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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-N-2455 (CBS)

LEVEL 3 COMMUNICATIONS, LLC,

Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF COLORADO, *et al.*,

Defendants.

DEFENDANT QWEST CORPORATION'S BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56, Local Rules 7.1(c) and 56, and the Court's April 16, 2002 Scheduling Order, defendant Qwest Corporation ("Qwest") submits this memorandum in support of its cross-motion for summary judgment. For the reasons set forth below, the Court should enter judgment for the defendants on each of the claims asserted by plaintiff Level 3 Communications, LLC ("Level 3").

I. INTRODUCTION AND SUMMARY

This case involves a complaint brought by Level 3 under section 252(e)(6) of the Telecommunications Act of 1996 (the "Act"). Level 3 is challenging an order of defendant, the Public Utilities Commission of Colorado ("Commission" or "Colorado Commission"), issued in an interconnection arbitration between Qwest and Level 3 that the Commission conducted pursuant to section 252(b)(4) of the Act. Level 3 asserts two claims, both of which challenge Commission rulings relating to the treatment of telephone calls by which the calling party accesses the Internet in determining certain payment obligations of Qwest and Level 3. As demonstrated below, the two Commission rulings Level 3 challenges not only are lawful but are *required* under binding Federal Communications Commission ("FCC") rules and orders that cannot be challenged here.

Level 3's claims arise in the context of the Act's requirement that incumbent local exchange carriers ("ILECs") open their local exchange markets to competitors by, among other actions, allowing competitive local exchange carriers ("CLECs") to "interconnect" their telecommunications networks with the ILECs' networks.[1] Through interconnection, a CLEC can exchange traffic with an ILEC and allow its customers to communicate with the ILEC's customers. The contractual terms and conditions of these arrangements are set forth in "interconnection agreements" that ILECs and CLECs negotiate and, if necessary, arbitrate before

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[1] 47 U.S.C. § 251(a)(1).

state public utility commissions. In this case, Qwest (an ILEC) and Level 3 (a CLEC) were able to agree upon all but a handful of the hundreds of issues encompassed by their Colorado interconnection agreement. By the time of the January 30, 2001 hearing on Level 3's petition for arbitration (which Level 3 filed on October 31, 2000), only four issues remained for the Colorado Commission to resolve.

Neither of Level 3's challenges to the Commission's arbitration order issued on March 30, 2001, has any legal or evidentiary support. First, Level 3 alleges that the Commission acted unlawfully in ruling that Qwest and Level 3 may not charge each other for the costs of handling calls transmitted to Internet Service Providers ("ISPs").[2] These calls originate on the network of one carrier and are transported to the network of the other for transmission to a customer's chosen ISP (*e.g.*, America Online, MSN).[3] The Commission adopted a "bill and keep" compensation mechanism for these calls instead of Level 3's proposed "reciprocal compensation" scheme under which Qwest and Level 3 would have charged each other for transmitting calls to ISPs.[4] Level 3's claim that the Commission erred is directly contradicted by an order the FCC issued last year – the *ISP Remand Order*[5] – in which the FCC sharply criticized the use of reciprocal

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[2] ISPs provide their customers with access to the Internet. America Online ("AOL"), for example, is an ISP.

[3] These calls are referred to as "ISP calls," "Internet calls," ISP-bound traffic," or "Internet traffic."

[4] As defined by the FCC, with reciprocal compensation, "each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e). By contrast, bill and keep refers to an "arrangement in which neither of two interconnecting carriers charges the other for terminating telecommunications traffic that originates on the other network." 47 C.F.R. § 51.713(a).

[5] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, 2001 FCC LEXIS 2340 (rel. Apr. 27, 2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). A copy of

compensation for Internet traffic and endorsed bill and keep as the probable permanent compensation scheme for this traffic.[6] Indeed, although the Commission issued its Initial Arbitration Order shortly before the *ISP Remand Order*, the order relies on substantially the same reasoning and policy considerations that led the FCC to reject reciprocal compensation for Internet traffic.

Moreover, in the *ISP Remand Order*, the FCC ruled that where, as here, a state commission ordered LECs to exchange ISP-bound traffic on a bill and keep basis prior to issuance of the *ISP Remand Order*, bill and keep for Internet traffic *must* apply: "[I]f a state has ordered bill and keep for ISP-bound traffic in a particular arbitration, those LECs [local exchange carriers] subject to the state order would continue to exchange ISP-bound traffic on a bill and keep basis."[7] Under the Hobbs Act,[8] which prohibits parties from collaterally attacking FCC rules and orders in federal district courts, this FCC ruling is binding on the parties and the Court and is fatal to Level 3's claim.

Second, Level 3 alleges that the Commission erred in ordering the exclusion of Internet calls from the telecommunications traffic that determines the proportionate financial responsibility of Qwest and Level 3 for the interconnection trunks that connect their telecommunications networks. These interconnection trunks are large "pipes" that contain the circuits over which calls are passed from one carrier's network to another carrier's network. Under another FCC rule that is binding on the parties, the Colorado Commission and this Court,

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the *ISP Remand Order* is attached as Exhibit A-1. The panel of the D.C. Circuit issued its opinion in the *WorldCom* case on May 3, 2002, though the court has not yet issued its mandate. Although the court remanded the order to the FCC, the court expressly declined to vacate the FCC's order. *See WorldCom*, 288 F.3d at 434. Thus, the *ISP Remand Order* remains the law of the land and, as discussed below, compels the Court to uphold the Colorado Commission's decision at issue in this case.

[6] *ISP Remand Order* ¶¶ 67-76.

[7] *Id.* ¶ 80 n.152.

[8] *See* 28 U.S.C. §§ 2341-2344.

the costs of these trunks must be shared by interconnecting carriers based upon the amount of "telecommunications traffic" carried over the trunks that originated on each carrier's network.[9] As defined by the FCC, this "telecommunications traffic" expressly excludes "interstate exchange access."[10] Because the FCC has ruled that Internet traffic is interstate exchange access, this traffic must be excluded from the telecommunications traffic that Qwest and Level 3 use to determine their respective financial responsibility for interconnection trunks.[11] Both the Colorado Commission and this Court must follow these FCC precedents; Level 3 cannot collaterally attack them in this proceeding.

