

B. The TPUC Final Order wrongly relies on the procedural and statutory criteria for obtaining an expansion of the local calling area to develop rules that apply to specific calls after the area is expanded. The result is anticompetitive and will contribute to number exhaust.

Once the mandatory calling scope is expanded through ELCS or mandatory EAS, then all of the federally-imposed standard rules pertaining to basic service provided by incumbents must apply. They must interconnect with competitive carriers; they must route calls; and, most important, they may not impose retail toll charges on their end users when those users call a customer of a competitive carrier with an NXX that is associated with any part of the mandatory local calling area, as expanded. With specific reference to this case, CenturyTel must **retail rate** all calls to every carrier's Kyle, Fentress and Lockhart NXXs just as it **retail rates** calls to its own San Marcos NXXs. Any other result will further contribute to number exhaust, since competitive carriers will need to obtain an NXX in each of the pre-ELCS exchanges. On the other hand, if ELCS is treated like the basic service that it is, then carriers will be able to relinquish some of their numbers, given that they will have access to the entire area with any number associated with any rate center in the ELCS area.

C. The TPUC Final Order confuses retail rating and wholesale carrier compensation rules. Retail rating (as opposed to wholesale carrier compensation) does not depend on the physical location of the called party at the time of the call.

This Commission and the TPUC have consistently required carriers to honor the rate center assignments of other carriers for **retail rating** purposes. While there are *wholesale carrier compensation* implications, the physical location of the calling and called parties at the time of the call has never determined the **retail rating** of an ILEC's customer call to another customer – whether served by the ILEC, another ILEC, a CLEC or a CMRS carrier. This rule has been expressly applied to ELCS by TPUC.

Customers have been able to secure a “local presence” in a distant exchange for many years.⁴⁴ The ILECs themselves have provided Foreign Exchange (FX) and FX-like services for decades and those services respect ELCS boundaries at the open end. Competitive carriers also offer such products – to human beings and to ISPs. The physical location of a CMRS customer at the time of the call has never determined **retail rating** of calls to that customer.⁴⁵ If the ILEC has to transport a call outside an exchange boundary to deliver it to the competitive carrier (CLEC or CMRS) then the competitive carrier may sometimes be required to compensate the ILEC for the cost of transport.⁴⁶ **Retail rating**, however, is completely controlled by the rate center assignments of the two NXXs and not the physical location of the called party at the time of the call. Any other result will lead to chaos and massive customer confusion.

TPUC directly addressed this issue in the “*FX Docket*.” TPUC’s Revised Award in that case states several times that calls between NXXs associated with the same mandatory local calling area are **retail rated** as local, even if the calling or called party is not physically located within the mandatory local calling area.⁴⁷

⁴⁴ See, e.g., *FX Docket*, *supra* p. 21. Until this case TPUC had no problem with a carrier providing a number to a customer who may not be physically present in the rate center at the time of the call, so long as the *wholesale carrier compensation* method is bill and keep. Indeed, TPUC tried very hard to preserve competitors’ ability to provide Virtual NXX or FX-like services to customers. An essential part of Virtual NXX/FX is **retail rating** of calls to the Virtual NXX/FX-like customer.

⁴⁵ ASAP will address CMRS call rating and NXX use below.

⁴⁶ Memorandum Opinion and Order, *TSR Wireless, LLC, et al., v. U S West Communications, Inc., et al*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, FCC 00-194 (Rel. June 21, 2000), *aff’d Qwest Corp v FCC*, 252 F.3d 462, 2001 U.S. App. LEXIS 13389 (D.C. Cir. 2001) (“*TSR*”); *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, Memorandum Opinion and Order, DA 02-250 (Rel. Feb. 4, 2002); *aff’d* Order on Review, FCC 02-220 (Rel. Jul. 25, 2002) (“*Mountain Order on Review*”), TPUC PUC Docket No. 21982, Revised Arbitration Award at fn. 153. These cases address transport cost responsibility in the context of *wholesale carrier compensation*. None in any way allow the ILEC to require 1+ dialing and impose toll on calls between NXXs that are rate centered in the same mandatory calling scope.

⁴⁷ TPUC then held that “bill and keep” would apply for *wholesale carrier compensation* purposes. Although this case does not involve *wholesale carrier compensation*, ASAP has consistently indicated that it prefers bill and keep, even though ASAP is entitled to recover reciprocal compensation from CenturyTel for much of the traffic in issue. ASAP has not sought, however any *wholesale carrier compensation* from CenturyTel under either § 251(b)(5) or § 201 for any traffic originated by CenturyTel’s customers.

As to the physical network, SWBT explained that when a carrier begins service of new telephone numbers, it publishes the new prefix to other carriers in the Local Exchange Routing Guide (LERG) in a process known as “opening a code in the LERG.” SWBT testified that when the carrier opens a code, it will publish the code with 1) a “rate center” designation and 2) a switch designation. SWBT indicated that the rate center designation identifies the code’s geographic location so that another carrier may classify the traffic as local or toll (long distance); the switch designation determines where to physically route calls that are dialed with that prefix.⁴⁸

SWBT contended that NPA/NXX assignment is important only from a retail (carrier to end user) but not from a wholesale (carrier to carrier) perspective. Ms. Butcher explained that calls made to the NPA-NXXs within the same rate center are local calls and calls made to NPA-NXXs in other rate centers are toll calls.⁴⁹

From the perspective of FX customers, ILEC-provided FX service and CLEC-provided FX-type service serve the same intended purpose. The end user in the foreign exchange is able to avoid toll calls to the FX customer and instead to place local calls to the FX customer physically located in a different exchange... . To be sure, these FX arrangements provide FX customers with exchange service within a Commission-prescribed mandatory local calling area even though the FX customer physically resides outside of said mandatory local calling area.⁵⁰

..As to the analogies with other services, FX-type service does not in and of itself facilitate the provisioning of toll calls beyond the affected exchange service areas (i e , the exchange service area where the FX customer is physically located and exchange service area where the FX customers receives dial tone and exchange service) FGA is specifically designed to provide a calling party with a connection to an interexchange carrier for the express purpose of completing toll calls via the use of a second dial tone and an access code In contrast, FX service provides a local connection between the calling party and the called party; there is no second dial tone, no access code, and no interexchange carrier involved with such calls. An end-use customer can reach an FX customer without incurring a toll charge only if the end-use customer’s phone number is within the same mandatory local calling area as the FX customer’s phone number assigned by virtue of the FX arrangement.⁵¹

From the perspective of the end user located in the foreign exchange, the FX customer appears to be “local” and all calls made to that customer are treated as local. While FX service has traditionally been offered by SWBT for many decades, [footnote omitted] the evidence in the record indicates that the competitive market for the service is in its infancy.⁵²

⁴⁸ FX Docket Revised Award, p. 21.

⁴⁹ FX Docket Revised Award, p. 27.

⁵⁰ FX Docket Revised Award, p. 30-31 (italics in original).

