

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

IN THE MATTER OF THE PETITION OF
LEVEL 3 COMMUNICATIONS, LLC FOR
ARBITRATION PURSUANT TO SECTION
252(B) OF THE TELECOMMUNICATIONS
ACT OF 1996, WITH QWEST
CORPORATION REGARDING RATES,
TERMS, AND CONDITIONS FOR
INTERCONNECTION

Docket No. UT-023043

QWEST CORPORATION'S MOTION
TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY
DETERMINATION

**QWEST CORPORATION'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR
SUMMARY DETERMINATION**

I. INTRODUCTION

Pursuant to WAC 480-09-426, Qwest Corporation submits this Motion to Dismiss or, in the alternative, for Summary Determination. Qwest's Motion relates the parties' disputes regarding the appropriate language for Sections 7.3.1.1.3, 7.3.1.1.3.1, and 7.3.2.2.1 of their proposed interconnection agreement.¹

This case involves a petition for arbitration brought by Level 3 pursuant to Section 252(b)(1) of the Telecommunications Act of 1996 (the "Act") in which Level 3 currently seeks arbitration of a single issue: whether the Commission should include interstate telephone calls to Internet service providers ("ISPs")² in the telecommunications traffic that determines the proportionate financial responsibility of Qwest and Level 3 for the interconnection trunks that connect their telecommunications networks. In their negotiations, the parties were unable to resolve whether Internet traffic should be included in the

¹ As noted in Qwest's Response to Level 3's Petition for Arbitration, after Level 3 filed its petition, the Qwest and Level 3 negotiators identified another potential area of dispute relating to cost recovery for performing "trouble isolations" on network facilities. The parties have resolved this issue through negotiations.

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

"relative use" calculations that the parties agree should be used to determine each party's proportionate financial responsibility for local interconnection trunks.

Qwest brings this motion to dismiss or, in the alternative, for summary disposition because, as a matter of law, Level 3's request must be rejected.³ Both the FCC and this Commission have recently and conclusively rejected the position Level 3 advances in its Petition. Indeed, this Commission addressed this precise issue less than three months ago in its *Thirty-Second Supplemental Order* in Docket UT-003013.⁴ This ruling, which is consistent with rulings from the Colorado and Oregon commissions resolving the same issue between Qwest and Level 3, is dispositive.⁵ There are no factual issues that could permit any other result than rejection of Level 3's position. In light of this Commission's recent, conclusive determination, there is no reason to have a hearing on this matter, and the Commission should adopt Qwest's proposed contract language as a matter of law.

In addition to this Commission, the FCC has rejected Level 3's position.⁶ Under the Act, carriers compensate each other for transporting and terminating "telecommunications traffic" pursuant to the reciprocal compensation provision of Section 251(b)(5). FCC rules governing reciprocal

³ In other proceedings in other states, Qwest has opposed motions for summary disposition in arbitration proceedings relating to the treatment of Internet-bound traffic. These proceedings occurred before the FCC issued its conclusive findings in the *ISP Remand Order*, discussed below, and where new factual issues and evidence had arisen. Furthermore, Qwest was not always successful in these efforts. Although a hearing on the parties' position may be warranted where facts are in dispute or new factual issues have arisen that may require a state commission to revisit previous determinations, no such circumstances exist here.

⁴ *Thirty-Second Supplemental Order; Part B Order; Line Splitting; Line Sharing Over Fiber Loops; OSS; Loop Conditioning; Reciprocal Compensation; and Nonrecurring and Recurring Rates for UNEs, Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 113 (June 21, 2002) ("*Thirty-Second Supplemental Order*").

⁵ In its Response to Level 3's Petition for Arbitration, Qwest had stated that no state commission had accepted Level 3's position. Qwest clarifies that this statement related to decisions rendered since the FCC issued its *ISP Remand Order*. In orders written shortly before the release of the *ISP Remand Order*, the Arizona Commission had accepted Level 3's position on this issue. However, that commission's decision did not consider the effect of the *ISP Remand Order*. As set forth herein, and as this Commission has previously recognized, the FCC has found that ISP-bound traffic is interstate. Thus, the Arizona decision is not consistent with the current, governing law.