Finally, even if Level 3 could collaterally attack the FCC's rulings – which it cannot – both Commission rulings that Level 3 challenges are required by the policy considerations that led the FCC in the *ISP Remand Order* to reject reciprocal compensation as a long-term compensation mechanism for Internet traffic. The FCC found that reciprocal compensation for this traffic causes uneconomic subsidies and improperly creates incentive for CLECs to specialize in serving ISPs to the exclusion of other customers.[12] In its arbitration order at issue here, the Commission found that these same policy considerations compel requiring bill and keep for Internet traffic and excluding this traffic from relative use. These policy determinations by the agencies that have responsibility for administering the Act are plainly lawful and proper. At its core, Level 3's complaint is an improper request for the Court to substitute its judgment for that of the expert agencies charged with implementing the Act. The Court should reject that request and enter judgment for the defendants on each of Level 3's claims.

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[9] 47 C.F.R. § 51.709.

[10] 47 C.F.R. § 51.701(b)(1).

[11] *ISP Remand Order* ¶¶ 52, 57, 65.

[12] *Id.* ¶¶ 67-76.

II. BACKGROUND

A. The Act's Negotiation And Arbitration Procedures

Section 251 of the Act imposes multiple obligations on telecommunications carriers, including the obligation under section 251(a)(1) to interconnect their networks with the networks of other carriers. Under section 251(c), ILECs have the additional obligation to allow interconnection and access to certain elements of their networks – "unbundled network elements" or "UNEs" – on rates, terms and conditions that are just, reasonable and nondiscriminatory.

The procedural mechanism for establishing the terms and conditions relating to these obligations is set forth in section 252. This section establishes the negotiation and arbitration procedures for carriers to follow in entering into interconnection agreements. Under section 252(a)(1), a CLEC initiates the process by requesting interconnection or access to UNEs. If the CLEC and ILEC cannot agree on all the terms and conditions of an interconnection agreement, either party may petition a state commission "to arbitrate any open issues."[13] If a party requests arbitration, a state commission must resolve the open issues in accordance with the substantive requirements of the Act "not later than 9 months after the date on which the local exchange carrier received the request [to negotiate]."[14] Regardless whether the terms and conditions of the interconnection agreement are established through negotiation or arbitration, the CLEC and ILEC must submit the agreement to the state commission for approval.[15]

B. The Qwest And Level 3 Negotiations And Arbitration

Qwest is an ILEC that serves the local exchange market in fourteen mid-western and western states, including Colorado. As a CLEC operating in Qwest's local exchange region,

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[13] 47 U.S.C. § 252(b)(1).

[14] 47 U.S.C. § 252(b)(4)(C).

[15] 47 U.S.C. § 252(e)(1).

Level 3 is in the business of transmitting to ISPs calls to the Internet placed by consumers and businesses. To access the Internet, end-users (*e.g.*, homes and businesses) who receive telecommunications service from Qwest or other carriers place calls to ISPs served by Level 3. These calls are first transmitted over the Qwest network, and then handed off to Level 3's network, for transport to the ISP.[16]

In response to Level 3's request for interconnection with Qwest in several states, the parties entered into negotiations in May of 2000. The negotiations spanned several months and resulted in the parties resolving all but a small number of issues encompassed by their state-specific interconnection agreements. On October 31, 2000, Level 3 filed a petition for arbitration with the Colorado Commission, pursuant to section 252(b)(1) of the Act, seeking rulings on these open issues. By the time of the hearing on Level 3's petition, only four issues remained unresolved.

Among the issues the parties could not resolve in their negotiations and that Level 3 included in its arbitration petition were (1) whether the parties should pay each other reciprocal compensation for Internet calls and (2) whether Internet traffic should be included in the telecommunications traffic that determines each party's share of the costs of the local interconnection service trunks that Level 3 acquires from Qwest. In its Initial Decision, issued on March 30, 2001, the Colorado Commission ruled against Level 3 on both of these issues.

On the first issue, the Commission concluded that federal law granted it the discretion to determine the intercarrier compensation mechanism to be used for ISP-bound traffic.[17] The Commission found that Level 3's proposal violated certain economic principles and would likely

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[16] These calls are then transmitted by Level 3 or another carrier to servers and other facilities that comprise the ISP's network.

[17] Subsequently, in its *ISP Remand Order*, the FCC adopted a rule that would have *required* the result adopted by the Colorado Commission had it then been in existence.

result in the same subsidies, market distortions and inappropriate incentives that the Commission had identified in previous decisions. The Commission further concluded that its decision adopting bill and keep for Internet traffic, and the reasoning underlying that decision, dictated a similar result on the issue of relative use. Finding that ISPs should compensate both the ILEC and the CLEC for the costs incurred in originating and transporting ISP-bound traffic, the Commission ordered that Internet-related traffic be excluded when determining relative use of entrance facilities and direct trunked transport.

The Commission's decision here is the third in an unbroken string of decisions by it in interconnection arbitrations, beginning nearly a year before the issuance of its decision in this case, holding that bill and keep applies to ISP-bound traffic. The Commission first adopted bill and keep for Internet traffic in the arbitration between Qwest and Sprint Communications Company, L.P.[18] The Commission reaffirmed that decision in its decision in the arbitration between Qwest and ICG Telecom Group, Inc.[19] In both of these arbitrations, the Commission ruled that that ISP-bound is not governed by the reciprocal compensation provisions of section

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[18] *See* Initial Commission Decision, *In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration Pursuant to U.S. Code § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Dkt. No. 00B-011T, Decision No. C00-479 (Colo. P.U.C. May 5, 2000) ("*Sprint Initial Decision*"), at 17-18; Decision Denying Application for Rehearing, Reargument, or Reconsideration, *In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration Pursuant to U.S.C. § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Dkt. No. 00B-011T, Decision No. C00-685 (Colo. P.U.C. June 23, 2000) ("*Sprint Decision on RRR*"), at 9-10, 14. Copies of the *Sprint Initial Decision* and the *Sprint Decision on RRR* are attached as Exhibits A-2 and A-3, respectively.