⁵¹ FX Docket Revised Award, p. 36 (italics in original).

⁵² FX Docket Revised Award, p. 49 (italics in original).

TPUC Final Order FOF No. 35 in the decision below observes that “ASAP assigns NXXs without regard to whether the customer is physically located within the exchange to which the NXX is associated.”⁵³ The TPUC Final Order on page 6 indicates that calls must have a geographic correlation to the ELCS area in order to qualify for “ELCS treatment.” In the CMRS world, however, there is not and never was any necessary correlation of the CMRS customer’s physical location to the rate center assignment of the customer’s number at the time of any individual call. **Retail rating** of wireline to wireless calls has always been determined by the two NXXs; it does not matter if the wireless customer is on the **moon** at the time of the call. A call from rate center A to a wireless NXX associated with a rate center that is “local” to rate center A, is **retail rated** as a local call and is not long distance. This has always been the case, and it is still the law. Wireless carriers secure NXXs for only one purpose: to obtain local **retail rating** for wireline-wireless calls from the rate center the carrier the NXX is associated. The TPUC Final Order prevents ASAP from arranging for local calling from any area other than where it has a switch.

The TPUC Final Order also ignores the fact that the ILECs have been providing FX service for many years. SBC and Verizon both provide both FX and FX-like service. If the TPUC Final Order conclusions are accepted, then calls from a CenturyTel San Marcos end user to a number used by a customer using one of SBC’s FX or FX-like services that has a Lockhart number, or a Verizon FX or FX-like service with a Kyle or Fentress number, are now subject to toll. Indeed, they must be subject to toll or else CenturyTel will be unlawfully discriminating between ILEC services and non-ILEC services based purely on the identity of the customer’s carrier. TPUC has found that ILEC and CLEC FX-like services compete with each other. ILECs cannot be allowed to discriminate in favor of other ILECs’ offerings and against competitive

⁵³ The significance of this finding is nil, given that this is how **all** wireless carriers dole out numbers. The focus on it demonstrates TPUC’s unreasonable and unlawful wireline-centric perspective.

carrier offerings. The TPUC Final Order completely fails to consider ILEC FX offerings, even though there was testimony on this point.⁵⁴

CenturyTel's presentation blurred the important differences between *wholesale carrier compensation* issues and **retail rating** principles. Unfortunately, TPUC fell victim to CenturyTel's sleight of hand.⁵⁵ ELCS must be treated like the traditional basic service that it is. While the location of calling and called parties at the time of a call may have some relevance for *wholesale carrier compensation* purposes, the potential physical presence of a customer outside the mandatory calling area at the time of the call has always been irrelevant to **retail rating**.

Preemption Point No. 2: The TPUC Final Order violates ASAP's federal rights to interconnection and numbering resources and wrongly determines ASAP's rights based on a relationship to wireline network components.

TPUC Final Order pages 1-3; Findings of Fact Nos. 12-51A; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

A. CMRS Carrier's interconnection rights predate the 1996 amendments to the federal Act.

Under 47 C.F.R. § 20.11,⁵⁶ CMRS carriers have a right to reasonable and non-discriminatory interconnection with the ILECs that compete with them. Long before the 1996

⁵⁴ Hng. Tr. pp. 855-58. See also FX Docket Revised Award, *supra*.

⁵⁵ For example, note 16 to the TPUC Final Order cites two cases to support the proposition that physical location is determinative for **retail rating** purposes. The Commission has now clarified what the rules are in the *Starpower Liability Order*. ASAP also notes that ¶ 37 of the *ISP Remand Order* does not say what the TPUC Final Order claims it does.

⁵⁶ Sec 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under section 208 of the Communications Act, 47 U.S.C. 208, alleging a violation of this section shall follow the requirements of Secs. 1.711-1.734 of this chapter, 47 CFR 1.711-1.734.

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

federal Act authorized local competition by CLECs, this Commission allowed certain carriers to use radio frequency to provide common carrier “Land Mobile” communications services that competed with the telephone companies. In 1949 the FCC first allocated radio spectrum for mobile service.⁵⁷ It awarded half of the frequencies to AT&T and the other half to non-landline entities. These other entities – “radio common carriers” (“RCCs” and now “CMRS”) – were the first real competitors to the Bell System and independent LECs. Incumbent LECs have tried to kill the competition ever since by refusing to accept and acknowledge the right of CMRS competitors to interconnect to the PSTN as peers, and provide service within ILEC territory. CLECs – which showed up 47 years later – are “johnny-come-latelies” to communications competition and ILEC discrimination.

The Commission has consistently maintained and enforced its procompetitive policy. In 1976 and then again in 1980, RCC (now CMRS) rights to interconnection and local numbers were reaffirmed.⁵⁸ When it began to issue cellular telephone licenses in the early 1980s, the FCC allocated two licenses for every service area, prohibited any licensee from owning a significant interest in both licenses, and thereafter encouraged the development of other radio technologies

(c) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

ASAP is not required to file a complaint under § 208 in order to obtain relief since it is already indirectly interconnected with CenturyTel via SBC’s LATA tandems; the problem is **retail rating** of calls originating on CenturyTel’s network. CenturyTel is withholding **retail rated** local calls to ASAP’s numbers unless and until ASAP executes an interconnection agreement with CenturyTel and changes the present interconnection method to establish a direct point of interconnection in San Marcos. See Exhibit 7.

⁵⁷ *Gen. Mobile Radio Serv.*, 13 F.C.C. 1190, 1212, *recon denied*, 13 FCC 1242 (1949).

⁵⁸ See, *Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service Under Part 21 of the Commission's Rules (Domestic Public Land Mobile Radio Service)*, 63 FCC 2d 87, 88; 1977 WL 38679 (F.C.C.) (1977); *Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service under Part 22 of the Commission's Rules (Memorandum of Understanding)*, 80 FCC 2d 352, 1980 WL 121568 (F.C.C.) (1980). These decisions expressly recognized that RCCs are co-carriers, not customers and have a right to and need for 7-digit local numbers and **retail rated** local calling to those numbers from other numbers that are rate centered in the same mandatory local calling area.

capable of providing directly competitive services. More important, it required all landline telephone companies to provide unaffiliated mobile concerns (including paging companies) with interconnection that was equal in type, quality, and price to that enjoyed by wireless affiliates of wireline telcos.⁵⁹ In 1983 the FCC again refused to let the telcos treat RCCs like end users,⁶⁰ but instead required co-carriage rights: "RCCs are not end users except to the extent that they use exchange facilities for administrative purposes." "[RCCs] are not and should not be treated as interexchange carriers under Part 69."⁶¹ In 1986 (10 years before the 1996 Act), the FCC once again reaffirmed this basic principle:

12. We believe that the Commission's interconnection requirements respecting paging, conventional mobile service, and cellular are well established. **Part 22 licensees are common carriers generally engaged in the provision of local exchange telecommunications in conjunction with the local telephone companies and are therefore "co-carriers" with the telephone companies. They are entitled to reasonable interconnection for the services they provide.**⁶²

⁵⁹ See, e.g., *An Inquiry into the Use of Bands 825-845 MHz & 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, 495-496 (1981); *Amendment of Part 21 of the Commission's Rules with Respect to the 150.8-162 Mc/s Band to Allocate Presently Unassignable Spectrum to the Domestic Public Land Mobile Radio Service by Adjustment of Certain of the Band Edges*, 12 F.C.C.2d 841, 849-850 (1968), *aff'd, sub nom Radio Relay Corp. v. FCC*, 409 F.2d 322 (2nd Cir. 1969).

