APPENDIX B

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

LEVEL 3 COMMUNICATIONS, LLC, a Delaware limited liability company,

Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF COLORADO; Raymond L. Gifford, in his official capacity as Chairman of the Public Utilities Commission of Colorado; Polly Page, in her official capacity as Commissioner of the Public Utilities Commission of Colorado, Jim Dyer, in his official capacity as Commissioner of the Public Utilities Commission of Colorado; and QWEST CORPORATION, a Colorado corporation,

Defendants.

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I. INTRODUCTION

The only remaining issue before this Court is simple—who is responsible for the costs associated with bringing a call placed by a Qwest customer over the Qwest network up to the point of interconnection with the Level 3 Communications, LLC ("Level 3") network?[1] As set forth in its Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Level 3's Memorandum in Support"), the decision of the Colorado Public Utilities Commission ("CPUC" or "Commission") should be vacated and remanded because:

- In the FCC's *Implementation of the Local Competition Provision in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), which was issued after the Commission's *Initial Order* and which had not yet become effective at the time the Commission issued its decision on applications for rehearing, reargument or reconsideration, the FCC amended 47 C.F.R. 51.703(b)'s ("FCC Rule 51.703(b)") prohibition on charges for origination of traffic to eliminate the limitation to "local" telecommunications traffic. As a consequence, FCC Rule 51.703(b) now applies to *all* telecommunications traffic unless it is specifically

[1] Level 3 is withdrawing from the Court's consideration what was referred to as Issue 2 in the proceeding below – whether Qwest should be required to pay Level 3 reciprocal compensation for all locally dialed traffic, including Internet-related traffic that Level 3 transports and terminates pursuant to Section 251(b)(5) of the Communications Act of 1934, as amended (the "Act"). The only remaining issue before the Court was referred to as Issue 6 in the proceeding below – whether Qwest should bear responsibility for originating Internet-related calls placed by its customers and routing them over its network to the point of interconnection, where calls will be handed off to Level 3 for termination.

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"carved out" under 47 C.F.R. 51.701(b)(1) ("FCC Rule 51.701(b)(1)"). However, the FCC's conclusion that internet-related traffic was "information access," and therefore outside the definition of "telecommunications traffic" under FCC Rule 51.701(b)(1), and hence outside FCC Rule 51.703(b)'s proscription on origination charges, has since been reversed by the United States Court of Appeals for the D.C. Circuit. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002). Thus, there is no basis for excluding internet-related traffic from the FCC Rule 51.703(b)'s prohibition on charges for origination of telecommunications traffic, and the portion of the Commission's order excluding internet-related traffic from the "relative use" calculation used to apportion costs of dedicated trunks and requiring Level 3 to bear the costs of those trunks when they are used to carry originating traffic *from* Qwest's end offices *to* Qwest's POI with Level 3 must be vacated and remanded.

- The Commission's proffered justification for excluding internet-related traffic from the "relative use" calculation -- that the ISP was the "cost causer" rather than the end user seeking to call the ISP -- was wholly circular and therefore arbitrary and capricious.

Nor can the Commission's decision be sustained on the basis of justifications now offered by the State Defendants and Qwest. The State Defendants attempt to distinguish the FCC's decision in *TSR Wireless, LLC v. US West Comm., Inc.,* 15 FCC Rcd 11166 (2000) ("*TSR Wireless*") on the grounds that decision applied only to "local," not "interstate" traffic. The FCC's *ISP Remand Order*, however, repudiated the grounds for this distinction, by striking the

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word "local" from FCC Rule 51.703(b) and ending the FCC's attempt to exclude jurisdictionally "interstate" traffic from the scope of its reciprocal compensation rules. Thus, *TSR Wireless* now controls that unless internet-related traffic falls into an exception to the definition of "telecommunications traffic" in FCC Rule 51.701(b)(1).