[19] *See* Initial Commission Decision, *In the Matter of the Petition of ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to § 252(B) of the Telecommunications Act of 1996*, Dkt. No. 00B-103T, Decision No. C00-858 (Colo. P.U.C. Aug. 7, 2000) ("*ICG Initial Decision*"), at 28-33. A copy of the *ICG Initial Decision* is attached as Exhibit A-4. ICG recently moved to reopen its appeal of this decision in Civil Action No. 00-D-2138 (CBS) before this Court. The case had been stayed and administratively closed.

251(b)(5) of the Act, which apply to local traffic,[20] and that there compelling economic and public policy-based reasons for excluding reciprocal compensation on Internet traffic.[21]

III. STATEMENT OF UNDISPUTED MATERIAL FACTS[22]

A. Procedural Facts

1. Level 3 filed its Petition for Arbitration of an Interconnection Agreement (the "Interconnection Agreement") with Qwest with the Commission on October 31, 2000.[23]

2. Qwest filed a timely Response to the Petition on November 27, 2000.[24]

3. The Commission assigned the arbitration of Level 3's petition to an administrative law judge ("ALJ") and the hearing on the petition commenced on January 30, 2001.[25]

4. At the hearing the parties stipulated to the admission of the pre-filed direct and rebuttal testimony and related exhibits of Level 3 witness Timothy J. Gates and the rebuttal

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[20] *See Sprint Decision on RRR* at 9-10; *ICG Initial Decision* at 31-32.

[21] *See Sprint Initial Decision* at 14-17; *Sprint Decision on RRR* at 3, 8; *ICG Initial Decision* at 29-32.

[22] The following facts are taken from the Joint Statement of Undisputed Material Facts filed by Qwest and the Commission defendants on August 22, 2002, pursuant to the Scheduling Order and the Court's instruction at the Status Conference held on July 23, 2002. Level 3 did not join in that filing. Instead, on that same day Level 3 filed a Motion for Extension of Time to File Stipulated Statement of Undisputed Facts. As noted in its response filed on September 11, 2002, Qwest does not take a position on Level 3's motion.

[23] *See* Record of proceedings below filed by the Commission in this case on June 17, 2002, (the "Record") at 2:370-91; *see also id.* at 3:525. Although the Record consists of 15 separate volumes plus the transcripts of the arbitration hearing, the pages are consecutively numbered from volume 1 through volume 15. For ease of use, citations to the Record will be by volume and page number as follows: "Record at [volume]:[page]."

[24] Record at 3:525.

[25] Record at 3:525; *see also* Transcript of proceedings, January 30, 2001, ("Tr.") at 1.

testimony and related exhibits of Qwest witness William E. Taylor. The parties waived cross-examination of these witnesses.[26]

5. The parties presented oral testimony through witnesses Ann Nagel and William P. Hunt (Level 3) and Larry Brotherson, Joseph Craig and Robert Kennedy (Qwest).[27]

6. Level 3 Exhibits 1 through 8 and 10 and Qwest Exhibits 1, 2 and 4 through 8 were marked for identification, offered and admitted into evidence.[28]

7. On March 2, 2001, both parties filed post-hearing briefs together with a revised issues matrix setting forth the unresolved issues.[29]

8. On March 16, 2001, the Commission adopted the Initial Commission Decision, which it mailed to the parties on March 30, 2001.[30]

9. On April 19, 2001, Level 3 and Qwest filed timely applications for rehearing, reargument or reconsideration ("RRR").[31]

10. On April 20, 2001, Level 3 filed a Notice of Filing of Supplemental Authority together with a News Release to supplement its application for RRR regarding the Federal Communications Commission's ("FCC's") adoption of its Order on Remand and Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of*

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[26] Record at 3:527; *see also* Tr. at 10, ll. 15-24.

[27] Record at 3:527-28.

[28] Record at 3:528.

[29] Record at 3:528.

[30] Record at 3:524-66.

[31] Record at 4:710-35.

1996, Intercarrier Compensation for ISP-Bound Traffic, CC Dkt. Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("*ISP Order on Remand*").[32]

11. On May 7, 2001, the Commission mailed the Decision on Applications for Rehearing, Reargument, or Reconsideration, which it had adopted on May 1, 2001.[33]

B. The Commission's Findings And Conclusions

1. Issue No. 2 – Whether The Parties Should Be Required To Compensate Each Other For The Transport And Termination Of Traffic Destined For Internet Service Providers.

12. The Commission determined that federal law grants discretion to state commissions to choose whether to adopt or not to adopt reciprocal compensation for ISP-bound traffic in arbitration proceedings under section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.*, (the "Act").[34]

13. The parties agreed that prior Commission decisions on the subject of reciprocal compensation for traffic bound for ISPs mandate a "bill and keep" mechanism, whereby neither party is obligated to pay the other party reciprocal compensation for the transport and termination of ISP-bound traffic.[35]

14. Consistent with its previous decisions in arbitration proceedings under the Act, the Commission found that an ISP-bound call originated by a Qwest end-user is analogous to a

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[32] Record at 4:743-52.

[33] Record at 4:756-66.

[34] Record at 3:539.

