

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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

**WC Docket 04-6**

**REPLY COMMENTS OF PETITIONER ASAP PAGING, INC.**

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## EXECUTIVE SUMMARY

This case is about whether the actual physical location of the called party at the time of the call will, for the first time ever, determine the retail rating to a calling party. The specific controversy relates to Texas Extended Local Calling Service (“ELCS”), which is either a “special arrangement” between ILECs, or is instead “traditional local service.”

ASAP believes that ELCS is traditional local service – or at least telephone exchange service – and the actual physical location of the called party is not determinative of the retail rating to the calling party. Allowing ILECs – that compete (or have affiliates which compete) with other providers – or state commissions that don’t “do wireless” to impose ever-changing and arbitrary and wireline-centric rules is a recipe for disaster. The calling and called NXXs control for retail rating purposes. The location of the called party, the location of a POI, the location of a switch, the network architecture, or the existence *vel non* of a written agreement can sometimes be important for *wholesale carrier compensation*, but this case concerns retail rating of calls from ILEC customers to customers of a competitive carrier that is already indirectly interconnected with the ILEC.

CenturyTel and TPUC both claim that Texas ELCS is a “special arrangement between ILECs.” They necessarily assert that Texas ELCS is not traditional local exchange service. ELCS, however, is “telephone exchange service” as defined by § 153(47) in the Act. Despite what CenturyTel and TPUC now claim, Texas ELCS has consistently been treated like “traditional local” service by both TPUC and this Commission. ELCS is not and cannot be a “special arrangement between ILECs.” Texas ELCS is “telephone exchange service” and all the rules relating to traditional local service, including dialing parity and respect for competitive carrier NXX rate center assignments apply. Local calls cannot be toll calls if competition is to survive.

The industry uniformly uses NXX rate center assignments for retail rating purposes. CenturyTel and TPUC now threaten to unravel the industry standard method – which is soundly based on FCC rules and precedent and practical considerations since it is not possible to determine the actual physical location of a called party even on a wireline-wireline call. Allowing an ILEC to disregard a competitive carrier’s rate center assignment, unless the competitive carrier meets a series of arbitrary, uncertain, inconsistent and costly requirements will lead to no competition since no insurgent will in fact be able to compete.

CenturyTel takes the position it can apply, or waive, any or all of these requirements at its whim, to the point that it unreasonably discriminates between ILECs and competitive carriers and among competitive carriers.

TPUC and CenturyTel argue that CenturyTel can legitimately require 1+ dialing and impose toll on CenturyTel’s customers when they call an ASAP local number since the called party’ actual physical location cannot be readily determined and ASAP has no wireline presence in San Marcos to serve as a surrogate for actual physical location.

CenturyTel intends to “toll rate” calls to ASAP’s numbers until ASAP establishes a switch or Point of Interconnection (“POI”) in the San Marcos local calling area **AND** ASAP proves that on a call by call basis the ASAP customer is physically present within the local calling area at the time of the call. CenturyTel does not so state, but it is also requiring ASAP to also execute an interconnection agreement before it will locally rate calls to ASAP’s numbers. This is important, because CenturyTel’s “agreement” will require ASAP to pay either reverse billing” or intrastate access.

CenturyTel does not impose each of these requirements on every other carrier. There is no written agreement with either SBC or Verizon, and at least one CLEC. Verizon does not have a switch or POI in San Marcos. SBC does have a wireline presence in San Marcos (but no

agreement with CenturyTel). ASAP has arranged to use SBC to transport and transit CenturyTel-originated traffic. Thus, ASAP does in fact have a wireline presence in San Marcos – through SBC – even though it is not required. CenturyTel admitted carriers can do this, but they will not let ASAP do so.

TPUC, meanwhile, wants ASAP to establish a wireline presence in every rate center where it holds an NXX<sup>1</sup> as a supposed alternative to proving called party location at the time of each call. This, of course, imposes significant costs and burdens beyond those required by federal law, destroys Type 2 interconnection, makes no sense from a wireless or wireline perspective and directly violates several express rights given by federal law. Besides, the result of a wireline presence appears to result only in ASAP paying access charges to CenturyTel – rather than reverse billing under a recent TPUC arbitration decision under § 252(b) of the Act.

There is a very simple set of questions to ask:

\*is there any way that ASAP can secure local calling to its local numbers without paying CenturyTel switched and special access charges or reverse billing?

\*if ASAP establishes a POI in San Marcos to act as a surrogate for customer location, will any call to any ASAP NXX – regardless of rate center designation – be retail rated as local and not incur switched access?<sup>2</sup>

CenturyTel: what exactly does it take to accomplish local (non-toll) calling without incurring access or reverse billing and to what NXXs does this apply? If there must be an agreement, if ASAP agrees to establish a wireline presence in the local calling area, will you

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<sup>1</sup> TPUC ASAP Order, Finding of Fact No. 51.

<sup>2</sup> ASAP has many numbers that are not local to San Marcos. If the San Marcos POI (instead of the Austin switch) is the surrogate for customer location, then any call to any ASAP number, regardless of rate center designation, is local, even if the NXX rate center is not local to San Marcos. This must be the case for both retail rating and intercarrier compensation, if one accepts the logic advanced by CenturyTel and TPUC.

agree to local rate calls to all of ASAP's numbers (regardless of rate center assignment) without payment of access, toll or reverse billing?

Texas Commission: what exactly does it take to accomplish local (non-toll) calling without incurring access or reverse billing? Be specific.

Force the question without equivocation and you will find the answers are different, and ultimately, do not in fact result in local rating without payment of access charges.

Neither ASAP nor this Commission can really determine what the Texas "rule" is for "local calling" since CenturyTel and TPUC ultimately impose different, incoherent and inconsistent requirements, each of which have nothing to do with the criterion – physical presence of the called party within the geographically relevant area – TPUC says is determinative for retail rating. TPUC has required competitive carriers to pay reverse billing (based on intrastate access) or pay extra money to establish a wireline presence – only to still pay intrastate access charges. This is an inescapable barrier to any form of competition.

Both CenturyTel and TPUC assert that – notwithstanding the federal law and precedent – the decision to ignore federal rules and impose additional obligations does not justify preemption. They each claim a state can impose additional and material financial obligations beyond those set out by federal rules if the competitive carrier has "alternatives" that are not "too onerous." CenturyTel and TPUC are simply incorrect and the requirements are "too onerous" in any event. A state cannot require a carrier to give up one federal right in order to exercise another; states cannot impose additional obligations beyond those set out in the FCC's rules on a competitive carrier when it comes to numbering, local calling, interconnection or network build-out. Such obligations are presumptively a barrier to entry. In any event, the evidence in the case below clearly shows that these obligations impose an unreasonable barrier to entry, directly contravene federal law and precedent and still do not result in local calling. The argument that

TPUC's decision can be justified as a means to protect consumers is ludicrous and has no support in either the PUC order or the evidence. In fact, consumers and competition are severely harmed.

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TPUC has not complied the official administrative record for the case, notwithstanding the fact that the decision has been appealed to state district court. ASAP therefore is providing its copy of the "Transcript" of the Hearing<sup>3</sup> and some of the Exhibits<sup>4</sup> that were admitted at hearing. This is necessary to rebut some of the incorrect statements and claims made by some of the commenting parties.

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If the Commission does not preempt TPUC, ILECs will be free to impose toll charges on their customers when they call a competitive carrier's user, unless the competitive carrier establishes a switch or POI in every local calling area **AND** is able to demonstrate on a call by call basis that the called customer is physically located in the local calling area at the time of the call and even then (at the ILEC's whim) perhaps also enter into a written agreement. This is an unreasonable, discriminatory, uneconomic and impossible burden that directly violates any number of specific FCC holdings. The implications to facilities-based and intermodal competition are staggering. TPUC's rule is contrary to reason, industry practice, the law and the Commission's rules and prior decisions. TPUC has wrongfully encroached on FCC authority,

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<sup>3</sup> The Transcript of the Hearing is presented as one file, and is contained in Attachment 1. The first part of the transcript is the testimony and argument in the "interim hearing." That testimony is identified below, when cited, as "Int. Hng. Tr." Following the interim hearing transcript is the transcript of the hearing on the merits, which is labeled "HOM Tr."

<sup>4</sup> The Exhibits will be contained in Attachment 2, but identified below by the Exhibit Number used in the Hearings below.

has denied important federal rights and has erected a significant and harmful barrier to entry.

ASAP's Petition must be granted and TPUC must be preempted.

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**REPLY COMMENTS**

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**REPLY COMMENTS OF PETITIONER ASAP PAGING, INC.**

NOW COMES ASAP PAGING, INC. (“ASAP” or “Petitioner”) and submits these Reply Comments in response to the Initial Commentors in this matter.

**I. Background and Status Update.**

A. Background.

ASAP’s Petition seeks preemption - on several grounds - of a Texas Public Utility Commission (“TPUC”) Order in a complaint case<sup>5</sup> brought by ASAP. The complaint case was not brought under § 252 of the federal Act, and TPUC was not acting as an arbitrator under § 252. The case concerned CenturyTel of San Marcos’ (“CenturyTel”) decision to begin charging its San Marcos users toll charges when they called ASAP’s customers that use numbering resources associated with ILEC rate centers that are “local” to San Marcos. ASAP filed a complaint before the TPUC seeking relief. TPUC ultimately denied relief, and this case ensued. Comments in support of the petition were filed by AAPC Metrocall, Affordable Telecom, Allied National Paging, Sprint,<sup>6</sup> the Texas Association of Paging Service Providers and Verizon Wireless.