Qwest attempts to assert that internet-related traffic should fall into the exception in FCC Rule 51.701(b)(1) for "interstate or intrastate exchange access." Qwest, however, does not even claim that internet-related traffic is "exchange access," but asserts that internet-related traffic must be excluded because it is jurisdictionally "interstate." This sleight-of-hand ignores the fact that "exchange access" is a statutorily defined term, and that Level 3's offering to ISPs does not fall within the definition of exchange access. Moreover, the FCC has not concluded that internet-related traffic is "exchange access," and the Commission made no such finding in the decision below. In addition, although the FCC concluded in the *ISP Remand Order* that internet-related calls exchanged between LECs were "information access," the United States Court of Appeals for the D.C. Circuit rejected that conclusion, reversing and remanding the *ISP Remand Order*. *WorldCom,* 288 F.3d at 434. Qwest's motion for summary judgment based on the definition of "telecommunications traffic" must therefore fail.

Moreover, Qwest's reliance on 47 C.F.R. 51.709(b) ("FCC Rule 51.709(b)") is inapposite. In the first instance, FCC Rule 51.709(b) is a reciprocal compensation rule intended to allocate the costs of a two-way trunk between origination -- for which the carrier on whose side of the POI the trunk lays cannot charge an interconnecting carrier -- and termination -- for which the carrier on whose side of the POI the trunk lays may charge a termination fee to an

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interconnection carrier. Nothing indicates that FCC Rule 51.709(b) was intended to override FCC Rule 51.703(b)'s prohibition on origination charges.

In any event, even if, as Qwest argues, FCC Rule 51.709(b) were applied to govern pricing for trunks as they are used to originate traffic from Qwest's end offices to its POI with Level 3 in this context, FCC Rule 51.709(b) does not require that internet-related traffic be excluded from a relative use calculation. First, FCC Rule 51.709(b) refers to "traffic," not "telecommunications traffic," so the scope of traffic to be included in 51.709(b)'s relative use calculation is not limited by the exceptions to the definition of "telecommunications traffic." However, even if "traffic" were equated with "telecommunications traffic," after the *ISP Remand Order* there is no longer any basis for limiting the relative use calculation to "local" telecommunications traffic, or for excluding internet-related traffic from the scope of "telecommunications traffic" because -- as stated above -- internet-related traffic is not "information access," and there is no basis for concluding that it is "exchange access."

Accordingly, Qwest's and the Commission's Cross-Motions for Summary Judgment should therefore be denied, Level 3's Motion for Summary Judgment should be granted, and the Commission's decision should be vacated and remanded.

II. ARGUMENT

A. 47 C.F.R. 51.703(b) and FCC Precedent Require Carriers to Pay for Interconnection Facilities Used to Bring Their Customers' Calls to the Point Of Interconnection with Another Carrier's Network.

1. 47 C.F.R. 51.703(b) Now Applies to All "Telecommunications Traffic."

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Following the FCC's *ISP Remand Order* and the D.C. Circuit's subsequent decision in *WorldCom* reversing a key portion of that order, FCC Rule 51.703(b) and the FCC's decision in *TSR Wireless* clearly require originating carriers to pay for interconnection facilities used to bring their customers' calls to the point of interconnection with another carrier's network, even when such calls are internet-related. FCC Rule 51.703(b) states:

> A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

Thus, as long as traffic is "telecommunications traffic," Qwest -- the LEC -- is operationally responsible for routing the call from the Qwest customer to the point of interconnection between Qwest and another LEC (Level 3, in this case), and must absorb all costs associated with this originating part of the call.

In order to understand the distinction between origination and termination and the FCC's assignment of cost responsibility for each, it is helpful to envision the network over which the call passes when a Qwest customer calls a Level 3 customer. As a first example, assume that the Level 3 customer is a local law firm. When the Qwest customer wishes to contact her lawyer, she will initiate the call by dialing a local number from her home or business telephone. The locally dialed call will be routed over Qwest's local network to the Qwest central office that serves the Qwest customer. From there, the call will be switched over Qwest's network until it reaches a Qwest office that has a dedicated interconnection trunk connecting Qwest's network to Level 3's network at the point of interconnection (called a "POI") between the two carriers. The portion of the call from the calling party's telephone to the POI is "origination."