⁶ 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).

compensation provide that the costs of interconnection 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.⁷ As defined by the FCC, this "telecommunications traffic" expressly excludes "interstate exchange access."⁸ 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.⁹ To the extent Level 3's real complaint is with the binding FCC pronouncements that require the exclusion of interstate Internet traffic from the "relative use" calculations that determine carriers' financial responsibility for interconnection trunks, this Commission has already recognized that this pronouncement is binding upon it. Furthermore, the United States Supreme Court and the Ninth Circuit Court of Appeals have consistently held that the Hobbs Act prohibits parties from collaterally attacking FCC rules and orders.¹⁰ Here, the Hobbs Act precludes Level 3's challenge to the FCC's binding rules and order relating to Internet traffic and relative use.

For these reasons, and those set forth below, the Commission should grant Qwest's motion.

II. PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

Section 252(a)(1) of the Act establishes that an ILEC and a requesting carrier may negotiate an interconnection agreement upon the ILEC's receipt of "a request for interconnection, services, or network elements pursuant to section 251." Pursuant to section 252(b)(1), either the ILEC or the requesting carrier may petition a state commission to arbitrate any open issues "from the 135th to the 160th day (inclusive) after the date on which an [ILEC] receives a request for negotiation." Negotiations for an interconnection agreement in Washington began on February 27, 2002, and on August 5, 2002,

⁷ 47 C.F.R. § 51.709. 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%.

⁸ 47 C.F.R. § 51.701(b)(1).

⁹ *ISP Remand Order*.

¹⁰ *See* 28 U.S.C. §§ 2341-2344.

Level 3 filed its Petition for Arbitration. As discussed, the only issue currently in dispute relates to whether Qwest should be required to pay all or most of the costs of the interconnection facilities that Level 3 obtains from Qwest to serve Level 3's ISP customers.

III. DISCUSSION

A. Standard of Review

Under CR 12(b)(6), which the Commission may apply in considering a motion to dismiss under WAC 480-09-426(1), dismissal is appropriate if the complaint alleges no facts that would justify the relief requested. The complaint's allegations and any reasonable inferences must be accepted as true.¹¹

Rule WAC 480-09-426(2) provides that a party may move for and be granted summary disposition if the pleadings filed in the proceeding and any evidence submitted demonstrate that there is no genuine issue of material fact and the moving party is entitled to summary disposition in its favor. In considering such a motion, the Commission may look to the standards applicable to a motion for summary judgment under Civil Rule 56 of the Civil Rules for Superior courts.¹²

B. The Commission Should Grant Qwest's Motion And Exclude Internet Traffic From The Relative Use Calculations That Determine The Parties' Proportionate Financial Responsibility For Interconnection Facilities.

1. The Commission Has Already Determined That Internet Traffic Is Not Included In A Relative Use Calculation.

Level 3 and Qwest agree that the division of financial responsibility for recurring costs for interconnection transport facilities should be based upon each party's relative use of the facilities. The parties also agree that relative use will be determined by the amount of traffic that each party originates

¹¹ *In the Matter of the Joint Application of PacifiCorp and PacifiCorp, Washington, Inc. for an Order Approving (1) the Transfer of Distribution Property from PacifiCorp to an Affiliate, PacifiCorp, Washington, Inc., (2) the Transfer by PacifiCorp of Certain Utility Property to an Affiliate, the Service Company, and (3) the Proposed Accounting Treatment for Regulatory Assets and Liabilities, and an Order Granting an Exemption under RCW 80.08.047 for the Issuance or Assumption of Securities and Encumbrance of Assets by PacifiCorp, Washington, Inc. and/or PacifiCorp.*, Docket No. UE-001878, 2002 Wash. UTC LEXIS 5 (WUTC Jan. 25, 2002).

¹² *AT&T Communications of the Pacific Northwest, Inc., v. Qwest Corp.*, Docket No. UT-003120, 2001 Wash. UTC LEXIS 218 (WUTC Apr. 5, 2001).

over those facilities. Their only disagreement concerns whether Internet traffic should be included in the originating traffic that determines each party's relative use.

In considering this very issue in Docket No. UT-003013, the Commission ruled unequivocally that because Internet traffic is interstate, not local, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities:

[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.¹³

Accordingly, this Commission has recently addressed the identical issue upon which Level 3 seeks arbitration, and decided that issue adversely to Level 3.