⁶⁰ TPUC's holding in TPUC Final Order FOF No. 20A and Conclusion of Law No. 29 that ASAP is the "called customer" is wholly inconsistent with the FCC's legal determination in *TSR* that paging companies perform "call termination" under § 251(b)(5) of the Act and as defined in 47 CFR § 51.701(d). In ¶ 22 the FCC observed that "A paging terminal performs a termination function because it receives calls that originate on the LEC's network and transmits the calls from its terminal to the pager of the called party. This is the equivalent of what an end office switch does when it transmits a call to the telephone of the called party." Paragraph 23 directly overrules the ILECs' claim that paging companies do not terminate calls to customers: "We similarly reject Defendants argument that paging carriers do not truly provide a call termination function because the paging terminal does not establish a direct communication path between the originating caller and the paging customer." It has been clear since at least 1981 that CMRS carriers are co-carriers and not "customers." The called customer is the paging customer, not ASAP. TPUC's similar holding with regard to ASAP's ISP customers cannot be reconciled with the FCC's decision in the *ISP Remand Order* that the ILEC and competitive carriers are engaged in joint provision of interstate access to the ISP, the customer.

⁶¹ *Access Charge Second Reconsideration Order, supra* at 882.

⁶² *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, ¶ 12, FCC 86-85 LEXSEE 59 Rad. Reg. 2d (P&F) 1275 (Rel. Mar. 5, 1986) ("*FCC Policy Statement*") (Emphasis added, internal citations omitted).

The Commission also issued a policy statement in the 1986 decision. Paragraph 2 of the policy statement provided:

2. The Commission's general interconnection policy for cellular systems, as set forth in that rulemaking, is that telephone companies are required to provide (a) a form of interconnection to a non-wireline carrier no less favorable than that used by the wireline cellular carrier and (b) a form of interconnection that is reasonable for the particular cellular system, to be negotiated by the cellular carrier and the wireline telephone company. 89 FCC 2d at 81-82; 86 FCC 2d at 495-96. A non-wireline cellular carrier is specifically given the right to request interconnection that may not be the same as that used by the wireline cellular carrier, and may not be "locked into the specific interconnection arrangements requested by a wireline carrier." 89 FCC 2d at 82. The cellular carrier is entitled to reasonable interconnection, the form of which depends upon the cellular system design and other factors: in some cases the interconnection of a cellular system as an end office (Type 2)⁶³ may be most appropriate, and in others, interconnection as a PBX (Type 1) may be best. 86 FCC 2d at 496. A cellular system operator is a common carrier, rather than a customer or end user, and as such is entitled to interconnection arrangements that **"minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer."** **Underlying these policies was the goal of interconnection arrangements most favorable to the end user.**⁶⁴

CMRS interconnection cannot be driven by ILEC dictates. Rather, the only factors that can be considered are system design to support the CMRS services in issue, cost to the consumer and avoidance of redundant facilities. The TPUC Final Order violates each of those principles, and treats ASAP like an end user by ignoring the fact that CenturyTel's end users are not calling ASAP but are instead calling ASAP's customer. When TPUC decides to look to ASAP's switch location for call rating purposes, it is treating ASAP like the called party and an end user "customer."⁶⁵ ASAP's customer is the called party. The TPUC Final Order deprives ASAP,

⁶³ ASAP interconnects with the PSTN "as an end office" via Type 2.

⁶⁴ Although the policy statement expressly spoke only to "cellular" the Commission later clarified that the statement also applied to all RCCs and Part 22 licensees, including paging. Memorandum Opinion and Order, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, ¶ 43 FCC 89-60, 4 FCC Rcd 2369 1989 FCC LEXIS 540, 66 Rad. Reg. 2d (P & F) 105 (Rel. Mar. 1989).

⁶⁵ TPUC Final Order FOF 29 expressly states that with regard to paging calls, ASAP is the "called customer." As a matter of law, ASAP *is not* a "customer"; it is CenturyTel's co-carrier and a peer.

ASAP's customers and the wireline customers that call ASAP's customers of federal rights that are almost 50 years old.

B. CMRS carriers have the right to local numbering resources and have no obligation to assign numbers that correspond to the physical location of the CMRS customer at the time of the call.

Interconnection is only one of several important aspects of wireline-wireless calling. CMRS carriers also need E.164⁶⁶ addresses to connect to the wired world. The Commission has recognized this for a long time as well. Before numbering authority was delegated to a neutral third party, the FCC required ILECs to provide local numbers to CMRS carriers in general and paging companies in particular. The Commission has always recognized that CMRS operators need local numbers so that the persons who call CMRS users (wherever they may be at any given time) will not incur toll charges. This is so despite the fact that it has always been self evident that a paging operator will never know the precise physical location of its customer, the called party at the time of the call. Still, paging companies are entitled to local numbering resources in order to provide for local retail rating. For example, in the *NRO NPRM*⁶⁷ the FCC observed:

111. Rate centers are telephone company-designated geographic locations which are assigned vertical and horizontal coordinates within an area code. (n171 set out below) Historically, telephone numbers are assigned on an NXX code basis, and associated with a particular switch. For call rating purposes, each switch is associated with a particular rate center. For most carrier billing systems, the rate centers associated with the switches serving the calling and called parties are used to determine whether a call is local or toll and to compute the air mile distance for rating the toll call. (n172 omitted) Thus, most carrier billing systems rely on NPA-NXX code information for rating calls.

112. Because it is typically necessary for each facilities-based service provider to be assigned an NXX code for each rate center in which it provides service, the rate center structure places a great strain on numbering resources. (n173 set out below) Moreover, although wireless carriers offer larger calling areas and thus require fewer NXX codes for the wireless service, they often must request as many NXX codes as are required to permit wireless customers to be called by wireline customers on a local basis. (n174 set

⁶⁶ E.164 is the international standard for numbering plans to map phone numbers to phone lines. See, Newton's Telecom Dictionary, 17th Ed. The North American Numbering Plan follows E.164.