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From the POI, the call will be routed over Level 3's network until Level 3 delivers the call to its customer, *i.e.*, Level 3 transports the call from the point of interconnection and terminates the call at its customer, the called party (in this example, a local law firm). This portion of the call is called "transport and termination," which is sometimes shortened to "termination." Under 47 U.S.C. 251(b)(5), the terminating telecommunications carrier is entitled to be compensated by the originating carrier for providing the transport and termination.

Next, assume that the Qwest customer wishes to place a local call to her ISP so that she can "surf the net." The call will be routed in the same fashion as the call to the Qwest customer's lawyer. That is, the Qwest customer will dial a local number, and the call will be routed over Qwest's local network in the same manner described above until it reaches the very same point of interconnection between the two carriers' networks. This portion of the call from the called party to the POI is still the originating portion of the call. Level 3 then transports and terminates the call from the POI to its ISP customer. The only difference is that, in the case of the ISP-bound call, the Qwest customer will place the call from her computer instead of her telephone; there is no difference in terms of the routing of the call over the Qwest or Level 3 networks.

As the FCC held in *TSR Wireless*, FCC Rule 51.703(b)'s ban on origination charges, like other provisions of 47 C.F.R. 51.701 *et seq.*, applies to both one-way and two-way services. *TSR Wireless*, 15 FCC Rcd at 11177-11178. As discussed in Level 3's Memorandum in Support at 7, in *TSR Wireless*, the FCC also held that, pursuant to FCC Rule 51.703(b), the cost of facilities

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used to deliver traffic to the POI "is the originating carrier's responsibility, because these facilities are part of the originating carrier's network." *Id*. at 11186.

Although it is true that the FCC in *TSR Wireless* discussed the originating carrier's obligations under FCC Rule 51.703(b) as relating to "local" telecommunications traffic, that was because FCC Rule 51.703(b) as it existed at that time precluded only charges for "*local* telecommunications traffic that originates on the LEC's network." [2] *Id*. at 11168 (emphasis added). In the FCC's *ISP Remand Order*, however, the FCC struck the word "local" from FCC Rule 51.703(b), as part of an overall reconsideration of its reciprocal compensation rules, and repudiated the distinction between "local" and "long distance"/"interstate" traffic it had made in earlier orders. *ISP Remand Order* at 9159-9161 (¶13-15), 9179 (¶61). The FCC stated:

> [B]ased on the rationale of the [*Initial ISP Order*] the [United States Court of Appeals for the D.C. Circuit] indicated that the question whether this traffic was "local or interstate" was critical to a determination of whether ISP-bound traffic should be subject to reciprocal compensation. . . . We were mistaken to have characterized the issue in that manner, rather than properly (and more naturally) interpreting the scope of "telecommunications"

[2] In the FCC's first order to address the issue, the FCC excluded ISP-bound traffic from § 251(b)(5)'s reciprocal compensation regime for transport and termination of traffic on the theory that ISP-bound traffic was not "local." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic,* 14 FCC Rcd. 3689 (1999)*("Initial ISP Order").* The FCC reached this conclusion by applying its "end-to-end" analysis, traditionally used to determine whether a call is jurisdictionally interstate—i.e., within the FCC's as opposed to the state public utility commission's jurisdiction—or not. *See id.* at 3689-90 (¶ 1), 3695-98 (¶¶ 10-12). However, that decision was appealed to the Court of Appeals for the District of Columbia. On review, the court held that the FCC had failed to explain why the traditional "end-to-end" jurisdictional analysis was relevant to deciding whether ISP calls fit the local or the long-distance call model, and vacated and remanded the order. [*Bell Atlantic Tel. Co. v. FCC]*, 206 F.3d 1 at 5, 8 (D.C. Cir. 2000).

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> within section 251(b)(5) as being limited by section 251(g). By indicating that all "local calls," however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two interrelated provisions of section 251—subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court because the statute does not define the term "local call," and thus that term could be interpreted as meaning either traffic subject to local *rates* or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term "local" created a tension that undermined the prior order because the ESP exemption permitted ISPs to purchase access through local business tariffs, yet the jurisdictional nature of this traffic has long been recognized as interstate.