[35] *See, e.g.*, Record at 3:530, 533-534 (discussing "underlying assumptions" of prior Commission decisions relating reciprocal compensation for ISP-bound traffic in arbitration proceedings under the Act).

long distance call placed by a Qwest end-user and delivered to an interexchange carrier ("IXC").[36]

15. Specifically, the Commission found that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call.[37]

16. The Commission found that persons placing long distance calls and those placing calls bound for the internet act primarily as customers of the IXC or ISP, respectively, rather than as customers of the local exchange carrier ("LEC").[38]

17. The Commission found that LECs participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.[39]

18. The Commission found that Level 3's proposed "alternative compensation mechanism" for handling ISP-bound traffic would result in a positive compensation rate for such traffic and is, therefore, not substantially different than other proposals for ISP-bound traffic compensation that the Commission had rejected in the course of previous arbitration proceedings under the Act.[40]

19. The Commission found that adoption of Level 3's proposed alternative mechanism would likely result in the same subsidies, market distortions, and inappropriate incentives, that the Commission previously identified in those previous decisions.[41]

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[36] Record at 3:538, 541.

[37] Record at 3:541.

[38] Record at 3:541.

[39] Record at 3:541.

[40] Record at 3:541.

[41] Record at 3:542-43.

20. The Commission found that reciprocal compensation at a positive rate violates the economic principle that a proper price signal requires that the end user be charged a price equal to the marginal cost of service.[42]

21. By contrast, the Commission found that a bill and keep mechanism for ISP-bound traffic is appropriate because it focuses on the need for various networks to interconnect, but requires each carrier to recover its costs through charges imposed upon its own customers.[43]

22. The Commission found that adoption of a bill and keep approach is the best way to encourage greater, more seamless interconnection in the future.[44]

23. The Commission rejected Level 3's contention that adoption of a bill and keep regime would result in Level 3's inability to recover costs it incurs for the transmission of ISP-bound calls.[45]

24. On the contrary, the Commission found that Level 3 has the ability to recover such costs under the same procedures the Commission identified in resolving this very issue in prior arbitration proceedings.[46]

25. Specifically, the Commission noted that Level 3 could raise its ISP rate to its business basic exchange rate, raise its basic exchange rate for all customers, or change its tariff to preclude ISPs from switching to the business basic exchange rate.[47]

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[42] Record at 3:542.

[43] Record at 3:542.

[44] Record at 3:542; *see also* Record at 4:761.

[45] Record at 3:542-43.

[46] Record at 3:542-43.

[47] Record at 3:543.

26. The Commission found that adoption of a bill and keep regime would properly require ISPs and ISP-users to more fully internalize the costs they impose on the network and relieve Qwest customers who do not use the internet of continuing to pay the "freight" for internet users.[48]

27. The Commission found that a bill and keep regime comes closer to rationalizing both the inter-carrier and end-user compensation issues raised by increasing network usage as a result of dial-up Internet access.[49]

28. The Commission found that a bill and keep regime also avoids some of the economic distortions caused by continuing reciprocal compensation on such traffic by allowing carriers to have better price signals in deciding how to build their networks and solicit their customers, while at the same time allowing customers to have better price signals as to the costs of their use of the network.[50]

29. The Commission concluded that disallowance of reciprocal compensation for ISP-bound traffic best comports with section 251(c)(2)(D) of the Act which requires that interconnection be on "rates, terms and conditions that are just, reasonable and nondiscriminatory."[51]

30. The Commission found that by eliminating an "unintended arbitrage opportunity" the disallowance of reciprocal compensation also will encourage the efficient entry of

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[48] Record at 3:543.

[49] Record at 3:543.

[50] Record at 3:543; *see also* Record at 4:760.

[51] Record at 3:543-44.

competitors into the residential telecommunications market and is, therefore, pro-competitive and anti-subsidy.[52]

31. Under a bill and keep regime, the Commission found that ISP-users pay for what they use and non-ISP-users do not have to pay for services they do not use.[53]

32. The Commission found that Qwest is reasonably able to differentiate ISP-bound traffic from other forms of traffic flowing from Qwest to Level 3 and that any problems that may arise in executing Qwest's call identification process can either be addressed through the dispute resolution process included in the Interconnection Agreement or by requesting a modification of the parties' Interconnection Agreement.[54]

33. The Commission found that Level 3 has the least cost access to information regarding whether traffic exchanged between it and Qwest is ISP-bound or not and, with adoption of a bill and keep mechanism, Level 3 has an appropriate incentive to make sure that traffic exchanged between the parties is properly differentiated and accounted for.[55]

34. Upon review of Level 3's arguments and the entire record, the Commission found no reason to reverse its prior decisions mandating a bill and keep compensation mechanism for ISP-bound traffic.[56]

35. Accordingly, the Commission approved those sections of the Interconnection Agreement that the parties agreed upon and adopted Qwest's proposed language for section 4.29.[57]

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[52] Record at 3:544.

[53] Record at 3:544.

[54] Record at 3:544; *see also* Record at 4:761.

[55] Record at 3:544.

[56] Record at 3:539; *see also* Record at 760.

36. In addition, the Commission approved the following language for section 7.3.4.1.3 of the Interconnection Agreement:

> Reciprocal compensation only applies to EAS/Local Traffic and does not apply to Internet Related Traffic. Internet Related Traffic shall be exchanged on a bill and keep basis.[58]

37. The parties complied with the Commission's order on this issue and included this language in the Interconnection Agreement filed with and approved by the Commission.

2. Issue No. 6 – Whether Internet-Related Traffic Should Be Included In Calculating Each Party's Responsibility For Originating Traffic Over Its Own Network

38. The Commission found that the logic underlying its decision rejecting reciprocal compensation at a positive rate for ISP-bound traffic dictates a similar result on this issue – whether Internet-related traffic should be included in calculating each party's responsibility for originating traffic over its own network.[59]

39. The Commission reiterated that, when connecting to ISPs served by a competitive LEC (such as Level 3), the incumbent LEC (Qwest) end-user acts primarily as the customer of the ISP, not as the customer of the incumbent LEC.[60]

40. The Commission found that ISPs should compensate both the incumbent LEC and the competitive LEC for costs incurred in originating and transporting ISP-bound traffic.[61]

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[57] Record at 3:544-45.

[58] Record at 3:545.

[59] Record at 3:559.

[60] Record at 3:559.

[61] Record at 3:559.