⁶⁷ *NRO NPRM, supra.*

out below) (Emphasis added)

Footnotes 171, 173, and 174 provide additional explanation:

n171 NEWTON'S TELECOM DICTIONARY, 14th Edition, at 591. See also Local Exchange Routing Guide (LERG), Volume 2, Section 1 at 24 (March 1997). Incumbent local exchange carriers (ILECs) chose to establish the rate center structure as part of their network design for billing and pricing functions and no regulatory mandate requires its existence.

n173 Numbering assignment guidelines for companies choosing to perform call rating consistent with the traditional ILEC rate center configuration require the assignment of one NXX code per rate center.

n174 NANC Report at 1.5.2; Nextel comments at 10. Wireless carriers, however, often require fewer NXX codes than wireline carriers because they have larger local service areas. Bell Atlantic Mobile comments at 12. We note that, to enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residence of end-users. (Emphasis added)

CMRS carriers need and deserve "local" numbers in specific ILEC rate centers so that landline customers can call CMRS customers without incurring toll charges. The Commission has therefore always allowed CMRS carriers to obtain and associate local numbers with wireline rate centers to allow CMRS customers to be called by wireline customers on a local (non-toll) **retail rated** basis. The CMRS customer gets to select the rate center from which it wishes to be reached on a "local" (non-toll) **retail rated** basis. Under federal law there can be no **retail rated** toll charge to an ILEC end user that calls a CMRS carrier's NXX associated with or local to the originating wireline rate center.⁶⁸ This has been the law for 50 years, even though it has always

⁶⁸ *TSR* and *Mountain* are not authority for the proposition that an ILEC can ever charge retail toll to its end users if the NXXs are associated with the same mandatory calling scope. Rather, they stand for the principle that the ILEC is entitled to recover *wholesale carrier compensation* for any out-of-area transport costs – when the CMRS carrier prevents the ILEC from assessing toll because of the rate center assignment of the calling and called NXXs. See *Mountain Order on Review* ¶ 5: "By configuring its interconnection arrangement in this manner, Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain's network." They also properly rule that ILECs can charge toll at retail for calls that are between different local calling scopes (based on NXX assignment) even though for wireline to wireless *wholesale carrier compensation* purposes the call is local. *Mountain* clearly recognized that it is the wireless carrier that controls ILEC **retail rating** based on the NXX rate center assignments. The ILEC is made whole through *wholesale carrier compensation*, if it must incur out-of-area transport cost. As TPUC recognized, CenturyTel bears no such costs.

been obvious that paging companies do not know and have never known the physical location of their customers. The TPUC Final Order reverses 50 years of federal precedent.

CMRS carriers obtain NXXs and associate them with wireline rate centers for a single purpose: to obtain **retail rated** local rating for calls to those numbers from wireline customers in the local calling area of that rate center. The NXX has no other meaning to the CMRS provider.⁶⁹ There is no law or regulation that requires a CMRS provider to give a number within an NXX block only to CMRS customers who are physically located in the rate center to which the NXX is assigned.⁷⁰ If there were such a regulation, CMRS providers would be required to contractually bind their customers to turn off their mobile stations at the rate center boundary, or the CMRS provider would have to possess the ability to “auto-sense” when a customer stepped over the boundary and then immediately inform every ILEC in the rate center to start charging toll at **retail** for calls to that number. The rule espoused by the TPUC Final Order is a recipe for chaos and massive customer confusion. We are talking about mobile service:

2.3 Wireless NXX Assignments.

NXX codes that are assigned to wireless carriers are associated to a specific wireline rate center and are communicated via the LERG. These are assigned to wireline rate centers in order to accomplish land to mobile rating. However, once

⁶⁹ See, e.g., *Wireless-Wireless Portability Order* ¶ 22 [“Because wireless service is spectrum-based and mobile in nature, wireless carriers do not utilize or depend on the wireline rate center structure to provide service: wireless licensing and service areas are typically much larger than wireline rate center boundaries, and wireless carriers typically charge their subscribers based on minutes of use rather than location or distance.”]; *Wireline-Wireless Portability Order, supra*; Eighth Report, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, FCC 03-150, ¶ 62 [“First, the defining aspect of mobile telephony is, of course, mobility... Second, wireless carriers have considerable discretion in how they assign telephone numbers across the rate centers in their operating areas. In other words, a mobile telephone subscriber can be assigned a phone number associated with a rate center that is a significant distance away from the subscriber’s place of residence”] and n. 227 [“Once the NPA-NXX (i.e., 212-449) is assigned to the wireless carrier, the carrier may select any one of its NPA-NXXs when allocating that number to a particular subscriber. Therefore, with regard to wireless, the subscriber’s physical location is not necessarily a requirement in determining the phone number assignment – which is very different from how wireline numbers are assigned.”]

⁷⁰ CenturyTel recognized this point in its February 26, 2003 Comments in Docket 95-116. [“(S)ince wireless telephone numbers are not assigned based on the physical service location of the end user, it is likely that the wireless end user will not be physically located within the rate center area.”]

NPA-NXXs are assigned to a wireless carrier, wireless carriers may select any one of their NPA-NXXs when allocating numbers to a subscriber. The WSP may select a particular NPA-NXX value based on customer desires of calling areas for land to mobile calls, mobile to land calls, or a combination of both. Alternatively, a wireless carrier may choose to select an NPA-NXX value that is physically closest to the subscriber billing address. There are no state or federal requirements to associate an NPA-NXX for a new subscriber based on their residence, billing, or other location.⁷¹

The TPUC Final Order takes away **retail rated** “local” calling to CMRS providers and leaves only “toll,” in violation of federal law and precedent. The TPUC Final Order prevents ASAP from using its federally-assigned “local” numbering resources, in violation of § 251(e)(1) of the Act and the FCC’s numbering rules, because the TPUC Final Order functionally changes the rate center assignments of ASAP’s NXXs from Fentress, Kyle and Lockhart to Austin. The TPUC Final Order improperly focuses on the location of the wireless “called party” at the time of the call for **retail rating** purposes and then compounds the error by presuming that the call is going to ASAP’s switch, even if the called customer is in fact within the ELCS area at the time of the call. TPUC is looking at everything through wireline blinders. CMRS is mobile service; CMRS providers do not provide access lines, and they do not provide service to a customer “premise.” Once the ILEC routes the call to the CMRS carrier, the ILEC is totally cost indifferent to where the call ultimately goes.