ISP Remand Order at 9172-9173 (¶ 45) (emphasis in original) (footnotes omitted). Thus, FCC Rule 51.703(b) is no longer limited to "local" telecommunications traffic.

Accordingly, the State Defendants' attempt to distinguish *TSR Wireless* on the basis that paging traffic was "local" but internet-related traffic is "interstate" is no longer valid. State Defendants' Memorandum Brief in Support of Motion for Summary Judgment ("State Defendants' Brief") at 12. Even if the CPUC correctly distinguished *TSR Wireless* at the time of the initial decision, that decision cannot now be sustained in the wake of the *ISP Remand Order* because FCC Rule 51.703(b) now applies to all "telecommunications traffic," not just local.

Finally, recent FCC decisions erase any remaining doubt as to the continued applicability of FCC Rule 51.703(b) to internet-related traffic. In the WorldCom/AT&T/Cox Virginia/Verizon Arbitration, discussed in Level 3's Opening Brief, the FCC rejected Verizon's interconnection proposal, stating that it would "relieve Verizon of its obligation to deliver its originating traffic to the network of a co-carrier, and shifts to the co-carrier Verizon's cost of

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facilities used to deliver its originating calls." *In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.,* CC Docket No. 00-218; CC Docket No. 00-249; CC Docket No. 00-251, Memorandum and Order, DA 02-1731, ¶ 46 (rel. July 17, 2002) ("*FCC Arbitration Order*"). The FCC approached the carriers' interconnection responsibilities generally, and said nothing about excepting internet-related traffic from its rulings.

FCC Rule 51.703(b) as modified by the *ISP Remand Order* is now the governing FCC rule, and the law that must now be applied.

2. Internet-Related Traffic is "Telecommunications Traffic" Subject to FCC Rule 51.703(b).

Qwest takes a different tack from the State Defendants, arguing that internet-related traffic is not "telecommunications traffic" subject to FCC Rule 51.703(b), under the definition of "telecommunications traffic" as revised by the *ISP Remand Order*. In relevant part, 47 C.F.R. 51.701(b)(1), defines "telecommunications traffic" as:

> "Telecommunications 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 (see [*ISP Remand Order*] paragraphs 34, 36, 39, 42-43."

Qwest argues that because "interstate or intrastate access" [sic] is excluded from the definition of "telecommunications traffic," internet-related traffic, which the FCC found to be, at least in part, jurisdictionally interstate, must be excluded from the definition of "telecommunications traffic."

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Defendant Qwest Corporation's Brief in Support of Its Cross-Motion for Summary Judgment, at 25-26.

Qwest's argument is a definitional non-sequitur. Qwest ignores the fact that "interstate exchange access" is a subset of interstate traffic. The FCC did not carve out all interstate traffic from the definition of "telecommunications traffic," but only "interstate . . . exchange access." Qwest cannot logically demonstrate that internet-related traffic is "interstate . . . exchange access" simply by showing that the FCC has concluded that a significant component of such traffic is interstate in nature.

Qwest nowhere makes a showing that internet-related traffic is actually "interstate . . . *exchange* access." Nor could it do so. The term "exchange access" is a statutorily-defined term with a specific meaning, referring to the "offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[3] "Telephone toll services" is itself a statutorily-defined term, meaning "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." Because Level 3's service is not a service "for which there is made a separate charge not included in contracts with subscribers for exchange service" -- and therefore not a "telephone toll service" -- the origination of an internet-related call to a Level 3 ISP customer cannot be "for the purpose of the origination . . . of telephone toll services." Moreover, the CPUC, in its *Initial Order* or its *Reconsideration Order*, did not find

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internet-related traffic to be "interstate exchange access." In addition, the FCC, in the *ISP Remand Order*, never concluded that internet-related traffic is "interstate exchange access."

The claim by Qwest that ISP-bound traffic must be treated like interstate access traffic is further undercut by the fact that the FCC continues to treat that traffic as local for numerous regulatory purposes. First, the FCC has recognized that virtually all ISP-bound traffic is locally dialed. That is, in order to call their local ISPs, customers make a local and not long-distance call. *ISP Remand Order* at 9157-9158 ¶ 10. Second, as evidenced by the Interconnection Agreement approved by the Commission below, carriers use the same facilities to route all locally dialed calls, whether ISP-bound or otherwise. *See,* Interconnection Agreement between Qwest and Level 3, § 7.2.2.9.2.