In addition to addressing this issue in Docket No. UT-003013, the Commission has also addressed whether Internet-bound traffic falls within the scope of parties' reciprocal compensation obligations for transport and termination of telecommunications traffic in Docket Nos. UT-003022 and UT-003040. In those dockets, the Commission's *Twenty-Fifth Supplemental Order* recognized that the FCC determined that Internet-bound traffic is not "telecommunications" and that such traffic does not fall within the purview of Section 251(b)(5).¹⁴ Furthermore, the Commission expressly recognized that under FCC rules, state commissions do not have authority to determine intercarrier compensation for Internet-bound traffic.¹⁵ Thus, under recent Commission rulings on this issue, Level 3's request must be rejected. In accordance with this ruling, Qwest's Statement of Generally Available Terms and Conditions ("SGAT") in Washington excludes Internet-bound traffic from the relative use calculations for entrance facilities and direct trunk transport used for interconnection and the exchange of

¹³ *Thirty-Second Supplemental Order* at ¶ 113 (footnote omitted) (emphasis in original).

¹⁴ 25th Supplemental Order; Order Granting In Part And Denying In Part Petitions For Reconsideration Of Workshop One Final Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040, at ¶ 9 (WUTC Feb. 8, 2002).

¹⁵ *Id.*

telecommunications traffic between Qwest and CLECs. That language, for the convenience of the Commission, is attached hereto as Exhibit 1. The language Qwest proposes for the parties' interconnection agreement¹⁶ is identical in all material respects to the language in Qwest's Washington SGAT.¹⁷ In its *Thirty-Ninth Supplemental Order* in Docket Nos. UT-003022 and UT-003040, the Commission approved Qwest's SGAT and found that it complies with Qwest's obligations under Sections 252 and 271 of the Act.¹⁸

Finally, also in Docket Nos. UT-003022 and UT-003040, the Commission addressed an analogous issue of whether Internet-bound traffic should be considered "local" traffic for purposes of the current FCC local use restriction on the use of Enhanced Extended Loops ("EELs"). In the Commission's *Twenty-Fourth Supplemental Order*,¹⁹ the Commission addressed whether Qwest could apply local usage restrictions on the use of EELs under FCC orders governing the use of EELs.²⁰ The Commission also addressed whether Internet-bound traffic would be considered "local" traffic for

¹⁶ The parties' proposed contract language is set forth in Exhibit B to Level 3's Petition for Arbitration.

¹⁷ Qwest's SGAT and its proposed language for the Level 3 interconnection agreement use slightly different terms to refer to traffic bound for the Internet. Sections 7.3.1.1.3, 7.3.1.1.3.1 and 7.3.2.2.1 of Exhibit 1 (Qwest's SGAT) provide that the relative use calculation applies to "non-ISP-bound traffic" and "non-ISP-bound data." Qwest's proposed SGAT language for Sections 7.3.1.1.3.1 and 7.3.2.2.1 of its agreement with Level 3 provides that the relative use calculation applies to "non-Internet Related traffic" and "non-Internet Related data."

¹⁸ 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040 ¶ 391 (WUTC July 3, 2002) ("*39th Supplemental Order*") ("The Commission approves Qwest's SGAT and all Exhibits, as filed on June 25, 2002, and allows the SGAT to become effective on July 10, 2002").

¹⁹ 24th Supplemental Order; Commission Order Addressing Workshop Three Issues: Checklist Items Nos. 2, 5, and 6, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040, at ¶ 9 (WUTC Dec. 20, 2001) ("*24th Supplemental Order*").

²⁰ *E.g.*, Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587 (June 2, 2000) ("*Supplemental Order Clarification*").

purposes of the FCC's interim restrictions on EEL usage. On the first question of whether a restriction could even apply, the Commission originally held that Qwest could not impose any restrictions on the use of EELs unless the FCC issued final rules permitting such restrictions.²¹ The Commission noted, however, that if such restrictions were permitted, Internet-bound traffic would not be considered "local" telecommunications traffic and, instead, would be "interstate" traffic.²² The Commission further recognized that it was preempted from deviating from the FCC's determination on this treatment of Internet-bound traffic.²³ Subsequently, in its *Thirty-First Supplemental Order*, in light of FCC precedent, the Commission reconsidered and reversed its previous determination that Qwest could not impose local use restrictions on EEL usage.²⁴ As a result, the Commission has found that local use restrictions can be applied to EELs and, most important for this matter, that Internet-bound traffic is not "local" traffic.