<sup>5</sup> *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.*, Docket No. 25673, Order (October 9, 2003).

<sup>6</sup> Sprint’s comments were particularly cogent and helpful, and have greatly reduced the volume of ASAP’s reply. Except for one issue (addressed below) ASAP agrees with Sprint but will not herein repeat Sprint’s arguments in the interest of brevity.

Oppositions were submitted by CenturyTel, Level 3, NECA, NTCA, TPUC and Valor. As will be seen below, several of the opposing commentators address issues that are totally irrelevant to this matter or make factual assertions that are not supported by the record of the TPUC case or even the TPUC Order.

B. Status update.

1. On March 31, 2004 ASAP filed a Complaint in Federal Court that involves some of the facts and circumstances that gave rise to this matter.<sup>7</sup> ASAP sought damages and declaratory and injunctive relief under state and federal antitrust laws, for tortious interference with contract and tortious interference with business relations, and for violations of the Communications Act. ASAP filed the lawsuit because of concerns that the applicable statute of limitations for some of the causes of actions could expire on April 1, 2004,<sup>8</sup> thereby preventing ASAP from obtaining any recompense for the harm done to it as a consequence of CenturyTel's unilateral action in imposing toll charges to its customers when they call ASAP's Fentress, Kyle or Lockhart numbers. In the Complaint, ASAP gave notice to the Court of the pendency of the matter before the Commission and indicated that the lawsuit should be abated until the FCC resolves the issues.

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<sup>7</sup> *ASAP Paging, Inc., v. CenturyTel of San Marcos, Inc.; CenturyTel Service Group, L.L.C.; CenturyTel Security Systems of Texas, L.P.; and CenturyTel, Inc.*, Case No. A 04 CA 181 SS, U.S.D.C. – (W.D. Tex., Austin Div.) In combination, the CenturyTel defendants provide – or provided on April 1, 2002 – paging and other wireless services, messaging, service to ISPs and Internet access. Int. Hng. Tr. p. 159, line 4 – p. 160, line 23, HOM Tr. p. 378; ASAP Exh. 8(paging and other wireless); HOM Tr. p. 108, line s 17–20 (messaging); Int. Hng. p. 47, lines 13-20; HOM Tr. p. 285 (Internet access); ASAP Exh. 44, p. 19, lines 15-17 (Gaetjen Reb.) (service to ISPs). In other words each of ASAP activities involved in this case directly compete with a CenturyTel offering.

<sup>8</sup> CenturyTel began requiring 1+ dialing and imposing toll on April 1, 2002, so any two year statute of limitations would bar relief unless the action was filed by March 31, 2004.

2. Texas ELCS LATA modification request. SBC recently filed a request for LATA modification to implement ELCS in Texas.<sup>9</sup> In that case, SBC represented to this Commission that ELCS is “traditional basic local service” even though CenturyTel and TPUC (and SBC in a pending case in Texas) take the position that Texas ELCS is not traditional basic local service and is instead a “special arrangement between ILECs.” A CMRS provider has opposed the LATA modification request because the TPUC has prevented that carrier from participating in ELCS cases based on the ASAP “precedent.” The CMRS carrier is therefore asserting that Texas ELCS is not traditional basic local service and LATA modifications cannot be approved.<sup>10</sup> SBC’s reply comments restate its position that Texas ELCS is “traditional local” service. If SBC is correct, then CenturyTel and TPUC are incorrect in their initial comments in this case.

CenturyTel and TPUC both claim that Texas ELCS is a “special arrangement.”<sup>11</sup> They therefore necessarily assert it is not traditional local exchange service. ELCS, however, is “telephone exchange service” as defined by § 153(47) in the Act.<sup>12</sup> Despite what CenturyTel and TPUC now claim, Texas ELCS has consistently been treated like “traditional local” service by

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<sup>9</sup> *In the Matter of Request of Limited Modification of LATA Boundaries to Provide ELCS Between the Jackson Exchange and the Tyler Exchange*, WC Docket 04-77.

<sup>10</sup> See Comments of Affordable Telecom, *In the Matter of Request of Limited Modification of LATA Boundaries to Provide ELCS Between the Jackson Exchange and the Tyler Exchange*, WC Docket 04-77 (filed April 6, 2004). Affordable Telecom is represented by the same counsel in WC Docket 04-77 that represents ASAP in this case.

<sup>11</sup> CenturyTel Opposition, pp. iii, (“special rate”), 1 (“special arrangement”); TPUC Comments at 2-3 (explaining Texas ELCS); TPUC Order at 1 (“this Order should be based narrowly on the unique nature of [ELCS]”), p. 6 (“ELCS is a special arrangement”).

<sup>12</sup> Texas ELCS is flat rate, non-optional and allows unlimited calling to other ELCS rate centers without a toll charge. It is therefore clearly “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” An exchange is the equivalent of a “rate center.”

both TPUC<sup>13</sup> and this Commission.<sup>14</sup> Since ELCS is not and cannot be a “special arrangement” between ILECs, and is instead “telephone exchange service” all the rules relating to traditional local service, including dialing parity and respect for competitive carrier NXX rate center assignments apply. It is noteworthy that neither CenturyTel nor TPUC assert that an ILEC can “toll rate” calls to competitive carriers that do not meet their inconsistent, extensive and expensive set of prerequisites in the context of “traditional local service.”

The comments demonstrate that this case has the potential to completely eliminate both inter-modal and intra-modal competition. If the installed base of ILEC wireline customers cannot call CMRS, CLEC – or potentially even cable<sup>15</sup> – customers on a local basis, no one will use CMRS, CLEC or cable providers since any ILEC customer that calls the competitive provider

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<sup>13</sup> TPUC Subst. R. 26.5(79), (117) and (118), 16 T.A.C. 26.5(79), (117) and (118) (definitions) (available at <http://www.puc.state.tx.us/rules/subrules/telecom/26.5/26.5.doc>):

(79) **Exchange area** — The geographic territory delineated as an exchange area by official commission boundary maps. An exchange area usually embraces a city or town and its environs. There is usually a uniform set of charges for telecommunications service within the exchange area. An exchange area may be served by more than one central office and/or one certificated telephone utility. An exchange area may also be referred to as an exchange

(117) **Local call** — A call within the certificated telephone utility's toll-free calling area including calls which are made toll-free through a mandatory extended area service (EAS) or expanded local calling (ELC) proceeding.

(118) **Local calling area** — The area within which telecommunications service is furnished to customers under a specific schedule of exchange rates. A local calling area may include more than one exchange area.

<sup>14</sup> See, Memorandum Opinion and Order, *In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, CC Docket No. 96-159, File Nos. NSD-LM-97-2 through NSD-LM-97-25, FCC 97-244 ¶¶ 3-8, 19 (Rel. Jul. 1997) (“*ELCS LATA Modifications*”). (LATA modification requests to support ELCS must be for “traditional local telephone service” which must be flat-rate and non-optional, and it cannot have anticompetitive effects, or at least present only *de minimus* discrimination or anticompetitive concerns).

<sup>15</sup> Cable providers are moving into IP-based voice telephony. They often assign an E.164 address to their customers. As a technical matter, the cable customer need not be “physically located” within the geographic boundary of the ILEC rate center to which the customer’s NXX line number is assigned. In the IP and CMRS worlds, the customer need only be “presence based” rather than “location based,” so the phone number is divorced from the rate center. This disassociation, however, does not mean that no call is “local” for purposes of retail rating calls made to the number by a wireline subscriber. This is not an “ELCS” case, or even a CMRS case. It concerns every means by which intra-modal and inter-modal

customers will pay toll. It cannot be emphasized enough that the great majority of end user customers are still served by ILECs who can effectively preclude competition if they are allowed to impose toll on their customers when they call customers of a disfavored competitor. The consequences boggle the mind.

## II. Reply to Comments.

### A. Why Are These People Here?

NECA, NCTA, Valor and Level 3 each address matters that are not in issue in this case. The concerns expressed by NECA and NCTA regarding “out of area” transport cost responsibility<sup>16</sup> are irrelevant to the case at bar because – as TPUC found – CenturyTel is not incurring any “out of area” transport cost.<sup>17</sup> ASAP has an informal arrangement with SBC whereby SBC takes ASAP’s traffic in San Marcos, transports it to the tandem and transmits it to ASAP’s switch.<sup>18</sup> In essence, ASAP has established a “virtual POI” in San Marcos, and has established interconnection within CenturyTel’s network.<sup>19</sup> CenturyTel does not bear any cost of transport. CenturyTel’s cost in processing traffic addressed to ASAP’s customers is exactly the same as CenturyTel’s cost of processing all other ELCS traffic to SBC and Verizon.<sup>20</sup>

Valor claims that the states have the right to determine what local areas will be local to each other.<sup>21</sup> ASAP is not challenging the TPUC’s right to decide which rate centers are “local” to each other. Since competitive carriers generally use ILEC rate center assignments, however,

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competition can develop. TPUC’s decision fundamentally challenges the foundation of the way the entire industry operates. Allowing toll charges as was done in Texas threatens all forms of competition.

