201.

jurisdiction over all ISP traffic interconnection issues under its § 201 authority, not only those involving reciprocal compensation.

17. CenturyTel acknowledges footnote 149 of the *ISP Order on Remand*, but states that the FCC did not specify in that order what a carrier's obligations are for transporting ISP-bound traffic under its Part 51 rules. CenturyTel asserts that this obligation does not exist in the Part 51 rules, but even if it did, CenturyTel would not have an obligation under § 251 of the Telecom Act to transport or terminate ISP-bound traffic that originates on CenturyTel's network. Interconnection, according to Centurytel, simply means the physical linking of two networks.

18. CenturyTel contends that the FCC's jurisdiction over ISP-bound traffic is based on the well-established principle that, when communications are jurisdictionally mixed and cannot be separated--the case with ISP-bound traffic--then, the FCC, not a state commission, has authority to regulate such communications.¹⁰ CenturyTel asserts that the FCC, having concluded that ISP-bound traffic should be classified as interstate communications, preempted the state commissions from exercising jurisdiction over all prospective interconnection matters relating to ISP traffic.

19. According to CenturyTel, in classifying ISP-bound traffic as interstate, the FCC excluded this traffic from §§ 251 and 252 altogether, thereby leaving the state commissions no authority over interconnection issues related to this traffic. Significantly, the *ISP Order on Remand* prohibited any carrier from invoking § 252(i) to opt into any existing interconnection agreement addressing ISP-bound traffic. At paragraph 82 of that order, the FCC stated that § 252(i) applies only

¹⁰ Citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n. 4 (1986) (federal regulation of traffic is appropriate where it is not possible to separate the interstate and intrastate components of the asserted regulation); and *Southwestern Bell Tel. Co. v. FCC*, 153 F. 3d 523, 541-42 (federal regulation of "jurisdictionally mixed" traffic is appropriate).

to agreements arbitrated or approved by state commissions pursuant to § 252. Further, CenturyTel states, the ALJ appropriately points out that the Court's description in *WorldCom* of the FCC's holdings in the *ISP Order on Remand* supports this position. That description states in pertinent part, "[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 252(e) of the Act."¹¹

20. CenturyTel addresses Level 3's request that this Commission cede jurisdiction to the FCC pursuant to § 252(e)(5), stating that Level 3 misapplies this section to the present circumstances. Section 252(e)(5) only applies to those instances in which a state commission fails to carry out its responsibilities under § 252. However, CenturyTel states, the FCC, the D.C. Circuit t, and the ALJ in this proceeding have all concluded that state commissions lack the authority to arbitrate the interconnection dispute at issue here. Thus, if the Commission adopts the Recommended Decision, such action would not constitute a failure to act; rather, the Commission does not possess the jurisdiction in the first instance.

21. CenturyTel contends that the ALJ's jurisdictional characterization of ISP-bound traffic is correct. While the FCC recognized that ISP-bound traffic has interstate and intrastate components, it also concluded that those components cannot be reliably separated. Therefore, ISP traffic is properly classified as interstate, and, as such, falls within the FCC's jurisdiction.¹² Thus, CenturyTel concludes, the Level 3 argument should be disregarded.

22. CenturyTel also points out that this Commission recently upheld the ALJ's decision to deny Level 3's declaration of intent to provide local services in CenturyTel's territory (Docket

¹¹ *WorldCom* at 432.

¹² *ISP Order on Remand* at ¶ 52.

No. 02U-236T). *See* Decision No. C03-0067. According to CenturyTel, the Commission concluded that the service Level 3 proposes to offer did not constitute a local exchange telecommunications service, and therefore, Level 3's certificate for local services should not be extended to serve in CenturyTel's exchanges. CenturyTel cites the FCC's Local Competition Order in which it states, "[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)." Further, the FCC 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 incumbents LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2)."¹³

23. CenturyTel continues: Level 3 erroneously argues that there are no limitations on state commissions' authority to arbitrate interconnection disputes. Not all interconnection arrangements are subject to § 252 arbitration and review. For example, intrastate and interstate access arrangements for the termination and origination of interexchange traffic are not arbitrated and reviewed by the state commissions pursuant to § 252. Section 252(a) makes reference only to §§ 251(b) and (c) and not to § 251(a) when describing the arbitration authority of a state commission. In relevant part, § 252(a) provides 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.¹⁴

¹³ *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 ¶¶190-91 (*Local Competition Order*).

¹⁴ 47 U.S.C. § 252(a).

24. According to CenturyTel, § 252(a) makes no specific reference to interconnection pursuant to § 251(a). Further, § 252(d) supports this position. That provision sets forth pricing standards for interconnection pursuant to §§ 251(b)(5) and 251(c)(2)-(4) only. None of these interconnection provisions applies to the negotiations between Level 3 and CenturyTel. There are no pricing standards in § 252(d) for § 251(a) interconnection, CenturyTel claims, because it was not contemplated that § 251(a) interconnection agreements would be reviewed by a state commission under § 252(e).