Finally, and perhaps most importantly for this case, the FCC has exempted ISPs from the payment of certain interstate access charges. *In re MTS and WATS Market Structure*, CC Docket 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983). Instead, ISPs are treated as end-users for the purpose of applying access charges and are, therefore, entitled to purchase local business services for their connections to LEC central offices and the public switched telephone network. *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) ("*ESP Exemption Ord*er").

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[3] As defined in 47 U.S.C. 153(16), "the term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."

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Although Qwest has not done so here, it has on occasion asserted that internet-related traffic is not "telecommunications traffic" because it falls under the exception for "information access." Although the FCC, in the *ISP Remand Order* at 9165 (¶ 30), did conclude that internet-related traffic exchanged between telecommunications carriers was "information access," that conclusion was rejected by the D.C. Circuit in *WorldCom*. 288 F.3d at 434. The Court observed that "it seems uncontested—and the [FCC] declared in the Initial Order—that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic." *Id.* at 433. The Court therefore concluded, "§ 251(g) does not provide a basis for the Commission's action," *i.e.*, that the exchange of ISP-bound traffic between LECs is not "information access" under § 251(g). *Id*. at 434.

Thus, Qwest's assertion that internet-related traffic is not "telecommunications traffic" subject to FCC Rule 51.703(b) is wholly without merit. Qwest has not and cannot demonstrate that internet-related traffic exchanged between Qwest and Level 3 falls into any of the exceptions to the definition of "telecommunications traffic" in FCC Rule 51.701(b)(1). Accordingly, internet-related traffic is "telecommunications traffic" for which FCC Rule 51.703(b) prohibits Qwest from charging for origination. For this reason, the Court should grant Level 3's motion for summary judgment, and deny the State Defendants' and Qwest's cross-motions for summary judgment.

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B. 47 C.F.R. 51.709(b) Does Not Require Level 3 to Pay Qwest's Costs of Carrying Its Originating Traffic to the POI.

Qwest argues that FCC Rule 51.709(b) requires that originating trunks on Qwest's side of the POI be allocated according to "relative use," and that internet-related traffic be excluded from such relative use calculations. Qwest misapplies FCC Rule 51.709(b) to apply to origination charges to a terminating carrier, rather than to termination charges to an originating carrier. Qwest also invents its own limitations for the scope of traffic covered by FCC Rule 51.709(b), adding the word "telecommunications" before "traffic" despite the plain language of the Rule, and then, as described above, incorrectly construing "telecommunications traffic" as excluding interstate services other than "exchange access, information access or exchange services for such access." 47 C.F.R. 51.701(b)(1).

FCC Rule 51.709(b) provides:

> The rate of a carrier 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 to send traffic that will terminate on the providing carrier's network.

In this case, the "carrier providing transmission facilities" is Qwest, and the "interconnecting carrier" is Level 3.

Qwest argues that FCC Rule 51.709(b) requires that internet-related traffic be excluded from relative use calculations because, in its view, internet-related traffic is not "telecommunications traffic" as defined in FCC Rule 51.701(b)(1). Qwest Brief at 25. As discussed in Section A.2, *supra*, Qwest's construction of FCC Rule 51.701(b)(1) and its

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application of statutory definitions is wrong.[4] For that reason alone, this ground for Qwest's Motion for Summary Judgment must be rejected.

In addition, Qwest's argument must be rejected because it stands FCC Rule 51.709(b) on its head, and attempts to use it to overturn the clear prohibition on origination charges in FCC Rule 51.703(b). Properly understood, FCC Rule 51.709(b) cannot be stretched to reach such a result.