<sup>16</sup> NCTA Comments, pp. 2, 3, 4; NECA/OPATSO Comments pp. 2, 3.

<sup>17</sup> TPUC ASAP Order, Finding of Fact Nos. 49-50.

<sup>18</sup> HOM Tr. 38, 111, 163, 166, 201, 259-61, 277-82, 339,-40, 536-37, 541-542, 842-844, 854, 855-56, 877, 812.

<sup>19</sup> HOM Tr. p. 293, lines 12-24.

<sup>20</sup> Int. Hng. Tr. p. 206; HOM Tr. pp. 473, 487-8, 494-5, 504-5, 510, 536-7; ASAP Exh. 43, pp. 11, 25, 28 (Goldstein Reb.).

once TPUC makes a decision on what rate centers are “local to each other,” it cannot exclude competitive carriers from receiving local calls within and between rate centers that are “local to each other” merely because the called party’s NXX is held by a competitive carrier rather than an ILEC or the provider uses a different technology. If Valor is claiming that a state can allow an ILEC to refuse to honor competitive carrier rate center assignments, it is simply wrong.

Level 3’s comments are also completely misplaced. ASAP agrees with Level 3 that states have jurisdiction under § 252(b) to arbitrate interconnection agreement terms relating to physical interconnection and wholesale carrier compensation issues, even those involving ILEC and CLEC jointly provided interstate information access service to ISPs. The case below, however, was not an arbitration and did not at all concern wholesale carrier compensation. Level 3 has confused the issues of which agency (state or federal) has regulatory jurisdiction over a carrier that provides service to ISPs and which agency (state or federal) is to devise and enforce those rules given to the FCC by the Act with the issue of which agency (state or federal) is charged with handling arbitrations under § 252(b) to develop the wholesale intercarrier terms on which two carriers will jointly carry traffic to and from an ISP.

Level 3 should pay much more attention to the other things TPUC is doing, like ruling that calls to an ISP served by Level 3 are “access,” whereas calls to an ISP served by CenturyTel are not. Level 3 should be more concerned that TPUC has now apparently allowed CenturyTel to impose retail toll on its users (as a result of the *ASAP* decision) AND recover access charges from a competitive carrier for calls to any competitor’s customers, in a recent TPUC arbitration award under § 252(b).<sup>22</sup> Level 3’s concerns are totally misplaced.

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<sup>21</sup> Valor Opposition, pp. 1-3.

<sup>22</sup> See Attachment 3 hereto (Arbitration Award, *Petition of Level 3 Communications, LLC for Arbitration Pursuant to 47 U.S.C. § 252 of Interconnection Terms and Conditions With CenturyTel of Lake Dallas, Inc. and CenturyTel of San Marcos, Inc.*, TPUC Docket 26431 (March 11, 2004); Motion for Reconsideration of Level 3, Docket 26431). CenturyTel was allowed to recover access charges from

Sprint asserts that the Texas ELCS statute need not be preempted.<sup>23</sup> The problem here is that TPUC has interpreted its own statute to mean that ELCS is a “special arrangement between ILECs” that is not available to competitive carriers unless they take additional and costly additional steps. If TPUC is right about what the Texas ELCS statute means,<sup>24</sup> and if ASAP is also right that the result violates federal law and should be preempted, then the Commission must preempt the statute.

B. ASAP is a real paging carrier.

1. ASAP is a “real” CMRS provider with real “paging” customers. CenturyTel and TPUC make it appear that ASAP’s CMRS operations are a sham and ASAP does nothing but provide retail Internet service and PSTN connections to unaffiliated ISPs. That is simply untrue and the record completely controverts the implication. ASAP has many CMRS Radio Station Authorizations (“RSAs”) and was in the CMRS business long before there was a public Internet. ASAP operates an extensive wireless network with approximately 25 transmitters in the Austin LATA alone.

Any notion that ASAP has done all of this “only” to arbitrage ISP traffic is ludicrous.<sup>25</sup>

**ISP revenue is only 10-15 percent of ASAP’s overall revenue.**<sup>26</sup> The great majority of the

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Level 3, even though Level 3 voluntarily agreed to establish a POI in CenturyTel’s local service area. CenturyTel is telling this Commission that ASAP can avoid retail toll charges if it establishes a POI in San Marcos, but what it fails to reveal is that even if ASAP does so CenturyTel will then ***demand access from ASAP*** before it executes a voluntary agreement because notwithstanding the physical POI in San Marcos, Century Tel believes ASAP is providing “Virtual NXX” and CenturyTel believes Virtual NXX providers owe the ILEC access for “Virtual NXX” service. ASAP will then have to go through another costly proceeding – this time under § 252(b) – that it cannot afford. Requiring an agreement will lead to arbitration, and the cost will surely bankrupt ASAP. That is just not right.

<sup>23</sup> Sprint Comments, p. 27.

<sup>24</sup> ASAP has disagreed with TPUC’s interpretation. This is one of the issues raised in ASAP’s state court appeal. The Texas courts, ultimately, will resolve the question but they have yet to do so, so TPUC’s interpretation is the most recent authority on the question. The Commission should rule that TPUC’s order and its interpretation of state law – if correct – violates applicable federal law principles.

<sup>25</sup> It bears repeating that ASAP has never sought reciprocal compensation or any other form of wholesale carrier compensation from CenturyTel or any other ILEC for the calls from ILEC end users to

customers to whom ASAP assigns the NXXs in issue are physically located in San Marcos, Kyle, Lockart and/or Fentress at least some of the time, or have some legitimate reason to need a pager with a number that is “local” to those towns.<sup>27</sup> ASAP has customers that “carry a pager,” including at least 85 customers in Lockhart that use the Lockhart NXX, and many others who use the 222 “reverse billing” NXX that ASAP was attempting to move from due to the costs involved.<sup>28</sup>

ASAP’s retail or wholesale paging customers include governmental entities, utilities, medical personnel and large corporations.<sup>29</sup> ASAP has resellers (including one in San Marcos) and those resellers also have customers that carry a pager.<sup>30</sup> CenturyTel’s own traffic study (and the CenturyTel witness that sponsored the study) indicated hundreds of “paging” messages each

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ASAP’s information access customers, or even its paging customers. ASAP Exh. 9, p. 11, lines 19-22 (Gaetjen Dir.); ASAP Exh. 44, p. 16 (Gatejen Reb.); Int. Hng. 118-119; *See In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 ¶ 57, 65 (Rel. Apr. 27, 2001) (“*ISP Remand Order*”) *Remanded Worldcom, Inc., v. FCC*, 288 F.3d 429, 2002 U.S. App. LEXIS 8542 (D.C. Cir. 2002). Obtaining full cost recovery from the ISP customer through monthly rates instead of the ILEC through carrier compensation cannot in any way be considered “arbitrage.” Indeed, it is precisely what the Commission said it wanted carriers to do.

<sup>26</sup> Int. Hng. Tr. p. 200, lines 3-9.

<sup>27</sup> Int. Hng. Tr. p. 199, line 14 – p. 200, line 2:  
 14 Q In your experience, when one of your  
 15 customers is obtaining your services, what is  
 16 important to your customer in terms of what its  
 17 number is?  
 18 A My customer who gets a pager from me is  
 19 getting a pager so that his customers, his  
 20 family, his employees or his employer can get a  
 21 hold of him in a timely fashion, and they seek  
 22 to make it as inexpensive and efficient as they  
 23 possibly can. So they would attempt to get a  
 24 local number so that, again, their family, their  
 25 employee or employees or associates would not be  
 0200  
 1 inconvenienced by having to pay a long distance  
 2 call to call their pager.

*See also*, HOM Tr. p. 868, line 12 – p. 871, line 7.

<sup>28</sup> Int. Hng. Tr. p. 40, line 17- p. 41, line 2.

<sup>29</sup> Int. Hng. p. 70, line 20 – p. 72, line 15.

month.<sup>31</sup> TPUC conveniently did not refer to the evidentiary record on this point, but it cannot deny the unrebutted fact that ASAP is a legitimate “paging” company with real customers and a real network including a switch, a terminal, many transmitters and various means to connect it all together.<sup>32</sup>

It should be no surprise to the Wireless Competition Bureau that since ASAP’s network is a wireless rather than a wireline network and there will not be a “wireline” presence in every rate center where ASAP has NXXs, coverage or customers. The Bureau likely does not share the TPUC’s horror that ASAP does not have a “wireline” presence everywhere its “mobile” customers are out enjoying their mobility.<sup>33</sup> TPUC’s determination that ASAP must have a “wireline” presence in a local calling area, if ASAP cannot otherwise demonstrate physical location of the called party in the local calling area, in order to qualify for local calling<sup>34</sup> functionally punishes a wireless carrier for being a wireless mobile carrier that facilitates mobility using an efficient network architecture and has no need to determine the location of the called party, other than for regulatory purposes imposed for arbitrary reasons. This is

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<sup>30</sup> ASAP Exh. 44, p. 18, line 23 (Gaetjen Reb.).

