

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Petition of ASAP Paging, Inc. for
Preemption of Public Utility Commission
of Texas Concerning Retail Rating of Local
Calls to CMRS Carriers

WC Docket No. 04-6

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

In responding to the Petition for Preemption (“Petition”) of ASAP Paging, Inc. (“ASAP”), Level 3 Communications, LLC (“Level 3”), urges the Commission to reiterate that it has not preempted state public utilities commissions (“PUCs”) from arbitrating interconnection disputes or enforcing interconnection agreements involving traffic bound for Internet service providers (“ISPs”). Although Level 3 takes issue with some of the conclusions of the Texas Public Utility Commission (“TPUC”)—which found in the order challenged by ASAP that CenturyTel of San Marcos, Inc. (“CenturyTel”), may collect toll charges from its customers for calls to ASAP’s wireless paging customers, or calls to its ISP customers, even though ASAP has associated those customers’ numbers with the San Marcos rate center—Level 3 takes no position on those conclusions here.

Instead, Level 3 requests that the Commission, in disposing of ASAP’s petition, reiterate its longstanding view that the Commission has not preempted state PUCs from arbitrating interconnection disputes or enforcing interconnection agreements involving ISP-bound traffic

providers (“ISPs”) under Sections 251 and 252 of the Communications Act, as amended (“Act”), but instead only from setting reciprocal compensation rates for such traffic. In its Petition, ASAP argues incorrectly that “ISP connections to the PSTN are part of an interstate service subject to the exclusive jurisdiction of the FCC.”¹ To the contrary, the TPUC and other state commissions retain jurisdiction over ISP-bound traffic pursuant to Sections 251 and 252 of the Act.

The FCC recently reiterated the overarching role of the state commissions with respect to mediation, arbitration, and enforcement of interconnection agreements *involving ISP-bound traffic* in particular. In granting Qwest authority to provide in-region interLATA services in nine western states, the FCC stated:

[T]he 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes, and it authorizes federal courts to ensure that the results of the state arbitration process are consistent with federal law. We find that this issue [*i.e.*, who should pay for interconnection facilities used to transport ISP-bound traffic] is part of a carrier-to-carrier dispute that is appropriately addressed through state commission and federal court proceedings.²

The U.S. Court of Appeals for the Eleventh Circuit has concurred, finding that Section 251 grants the state public utilities commissions jurisdiction to interpret and enforce interconnection

¹ ASAP Petition at 50.

² *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, Memorandum Opinion and Order*, 17 FCC Rcd. 26,303, ¶ 325 (2002).

agreements, including those covering ISP-bound traffic.³ Most state commissions addressing the issue have concurred with the FCC and the Eleventh Circuit.⁴

With respect to ISP-bound calls, the FCC explicitly limited its preemption of the state commissions to the issue of setting rates for per-minute terminating reciprocal compensation for ISP-bound traffic.⁵ The FCC grounded its preemption of state-commission rate-setting authority on its unique and plenary authority to regulate rates under Section 201 of the Act.⁶ But the FCC did not otherwise disturb state commission authority as granted expressly by statute under Sections 251 and 252 of the Act—nor could it, without running afoul of the U.S. Supreme

³ *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003).

⁴ *See, e.g., In re Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, with Qwest Corp. Regarding Rates, Terms and Conditions for Interconnection*, Opinion and Order, Arizona Corporation Commission, Docket No. T-03654A-00-0882, T-01051B-00-0882, Decision No. 63550 (April 10, 2000); *In re Petition of Level 3 Communications, LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Order Accepting the Arbitrator's Recommendation and Requiring Filed Interconnection Agreement, Minnesota Public Utilities Commission, Docket No. P-5733,421/IC-02-1372 (Dec. 23, 2002); *In re Level 3 Communications, LLC Interconnection Arbitration Award Application*, Order, North Dakota Public Service Commission, Case No. PU-2065-02-465 (Nov. 20, 2002); *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252, Seventh Supplemental Order*, Docket No. UT-023043, at ¶¶ 12-19 (Feb. 28, 2003); *In re Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin*, Arbitration Award, Wisconsin Public Service Commission, Docket No. 05-MA-130 (Dec. 2, 2002).

⁵ *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, 9187, ¶ 78 n.149 (2001) (“*ISP Order on Remand*”), remanded *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

⁶ *See ISP Order on Remand*, 16 FCC Rcd. at 9157, 9181, ¶¶ 52, 65, 66.

Court’s findings in *AT&T Corp. v. Iowa Utilities Board*.⁷ Moreover, the FCC has specified that the state commissions retain the authority to enforce FCC-mandated reciprocal compensation rates for ISP-bound traffic—further undercutting any argument that the FCC has simply preempted all state-commission jurisdiction with respect to ISP-bound traffic.⁸

To read the FCC’s preemption more broadly to infer an intent to preempt *all* state-commission jurisdiction over *all* matters involving ISP-bound traffic would contradict the language of the statute and judicial pronouncements to the contrary. Most critically, it would fail to satisfy the U.S. Supreme Court standard for preemption of state law by a federal agency, namely that the agency must explicitly state its intent to preempt state law. “[W]e can expect that [federal agencies] will make their intentions clear if they intend for their regulations to be exclusive.”⁹ Such clear intentions are lacking in this case. To the contrary, in footnote 149 of the *ISP Order on Remand* the FCC made clear its intention *not* to preempt the state commissions with respect to matters other than rate-setting.

⁷ 525 U.S. 366, 385 (1999) (stating that “the 1996 Act entrusts state commissions with the job of approving interconnection agreements,” although it “do[es] not logically preclude the [FCC’s] issuance of rules to guide the state-commission judgments.”).

⁸ *See, e.g., ISP Order on Remand*, 16 FCC Rcd. at 9187-88 ¶ 79.

⁹ *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985).

CONCLUSION

For the foregoing reasons, Level 3 urges the Commission to reiterate that it has not preempted state PUCs from arbitrating interconnection disputes or enforcing interconnection agreements involving ISP-bound traffic.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John T. Nakahata", is written over a horizontal line. The signature is fluid and cursive.

William P. Hunt, III
Vice President, Public Policy
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, Colorado 80021
+1 720 888 2516

John T. Nakahata
Kent D. Bressie
Charles D. Breckinridge
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036
+1 202 730 1337

Counsel for Level 3 Communications, LLC

23 March 2004