41. In short, upon review of the entire record, including FCC decisions cited by Level 3, the Commission ordered that Internet-related traffic be excluded when determining when relative use of entrance facilities and direct trunked transport.[62]

42. Accordingly, the Commission adopted language agreed to by both Level 3 and Qwest and approved the additional language proposed by Qwest for sections 7.3.1.1.3.1 and 7.3.2.2(a) indicating that the relative use factor will exclude Internet-related traffic and be based on non-Internet traffic only.[63]

43. The parties complied with the Commission's order on this issue and included this language in the Interconnection Agreement filed with and approved by the Commission.

III. ARGUMENT

A. Standard Of Review

Section 252(e)(6) of the Act allows an "aggrieved party" to challenge a state commission's approval of an interconnection agreement under section 252(e)(1) "in an appropriate Federal district court." Under the Act, the district court is to review the Commission's decision "to determine whether the agreement . . . meets the requirements of section 251 and [section 252]."[64] A district court therefore considers *de novo* whether an interconnection agreement complies with the Act and the FCC's regulations implementing the Act.[65] The Court reviews all other issues under an arbitrary and capricious standard.[66] In

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[62] Record at 3:559; *see also* Record at 4:762.

[63] Record at 3:559.

[64] 47 U.S.C. § 252(e)(6); *see also U S WEST Communications, Inc. v. Sprint Communications Co., L.P*, 275 F.3d 1241, 1245, 1248 (10th Cir. 2002); *U S WEST Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997).

[65] *See Sprint*, 275 F.3d at 1248; *Hix*, 986 F. Supp. at 19.

[66] *Id.*

addition, the Court must defer to the FCC's interpretations of the Act and federal telecommunications law generally[67] and, pursuant to the Hobbs Act, must follow FCC decisions and orders implementing the Act.[68]

B. The FCC's *ISP Remand Order* Requires Qwest and Level 3 To Use Bill And Keep For Internet Traffic And Confirms That The Commission's Ruling Is Correct.

1. The *ISP Remand Order* Mandates Bill And Keep For Qwest And Level 3.

In the *ISP Remand Order,* the FCC ruled unequivocally that Internet-bound traffic is properly characterized as "interstate access" traffic.[69] The FCC observed that "[m]ost Internet-bound traffic traveling between a LEC's (*i.e.* Qwest's) subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[70] On that basis, the FCC concluded that it has authority to establish rules governing such traffic pursuant to section 201 of the Act, which gives the FCC the authority to regulate interstate telecommunications.[71]

In exercising its authority, the FCC specifically rejected reciprocal compensation as an appropriate compensation scheme for Internet traffic and, accordingly, ordered a phase-out of

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[67] *See Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Qwest Corporation v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001) (stating that "[w]hen it appears that Congress delegated lawmaking authority to an agency, we review the agency's statutory interpretation promulgated in the exercise of that authority under the two steps set out in *Chevron*") (citations omitted).

[68] *See* 28 U.S.C. §§ 2341-2344; *see also FCC v. ITT World Communications., Inc.*, 466 U.S. 463, 468 (1984); *U S WEST Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1117-18 (D. Colo. 1999) (noting that the "FCC's rules are likewise binding on this Court") (collecting cases).

[69] *ISP Remand Order* ¶¶ 52, 57.

[70] *Id.* ¶ 58.

[71] *Id.* ¶¶ 52, 65.

reciprocal compensation for this traffic.[72] The FCC found that reciprocal compensation causes uneconomic subsidies and improperly creates incentive for CLECs to specialize in serving ISPs to the exclusion of other customers.[73] These improper effects, the FCC concluded, arise from the fact that reciprocal compensation for Internet traffic permits carriers to recover their costs "not only from their end-user customers, but also from *other carriers*."[74] The FCC explained:

> Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. *Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments*.[75]

The FCC found further that the market distortions caused by reciprocal compensation payments "are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act."[76] By targeting ISP customers that have large volumes of exclusively incoming traffic, the FCC found, CLECs are able to reap "a reciprocal compensation windfall."[77]

In contrast to reciprocal compensation, the FCC found, "a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically inefficient

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[72] *See id.* ¶ 77-78.

[73] *Id.* ¶¶ 67-76.

[74] *Id.* ¶ 68 (emphasis in original) (footnote omitted).

[75] *Id.* (emphasis added).

[76] *Id.* ¶ 69.

[77] *Id.* ¶ 70.

than recovering these costs from originating carriers."[78] The FCC explained that a bill and keep regime may eliminate the undesirable economic incentives and "regulatory arbitrage" caused by reciprocal compensation "by forcing carriers to look only to their ISP customers, rather than to other carriers, for cost recovery."[79] Accordingly, the FCC stated that there is a "strong possibility" that a pending rulemaking proceeding "may result in the adoption of a full bill and keep regime for ISP-bound traffic."[80]

Instead of immediately ordering an entirely new compensation scheme for Internet traffic with its issuance of the *ISP Order*, the FCC ordered an "interim regime" under which reciprocal compensation is phased out over three years. The FCC adopted this phased approach based on its concern that a "flash cut" to a new compensation scheme "would upset the legitimate business expectations of carriers and their customers" who had been operating under an existing agreement providing that carriers would receive reciprocal compensation.[81] However, in situations where no such agreement existed, or had expired, the FCC made it clear that reciprocal compensation for Internet traffic will not be permitted and that bill and keep must apply.[82] Thus, addressing the precise situation that exists in this case, the FCC ruled:

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[78] *Id.* ¶ 67.

[79] *Id.* ¶ 74.

[80] *Id.* ¶ 83. Indeed, such an approach would be fully consistent with the FCC's repeated pronouncements that Internet traffic is not subject to the Act's reciprocal compensation obligations set forth at § 251(b)(5). *See, e.g.,* Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Dkt. No.01-138, FCC 01-269 (rel. Sept. 19, 2001), at ¶ 119 ("ISP-bound traffic is not subject to the reciprocal compensation provisions of section[s] 251(b)(5) and 252(d)(2)"); Memorandum Opinion and Order, *Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Dkt. No 01-9, FCC 01-130 (rel. April 16, 2001), at ¶ 215 (same).