<sup>31</sup> CenturyTel did not dispute that ASAP is in fact a “legitimate” wireless carrier with resellers and customers in the local calling area, to whom calls will be completed in the local calling area. HOM Tr. p. 141, lines 9-15; p. 535, line 1; p. 579, line 17 – 583, line 6.

<sup>32</sup> ASAP Exh. 9, pp. 2-3 (Gaetjen Dir.); ASAP Exh. 44, p. 2, lines 8-16, p. 3, lines 6-11, p. 9, lines 9-24, p. 10, lines 1-9 (Gaetjen Reb.); HOM Tr. p. 141, lines 9-15; p. 535, line 1; p. 579, line 17 – 583, line 6; TPUC ASAP Order Finding of Fact Nos. 10-11.

<sup>33</sup> Memorandum Opinion and Order, *In the Matter of Telephone Number Portability, Carrier Requests for Clarification of Wireline-Wireless Porting Issues*, CC Docket 95-115, FCC 03-237 ¶ 22 (Oct. 7, 2003) (“*Wireless-Wireless Portability Order*”):

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.

<sup>34</sup> TPUC ASAP Order, pp. 2, 7, Conclusion of Law Nos. 19, 29, 30; *see also* HOM Tr. p. 750-52.

unreasonably discriminatory and functionally requires wireless carriers to wastefully duplicate the legacy wireline architecture at an unreasonable and unnecessary cost and expense.<sup>35</sup>

At the time of the interim hearing, ASAP had 100-150 retail customers with billing addresses in the San Marcos area. They initially used the Lockhart NXX.<sup>36</sup> By the time of the permanent hearing, ASAP had 88 numbers in use in the Lockhart NXX. Of these only 5 are used by ISPs. The remaining 83 are for or in support of persons who “carry a pager.” ASAP would have at least 35 more of these numbers in use, except that it had to move those customers over to its “LATA-wide” 222 NXX or keep them there in order to maintain them as customers when CenturyTel began charging toll on April 1, 2002.<sup>37</sup> In this regard, TPUC’s claim<sup>38</sup> and CenturyTel’s assertion<sup>39</sup> that ASAP has not demonstrated harm, lost customers or that the price ASAP must charge its customers is not materially affected reflects an assiduous blindness to the evidence. ASAP lost customers (including San Marcos paging customers and San Marcos Internet<sup>40</sup>) and has had to take costly action to keep others. ASAP’s ability to grow has been stunted by CenturyTel’s actions and the immense cost of this case.<sup>41</sup>

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<sup>35</sup> *But see, In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, & 12, Policy Statement ¶ 2, FCC 86-85 LEXSEE 59 Rad. Reg. 2d (P&F) 1275 (Rel. Mar. 5, 1986) (“*FCC Policy Statement*”). 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).

<sup>36</sup> Int. Hng. p. 17, line 3 – p. 18, line 24.

<sup>37</sup> When CenturyTel started imposing toll, call volume to ASAP’s non “reverse billing” numbers went “down to zero.” Int. Hng. p. 40, line 1 – p. 41, line 2.

<sup>38</sup> TPUC Comments, p. 8, 10

<sup>39</sup> CenturyTel Opposition, pp. iii, 10, 11.

<sup>40</sup> ASAP Exh. 9, p. 7, lines 15-16 (Gaetjen Dir.).

<sup>41</sup> ASAP Exh. 9, p. 13, lines 11-23, p. 16, line 12 – p. 17, line 5 (Gaetjen Dir.); ASAP Exh. 44, p. 23 lines 11-15 (Gaetjen Reb.).

As to TPUC and CenturyTel's observation that no "paging" customers used Kyle or Fentress numbers, ASAP reasonably did not move those customers over to the relatively new Kyle and Fentress NXXs during this case because of the threat (now actualized) that any such customers would not be reachable on a local basis from San Marcos. ASAP was trying to move from the reverse billing arrangement with SBC because the cost requires ASAP to charge more for those users with "reverse billing numbers." This renders ASAP's service more expensive and less competitive.<sup>42</sup> ASAP, however, has had to continue relying on that service because CenturyTel is charging toll to ASAP's Fentress, Kyle and Lockhart numbers.

CenturyTel and TPUC clearly do not understand wireless service and, sadly, it is apparent neither of them felt any need to look at the overwhelming evidence<sup>43</sup> of the harm to ASAP, its customers and CenturyTel's customers that was adduced in the TPUC hearings. Lack of local calling absolutely presents a barrier to entry and continued service provision.

CMRS carriers obtain local numbers so that their customers can be called by wireline customers on a local basis. One of the ISP customers that TPUC **deemed** to be "in Austin" is in fact in San Marcos (as is evident by the name "San Marcos Internet") and legitimately needs to be reachable on a local basis by its San Marcos customers. CenturyTel and TPUC are simply denying ASAP and its customers this important and valuable right and need.

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<sup>42</sup> ASAP Exh. 44, p. 19, lines 1-11; Int Hng. Tr. pp. 40, line 2 p. 41, line 2; p. 42, line 14 – p. 45, line 3; HOM Tr. p. 50, line 4 – p. 51, line 14 (customers using reverse billing numbers pay \$3.00 more per month).

<sup>43</sup> TPUC's counsel clearly did not review the record. For example, at page 15, TPUC contends that "the record includes no evidence, or even a claim, that ASAP has entered into any FX-type arrangement for the three NPA-NXXs at issue." ASAP presented an overwhelming amount of evidence on this very point. ASAP Exh. 43, p. 3, lines 7-17, p. 6, lines 1-16, pp. 7-9, p. 24, line 25, p. 25, line 13 (Goldstein Reb.); ASAP Exh. 44, p. 10, line 10 – p. 13, line 15, p. 21, line 19 – p. 23, line 6 (Gaetjen); HOM Tr. p. 819 – 822; p. 843, line 11 – p. 845, line 2; p. 855, line 1 – p. 859, line 3.

That ASAP also provides Internet access service<sup>44</sup> and provided connections to **five** ISPs, using **five** of the numbers in the NXX blocks in issue is irrelevant<sup>45</sup> to the issue of whether a state commission can allow an ILEC to ignore a competitive carrier's rate center assignments,<sup>46</sup> or whether a state commission can confiscate a competitive carrier's NXXs by functionally reassigning the numbers to a different rate center. TPUC and CenturyTel consistently refer to the traffic in issue as going "to Austin" even though CenturyTel billed its end users for calls to Lockhart.<sup>47</sup>

<sup>44</sup> The FCC obviously does share the outrage feigned by TPUC and CenturyTel that ASAP provides Internet-related service as part of its CMRS activities. The Commission has extensively discussed – with great excitement – the provision of Internet-related services by CMRS carriers. The Commission already knows that that CMRS carriers access the PSTN in order to provide Internet-related services. *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*, 8<sup>th</sup> Report, FCC 03-150 ¶¶ 124-148 (Rel. Jul. 14, 2003) (“8<sup>th</sup> CMRS 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*, 7<sup>th</sup> Report, FCC 02-179, pp. 9, 55, 88, Appendix A, n. 2, (Rel. Jul. 3, 2002) (“7<sup>th</sup> CMRS Report”). This Commission obviously does not think that it is in any way improper for a CMRS provider to join the Internet revolution. Indeed, 47 C.F.R. § 51.100(b) expressly allows interconnection trunks to be used to provide information service if the carrier is also providing telecommunications service.

<sup>45</sup> CenturyTel testified it would have taken the action to require 1+ dialing and would have still imposed toll even if ASAP did not provide service to ISPs, so the excuse that it is really all about the ISPs is merely a *post-hoc* rationalization. Int. Hng. p. 218, lines 9-21:

9 Q If ASAP's subscribers were -- if you  
10 had no awareness of the nature of ASAP's  
11 customers -- or if it was your understanding  
12 that ASAP's customers were all, shall we say,  
13 paging or paging plus voice mail or paging plus  
14 e-mail customers, would you have made the  
15 decision that resulted in the change on April 2?

16 A Yes.

17 Q So it's irrelevant to you what the  
18 nature of ASAP's subscribers are as to the  
19 decisions that resulted on what happened on  
20 April 2?

21 A Yes.

<sup>46</sup> ASAP Witness Goldstein explained how important it is for ILECs to honor competitive carrier rate center assignments. ASAP Exh. 10, pp. 8-10 (Goldstein Dir.); HOM Tr. p. 261, line 7 – 264, line 3.

<sup>47</sup> HOM Tr. p. 676, line 20 – 677, line 20; Exhibit 4 to ASAP Exhibit 9 (Gaetjen Dir.). (CenturyTel bill showing call to ASAP Lockhart NXX as going to “Lockhart”).

The Commission's found in the *ISP Remand Order* that calls do not "terminate" at an ISP. Locating the ISP is a useless and ephemeral exercise.<sup>48</sup> Besides, one of the ISPs is clearly in San Marcos.<sup>49</sup> The paging traffic terminates outside of Austin unless a paging customer happens to be in Austin rather than Fentress, Kyle, Lockhart, San Marcos or anywhere else at the time. The claim that the calls go to Austin is merely a convenient way to erect an entry barrier by imposing toll.