This Commission has never required a CMRS provider to use an NXX to provide service to customers only while they are physically located in the rate center to which the NXX is associated, in order to have **retail rated** local wireline-wireless calling. The FCC has never allowed an ILEC to impose toll on its users when they call a CMRS customer with a number that

⁷¹ North American Numbering Council LNPA Working Group Report on Wireless Wireline Integration, p. 33 May 8, 1998 (NANC Report to FCC) available at <http://www.fcc.gov/wcb/tapd/Nanc/rptnancr.doc> (emphasis added). NANC clearly understands that **retail rating** is determined by the NXX rate center assignment and that a wireless carrier obtains an NXX and associates the NXX with a rate center for the sole purpose of arranging for local **retail rating** of wireline-wireless calls.

is associated with the same local calling area.⁷² Instead, the rules allow the ILEC to recover from the CMRS carrier – on a *wholesale carrier compensation* basis – any “out of local area” transport costs incurred when the ILEC delivers calls to a switch or paging terminal. CenturyTel, however, does not incur any additional transport cost. CenturyTel merely routes – but does not transport – out of San Marcos when its users dial an ASAP number.⁷³

The TPUC Final Order holds that ASAP’s NXXs are not eligible for “ELCS treatment” because the called party is not demonstrably within the ELCS area at the time of each call. This conclusion is incorrect, for two reasons. First, while there may be *wholesale carrier compensation* implications, the location of the called party has absolutely no relevance to the **retail rating** of a call.⁷⁴ TPUC expressly so held with regard to wireline-wireline calls in the *FX Docket*. This is especially so for wireline-wireless calls. Wireless carriers obtain NXXs for the sole purpose of securing local **retail rating** to or from a particular area, and they can (and routinely do) assign numbers in an NXX to customers that may never be physically located in the geographic area corresponding to the exchange or rate center. There is absolutely nothing wrong with that.

TPUC on at least one occasion did recognize that CMRS carriers deserve to have similar local calling area access for **retail rating** purposes. It did so as a result of the fact that the “Grand Prairie rate center” had ELCS characteristics in the 214 and 972 NPAs. In TPUC Docket 18438, TPUC required ILECs to consolidate several rate centers in Dallas/Fort Worth and Houston. At the same time, TPUC ordered:

...the creation of a rate center in the 214 area code with the identical ELCS characteristics of the Grand Prairie rate center, to be used exclusively by wireless providers (e.g., cellular, paging and PCS providers). In turn, all wireless providers

⁷² In fact, the FCC’s dialing parity rule expressly prohibits ILECs from requiring additional digits when an ILEC end user calls a paging company NXX that is “local.”

⁷³ TPUC Final Order FOF Nos. 49, 50.

⁷⁴ This is true both for wireline-wireline calls and wireline-wireless calls.

in the Dallas metropolitan areas shall obtain NXX codes only from the 214 NPA. This is intended to relieve the jeopardy situation that exists for the 972 NPA, while at the same time ensuring a ready supply of NXX codes for wireless providers.⁷⁵

If CMRS is not entitled to participate in extended local calling arrangements, and if TPUC had intended to limit “eligibility” to participate in extended local calling arrangements to only those CMRS customers that were physically present in the extended area at the time of the call, it is certainly not evident from the TPUC Order in Project No. 18438. Indeed, the “Texas Number Conservation Task Force Report,” [Exhibit 8] which was adopted by TPUC in large part by Order No. 1 in that Project, detailed several of the points emphasized in this Petition. For example, the Task Force Report expressly notes that:

*Competitive carriers’ switches provide service over a larger area than ILEC switches.⁷⁶

***Retail rating** is an automated process based on the rate center association of the calling and called NXXs.⁷⁷

***Retail rating** for wireline to wireless calling depends on the rate center assignment of the CMRS provider’s NXX.⁷⁸

The TPUC Final Order wrongly focuses on the physical location of the called wireless party at the time of the call for purposes of **retail rating** as opposed to *wholesale carrier compensation*. This principle, if adopted, logically equally applies to all CMRS carriers, including cell and PCS. Under the TPUC Final Order, the **retail rating** of any given wireline to wireless call (Cell/PCS and paging) depends on whether the CMRS customer is physically within or without the local calling area at the time of the call. Alternatively, it will depend on the CMRS switch location. Both results violate federal law and precedent.

The TPUC Final Order next decides that since paging customers cannot be located when they receive individual pages, ASAP’s switch and paging terminal will be used as a proxy for the

⁷⁵ Project No. 18438, *Number Conservation Measures in Texas*, Order No. 1, ¶ 18 (June, 1998).

⁷⁶ Task Force Report, p. 1.

⁷⁷ Task Force Report, pp. 7, 84, 85.

⁷⁸ Task Force Report, pp. 24, 26, 28, 32, 34, 38.

customer location to determine **retail rating**. This turns ASAP's Kyle, Lockhart and Fentress NXXs into Austin NXXs. ASAP clearly has the right to obtain NXXs in the Kyle, Fentress and Lockhart rate centers, since it has spectrum authorizations, customers and coverage there. Given this fact, neither CenturyTel nor TPUC can overturn or ignore ASAP's Kyle, Fentress and Lockhart assignments by "deeming" those NXXs to instead be rate centered in Austin.

One must wonder what the rule will be when a SWBT Lockhart customer calls an ASAP Lockhart NXX.⁷⁹ Will that be a Lockhart "local" call, or a toll call between Lockhart and Austin? What is the rule when a SWBT Austin customer calls an ASAP Lockhart number – is that a local call "within" Austin or is it instead a toll call between Austin and Lockhart?⁸⁰ Or, as is likely, will calls from CenturyTel's San Marcos users to the Lockhart NXX be toll at the same time that calls from SBC's Austin users to ASAP's Lockhart NXXs will be toll? Such a result would be horrendously impossible to administer and is obviously anticompetitive. The TPUC Final Order completely and unlawfully unravels the NXX rate center assignment rules and processes and the resulting **retail rating**.

C. The TPUC Final Order wrongly equates CMRS to the wireline network, violates ASAP's CMRS rights to Type 2 Interconnection, and denies use of the "local" numbers assigned to ASAP by NANPA.

Under the TPUC Final Order, the only way that ASAP can achieve local **retail rating** from San Marcos is to place a switch or paging terminal in Kyle, Fentress and Lockhart.⁸¹ Alternatively, ASAP could obtain a San Marcos NXX (thereby contributing to number exhaust

⁷⁹ SBC-Texas serves Lockhart. Lockhart is not "local" or ELCS to Austin.

⁸⁰ SBC and Verizon (which serves Kyle and Fentress) are both at present properly honoring ASAP's rate center assignments, including those within "ELCS" areas.

⁸¹ As noted, CenturyTel has refused to treat calls from San Marcos to ASAP's new Kyle switch as **retail rated** local calls, even though Kyle is in the same ELCS area. CenturyTel has insisted that ASAP must first execute an interconnection agreement.

when the NXX is otherwise unnecessary) and place a switch or paging terminal in San Marcos.⁸² This is wholly unreasonable. First, it requires additional investment and cost for switches that are not needed for any technical reason. Second, it is required solely to meet CenturyTel's wireline-centric view of the world, and allows CenturyTel to dictate the form of interconnection between CenturyTel and ASAP. Finally, it destroys ASAP's right to Type 2 interconnection at the LATA tandem and thereby obtain access to all end offices and other tandems that are connected to the LATA tandem, with **retail rated** local calling from wireline customers within the mandatory local calling area that contains the rate center to which ASAP has associated its NXX.