[81] *ISP Remand Order* ¶ 77.

[82] *Id.* ¶ 81.

> [I]f a state has ordered all LECs to exchange ISP-bound traffic on a bill and keep basis, *or if a state has ordered bill and keep for ISP-bound traffic in a particular arbitration*, those LECs subject to the state order would continue to exchange ISP-bound traffic on a bill and keep basis.[83]

In this case, as discussed earlier, the Colorado Commission had issued its arbitration order requiring Qwest and Level 3 to use bill and keep for Internet traffic shortly before the FCC issued the *ISP Remand Order*. As ruled by the FCC, under that order issued "in a particular arbitration," Qwest and Level 3 must "continue to exchange ISP-bound traffic on a bill and keep basis."[84]

This result is entirely consistent with the FCC's rationale in the *ISP Remand Order* that carriers without an expectation of reciprocal compensation will not be harmed by immediate imposition of bill and keep compensation scheme. As discussed above, long before Level 3 filed its arbitration petition in Colorado, the Colorado Commission had ruled in the *Sprint* and *ICG* arbitrations that a bill and keep compensation regime would govern Internet traffic in Colorado.[85] In addition, in October 2000, the Commission permitted Qwest to modify its public tariff to establish that reciprocal compensation would not apply to Internet traffic. Thus, when it filed its arbitration petition, Level 3 could not have had a reasonable expectation of receiving reciprocal compensation for Internet traffic in Colorado.

2. The Hobbs Act Requires The Court To Follow the FCC's Ruling Relating To The Application Of Bill And Keep.

Under the Hobbs Act, the Commission and this Court are bound by the FCC's rulings relating to the nature of Internet traffic and reciprocal compensation. The Hobbs Act vests

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[83] *Id.* ¶ 80 n.152 (emphasis added).

[84] *Id.*

[85] *See Sprint Initial Decision* at 14-15; *Sprint Decision on RRR* at 2-3, 9; *ICG Initial Decision* at 17-18, 28-33.

United States courts of appeal with exclusive jurisdiction to determine any challenge to FCC orders:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . .[86]

Section 402(a) encompasses "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission under [the Communications Act of 1934, as amended by the 1996 Telecommunications Act]. . . ."[87] As the Ninth Circuit stated in a case involving the Hobbs Act and an FCC order, "[t]ogether, these two provisions vest the courts of appeal with exclusive jurisdiction to review the validity of FCC rulings."[88] Thus, the United States Supreme Court has made clear that collateral attacks on FCC orders in federal district courts are prohibited by the Hobbs Act.[89] Likewise, citing numerous cases, this Court has acknowledged that FCC rules are "binding" on the Court.[90]

This Court is required, therefore, to follow the FCC's ruling in the *ISP Remand Order* establishing that carriers will exchange Internet traffic on a bill and keep basis where a state commission has ordered that compensation mechanism in an arbitration. Level 3's claim that bill and keep should not apply despite the FCC's rulings in the *ISP Order* is precisely the type of collateral attack that the Supreme Court and other federal courts have ruled are impermissible under the Hobbs Act.

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[86] 28 U.S.C. § 2342.

[87] 28 U.S.C. § 402(a).

[88] *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996).

[89] *FCC v. ITT World Communications., Inc.*, 466 U.S. 463, 468 (1984).

[90] *See Hix*, 57 F. Supp. 2d at 1117-18 (collecting cases).

3. Even If The *ISP Remand Order* Were Not Controlling, The Commission's Adoption Of Bill and Keep Complies With The Act And Must Be Upheld.

As noted above, Level 3 may not challenge in this Court the FCC rulings that control this case. Even if it were appropriate to consider the policies underlying the Telecommunications Act and the FCC's rulings, however, they plainly support the Commission's rulings here. Indeed, the Colorado Commission's findings and conclusions are nearly identical to those the FCC set forth in the *ISP Remand Order*.

Like the FCC, the Colorado Commission found that the payment of reciprocal compensation for Internet traffic under the Act causes uneconomic subsidies and improperly creates incentive for CLECs to specialize in serving ISPs to the exclusion of other customers.[91] Like the FCC, the Colorado Commission also found that a bill and keep regime comes closer to rationalizing both the inter-carrier and end-user compensation issues by providing better pricing signals.[92] Both commissions also found that bill and keep will likely end improper arbitrage opportunities and encourage efficient market entry by competitor into the residential telecommunications market.[93] Finally, contrary to Level 3's claim, both the FCC and the Colorado Commission found that Internet traffic originated by a Qwest end-user is analogous to a long distance call placed by a Qwest end-user and delivered to an interexchange carrier.[94]

As this virtually identical reasoning by both the Commission and the FCC demonstrates, bill and keep for Internet traffic is plainly consistent with the Act and, therefore, lawful. Under the Court's standard of review – determining whether the interconnection agreement, including

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[91] *Compare* Record at 3:542-43 *with ISP Remand Order* ¶¶ 67-76.

[92] Record at 3:543.

[93] *Compare* Record at 3:544 *with ISP Remand Order* ¶ 74.

[94] *Compare* Record at 3:538, 541 *with ISP Remand Order* ¶ 60.

the reciprocal compensation provisions, meet the requirements of the Act – the Commission's ruling on this issue must stand.