Neither TPUC or CenturyTel are forthright enough to acknowledge that they are merely "deeming" the calls to go "to Austin"<sup>50</sup> rather than where they really go merely because ASAP's service is wireless and the called party cannot be reliably located with reference to a wireline rate center at the time of an individual call. TPUC "deemed" the customer to reside within ASAP's Austin switch. Interestingly, CenturyTel witnesses testified that the location of a switch is not determinative for call rating. Besides, notwithstanding TPUC's finding and CenturyTel's assertion to this Commission that the calls go "to Austin," CenturyTel's billed its customers toll for calls to "Lockhart" and not to "Austin."<sup>51</sup>

This Commission has expressly held that a call does not "terminate" at an ISP location since the ISP site is merely an "intermediate" switching point along the way to the ultimate destination of the call. ASAP's switch is obviously also an intermediate switching point as well. TPUC's insistence that it must "find the wireless customer" in order to determine retail rating is

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<sup>48</sup> ASAP Exh. 43, p. 4, lines 6-20 (Goldstein Reb.); ASAP Exh. 44, pp. 10-13 (Gaetjen Reb.).

<sup>49</sup> ASAP Exh. 44, pp. 9, 12-13 (Gaetjen Reb.); other ISP customers were not collocated in ASAP's Austin location: they took a DS1 ISDN PRI handoff and handled it from there. Int. Hng. p. 118, lines 4-19.

<sup>50</sup> TPUC claims the numbers are "located in Austin" TPUC Comments p. 16. Numbers have no physical manifestation – they are merely addresses and do not occupy physical space. The number is a proxy for the called party's physical location.

<sup>51</sup> See Int. Hng. Tr. 194, line 16 – 195, line 19 (location of switch not determinative); HOM Tr. p. 676, line 20 – 677, line 20, Exhibit 4 to ASAP Exhibit 9 (Gaetjen Dir.) (CenturyTel bill showing call to ASAP Lockhart NXX as going to "Lockhart").

completely misplaced. It is impossible to “find the wireless customer” in terms of the called customer’s location within or without a local calling area. Deeming a customer to reside inside a switch is arbitrary, capricious and the one place we know they will not be. The industry solved the problem of “finding the customer” long ago: industry uses NXXs as a surrogate of the customer’s location for **retail rating**.<sup>52</sup> This is not some dark secret held by wireless carriers and only recently revealed in the *ASAP* case before the Texas Commission; it is well known and is not a problem – except to the extent an ILEC and a misguided state commission have wrongly decided to make it so.

C. TPUC and CenturyTel are converting ASAP’s Fentress, Kyle and Lockhart NXXs into Austin NXXs unless ASAP meets an ever-changing, inconsistent and impossible set of requirements.

TPUC<sup>53</sup> and CenturyTel and essentially admit – as they must – that they have turned ASAP’s non-Austin NXXs into Austin NXXs. CenturyTel refers to ASAP’s Fentress, Kyle and Lockhart NXXs as “Austin Virtual NXXs.”<sup>54</sup> They both pretend that the calls go “to Austin.” We all know they do not truly go to a customer residing within ASAP’s Austin switch. CenturyTel’s

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<sup>52</sup> This Commission has referred to the fact that the calling and called NXXs are the determinant for **retail rating** of calls on several occasions. In ¶ 17 of the Memorandum Opinion and Order in *Starpower Communications v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278 (Nov. 7, 2003) (“*Starpower Liability Order*”) the Commission noted that “at all relevant times, industry practice among local exchange carriers similarly appears to have been that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties.” See also, *In the Matter of Number Portability*, CC Docket 95-116, Comments of BellSouth, p. 7; Centennial, p. 1; SBC, p. 4, Verizon, p. 6 (Jan. 20, 2004). See also HOM Tr. p. 198-199. The rules for local retail rating are different for wholesale carrier compensation, and ASAP has consistently so proclaimed. TPUC asserts the rules can be the same for both, TPUC Comments, p. 15, apparently with the result that ILECs get to simultaneously charge toll to end users and access to the competitive provider. It is clear that both CenturyTel and TPUC continue to confuse and conflate the differing rules and concepts related to retail rating and wholesale carrier compensation.

<sup>53</sup> TPUC Comments, pp. 2, 10, 16. TPUC goes so far as to claim that the numbers are “located in Austin.”

<sup>54</sup> CenturyTel Opposition pp. ii, iii, 3, 4, 5, 11. ASAP’s NXXs, however, are not “virtual” since ASAP has customers and facilities in each rate center. HOM Tr. pp. 534, 583, 622-623, 668.

bills to its customers speak the truth: they say that the calls are going to “Fentress,” “Kyle” or “Lockhart”<sup>55</sup>

CenturyTel should not be allowed to represent to its users that calls to ASAP customers go to “Lockhart” but then represent to this Commission that the calls go “to Austin.” How can a call to “Lockhart” be toll if calls to “Lockhart” are local? How can CenturyTel bill the rates for a call “to Lockhart,” if the call really went to “Austin”? Such confusion is ridiculous. The industry uses NXX rate center<sup>56</sup> assignments for retail rating as a surrogate for customer location.<sup>57</sup> That practice is reasonable, consistent with Commission rules and it must be enforced here.

Even though CenturyTel does not directly so state, CenturyTel clearly reserves the right to not honor rate center assignments and therefore not provide dialing parity unless there is a written agreement. CenturyTel states that it requires competitive carriers to have a POI or switch in the ELCS area AND demonstrate that both the calling and called party are physically located within the ELCS area at the time of the call, unless CenturyTel’s agrees in some kind of writing to rate a call as “local.”<sup>58</sup> This is discrimination run riot.

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<sup>55</sup> When CenturyTel bills its end users for calls to ASAP’s Lockhart NXX, CenturyTel tells the end user that the toll charge is for a call from San Marcos to Lockhart and the call is rated as if it is a call to Lockhart. *CenturyTel does not charge its users an amount consistent with a call “to Austin.”* In any event the calls do not “go” to Austin; they transit ASAP’s Austin switch and are then terminated to ASAP’s customers wherever they may be. CenturyTel and TPUC are engaging in a tortuous fiction that the calls go to Austin, merely to justify charging an anticompetitive and harmful toll for calls that are addressed to and in fact terminate to customers that have a legitimate need to have a local presence in the local calling area that includes San Marcos.

<sup>56</sup> It is called a “rate center” precisely because it is used for “rating.” HOM Tr. p. 225, lines 4-20, p. 261, line 7 – p. 264, line 2, p. 594 line 18 – p. 595, line 7. TPUC staff witness Kelsaw agreed that “routing” does not determine “rating.” HOM Tr. p. 743, line 8 – p. 744, line 10.

<sup>57</sup> Even in the wireline world, we do not really know where the called part may be at the time of a call. ASAP Exh. 44, p. 12, lines 1-12, note 18 (Gaetjen Reb.).

<sup>58</sup> HOM Tr. p. 287, line 25, p. 309, line 2. In the Interim hearing, however, CenturyTel testified a written agreement would not be required. Int. Hng. Tr. p. 178, 291, 296, 474. CenturyTel admits it does not in fact enforce this so-called requirement, especially against ILECs. For example, CenturyTel and Verizon share the ELCS area, but there is no Verizon POI in San Marcos. The CenturyTel/Verizon POI is in Kyle. ASAP Exh. 9, p. 8 (Gaetjen Dir.); HOM p. 474, line 7 – p. 476, line 9.

CenturyTel asserts that ASAP could solve the problem by direct interconnection in San Marcos.<sup>59</sup> This is not correct. CenturyTel and TPUC are requiring ASAP to establish a POI and/or switch in San Marcos, Fentress, Kyle and Lockhart AND still demonstrate that the called party is physically within the correct rate center. CenturyTel has refused to retail rate calls to ASAP as local, even after ASAP installed a switch in the ELCS area, unless and until there is a written interconnection agreement.<sup>60</sup> There is no written agreement with Verizon, SBC and at least one CLEC<sup>61</sup> and CenturyTel retail rates to NXXs in those carriers' NXXs as local.

The entire exercise is wasteful and is designed only to artificially increase ASAP's cost of doing business and impose other competitive handicaps. The location of ASAP's customer has absolutely no cost implication to CenturyTel. As noted previously, once CenturyTel hands calls off to SBC in San Marcos, it is totally cost-indifferent to where the call ends up or who the terminating carrier is. The physical location of a called CMRS customer has never affected retail rating to the calling party; under federal numbering rules, wireless carriers are not required to associate a customer with any particular rate center in order to obtain local calling.<sup>62</sup> TPUC's

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It is important to determine the physical location of the calling party for 911 purposes. The physical location of the called party, however, is a completely different thing. The industry, for very good reasons, uses the calling and called NXXs as a surrogate. All the commentors that address the point agree that this is also true for CMRS customers that receive a call. AAPC Metrocall Comments, pp. 5-6, Allied Comments, p. 3, Sprint Comments, pp. 5, 11, Verizon Wireless Comments, pp. 6-11.. If a call is to an NXX that is local, the call is retail rated as local. If a call is to an NXX that is not local, then the call is toll. CenturyTel and TPUC want to impose toll on all calls to competitive carriers unless they replicate the wireline network, and then pay access. Mobile customers are mobile, but that does not mean all calls to them are punishable by a toll to the calling party or access charges to the competitive carrier.