25. Finally, CenturyTel argues that this arbitration does not fall under § 251(c) because CenturyTel is a rural provider exempt from the obligations contained in that section. This Commission has not terminated CenturyTel's rural exemption status (pursuant to § 251(f)); therefore, interconnection with CenturyTel could fall only under §§ 251(a) or (b). However, CenturyTel does note that due to the interstate nature of this ISP-bound traffic it also cannot fall under § 251 (b). With only 251(a) then remaining, CenturyTel reiterates that § 252 does not give state commissions authority to arbitrate an interconnection dispute involving only § 251(a) interconnection.

D. Decision

26. It is not clear to us whether the FCC has completely preempted state commissions' jurisdiction over issues relating to ISP-bound traffic, or whether the FCC intended only to carve out reciprocal compensation for such traffic and bring it within federal jurisdiction. The *ISP Remand Order* seems to want to have it both ways. On the one hand, it makes a jurisdictional determination that ISP-bound traffic is mixed and hence interstate; on the other hand, the Order seems to imply what seems a logical impossibility; namely, that only the compensation aspect of ISP traffic is FCC jurisdictional. To this extent we do not understand what the FCC means to do, we grant the Exceptions and do not accept the ALJ's rationale.

27. Ultimately, however, we agree with CenturyTel that, for reasons other than those cited by the ALJ, dismissal of Level 3's Petition for Arbitration is required. We conclude that in light of: (1) CenturyTel's status as a rural incumbent local exchange carrier (ILEC); and (2) the interexchange nature of the ISP traffic to be carried by Level 3 with its proposed interconnection with CenturyTel, the Commission lacks jurisdiction to arbitrate this dispute under § 252 of the Telecom Act.

28. On the issue of preemption, Level 3 is correct that the FCC's intent to preempt state commission authority must be clear and unambiguous. *Integrity Management International, Inc. v. Tombs & Sons*, 836 F.2d 485 (10th Cir. 1987). Because we see confused temporizing from the FCC, and nothing approaching clear and unambiguous intent to preempt, we cannot find ourselves preempted.

29. Generally, the Recommended Decision (and CenturyTel in its support of the Recommended Decision) relies on the *ISP Order on Remand* for its conclusion that the FCC intended to preempt state commission arbitration over all matters relating to ISP-bound traffic. That decision, however, contains no clear and unambiguous statements that the FCC intended such preemption. Furthermore, the most plausible interpretation of the *ISP Order on Remand* is that the FCC intended to preempt state commissions on ISP-bound traffic only with respect to compensation issues, and even then, only on matters that would conflict with the FCC's specific directives relating to compensation. For example, in paragraph 4 of the Executive Summary, the FCC stated its general determination "that intercarrier compensation for ISP-bound traffic is within the jurisdiction of this Commission under section 201 of the (Telecom) Act..." (emphasis added). And in attempting to point to specific language in the *ISP Order on Remand* to support its preemption argument, CenturyTel cited paragraphs 52 and 82 of the order. However, the language in those paragraphs is

clear that the FCC was addressing only its authority to establish intercarrier compensation requirements for ISP traffic.

30. We further note that the ISP Order on Remand explicitly acknowledges that state commissions have and would continue to have a role in arbitrating, reviewing, and enforcing interconnection agreements relating to ISP-bound traffic. *See ISP Order on Remand*, paragraph 79 (carrier may rebut presumptions regarding the amount of traffic that is ISP-bound traffic by providing evidence "to the appropriate state commission" in "state commission proceedings"); and paragraph 80 (FCC-ordered rate caps have no effect to the extent state commissions have ordered LECs to exchange ISP-bound traffic at rates below the caps or on a bill-and-keep basis).

31. CenturyTel points to the conclusion in the ISP Order on Remand that ISP-bound traffic is interstate traffic and within the FCC's § 201 jurisdiction. Interstate communications, CenturyTel argues, does not fall within state commissions' authority, but is exclusively within the FCC's jurisdiction. Accordingly, whether or not the FCC specifically articulated its intent to preempt the states on matters related to ISP traffic, preemption follows from the determination that this traffic is interstate communications. We disagree.

32. The FCC itself, in the *Local Competition Order* (footnote 11, *supra.*) observed that the Act abolished previously existing distinctions between the FCC's jurisdiction over interstate communications and the states' jurisdiction over intrastate communications. Specifically, the FCC stated that §§ 251 and 252 created "parallel jurisdiction for the FCC and the states." So, § 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection and unbundled network elements, and, similarly, the states' authority under § 252 extends to both interstate and intrastate matters. This interpretation of the Act is confirmed by the courts. *Southwestern Bell Telephone v. Public Utility Commission*, 208 F. 3d 475, at 480 (5th Cir.

2000). Therefore, the FCC's determination that ISP-bound traffic is interstate traffic is not particularly relevant on the question whether the Commission possesses jurisdiction over the present dispute between Level 3 and CenturyTel. For the reasons discussed above, we conclude that the FCC has not preempted state commission jurisdiction under § 252 of all disputes relating to ISP-bound traffic.