Given this overwhelming weight of recent and dispositive Commission rulings, Level 3's position fails as a matter of law. Granting Qwest's motion is particularly appropriate because the Commission has addressed this identical issue recently in two separate dockets. Both dockets were exhaustive and open to any CLEC that chose to participate. Indeed, Docket Nos. UT-003022 and UT-003040 have been open for years, and the Commission carefully considered the treatment of Internet-bound traffic in a variety of different contexts, including as it related to compensation for transport of telecommunications traffic. At the culmination of this collaborative effort between Qwest and numerous

²¹ *24th Supplemental Order* ¶ 24.

²² *Id.* ¶ 27 ("The Commission believes, as Qwest proposes, that states have been preempted by the FCC's *ISP Remand Order* on this question, and that ISP-bound traffic must be treated as interstate for the purpose of determining local use of the facilities in question").

²³ *Id.*

²⁴ *31st Supplemental Order; Order Granting Qwest's Petition for Reconsideration of the 24th Supplemental Order and Granting and Denying Petitions for Reconsideration of the 28th Supplemental Order, In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040 ¶ 16 (WUTC Apr. 12, 2002) ("*31st Supplemental Order*").

Washington CLECs, the Commission expressly approved SGAT language that is virtually identical to the language Qwest proposes for its interconnection agreement with Level 3. The Commission should grant Qwest's motion and determine as a matter of law that Qwest's proposed language for Sections 7.3.1.1.3.1 and 7.3.2.2.1 is consistent with Commission and FCC rulings.

2. The FCC Has Determined That Internet Traffic Should Not Be Included In A Relative Use Calculation.

The concept of assigning financial responsibility for interconnection facilities based upon interconnecting carriers' relative use of those facilities is firmly embedded in the FCC's rules relating to reciprocal compensation for the transport and termination of "telecommunications traffic." In particular, 47 C.F.R. § 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.

The "traffic" referred to in this rule is "telecommunications traffic" which, as the FCC defines it, expressly excludes interstate traffic. The FCC defines "telecommunications traffic" 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.*"²⁵ 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 the originating traffic that determines carriers' relative use of interconnection facilities.

In its *ISP Remand Order*, the FCC ruled that Internet traffic is properly characterized as interstate access: "the LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access."²⁶ As such, this traffic is excluded from the "telecommunications traffic" that must be used under 47 C.F.R. § 51.709(b) to determine relative use.

²⁵ 47 C.F.R. § 51.701(b)(1).

²⁶ *ISP Remand Order* ¶¶ 52, 57, 65. The recent remand of the *ISP Remand Order* by the United States Court of Appeals for the District of Columbia does not affect the FCC's determination that traffic bound for ISPs is

In addition to being compelled by the *ISP Remand Order*, the Commission's prior rulings on this issue are supported by the policy reasons that led the FCC to phase out the payment of reciprocal compensation for this traffic. The FCC found in the *ISP Remand Order* that reciprocal compensation for Internet traffic causes uneconomic subsidies and improperly creates incentive for CLECs to specialize in serving ISPs to the exclusion of other customers.²⁷ Citing these and other policy considerations, the FCC adopted a compensation scheme under which reciprocal compensation for Internet traffic is phased out over three years.²⁸

The policy objectives that led the FCC to this result also support excluding Internet traffic from relative use calculations. By excluding Internet traffic from the relative use calculations in Sections 7.3.1.1.3 and 7.3.2.2 of the interconnection agreement, Qwest's language properly implements this Commission's prior rulings and the FCC's pronouncements on this issue. Indeed, as noted above, the Commission already has approved virtually identical language for Qwest's SGAT. Under Qwest's proposal, if Level 3 originates 95% of the local traffic across a transport facility provided by Qwest, it must pay 95% of the transport rate. If, however, Qwest provides the transport facility and originates 95% of the local traffic carried over the facility, it must issue a credit for 95% of the transport rate. Accordingly, Qwest does not propose that Level 3 bear the entire financial burden of interconnection facilities on Qwest's side of the point of interconnection ("POI") or be required to construct those facilities. Rather, where Level 3 and Qwest use two-way facilities and do not establish a mid-span meet POI, the cost of facilities used to exchange traffic would be shared based upon each carrier's relative use of those facilities, as required by the FCC's rules.

interstate in nature. Rather, the court's remand turns on its determination that section 251(g) of the Act cannot provide the basis for the FCC's conclusion that reciprocal compensation is not owed for ISP-bound traffic. *See WorldCom, Inc.*, 288 F3d at 434.