<sup>59</sup> CenturyTel Opposition, p. 13.

<sup>60</sup> HOM Tr. p. 294, lines 5-7, p. 297, lines 14-19, p. 30; *See* Exhibit 7 to ASAP Petition (October 29, 2003 Letter from CenturyTel Counsel to ASAP Counsel).

<sup>61</sup> HOM Tr. 297, lines 14-19, p. 304, lines 15-20.

<sup>62</sup> *See*, North American Numbering Council LNP 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):

**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

new state-imposed “wireline presence within the local calling area” requirement is inconsistent with federal interconnection and numbering rules, and is absolutely a significant barrier.<sup>63</sup>

D. CenturyTel’s unilateral action and TPUC’s ruling create significant barriers to entry, violate specific federal rules and significantly impede ASAP’s ability to compete and provide service.

CenturyTel does not address, and TPUC inadequately addresses, the “federal rights” issues in ASAP’s Petition. Indeed, neither TPUC<sup>64</sup> nor CenturyTel truly responded to the federal rights points that ASAP clearly raised.

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in order to accomplish land to mobile rating. However, once 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. (emphasis added)

**Appendix D (Wireless Wireline Integration Task Force Rate Center Issue Position Paper) § 1.3, Part II.D.2:**

Because most wireless applications include terminal mobility, there is no technical requirement for association of the telephone number and a geographic location of the user.

<sup>63</sup> TPUC says there is no relationship between the number used by ASAP’s customers and the rate center assignment of the number they use. TPUC cites to ¶ 2.14 of the Central Office Code Assignment Guidelines for support that this is a violation of numbering rules. TPUC Comments at 3. TPUC conveniently fails to quote the full paragraph:

2.14 It is assumed from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer’s premise physically located in the same rate center that the CO codes/blocks are assigned.

Exceptions exist, for example tariffed services such as foreign exchange service.

Alliance for Telecommunications Industry Solutions, Industry Numbering Committee, Central Office Code (NXX) Assignment Guidelines, INC 95-0407-008, (March 23, 2004), available at <http://www.atis.org/pub/clc/inc/conxx/COCAG-Final-Docment-3-23-04.doc> (viewed April 13, 2004) (emphasis added).

Clearly, the Guidelines recognize the difference between wireline and wireless practices noted above. And, they provide an exception for FX and FX-type services. ASAP’s services to ISPs are akin to FX-type service. Further, the guidelines address assignments to carriers, not use by customers. HOM Tr. p. 840. The Commission has already expressly held wireless carriers have no obligation to assign numbers based on the location of a customer in relation to a wireline rate center. TPUC’s zeal to punish wireless by imposing toll is inconsistent with the applicable federal rules.

ASAP conclusively showed that CenturyTel and TPUC have eviscerated ASAP's right to interconnect using Type 2A and to obtain and use local numbers. CenturyTel and TPUC completely ignored the "dialing parity" issue. CenturyTel and TPUC have arrogated to themselves the power to dictate the form of interconnection by requiring ASAP to waive its federal right to interconnect at the LATA tandem via Type 2A – rather than at the end office level under Type 1 or 2B – in order to secure its federal right to "local calling" to its NXXs. The "wireline presence in every rate center" state level requirement as a condition to obtain local calling means that ASAP must interconnect under either Type 1 or Type 2B. CenturyTel and TPUC are dictating the form of interconnection, contrary to federal law.

If CenturyTel can impose toll on calls to ASAP's numbers then it will effectively eliminate all usefulness of them. A carrier gets NXXs in a rate center for the sole purpose of determining retail rating.<sup>65</sup> Federal law clearly grants ASAP the right to use Type 2A interconnection and clearly grants ASAP the right to obtain local numbers – in order to arrange for local calling – in the areas where it holds a federal license to provide CMRS service. A state cannot require ASAP to waive one clear federal right in order to exercise another clear federal right. Each is separate and distinct (although they work in tandem<sup>66</sup>) and each is vitally important. CenturyTel and TPUC are illegally forcing ASAP to agree to cut off its left leg in order to keep its right leg. ASAP has a right to stay bipedal and no state can handicap ASAP in the exercise of its federal rights.

CenturyTel and TPUC are saying the FCC need not concern itself with many years of federal precedent specifically intended to allow competitive carriers to obtain and use local

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<sup>64</sup> TPUC purported to respond to these points, TPUC Comments, pp. 14-17, but there was no real substance; instead TPUC merely issued serial blanket denials that there was any violation of federally protected rights.

<sup>65</sup> *NANC Report to FCC, supra.*

numbers – the very purpose of which is to secure “local” calling, including calls from ILEC customers to the customers of competitive carriers.

The Commission has always recognized that competitive carriers in general and CMRS operators in particular need local numbers so that the persons who call competitive carriers’ customers (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 CMRS operator will never know the precise physical location (in relation to a local calling area boundary) 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*<sup>67</sup> the FCC observed:

111. Rate centers are telephone company-designated geographic locations which are assigned vertical and horizontal coordinates within an area code. (n171 omitted) 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 omitted) 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 out below)

Footnote 174 provides additional explanation:

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<sup>66</sup> Pun intended.

<sup>67</sup> Notice of Proposed Rulemaking, *In the Matter of Numbering Resource Optimization; Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission's Rule Prohibiting Technology-Specific or Service-Specific Area Code Overlays; Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes; California Public Utilities Commission and the People of the State of California Petition for Waiver to Implement a Technology-Specific or Service-Specific Area Code*, FCC 99-122, CC Docket No. 99-200; RM No. 9258; NSD File No. L-99-17; NSD File No. L-99-36, 14 FCC Rcd 10322, 1999 FCC LEXIS 2451, ¶¶ 111-112, n. 171 (Rel. Jun. 2, 1999) (“*NRO NPRM*”) (emphasis added).

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)

The Commission has observed that “wireless carriers have considerable discretion in how they assign telephone numbers across the rate centers in their operating areas.”<sup>68</sup> It is therefore clear that wireless carriers have no obligation to assign numbers based on a customer’s physical location with reference to an ILEC’s rate center. Instead, the preferences of its customers and cost considerations govern. TPUC and CenturyTel want to remove the “considerable discretion” given to CMRS so they can maximize customer welfare and employ efficient architectures.

Competitive carriers have a federal right to obtain local numbers precisely so that ILEC customers can call competitive carrier customers on a **retail rated** local basis. This is an important federal right, the denial of which will completely preclude intra-modal and inter-modal competition. TPUC and CenturyTel are essentially claiming competitive carriers do not need local numbers to compete in the local marketplace, since they can always use 800 service or buy reverse billing. CenturyTel and TPUC claim a state action which wipes out competitive carriers’ federal rights to obtain and use local numbers is minor and not a proper subject of preemption because more costly alternatives are available. This preposterous position, which wipes out decades of competitive development, simply cannot be sustained.

800 service or reverse billing are not adequate substitutes for local numbers and local retail rating to them. CenturyTel and TPUC stretch all reason when they assert that it is possible to compete with flat rate local service using 800 service, or by paying 3.1¢ per minute in reverse

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<sup>68</sup> *8<sup>th</sup> CMRS Report* at ¶ 62. Note 226 to that paragraph observes that CMRS providers “assign numbers so as to minimize the access charges paid to local wireline companies.” ASAP allows its customers to select the number that will allow family, employers, fellow employees or others to reach them without incurring a toll. Int. Hng. p. 199, line 14 – p. 200, line 2

billing charges for calls from a CenturyTel San Marcos user to an ASAP user with a Kyle, Fentress or Lockhart number,<sup>69</sup> but that is simply not true. If it were, then competitive carriers would not be entitled to local numbers and all of them would compete by using 800 service or reverse billing, rather than local numbers. Only ILECs would get local numbers.

800 numbers are not a reasonable alternative and the evidence shows this to be the case.<sup>70</sup> First, they too involve payment of access charges at the originating end. Second, 800 numbers also require the calling party to pulse in additional digits or dialing codes. Congress and this Commission clearly understand the obvious competitive disparity caused by lack of dialing parity: both have required dialing parity precisely because it is essential to competition.<sup>71</sup> CenturyTel testified it will not give dialing parity for calls to ASAP numbers unless ASAP:

- \*enters into an interconnection agreement;
- \*establishes a POI in San Marcos; and
- \*Demonstrates physical location in the local calling area at the time of the call.<sup>72</sup>

CenturyTel, however, does not impose these requirements on SBC or Verizon and at least one CLEC.<sup>73</sup> In any event, using 800 numbers is a waste of numbering resources, since it will consume both an 800 number and a local number, when only one number is required if the competitive carrier can use the local number only.

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<sup>69</sup> CenturyTel's proposed reverse billing rate is 3.1¢ per minute. *See* Attachment 4 hereto (ASAP Exh. 45). Mr. Gaetjen explained in his testimony why 800 service or reverse billing are not viable alternatives. *See* ASAP Exh. 44, pp. 49 (Gaetjen Reb.). Mr. Gaetjen and ASAP's expert witness Goldstein demonstrated the importance of "local" calling for both Internet access and paging, especially in rural areas. ASAP showed that number aggregation among multiple rate centers allows ISPs to bring more affordable and modern Internet access service in rural areas. ASAP Exh. 43, pp. 25-28 (Goldstein Reb.); ASAP Exh. 44, p. 13, note, 20 (Gaetjen Reb.)