1. The TPUC Final Order imposes unnecessary and unlawful costs on ASAP and CenturyTel's end users.

A cellular system operator is a common carrier, rather than a customer or end user, and as such is entitled to interconnection arrangements that "minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer." Underlying these policies was the goal of interconnection arrangements most favorable to the end user.⁸³

The TPUC Final Order requires ASAP to locate a switch or paging terminal in every rate center where it has an NXX in order to obtain retail-rated local calling.⁸⁴ This is not necessary for any technological reason; it is completely based on TPUC's misguided belief that wireless carriers' rights must somehow be judged based on their relationship to the wireline network.⁸⁵ Obviously, there is a significant cost to such a major redesign of a carrier's network and the

⁸² CenturyTel will likely still refuse to **retail rate** calls to a San Marcos NXX unless ASAP executes an interconnection agreement, establishes direct interconnection **and** demonstrates that the called party is physically present in San Marcos at the time of the call.

⁸³ *FCC Policy Statement, supra.* The Commission clarified that the policy statement applied to all RCCs and Part 22 licensees, including paging in ¶ 43 of the *Cellular Interconnection Proceeding*.

⁸⁴ The only other alternative would be to obtain Type 1 interconnection in an ILEC end office in each desired local calling area. Type 1 interconnection is addressed below.

⁸⁵ "[T]he services provided by LECs and CMRS carriers have an essential difference: the wireline phone is tied to a single physical location, whereas the wireless phone can travel at will." Opposition of The Federal Communications Commission to Emergency Motion for Stay, *USTA v. FCC*, No. 03-1414 Before the D.C. Circuit Court of Appeals, filed Nov. 26, 2003, p. 15.

purchase and placement of so many switches.⁸⁶ The TPUC Final Order clearly and obviously violates this Commission's past rulings that a CMRS carrier is entitled to interconnection that minimizes unnecessary duplication of switching facilities. If ASAP chooses to not install all of these switches, then CenturyTel's end users will pay toll under the TPUC Final Order. This is not the kind of interconnection arrangement that is most favorable to the end user. The TPUC Final Order violates federal law.

2. The TPUC Final Order improperly relates CMRS service to the wireline network.

CMRS carrier's rights do not depend on any relationship to the wireline network.⁸⁷ Wireline rules cannot be blindly applied to CMRS service. The TPUC Final Order wrongly applies wireline concepts to ASAP's mobile service when it concludes that CenturyTel can impose retail toll charges on its end users who call ASAP's customers who are not (or are deemed to not be) within the ELCS area at the time of the call. We are addressing mobile service. Being mobile – and occasionally outside of a wireline local calling area – is not a crime that is punishable by a toll on the calling party.

3. The TPUC Final Order eliminates ASAP's right to Type 2 interconnection.

There are three general CMRS interconnection types:

105. LECs are currently obligated to provide three basic types of interconnection to CMRS providers. Type 1 service involves interconnection to a telephone company end office similar to that provided by a local exchange carrier to a

⁸⁶ ASAP has 13 NXXs in the Austin LATA, two of which are associated with the Austin rate center. See CenturyTel Exh. 5, Novak Deposition Exh. 2. The TPUC Final Order requires ASAP to place eleven more switches in the Austin LATA if it wants to secure **retail rated** local calling from ILEC end users in the rate centers and associated local calling areas with which the eleven non-Austin NXXs are associated. There is absolutely no technical reason for such a requirement.

⁸⁷ *In Re Cost-Based Terminating Compensation for CMRS Providers*, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207, DA 01-1201 (May 9, 2001); *In the Matter of Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 ¶¶ 104 (Rel. Apr. 27, 2001) ("*Intercarrier Compensation NPRM*"). These cases involved *wholesale carrier compensation*, but this concept is validly applied to the **retail rating** issue: one cannot blindly impose wireline rules on wireless service.

private branch exchange (PBX). Type 1 interconnection involves an end office connection that combines features of line-side and trunk-side connections and uses trunk-side signaling protocols. Type 1 interconnections enable the CMRS provider to access any working telephone number, including all NXX codes within the LATA of the LEC providing the interconnection. The Type 1 connection also permits access to Directory Assistance, N11 codes, and service access codes. Type 2A connections give the CMRS carrier the ability to connect to the Public Switched Network in the same manner as any wireline carrier. The connections, which may be either solely to access tandems or to a combination of tandems and other central offices, are true trunk-side connections using trunk-side signaling protocols. Type 2A connections do not permit access to LEC operator services or N11 codes. Type 2B connections are trunk-side connections to an end office that operate in the same manner as high-usage trunks. Under Type 2B interconnection, the CMRS provider's primary traffic route is the Type 2B connection, with any overflow traffic routed through a Type 2A connection. Type 2B interconnection permits access to valid NXX codes, but cannot access operator services or N11 codes.⁸⁸

CMRS carriers have the right to choose between Type 1 and Type 2 and the ILEC cannot dictate the form of interconnection, especially the choice between Type 1 and Type 2.⁸⁹ ASAP has exercised its right to choose Type 2. This Type 2 interconnection – in combination with ASAP's NANPA issued NXXs in twelve rate centers within the Austin LATA – must allow ASAP's customers to be reachable on a retail rated local basis from any calling party located within the mandatory local calling area of ASAP's NXX.⁹⁰

⁸⁸ See, e.g., *In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, ¶ 105 FCC 94-145, CC Docket No. 94-54, RM-8012, 9 FCC Rcd 5408, 1994 FCC LEXIS 3181 (Rel. Jul. 1, 1994) (“*CMRS Equal Access Obligations*”). The FCC has used these definitions any number of times, including in the 1986 *Policy Statement*.

⁸⁹ 1986 *Policy Statement supra*; Memorandum Opinion and Order, *In the Matter of William G. Bowles Jr. P.E. d/b/a Mid Missouri Mobilfone, Complainant, v United Telephone Company of Missouri*, DA 97-1441, File No. E-96-04 (Rel. July 1997); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369 at 2376 (1989): (“We deny BellSouth's and Ameritech's requests to reconsider or clarify the application of our Type 2 reasonable interconnection and six-month policies to RCCs. First, we agree with the RCC oppositions that paging carriers' requests for Type 2A interconnection are not inherently unreasonable, contrary to the assertions of BellSouth. We emphasize that, like a cellular system, a paging carrier is entitled to choose the most efficient form of interconnection for its network, and the BOCs may not dictate an RCC's type of interconnection.”).

⁹⁰ Type 2 interconnection at a tandem allows a CMRS carrier to receive calls from any end office that “subtends” the tandem, and from any other tandem (and its end offices) that are connected to the Type 2 tandem. *CMRS Equal Access Obligations, supra* at ¶ 105. CenturyTel's San Marcos end office/tandem is connected to SWBT's Greenwood tandem, so ASAP should be able to receive calls from San Marcos via its Type 2 interconnection. See also, Hng. Tr. pp. 220-21. ASAP should be able to

The TPUC Final Order, however, converts every one of ASAP's 13 Austin LATA NXXs into Austin NXXs. It denies access to the end offices and tandems that connect to SBC's Greenwood and Homestead tandems within the Austin LATA, unless the calling party pays a toll.