4. Level 3's Reliance On *Bell Atlantic* Is Misplaced.

As set forth above, this Court's duty under the Act is as well-settled as it is straightforward: the Court is to review the Commission's decision "to determine whether the agreement . . . meets the requirements of section 251 and [section 252]."[95] Ignoring this basic standard of review, Level 3 argues that the FCC's *ISP Remand Order* "should have had no effect" on the Colorado Commission's decision to exclude Internet traffic from reciprocal compensation.[96] According to Level 3,[97] the Colorado Commission was bound to determine this question based on the "existing law" at the time the Commission issued its Initial Decision and its Decision on Application for RRR and that the "existing law" was set forth in a decision of the United States Court of Appeals for the District of Columbia Circuit in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), vacating the precursor to the *ISP Remand Order*, the *ISP Order*.[98] According to Level 3, the Commission's bill and keep decision is contrary to *Bell Atlantic* and, thus, should be reversed here.[99] Level 3's claim is meritless.[100]

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[95] 47 U.S.C. § 252(e)(6). *See also Sprint*, 275 F.3d at 1245, 1248; *Hix*, 986 F. Supp. at 19.

[96] *See* Complaint ¶ 31.

[97] *See id.* ¶¶ 29, 31.

[98] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, 14 FCC Rcd 3689 (rel. Feb. 26, 1999) ("*ISP Order*").

[99] *Id.*

[100] Level 3's current claim that the *ISP Remand Order* "should have had no effect on the Colorado [Commission's] decisions" is directly at odds with its position below. Indeed, it was *Level 3* that brought the FCC's decision in the *ISP Remand Order* to the Commission's attention by filing a Notice of Filing of Supplemental Authority with the Commission the day after it filed its Application for

First, as set forth above, the Court's task here is to determine whether the parties' interconnection agreement complies with current law. Contrary to Level 3's claim, the Court need not look to a specific instant in time and determine (a) what the law was then and (b) whether the agreement complies with that then-existing law. The Court's mandate is clear – it is to consider whether the agreement at issue complies with the Act and the Act's implementing regulations.[101]

Moreover, even if the Court should ignore current law and look to the law as it existed just after *Bell Atlantic*, the outcome in this case would remain unchanged. As it did before the Commission, Level 3 overstates the effect of the *Bell Atlantic* decision. The Commission's decision to order bill and keep is fully consistent with the *Bell Atlantic* decision. As noted by the Commission in rejecting this argument below:

> While the [*Bell Atlantic*] court may have suggested that Internet calls may *appear* to be functionally similar to local traffic, it made no definitive ruling on that issue to bind state commissions in § 252 proceedings. The court did not disturb the FCC's holding in the [*ISP Order*] that state commissions have the discretion to determine the intercarrier compensation mechanism for ISP traffic such proceedings. As part of that discretion, the FCC ruled, state commission "are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism." [*ISP Order*] ¶ 26. This directive from the FCC is still effective, notwithstanding the *Bell Atlantic* decision, and, as such, we retain the policy discretion not to adopt reciprocal compensation for ISP traffic.[102]

RRR. *See* Record at 743-44. In that Notice, Level 3 asserted that "the FCC's pronouncement [the *ISP Remand Order*] is *relevant* to the issues in this arbitration" and, because of that relevance, Level 3 was submitting the news release relating to the order "as a supplement to its Application for RRR." *Id.* at 743 (emphasis added). Level 3 does not explain how the FCC's *ISP Remand Order* could, on the one hand, be "relevant to the issues" in its arbitration, yet, on the other, be something that "should have had no effect" on the Commission's decisions.

[101] *See Sprint*, 275 F.3d at 1248; *Hix*, 986 F. Supp. at 19.

[102] Record at 3:540.

Contrary to Level 3's claim, the Colorado Commission's bill and keep directive is fully consistent with *Bell Atlantic* and falls well within the Commission's discretion on the record here.

C. The Commission's Exclusion of Internet Traffic From Relative Use Calculations Is Required Under Binding FCC Rules And Orders That May Not Be Collaterally Attacked Here And Is Well-Supported By The Record Below.

1. The FCC Rules That Require The Exclusion Of Internet Traffic From Relative Use Calculations Are Binding On The Court.

FCC Rule 51.709(b) establishes that the requirement of assigning financial responsibility for interconnection facilities based upon relative use:

> The rate of a carrier [*i.e.*, Qwest] providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier [*i.e.*, Level 3] to send traffic that will terminate on the providing carrier's network.

In other words, if Level 3 originated 60% of the "telecommunications traffic" carried over a trunk and Qwest originated 40%, Level 3 would pay 60% of the costs of the trunk and Qwest would pay 40%.

The "traffic" referred to in this rule is "telecommunications traffic," defined by the FCC as traffic "exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access*, information access, or exchange services for such access."[103] Under this definition, therefore, any traffic that is "interstate or intrastate access" is outside the scope of Rule 51.709(b) and must be excluded from calculations of relative use.

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[103] 47 C.F.R. § 51.701(b)(1) (emphasis added).

In its *ISP Remand Order*, the FCC unequivocally ruled that Internet traffic is interstate traffic.[104] As interstate traffic, therefore, Internet traffic is excluded from the "telecommunications traffic" that, pursuant to 47 C.F.R. § 51.709(b), must be used to determine relative use. Thus, in a ruling just three months ago on this precise issue, the Washington Utilities and Transportation Commission recognized that under the FCC's rules, Internet traffic must be excluded from relative use calculations:

> [C]ost sharing for interconnection facilities will be determined according to the relative *local* traffic flow over that facility. Whereas the FCC has concluded that ISP-bound traffic is interstate traffic, this traffic should be excluded from the consideration of interconnection facilities cost-sharing.[105]

Thus, the Colorado Commission's ruling is required by the FCC's binding rules relating to relative use and the FCC's finding that Internet traffic is interstate. The Hobbs Act requires the Court and the Commission to apply these binding rules. On this basis alone, the Commission's ruling must be upheld.

Level 3's claim that the Colorado Commission erred by excluding Internet traffic from the relative use calculation is precisely the type of collateral attack barred by the Hobbs Act. For example, in applying the Hobbs Act under the Telecommunications Act, the United States Court of Appeals for the Ninth Circuit concluded that, although it "doubt[ed] the soundness of the FCC's interpretation of [the Act]" on the issue presented there, it nevertheless ruled that under the Hobbs Act it was "not at liberty to review that interpretation."[106] Similarly, to allow Level 3's claim, this Court would necessarily have to find (1) that relative use calculations should include

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[104] *See ISP Remand Order* ¶¶ 52, 58, 65.