<sup>70</sup> The importance of dialing parity and its relationship to call rating was discussed in ASAP's testimony. ASAP Exh. 9, p. 13, lines 10-23 (Gaetjen Dir.); ASAP Exh. 10, pp. 8-10 (Goldstein Dir.). *See also* HOM Tr. p. 261, line 7 – 264, line 3.

<sup>71</sup> CenturyTel agreed during the hearing it is required to provide dialing parity – but only after it has executed an interconnection agreement. HOM Tr. p. 489, line 7.

<sup>72</sup> *See*, HOM Tr. 370, line 18 – 371, line 7.

<sup>73</sup> HOM Tr. p. 291-292, 296, 474, 608

Reverse billing is arguably not required to be made available at all,<sup>74</sup> and it certainly involves a substantial cost.<sup>75</sup> And, its application here is simply inappropriate. Reverse billing is used only to reverse bill charges for calls that would “otherwise be toll.” Here, the calls should not be toll, so there is no reverse billing to apply.<sup>76</sup> Also, reverse billing may ultimately be eliminated because of technical issues related to number portability and thousands-block pooling and wireless number portability.<sup>77</sup> CenturyTel’s reliance on reverse billing is a slender reed on which to stand, a reed which bends and ultimately breaks from the weight CenturyTel puts on it.

The question must be asked: why is CenturyTel entitled to be paid toll by its customers or the equivalent of intrastate access charges by ASAP when a CenturyTel user calls an ASAP user with a number that is “local” to San Marcos? What justification is there for a usage sensitive charge by the originating co-carrier to the terminating co-carrier for a local call? There is no justification. The *TSR/Mountain* line of cases do not authorize it. SWBT – which is not exactly the paragon of nondiscrimination – does not charge it.<sup>78</sup> CenturyTel, alone, has the temerity to insist on being paid to route a local call to a co-carrier for ultimate termination when it incurs no

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<sup>74</sup> 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, ¶ 30 (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”). *But see, In the Matter of Paging Coalition Request for Declaratory Ruling that Termination by Verizon of Type 3A Interconnection Service Would Be Unjust and Unreasonable, in Violation of Section 201 of the Communications Act, 47 U.S.C. § 201, and Otherwise Unlawful*, CC Docket 01-346, pending. CenturyTel indicated that reverse billing is not mandatory, the price is not regulated and reverse billing agreements are not filed with state commissions under § 252(e). Int. Hng. Tr. p. 180, lines 4-13; HOM Tr. p. 293, line 12 – p. 294, line 25, p. 435, line 10 - p. 436 line 5.

<sup>75</sup> Int. Hng. Tr. p. 40, line 2 – p. 41, line 2, p. 44, line 18 – pl 45, line 3, 46, line 20 – p. 47, line 3.

<sup>76</sup> SBC does not assess the usage charge on reverse billing when a call is between two NXXs that are local to each other, including when they are ELCS. Int. Hng. p. 44, line 1 – p. 45, line 3; HOM p. 198, line 1 – p. 199, line 13, p. 614, line 5 – p. 619, line 14; ASAP Exhibits 35, 36. Reverse billing is an arrangement to “reverse bill” a toll call: instead of billing the calling party, the carrier serving the called party is billed. Toll charges – whether reverse billed or not – simply do not apply when the call is not a toll call to begin with.

<sup>77</sup> *See, In the Matter of Telephone Number Portability, Petition of Puerto Rico Telephone Company for Declaratory Ruling*, CC Docket No. 95-116, (filed Nov. 26, 2003)

<sup>78</sup> ASAP Exh. 44 (Gaetjen Reb.) p. 19.; Hng. Tr. pp. 91, 94, 198-99.

cost of transport. It is not a lawful or viable solution. It absolutely does impede competition and is a barrier.

CenturyTel's position is understandable. It is, after all, an ILEC and as a class ILECs are typically not too sympathetic to the plight of their fledgling competitors. ILECs seem to believe they are entitled to tax their competitors, and they are fully aware that the power to tax is the power to destroy. TPUC's position is more disturbing. One must hope that TPUC simply does not understand wireless and – given that it has little contact with wireless – has no real incentive to try. Both, however, either purposefully or out of ignorance, refuse to acknowledge the elephant in the living room. In order to survive, competitive carriers must arrange for their customers to be reachable on a local basis by ILEC customers, and they must be able to do it economically without paying tribute to the ILEC either directly through access or reverse billing or indirectly through toll charges on users that call competitive carrier customers. If they cannot, then they will disappear. It is that simple. It is for this very reason that the Commission allows competitive carriers to obtain local numbers and to use efficient interconnection architectures, and it is for this reason that the FCC must preempt this dangerous, anticompetitive and illegal action by CenturyTel and TPUC.

E. TPUC and CenturyTel are urging inconsistent “solutions” that ultimately still do not result in local calling without payment of access charges.

Even a casual reading of CenturyTel's Opposition and TPUC's comments reveals that they are attempting to impose inconsistent requirements. TPUC wants ASAP to give up Type 2A interconnection at the SBC tandem and establish a wireline presence in every rate center where ASAP has an NXX. In other words, TPUC believes that ASAP must move to Type 1A or 2B interconnection – with POIs in Kyle, Fentress and Lockhart – in order to secure local calling

from San Marcos.<sup>79</sup> TPUC does not indicate that ASAP can “solve the problem” by establishing a single POI with CenturyTel in San Marcos – where ASAP does not have an NXX – in order to collect “local” calls from San Marcos.

CenturyTel, on the other hand, will not locally retail rate calls to ASAP’s numbers unless and until:

\*ASAP establishes a POI in San Marcos, and

\*There is an interconnection or reverse billing agreement.<sup>80</sup>

<sup>79</sup> ASAP must point out that moving to Type 1 or 2B in Kyle, Fentress and Lockhart would not in fact allow ASAP to receive calls that originate in San Marcos. Types 1A and 2B provide “Direct End Office Trunks” to the ILEC end office, but the end office does not act as a tandem and calls from other end offices – such as CenturyTel’s San Marcos switch – cannot be routed over Type 1 or 2B connections in towns other than San Marcos. Hence, TPUC’s attempt to require ASAP to move to Type 1A or 2B in Fentress, Kyle and Lockhart still would not result in local calling from San Marcos.

<sup>80</sup> CenturyTel does not mention this requirement in its Opposition. But it exists. *See* HOM Tr. pp. 292, line 25 – p. 294, line 12:

25 Q Is it CenturyTel's position that it  
0293  
1 will not rate a call from a CenturyTel user to  
2 another carrier with an NXX in the same rate  
3 center as local unless there is a written  
4 agreement between CenturyTel and that carrier  
5 for interconnection and compensation purposes?  
6 A Unless there is an interconnection  
7 arrangement?  
8 Q Agreement. I said agreement.  
9 A Or a wide area calling arrangement?  
10 There has to be some type of an agreement for  
11 traffic exchange.  
12 Q Is a wide area calling agreement an  
13 interconnect agreement?  
14 A No.  
15 Q Does it address traffic exchange  
16 pursuant to Section 251(b)(5) of the act?  
17 A No.  
18 Q If it addresses traffic that originates  
19 and terminates in the same MTA, isn't that  
20 subject to 251(b)(5) of the act?  
21 A Yes, but wide area calling, they have  
22 determined, is not part of interconnection.  
23 They still have an interconnection obligation to  
24 get your traffic to you, but I don't have an  
25 obligation to get it there locally.

0294

1 Q Must there be a written agreement?  
2 A In this instance, yes. There does not

\*ASAP pays intrastate switched access to CenturyTel for all traffic.

In other words, ASAP has three choices: (1) allow CenturyTel to impose toll; (2) execute a reverse billing arrangement and pay for all traffic at 3.1¢ per minute; or (3) execute an interconnection agreement that requires ASAP to obtain a special access facility to establish a POI in San Marcos and then pay intrastate switched access for all calls originated by CenturyTel. CenturyTel does not offer any means by which ASAP can end toll and not incur an excessive price per minute of use. These are simply not reasonable or lawful choices.

F. TPUC has no jurisdiction over ASAP's interstate information access service to ISPs.

Only TPUC addressed ASAP's point challenging TPUC's attempt to assert intrastate regulatory jurisdiction over ASAP's interstate information access service to ISPs.<sup>81</sup> TPUC asserts that registration is not onerous and states can exercise "oversight" of "any telecommunications service that may be involved with internet dial-up service. TPUC misses the point.

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.<sup>82</sup> While it is true that some of the Internet communications that travel over a switched or dedicated connection may ultimately

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3 have to be written agreement in order for me to  
4 pass you traffic.

5 Q Must there be a written agreement in  
6 order for you to rate the call as local?

7 A Yes, there must be.

8 Q That applies to CLECs?

9 A Yes.

10 Q CMRS carriers?

11 A Yes, sir.

12 Q Other incumbent LECs?

13 A Yes, sir.

<sup>81</sup> TPUC Comments pp. 17-18.