The TPUC Final Order denies ASAP the choice of Type 1 or Type 2 interconnection. It makes Type 2 interconnection unworkable by requiring ASAP to have 12 switches or paging terminals that subtend SBC's Austin tandems. It functionally requires ASAP to move to Type 1 interconnection because if ASAP were to use Type 1 it would get local **retail rating** for calls to the Type 1 number regardless of the physical location of its CMRS customer at the time of the call, and regardless of the rate center in which ASAP had its paging terminal.⁹¹ This exposes yet another anticompetitive and discriminatory result of CenturyTel's position and the TPUC Final Order's conclusions.

When a CMRS carrier's uses Type 1 interconnection, the CMRS carrier's "number" resides in an ILEC switch, and not the CMRS switch.⁹² Since the number resides in the ILEC switch, calls to that number from any calling party within the mandatory local calling area, including any "ELCS" territory will be **retail rated** as local. This will be the case regardless of the physical location of the called party at the time of the call, whether the called party is a "customer who carries a pager" or is an ISP. Federal law does not allow the result that **retail** charges to an ILEC user vary depending whether the called number resides in an ILEC switch or

arrange for **retail rated** local calls from San Marcos to its subscribers by assigning an NXX associated with a rate center that is "local" to San Marcos.

⁹¹ That is, unless TPUC intended to overrule the FCC's Type 1 and Type 2 rules in Texas. ASAP has in fact obtained Kyle Type 1 numbers from Verizon. For a short time San Marcos callers could reach those numbers on a **retail rated** local basis. Then they suddenly could not. This situation persists.

⁹² Recall that with Type 1, the CMRS carrier switch or paging terminal looks like a PBX, and not a Class 5 (end office) switch. The NXX resides in the ILEC's end office switch, not the CMRS carrier's "PBX."

a competitive carrier switch. The TPUC Final Order unlawfully denies federal rights granted to ASAP, ASAP's customers and CenturyTel's customers.

Preemption Point No. 3: The TPUC Final Order wrongly concludes that CenturyTel's actions were not anticompetitive.

Order pages 1-3; Findings of Fact Nos. 12-51A; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

The TPUC Final Order concludes that CenturyTel's actions were not anticompetitive because the calls in issue are not local. It therefore did not address whether CenturyTel acted anticompetitively if the calls are local.

CenturyTel is attempting to charge its users a toll when they call users of a competitor. Yet when a CenturyTel user calls a SWBT or Verizon user (including a SWBT or Verizon FX user that is physically outside the ELCS area at the time of the call), CenturyTel does not impose a toll.

CenturyTel competes with ASAP on several levels. CenturyTel (or an affiliate) provided paging service, at least at the time of the hearing on interim relief.⁹³ CenturyTel provides service to ISPs that is different than, but competes with, ASAP's services.⁹⁴ CenturyTel (or an affiliate) provides Internet access – in competition with ASAP⁹⁵ and ASAP's ISP customers. CenturyTel therefore has the obvious incentive to raise the cost to ASAP and customers that choose to use a carrier other than CenturyTel by imposing higher costs on them. The actions CenturyTel took, and the positions it is advancing, are anticompetitive since they would seriously hinder, if not completely prevent, the competitive alternatives made available by ASAP and the ISP users of

⁹³ Int. Hng. pp. 159, 207; ASAP Exh. 8.

⁹⁴ Hng. Tr. pp. 108-9.

⁹⁵ ASAP provides information services that compete with those provided by CenturyTel's ISP offerings. Int. Hng. Tr. pp. 47, 155; ASAP Exh. 7.

its numbers. San Marcos callers will not call ASAP or users of ASAP's numbers that are local to San Marcos if they must pay toll.⁹⁶

Section 202 of the Communications Act prevents CenturyTel from granting unreasonable preferences to or unreasonably discriminating against any of its end use customers or competitors. CenturyTel also cannot have or maintain unreasonable preferences. In this case, CenturyTel seeks to impose toll charges on its users that call ASAP's customers with Kyle, Fentress and Lockhart numbers, but it does not do so when its users call other CenturyTel customers with numbers associated with the ELCS area, or customers with Verizon's Kyle or Fentress numbers or customers with SWBT's Lockhart numbers, including FX customers that are not physically within the ELCS area at the time of the call. This difference in treatment based on the identity of the called party or the called party's service provider clearly violates § 202.

CenturyTel certainly did act anticompetitively and it clearly did unreasonably discriminate against its own users, ASAP and ASAP's users. The Commission should so rule.

Preemption Point No. 4: The TPUC Final Order allows a violation of the local dialing parity rule (47 C.F.R. § 51.207).

Order pages 1-3; Findings of Fact Nos. 12-51A; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

TPUC failed to address ASAP's contention that CenturyTel's action violated federal local dialing parity obligations. The TPUC Final Order should have ruled that CenturyTel violated federal law. This Commission must preempt TPUC in order to enforce the local dialing parity rule.

47 U.S.C. § 153(15) defines "dialing parity":

⁹⁶ This Commission has recognized the importance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues. See, e.g., *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9142-43, 9159, 9160 (1997) ("*Universal Service Order*"); *Universal Service Report to Congress*, 13 FCC Rcd at 11541-42. The Commission has obviously known that paging companies need local numbers so that calling parties do not pay toll. Mr. Goldstein and Mr. Gaetjen both explained the need for local call rating. ASAP Exh. 9 (Gaetjen Dir.) p. 13; ASAP Exh. 44 (Gaetjen Reb.) p. 7; Hng. Tr. p. 263.

The term 'dialing parity' means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among two or more telecommunications services providers (including such local exchange carrier).

The Commission promulgated its local dialing parity rules in 47 C.F.R. §§ 51.205 and 51.207. Section 51.205 addresses carrier rights to dialing parity, while § 51.207⁹⁷ addresses end users' right to dial the same number of digits to make a local call regardless of the called party's service provider. Unlike § 51.205, § 51.207 is not limited to carriers that provide telephone exchange or exchange access service. Section 51.207 grants end users the right to dial local calls on a 7-digit basis to service providers such as ASAP.⁹⁸ The TPUC Final Order allows CenturyTel to require 1+ dialing purely because of the identity of the called party's service provider, and the fact that the called party is "deemed" to be not physically located within the mandatory calling area at the time of the call even when the called party is in the area at the time of the call. There are ILEC customers that are not located in the mandatory local calling area at the time of the call but will still be able to have 7 digit dialing within the ELCS area. This is not parity.

Requiring CenturyTel users to dial extra digits when they call an ASAP customer violates the federal dialing parity rules.

⁹⁷ Sec. 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.

⁹⁸ It is clear from this Commission's rulings on dialing parity that once a carrier obtains an NXX associated with a rate center that is "local" to an ILEC customer, the ILEC cannot require additional digits – such as 1+ – to be dialed. The focus is obviously on the rate center assignments.