By its terms, FCC Rule 51.709(b) is directed at limiting the "rate" that the providing carrier may charge. In the situation being described in FCC Rule 51.709(b), the rate being limited is the rate, as referenced more explicitly in FCC Rule 51.709(a), that the providing carrier (e.g Qwest) would charge to the interconnecting carrier (e.g. Level 3) for transport and termination. Such a rule allocating the cost of two-way trunks is needed because a two-way dedicated trunk can be used both to deliver originating traffic to the POI, for which the providing carrier receives no intercarrier compensation, and the same trunk can transport terminating traffic from the POI, for which the providing carrier may be entitled to compensation. As the FCC explained, "if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate [for transport and termination] that recovers the full cost of those trunks." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of*

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[4] Even if Qwest were correct that "telecommunications traffic" excludes internet-related traffic, it would still not prevail because 51.709(b) on its face directs calculation of relative use based on "traffic," not just "telecommunications traffic." The term "traffic," without a modifier, is plainly broader than "telecommunications traffic."

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1996, First Report and Order, 11 FCC Rcd 15499, 16028 (1996). FCC Rule 51.709(b) was therefore necessary because otherwise the providing carrier (e.g. Qwest) could circumvent FCC Rule 51.703(b)'s prohibition on origination charges by requiring an interconnecting carrier (e.g., Level 3) to pay a disproportionate cost of the two-way trunk that would in the end subsidize (or cover completely) the cost of originating the providing carrier's (e.g., Qwest) traffic over the same facilities. Again, the FCC explained, "the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier." *Id*.

Qwest's use of FCC Rule 51.709(b) as a sword to allow it to shift its costs of carrying originating traffic to the POI to the interconnecting carrier thus inverts the purpose of the rule, and contravenes FCC Rule 51.703(b). Instead, FCC Rules 51.709(b) and 51.703(b) should be read harmoniously, and when done so, they cannot support Qwest's Cross-Motion for Summary Judgment. Accordingly, Qwest's Cross-Motion for Summary Judgment should be denied.

C. The *ISP Remand Order* Did Not Alter Requirements for the Originating Carrier to Carry Internet-Related Traffic to the POI Without Origination Charges.

Although the FCC asserted jurisdiction over intercarrier compensation for the termination of ISP-bound traffic in the *ISP Remand Order*, it did not alter other regulatory obligations of the originating LEC, including specifically the obligation to carry traffic to a single point of interconnection. In Footnote 149 of the *ISP Remand Order*, the FCC made clear that its invocation of its jurisdiction to set rates with respect to what an originating carrier pays a terminating carrier to terminate an ISP-bound call should not be read to alter the other

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responsibilities of an originating carrier. Most specifically, the FCC expressly provided that it was not altering the responsibility of Qwest or any other originating carrier to carry its originating traffic to the point of interconnection between the originating carrier and the terminating carrier (e.g., Level 3). Thus, those rules regarding Qwest's interconnection obligations and the obligation to carry traffic to the POI without charging for origination remain intact.

Second, even if interconnection facilities used to handle the origination of ISP-bound traffic were to be considered "intercarrier compensation" subject to the *ISP Remand Order*, the FCC's additional statement, made in the context of explaining the relationship of intercarrier compensation for ISP-bound traffic to intercarrier compensation that the FCC regarded to be under § 251(b)(5), cannot be ignored. The FCC expressly stated, "we . . . are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic." *ISP Remand Order at 9194* (¶ 90).

The CPUC decision, however, has exactly that result. For ISP-bound traffic, the CPUC shifts costs associated with the interconnection facility to the carrier serving the ISP, even though that facility may be used only for origination of traffic from the other carrier's customers. For voice traffic or paging, however, the CPUC would follow FCC Rule 51.703(b) and require the originating carrier to bear the costs of transporting traffic originating on its network to the point of interconnection, even if all traffic flowed only one way (as it does with paging). The CPUC's Order cannot be sustained when doing so would take precisely the action that the FCC, in the *ISP Remand Order,* expressly stated it was unwilling to take.

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D. Level 3's Position is Consistent with FCC Rules, and, Therefore, There is No Basis for Qwest's Hobbs Act Argument.