[105] Thirty-Second Supplemental Order, *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Dkt. No. UT-003013, (Wash. U.T.C. rel. June 21, 2002)("*Washington 32nd Supp. Order*"), at ¶ 113 (footnote omitted) (emphasis in original).

[106] *U S WEST Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000).

interstate access traffic or (2) that Internet traffic is not interstate. But, the FCC has already decided these issues and, as the Ninth Circuit stated, this Court is "not at liberty to review that interpretation."[107]

2. Even If the FCC's Rules On Relative Use Were Not Binding, The Commission's Exclusion Of Internet Traffic Is Lawful.

Level 3's decision to serve ISP customers in Colorado requires it to interconnect with Qwest's network. By interconnecting with Qwest, Level 3 can receive calls placed by Qwest customers and deliver those calls to Level 3's ISP customers whom Qwest's customers have chosen to be their ISP. To interconnect with Qwest, Level 3 obtains two types of interconnection trunks – direct trunk transport and entrance facilities – from Qwest. The need for these facilities and the costs associated with them arise directly from Level 3's business decision to serve ISPs. It is obvious, of course, that if Level 3 did not go into the business of serving ISPs, it would not be ordering these interconnection facilities from Qwest.

Because Level 3's principal business is providing communications between ISPs and the customers that the ISPs serve, including this traffic originating on the Qwest network in the calculation of relative use would substantially increase Qwest's share of the cost of the interconnection trunks and correspondingly decrease Level 3's share. Indeed, including these Internet calls in relative use calculations, contrary to the FCC's rule excluding interstate calls from these calculations, would mean that virtually all originating calls would be from Qwest and that Level 3 would pay almost nothing for the trunks it obtains from Qwest.

As noted above, Level 3 may not challenge in this Court the FCC rulings that control this case, including the rulings relating to relative use. If the Commission properly applied the FCC's rulings, then that is the end of the matter, and summary judgment should be granted in favor of

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[107] *Id.*

defendants here. In any case, if it were proper to consider the policies underlying the Act and the FCC's rulings, the Commission's ruling relating to relative use would still clearly be lawful.

As the Colorado Commission found, the same concerns that led the FCC to phase out reciprocal compensation for Internet traffic require excluding Internet traffic from relative use calculations in this case. Without this exclusion, Level 3 would benefit improperly from its decision to specialize in serving ISPs that have "exclusively incoming traffic," as it would be able to shift the costs of interconnection trunks almost entirely onto Qwest. As a result, Qwest and its customers would be required to subsidize Level 3's operations, and Level 3 would have a strong, distorted incentive to continue to focus its business on ISPs. These are the precise effects that the FCC intended to eliminate in the *ISP Remand Order*.

For the same reasons, other state commissions that have addressed this issue have ruled that Internet traffic must be excluded from reciprocal compensation and the cost-sharing allocations for interconnection trunks. In another interconnection arbitration proceeding between Qwest and Level 3 involving the same issues, the Oregon Commission recently found that the identical policy considerations cited by the Colorado Commission and relied upon by the FCC in the *ISP Remand Order* – avoiding subsidies, market distortions, and improper incentives – require excluding Internet traffic from the parties reciprocal compensation obligations and from calculations of relative use.[108] Similarly, as noted, the Washington Commission ruled that the FCC's finding that Internet traffic is interstate requires excluding this non-local traffic from reciprocal compensation and relative use calculations.[109]

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[108] Arbitrator's Decision, *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 with Qwest Corporation*, ARB 332, at 9 (Aug. 15, 2001), *adopted by*, Commission Decision, *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 with Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Order No. 01-809, ARB 332, at 6 (Sept. 13, 2001).

[109] *Washington 32nd Supp. Order* ¶ 113. The Arizona Corporation Commission reached a different result in the Qwest/Level 3 arbitration in that state. Opinion and Order, *In the Matter of*

Level 3's conclusory claim that the Commission's decision violates the Commission's "own rules" does not change the outcome.[110] State rules do not govern here. The Court's task it to determine whether the parties' interconnection agreement complies with the Act and the FCC's rules implementing the Act.[111] State rules are irrelevant to this inquiry.[112]

Thus, the Commission's exclusion of Internet traffic from Qwest's and Level 3's relative use calculations is required by the policies the FCC identified in the *ISP Remand Order*, is supported on the record here, and complies with applicable state law.

IV. CONCLUSION

For the reasons stated, the Court should grant Qwest's cross-motion for summary judgment and enter judgment for the defendants on each of Level 3's claims.

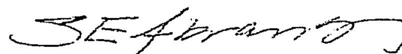
Petition of Level 3 Communications LLC for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996, Dkt. Nos. T-03654A-00-0882 and T-01051B-00-0882, Decision No. 63550, at 10 (Ariz. C.C. April 10, 2001). That decision was issued prior to the FCC's April 27, 2001 decision in the *ISP Remand Order* and, therefore, is not of any precedential or persuasive value in this case.

[110] *See* Complaint ¶ 35.

[111] *See* 47 U.S.C. § 252(e)(6); *Sprint*, 275 F.3d at 1248; *Hix*, 986 F. Supp. at 19

[112] However, even if state rules had some bearing on the Court's review here, as the Commission noted in its decision denying Level 3's application for RRR, the rules cited by Level 3 (4 CRR 723-39-3.5) merely set forth the construction and maintenance obligations of carriers in Colorado – they do not address *financial responsibility* relating to those facilities. *See* Record at 762. Instead, Rules 4 CCR 723-39-3.3.4 and 729-39-3.4 address the financial question and the Commission's decision fully comports with those rules. *Id.*

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2002, I served a true and correct copy of the foregoing **Defendant Qwest Corporation's Brief In Support of Its Cross-Motion for Summary Judgment** by electronic mail and by depositing the same in the United States Mail, proper First Class postage prepaid and addressed to the following:

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