<sup>82</sup> *ISP Remand Order, supra.* ¶¶ 49, 52.

originate and terminate in the same state, one cannot separate the two.<sup>83</sup> 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.<sup>84</sup>

ISPs can choose to purchase intrastate service. Alternatively, the ISP can choose to obtain service through an interstate offering.<sup>85</sup> It is possible to get a local number as part of an ILEC's interstate switched access FG A or BSA A tariff.<sup>86</sup> The TPUC Final Order wrongly eliminates the choice given to ISPs to purchase either an interstate service or an intrastate service. ASAP has offered only an interstate service, and the ISPs have chosen to accept that service.<sup>87</sup> The TPUC Final Order is inconsistent with the current law concerning the jurisdictional nature of the telecommunications services provided to ISPs and removes the choices made by ASAP's ISP customers to receive interstate, rather than intrastate, service.

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<sup>83</sup> *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8<sup>th</sup> Cir. 1998) [Although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated.]

<sup>84</sup> 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.”

<sup>85</sup> *ISP Remand Order* ¶ 55; *MTS/WATS Market Structure Order*, 97 FCC 2d at 711-12, 722; *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Memorandum Opinion and Order, 4 FCC Rd 1, 141 (1988), *aff'd*, *California v. FCC*, 4 F.3d 1505 (9<sup>th</sup> Cir. 1993).

<sup>86</sup> ASAP Exh. 43 (Goldstein Reb.) p. 18; ASAP Exh. 44 (Gaetjen Reb.) p. 11. Calls to an interstate Feature Group A number are **retail rated** as local to the calling party; there is no charge, even if the IXC and the called party are not “physically present” within the local calling area at the time of the call. FG A incorporates expanded calling areas like ELCS. Local numbers are routinely used to support totally interstate services. This is what ASAP does for its ISP customers.

<sup>87</sup> Since ASAP is not an ILEC, it is not required to have interstate tariffs.

“It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC.”<sup>88</sup> “The states do not have jurisdiction over interstate communications.”<sup>89</sup> The Commission has preempted state statutes and state regulatory actions that attempted to intrude on the FCC’s exclusive interstate authority.<sup>90</sup> TPUC Ordering Paragraph No. 4 expressly requires ASAP to register or cease providing service. This is beyond TPUC’s power, since it cannot in any way prevent a carrier from providing a purely interstate service until it subjects itself to state regulation.

ASAP agrees that TPUC registration itself is not a particularly onerous thing to accomplish.<sup>91</sup> The act of registration, however, necessarily subjects the registrant to significant PUC jurisdiction. This includes TPUC’s ability to require reporting, statewide averaged prices and certain quality standards.<sup>92</sup> TPUC can specify billing formats,<sup>93</sup> and require the registrant to cease doing business in the state under certain circumstances.<sup>94</sup> It allows TPUC to resolve some disputes between the carrier and its customers – presumably with an appeal to state court (rather than the FCC or a federal court). Registration may require ASAP to pay regulatory assessments imposed on intrastate nondominant carriers, based on ASAP’s purely interstate service

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<sup>88</sup> *AT&T Communications v. Wyo. PSC*, 625 F.Supp. 1204, 1208 (USDC Wyo., 1985).

<sup>89</sup> *AT&T and the Associated Bell Sys. Cos. Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange Service in Common Control Switching Arrangements (CCSA)*, 46 F.C.C.2<sup>nd</sup> 14, 20 (1975), *aff’d California v. FCC*, 567 F.2d 84 (D.C.Cir.1977) *cert. den.* 434 U.S 1010.

<sup>90</sup> *In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, FCC 91-185, 6 F.C.C.R 4475 (Rel. Jul. 1991); Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 F.C.C. Rcd 1619 (1992) (“*MemoryCall*”).

<sup>91</sup> Order p. 5, n. 9.

<sup>92</sup> See PURA §§ 52.102, 52.256.

<sup>93</sup> See PURA § 16.001(c); PUC Subst. R. 26.420(f)(5)(A).

<sup>94</sup> See PUC Subst. R. 26.107(f)(2). TPUC Final Order itself required ASAP to either register or cease providing service.

revenue.<sup>95</sup> ASAP does not at present know whether the revenues from the service it provides to ISPs is subject to the state USF or the federal USF.<sup>96</sup> Any attempt to require ASAP to pay regulatory assessments to both jurisdictions and USF to both state and federal funds for the same service revenue will be confiscatory and unlawful. TPUC's assertion of jurisdiction over ASAP's interstate service exceeds the state's authority and violates federal law.

G. Preemption is required under every theory.

ASAP was somewhat surprised to see that TPUC invoke § 253(b) at page 8 of its Comments. One can search in vain for any discussion or holding in TPUC's ASAP Order that its action was "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." There are no findings. They simply did not consider the statutory criteria, and had they done so, they could not have in good faith made a finding of necessity. The Order does not result in competitive neutrality, notwithstanding TPUC's *post hoc* rationalization to the contrary. Indeed, it is the opposite: ASAP is competitively hobbled in its ability to compete against CenturyTel in messaging, Internet access and service to ISPs.

ASAP has shown above the harm that has been done to ASAP, ASAP's customers and CenturyTel's own customers. TPUC's order requires ASAP to choose between two equally harmful results. Either ASAP can allow CenturyTel to impose toll – which means CenturyTel users will not call ASAP's users – or ASAP can pay reverse billing or access. If ASAP chooses

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<sup>95</sup> PURA § 16.001 imposes a "regulatory assessment" on "telecommunications carriers" that "serve[] the ultimate consumer."

<sup>96</sup> PUC Subst. R. 26.420(f) imposes a "TUSF" (Texas USF) on all "telecommunications providers having access to the customer base; including but not limited to wireline and wireless providers of telecommunications services." TPUC regulates how providers recover the assessment and require the provider to "file the appropriate changes to its tariff and provide supporting documentation for the method of recovery." As noted above, ASAP's services have been mandatorily or permissively detariffed by this Commission. TPUC cannot require ASAP to file tariffs for services this Commission has said ASAP may or must detariff.

the latter, CenturyTel users will call, but ASAP's service will be more expensive to the point it will not be commercially viable. If local calling without access is unimportant, then why has this Commission expended such great effort to allow competitive carriers to obtain local numbers and get dialing parity? Why has the Commission ruled so many times with such clarity that CMRS carriers are co-carriers and are not subject to access? Why has the Commission repeated so many times that the CMRS carrier is entitled to determine the most efficient and cost-efficient means to interconnect? The competitive harm and the denial of federal rights is compelling, and the evidence in this case justifies merely proves that all the FCC's past efforts in this area were justified. ILECs never quit trying to impose access charges and inefficient interconnection architectures on competitive carriers, so this Commission will have to continually repeat that its rules mean what they say.

### CONCLUSION

ASAP is a small business.<sup>97</sup> It has no DC lobbyist/lawyers and no hall monitors to fraternize with regulatory commission staffers. Instead, ASAP is merely a family owned entrepreneurial, innovative, customer-driven local Texas provider that focuses on providing service to the folk in the communities it serves. This case has brought ASAP to the brink of bankruptcy because what should be clear rules seem to have no meaning to companies with market power and lots of ratepayer money to use to drive out nascent competitors through the death march of the regulatory process.<sup>98</sup>

Does the FCC believe that All Things Communicative should be reserved to large corporations that do not innovate, do not care about their customers and are concerned mostly about reports they make to Wall Street? If there has been a decision that there should be no small businesses that want to deploy different technologies using network architectures different than

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<sup>97</sup> Int Hng. Tr. p. 17, lines 16-22; ASAP Exh. 9, pp. 2-3 (Gaetjen Dir.).

the ILECs, and then provide more affordable service to their neighbors, ASAP must have somehow missed that edition of the FCC Reports. If that is the case, then deny this Petition, but please at least be forthright enough to tell the country that the Commission has decided to forget this “competition experiment.”

If the Commission instead believes that innovation is good, inter-modal competition is good and small business has a legitimate role in the industry, then all ASAP asks is that the rules be enforced. Those rules clearly entitle ASAP, its customers and CenturyTel’s customers to local calling without having to jump through artificial, arbitrary and inconsistent requirements imposed by hostile ILECs and state commissions that simply do not understand wireless since they do not regulate it.

Competition truly does stand in the balance. ASAP’s Petition must be granted.

**WHEREFORE, PREMISES CONSIDERED, ASAP PAGING INC.** respectfully requests that the Commission grant ASAP’s Petition for Preemption and: (1) preempt the October 9, 2003 order of the Public Utility Commission of Texas in TPUC Docket 25673 [Exhibit 1]; (2) preempt certain provisions of the Texas Public Utility Regulatory Act [Exhibit 2]; (3) preempt certain TPUC substantive rules [Exhibit 3]; (4) require the TPUC and CenturyTel of San Marcos, Inc. (“CenturyTel”) to honor federal law as it pertains to **retail rated** local calling to CMRS users with numbers that are “local” to the landline user; and (5) preempting TPUC’s attempt to require that ASAP submit to state regulation for an exclusively interstate service over which TPUC has no jurisdiction.

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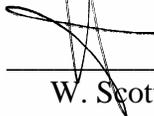
<sup>98</sup> ASAP Exh. 44, p. 23, lines 11-15 (Gaetjen Reb.)

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record below to the above-styled cause, on this 23<sup>rd</sup> day of April, 2004.

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