The Hobbs Act, as correctly quoted by Qwest, grants exclusive jurisdiction to the United States Court of Appeals over any action "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" any "final" order of the FCC. 28 U.S.C. § 2342 (2001). Qwest argues that "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" on FCC rules that have been found impermissible under the Hobbs Act. Qwest Memorandum in Support of Cross Motion for Summary Judgment ("Qwest Memorandum in Support"), p. 26. Qwest argues that Level 3's appeal in this case is a violation of the Hobbs Act, and suggests that this Court has no jurisdiction over the dispute before it. Qwest's position is frivolous.

Level 3 has not asked this Court to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" any order of the FCC. As explained above, contrary to Qwest's arguments, the *ISP Remand Order* does not require that ISP-bound traffic be excluded from the relative use calculation at issue in this case. On the contrary, Level 3 is asking the Court to apply FCC rules and precedent – including the *ISP Remand Order* itself – and hold Qwest to its obligations to Level 3, as articulated in those FCC rules and decisions.

In making its Hobbs Act argument, Qwest would have the Court believe the FCC has conclusively decided that ISP-bound traffic is and should be treated as interstate access traffic for

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all regulatory purposes. Again, as discussed in Section II.B. of this brief, both the *ISP Remand Order* and *Worldcom* disprove Qwest's argument.[5]

In bringing this appeal of the Commission's interconnection order, Level 3 is properly exercising its rights under 47 U.S.C. § 252(e)(6) of the Act. Qwest's arguments to the contrary should be soundly rejected by this Court.

E. The CPUC's Reasoning in Excluding Internet-Related Traffic from Calculation of Relative Use Is Circular.

In their Cross-Motion's for Summary Judgment, Qwest and the CPUC argue that the CPUC correctly concluded that ISP traffic must be excluded from the relative use principle because of the opportunities that will otherwise exist for regulatory arbitrage. Examination of the CPUC's decision, however, shows that its reasoning is entirely circular, and it therefore cannot be sustained. It also erroneously applies regulatory arbitrage concerns arising from per minute priced, usage-sensitive payments from originating carriers to terminating carriers serving ISPs for transport and termination on the terminating carrier's side of the POI to non-traffic sensitive costs for origination on the originating carrier's side of the POI. For these reasons, the Commission's Order must be vacated as arbitrary and capricious.

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[5] The cases cited by Qwest in support of its Hobbs Act argument are inapposite. In FCC v. ITT, certain carriers petitioned the FCC to institute a rulemaking concerning actions the FCC may take as part of the Consultative Process in which the FCC and its European and Canadian counterparts participated. FCC v. ITT World Communications, Inc., 466 U.S. 463, 465-66 (1984). After the FCC denied the petition, the carriers then filed a complaint "in the District Court [that] raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied." FCC v. ITT, 466 U.S. at 468. For that reason, the Supreme Court found that the Hobbs Act was contravened by the carriers'

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As the centerpiece of its "reasoning" supporting exclusion of internet-related traffic from relative use calculations, the Commission stated, "When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the LEC." *Initial Order* at 36. This justification is plainly circular and entirely conclusory. The plain truth is that the ILEC end-user is acting both as a customer of the ILEC and as a customer of the ISP. There is no logical justification for shifting the costs of originating the call to the ISP via the carrier serving the ISP, particularly when the costs of originating a call to a pizza parlor are not shifted to the pizzeria via the carrier serving the pizzeria.

It is noteworthy that the FCC – which expressed a similar concern about regulatory arbitrage in revising the terminating compensation structure applicable to ISP-bound traffic – did not modify the obligations governing origination of traffic to a point of interconnection. Indeed, the basis for the FCC's concern with respect to any regulatory arbitrage is inapplicable to dedicated trunks used to carry originating traffic to the POI. It is clear from a review of the *ISP Remand Order* that any arbitrage concern on the part of the FCC was limited to the area of what payment a terminating carrier might *receive* from the originating carrier for transporting and terminating ISP-bound traffic from the POI to the called party, as opposed to having the originating carrier bear its costs of carrying traffic from the calling party to the POI. In defining the issues it was addressing, the FCC stated, "Reciprocal compensation is a [calling party network pays] regime in which the originating carrier pays an interconnecting carrier for

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complaint. Id. In other words, the party bringing suit was directly attacking a clear ruling of the FCC. That is not the case in this proceeding.