Preemption Point No. 5: The TPUC Final Order incorrectly finds that the service ASAP provides ISPs is not “incidental” to ASAP’s CMRS service.

Order pages 3-5; Findings of Fact Nos. 24-32; Conclusions of Law Nos. 6, 14-16; Ordering Paragraph 4.

The TPUC Final Order adopts the PFD recommendation on this point. The PFD correctly points out that there is no statutory or rule definition of “incidental” as that term was used in the FCC Rule that allowed CMRS carriers to provide incidental services.⁹⁹ ASAP relied on a definition of “incidental” from Black’s Law Dictionary¹⁰⁰ to demonstrate that providing service to ISPs was indeed “incidental” to its principal CMRS service. CenturyTel asserted that only services that actually use wireless spectrum can be incidental. The PFD and TPUC Final Order rejected CenturyTel’s extremely limited definition because, as ASAP pointed out, when a paging customer dials in to retrieve voice mail there is not any spectrum use. On the other hand, the TPUC Final Order adopts the PFD conclusion that an incidental service “must be one that is provided to the paging customers and directly supplemental to their paging service.”¹⁰¹ The rule did not use “supplemental”; it used “incidental.” These are two different words with two different meanings. “Incidental” is a broader term than “supplemental.”¹⁰² TPUC’s use of “supplemental” to define “incidental” is incorrect and inconsistent with federal law. These are two different words, and they are not synonyms.

⁹⁹ 47 C.F.R. 22.323 was the “incidental service” rule. The FCC eliminated the rule in its Report and Order, *In the Matter of Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, WT Docket No. 01-108, FCC 02-229 ¶¶ 67-68, Appendix A (Rel. Sept. 2002). The FCC, however, emphasized that “elimination of the rule in no way diminishes or otherwise alters either the right of Part 22 licensees to provide incidental services or the regulatory treatment of those services as CMRS, which we have repeatedly affirmed in prior orders.”

¹⁰⁰ Black’s Law Dictionary, Revised 5th Ed. (1979) defines “incidental” as “(d)epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.” Since ASAP depends on a connection to the Internet and to ISPs in order to provide its “principal” CMRS services, providing PSTN connectivity to ISPs is “incidental” to CMRS.

¹⁰¹ PFD, p. 16, Order p. 4.

¹⁰² Black’s Law Dictionary, Revised 5th Ed. (1979) defines “Supplemental” as “(t)hat which is added to a thing to complete it.”

TPUC's definition is too limited and incorrectly ignores the evidence concerning the extent to which ASAP's paging service is tied to, relies on and uses the Internet and ISPs. In order to provide its "principal" CMRS service, ASAP must be connected to the Internet and ISPs. The next step – providing PSTN connectivity to ISPs using the same switch and allowing them to use numbers within NXX blocks that would otherwise lie fallow – is direct, logical and ineluctably . . . incidental. ASAP's paging customers can and do receive pages and other information that are launched from the Internet, and therefore ISPs.¹⁰³ Mr. Gaetjen's unrebutted testimony was that "the Internet and paging service are intertwined and the joining will continue. They are related and complementary and at some point may wholly join."¹⁰⁴ ASAP's service to ISPs is incidental to its CMRS authority.¹⁰⁵

Once the FCC clarifies that ASAP's service to ISPs is incidental to its CMRS services, then the Commission should preempt, pursuant to § 332(c)(3) of the Act,¹⁰⁶ TPUC's attempt to impose intrastate regulation on ASAP's CMRS service.

Preemption Point No. 6: The TPUC Final Order erroneously subjects ASAP's service to ISPs to state regulation.

Order pages 3-5; Findings of Fact Nos. 24-32; Conclusions of Law Nos. 6, 14-16; Ordering Paragraph 4.

The TPUC Final Order correctly finds that the service ASAP provides to ISPs is not "basic local telecommunications service," "local exchange telephone service" or "switched

¹⁰³ Hng Tr. 25-6, 34-5, 56.

¹⁰⁴ ASAP Exh. 44 (Gaetjen Reb.) p. 15.

¹⁰⁵ In *Federal Express Corp. v. Cal. PUC*, 936 F.2d 1075 (9th Cir. 1991), the appellate court held that ~~Federal Express trucking operations were "part and parcel" (pun in original) of its air delivery system,~~ and therefore not subject to state trucking regulation on account of the federal preemption in the Airline Deregulation Act of 1978 (then codified at 49 U.S.C App. § 1305(a)(1) (1988)). The trucking operations were therefore "incidental" to the airline operations. As Mr. Gaetjen testified, both operations (traditional paging and PSTN connectivity to ISPs) rely on use of and access to the Internet.

¹⁰⁶ Section 332(c)(3) provides:

STATE PREEMPTION.--(A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services....

access service” under the Texas statute and that ASAP is therefore not required to obtain a state issued certificate. The TPUC Final Order, however, incorrectly concludes that ASAP must register as a nondominant carrier under PURA § 52.103. This conclusion is wrong because a state commission cannot assert regulatory authority over a purely interstate service. This Commission has exclusive jurisdiction; this is so even if the state’s statutory and regulatory definitions facially cover ASAP’s activities.¹⁰⁷ The Texas PUC cannot require an entity that provides only interstate services to subject itself to state regulation.

The FCC has absolutely and clearly held that ISP connections to the PSTN are part of an interstate service subject to the exclusive jurisdiction of the FCC.¹⁰⁸ While it is true that some of the Internet communications that travel over a switched or dedicated connection may ultimately originate and terminate in the same state, one cannot separate the two.¹⁰⁹ The reason is that once a connection to the ISP is made, it is not possible to segregate those parts of the Internet session that involve an end-to-end communication that is within a state and those parts of the session that involve communication between two states.¹¹⁰

TPUC’s changes to the initial recommended findings in the PFD do not save the ultimate finding. The PUC is still necessarily asserting regulatory power over a purely interstate activity,

¹⁰⁷ The TPUC Final Order, at p. 3 asserts that ASAP admitted that it met the PURA definition of “telecommunications utility.” This misstates ASAP’s position. ASAP never agreed it was a telecommunications utility as defined in state law. ASAP did agree that the definition itself facially described what ASAP did when it provided service to ISPs. ASAP, however, has consistently asserted it is not a telecommunications utility subject to state certification, registration or regulation since its activities are purely interstate.

¹⁰⁸ *ISP Remand Order, supra.* ¶¶ 49, 52.

¹⁰⁹ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) [Although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated.]

¹¹⁰ Memorandum Opinion and Order *In the Matter of GTE Telephone Operating Cos GTOC Tariff No 1 GTOC Transmittal No. 114*, CC Docket No. 98-79, FCC 98-292 ¶ 22 (Rel. Oct. 1998) (“*GTE ADSL*”): “In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various state or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously.”