33. Nevertheless, we determine that § 252 gives the Commission jurisdiction only over matters arising under §§ 251(b) and (c). Level 3 argues that the only prerequisite for invoking the Commission's § 252 jurisdiction is a request for interconnection made to an ILEC. According to Level 3, § 252(a) refers only to a request for interconnection under § 251, without reference to any subsection of § 251. Thus, even a request for interconnection under § 251(a) is subject to arbitration by a state commission. We disagree.

34. CenturyTel points out that § 252(a) mentions §§ 251(b) and (c) specifically (ILEC may negotiate an interconnection agreement without regard to the standards set forth in subsections (b) and (c)), and makes no mention of § 251(a). Moreover, we note that § 252(a), according to its title, relates to interconnection agreements arrived at through negotiations. However, the provision where an ILEC's duty to negotiate is specified is in § 251(c) (which also incorporates the duties specified in § 251(b)). The duty to negotiate interconnection agreements, therefore, is itself a §§ 251(b) and (c) obligation, not one arising under § 251(a). We conclude that a state commission's § 252 authority is limited to requests for interconnection agreements implicating §§ 251(b) and (c) obligations. As such, a state commission has no arbitration authority over § 251(a) matters.

35. Level 3 purports to request interconnection under §§ 251(a), (b), and even (c), to the extent CenturyTel is not a rural ILEC with an exemption under § 251(f)(1). We conclude that no provision of § 251(b) applies to this case. The only § 251(b) obligation plausibly raised by Level 3's

Petition for Arbitration is that arising under § 251(b)(5) (duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications). However, the *ISP Order on Remand* clearly excludes ISP-bound traffic from § 251(b)(5). Therefore, Level 3's Petition states no plausible claim for interconnection under § 251(b).

36. Similarly, the Petition cannot state a claim for interconnection under § 251(c). In the first place, CenturyTel is a rural ILEC and, pursuant to § 251(f), is presently exempt from § 251(c) obligations. The Commission has not terminated CenturyTel's rural exemption (by finding that a request for interconnection with CenturyTel is not unduly economically burdensome, is technically feasible, and consistent with universal service requirements). Moreover, CenturyTel notes that the ISP customers that Level 3 seeks to serve are not located in CenturyTel's local calling area. As such, calls by CenturyTel's end-users to Level 3's ISP customers would originate and terminate in different calling areas, and, therefore, would be interexchange calls. Section 252(c)(2) is clear that the duty to interconnect under its provisions does not apply to interexchange calling. Rather, that section is limited to interconnection for the purpose of providing exchange service and exchange access. It is apparent that Level 3 does not propose to provide either service pursuant to its proposed interconnection with CenturyTel. For these reasons, the Petition does not state a request for interconnection under § 251(c).

37. Level 3's Petition can only state a request for interconnection under § 251(a). And, as explained above, state commissions' § 252 jurisdiction does not extend to such requests for interconnection. Consequently, we conclude that the Petition should be dismissed. For these reasons, we affirm the ALJ's recommendation to dismiss this proceeding.

II. ORDER

A. The Commission Orders That:

1. The Motion for Pro Hac Vice filed by Level 3 Communications, LLC is granted.
2. The Motion for Pro Hac Vice filed by CenturyTel of Eagle, Inc., is granted.
3. The Motion for Leave to File Additional Authority by Level 3 Communications, LLC submitted on January 16, 2003 is denied.
4. The Motion for Leave to File Additional Authority and Response by Level 3 Communications submitted on January 17, 2003 is denied.
5. The Exceptions by Level 3 Communications, LLC, to Decision No. R02-1242 are granted in part only consistent with the above discussion. Otherwise the Exceptions are denied.
6. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.
7. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
January 17, 2002.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

**THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

POLLY PAGE

JIM DYER

Commissioners

**CHAIRMAN RAYMOND L. GIFFORD
SPECIALLY CONCURRING.**

III. CHAIRMAN RAYMOND L. GIFFORD SPECIALLY CONCURRING:

1. I support the Commission's rationale for dismissing this arbitration petition, but in a most reluctant way. There is much room here for help from the Federal Communications Commission (FCC), which has repeatedly twisted itself in knots over these ISP-bound traffic issues. I believe that the law, as it currently stands, does not give Level 3 Communications, LLC (Level 3) an arbitration right before a state commission under § 252. Level 3's request for interconnection falls under § 251(a), a category of interconnection obligation that we have never arbitrated or approved.

2. That said, I have misgivings that this is indeed the best course or the only course that the FCC could plot for Internet Service Provider (ISP) traffic interconnection. Surely, subjecting this traffic to access – as must be Centurytel or Eagle, Inc.'s desire – is not best for consumers or for competitive provision of ISP services. Neither, of course, do we want artificial inducements such as ISP-bound reciprocal compensation obligations falsely to signal the need to enter the ISP traffic market. Regulatory arbitrage—be it for universal service purposes or simply false price inducements—is something to be avoided.

3. I believe that the FCC has both the discretion and the power under the Telecommunications Act of 1996 to correct the confusion surrounding ISP traffic, its jurisdictional status, and compensation mechanisms attaching to it. The sooner that is done, in clear, unambiguous language, the better off consumers will be.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Chairman