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'transport and termination,' *i.e.*, for transport from the networks' point of interconnection and for any tandem and end-office switching [on the terminating network]." *ISP Remand Order* at 9182 (¶ 68). This is not the carriage of traffic *to* the point of interconnection.

As discussed in Section II.C, *supra*, the FCC made it clear that those same policy concerns about intercarrier compensation should not serve to alter carriers' interconnection obligations under FCC Rules 51.703(b) and 51.709(b). First, as discussed above, the FCC explicitly stated, in Footnote 149 of the *ISP Remand Order*, that its ruling regarding reciprocal compensation for transport and termination of ISP-bound traffic does not alter parties' obligations to interconnect and to carry traffic to the POI under those rules. *ISP Remand Order* 9187 (¶ 78, n. 149). Second, the FCC's decision in *TSR Wireless* makes clear that the FCC would not apply its concerns about the arbitrage possibilities for transport and termination of ISP traffic to obligations to interconnect and to carry originating traffic to the POI, even in the case of one-way traffic. As discussed in Section II.A, *supra*, in *TSR Wireless*, the FCC explicitly recognized that the paging traffic at issue was one-way traffic, but nevertheless applied FCC Rule 51.703(b) to preclude origination charges and to require US West to bear the costs of carrying originating traffic to the POI. *TSR Wireless*, 11176-77 at ¶ 19.

It is notable that the other state public utility commission case cited by Qwest as support for its position on this issue, Thirty Second Supplemental Order, *In re Continued Costing and Pricing of Unbundled Network Elements, Transport and Termination* (Washington Utilities and Transportation Commission, Docket No. UT-003013 (Wash. U.T.C., June 21, 2002) relies heavily on the same policy arguments regarding arbitrage as the CPUC and Qwest set forth in

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this case. Given that the issues presented in the *ISP Remand Order* are complex, it is perhaps understandable that there may be some confusion over the scope and intent of the FCC's pronouncements. However, these policy arguments cannot serve to void Qwest's obligations under established rules and regulations.

It is also worth noting that the Arizona Corporation Commission ("Arizona Commission") has correctly analyzed this issue. The Arizona Commission held that ISP-bound traffic between Level 3 and Qwest was to be included in the relative use calculation for the purpose of determining responsibility for payment for direct trunk transport and entrance facilities between the Qwest and Level 3 networks. Highlighting the specific difference between interconnection and intercarrier compensation, the Arizona Commission stated:

> The issue of relative use of facilities on Qwest's side of the POI is distinct from the issue of whether Internet traffic is local and subject to reciprocal compensation. Qwest's reliance on FCC rules and orders concerning reciprocal compensation for local traffic is misplaced. Because this is a distinct issue from reciprocal compensation, we do not believe that employing the same compromise for switching costs and reciprocal compensation is appropriate. We, therefore, find that ISP traffic should be included in the calculation of relative use of interconnection facilities on Qwest's side of the POI.

Opinion and Order, *In re Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rules, Terms and Conditions for Interconnection*, Arizona Corporation Commission Utilities Division, Docket No. T-03654A-00-0882, Docket No. T-01051-B-00-0882, Decision No. 63550 at 19 (Ariz. Corp. Com., April 10, 2001).

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Accordingly, because the Commission's reasons for excluding internet-related traffic from calculation of relative use were entirely circular, and therefore arbitrary, the Court should grant Level 3's Motion for Summary Judgment, and deny State Defendant's and Qwest's cross-motions for summary judgment.

III. CONCLUSION

For all of the above reasons, this Court should reject the cross motions of Qwest and the Commission for Summary Judgment, grant Level 3's motion for summary judgment and vacate and remand the Commission's decision.

DATED this 11th day of October, 2002.

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I hereby certify that I served the foregoing PLAINTIFF' RESPONSE TO CROSS-MOTIONS FOR SUMMARY JUDGMENT upon all parties herein by depositing copies of the same in the United States mail, first class postage prepaid, or as otherwise indicated, on this 11th day of October, 2002, addressed to the following:

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