²⁷ *ISP Remand Order* ¶¶ 67-76.

²⁸ *Id.* ¶¶ 77-82. The FCC endorses bill and keep as the likely permanent compensation scheme for Internet traffic, stating 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." *Id.* ¶ 83. As defined by the FCC, "[b]ill and keep' refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network." *Id.* ¶ 2 n.6.

Under Level 3's proposal, however, Level 3 would require Qwest to carry non-local, Internet traffic from Level 3's POI across Qwest's Washington network for free. The applicable FCC rules do not give Level 3 that right.

3. The Hobbs Act Precludes Level 3 From Collaterally Attacking The FCC's Pronouncements On Treatment of Internet-Related Traffic.

The Commission has previously recognized that it is required by FCC rules to treat Internet-bound traffic as interstate traffic for purposes of reciprocal compensation. To the extent Level 3 is asking this Commission to deviate from the FCC's requirements, this Commission cannot accede to that request. Under the Hobbs Act, the Commission is bound by the FCC's rulings relating to relative use and Internet traffic. The Hobbs Act vests 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. . .

.²⁹

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]. . . ."³⁰ As stated by the Ninth Circuit, "[t]ogether, these two provisions vest the courts of appeal with exclusive jurisdiction to review the validity of FCC rulings."³¹ Thus, the United States Supreme Court has made clear that collateral attacks on FCC orders are prohibited by the Hobbs Act.³²

²⁹ 28 U.S.C. § 2342.

³⁰ 28 U.S.C. § 402(a).

³¹ *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996). See also *U S WEST Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000); *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1123 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).

³² *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984).

Level 3's request that the Commission deviate from the FCC's rulings excluding Internet traffic from the reciprocal compensation provisions of Section 251(b)(5) and the relative use calculation is precisely the type of collateral attack on FCC rules that the Supreme Court and Ninth Circuit have ruled are impermissible under the Hobbs Act. In *U S West Communications, Inc. v. Hamilton*, for example, the Ninth Circuit addressed U S WEST's claim that its obligation under interconnection agreements to provide CLECs with access to poles, ducts, conduits, and rights-of-way should be "reciprocal" – that is, CLECs should provide U S WEST with access to their facilities. Although the Court "doubt[ed] the soundness of the FCC's interpretation of [the Act]" that did not provide for reciprocal access, it nevertheless ruled that under the Hobbs Act it was "not at liberty to review that interpretation."³³

Similarly, to allow Level 3's claim to proceed, this Commission would necessarily have to find (1) that relative use calculations should include interstate access traffic or (2) that Internet traffic is not interstate. But, the FCC has already decided these issues and, as stated by the Ninth Circuit, this Commission is "not at liberty to review that interpretation."³⁴ Thus, the Hobbs Act requires the Commission to reject Level 3's claim.

4. Other State Commissions Have Agreed With Qwest.

State commissions in Colorado and Oregon have also addressed this issue in interconnection arbitrations between Level 3 and Qwest. Both of these commissions rejected Level 3's position and adopted Qwest's language relating to relative use.

In ruling for Qwest, the Colorado Commission found that the reasons for requiring bill-and-keep for Internet traffic -- avoiding subsidies, market distortions, and improper incentives -- also require excluding Internet traffic from relative use.³⁵ Similarly, in adopting Qwest's language, the arbitrator in

³³ *Hamilton*, 224 F.3d at 1055.

³⁴ *Id.*

³⁵ See *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Dkt.

the Qwest/Level 3 arbitration in Oregon, and the Oregon Commission in turn, cited the policy considerations underlying the *ISP Remand Order*:

The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded when calculating relative use by the originating carrier.³⁶

These rulings, involving precisely the same issue and the same parties as presented in this case, confirm that the FCC's rules, the *ISP Remand Order*, and the relevant policy considerations require excluding Internet traffic from relative use determinations. They also confirm the correctness of this Commission's rulings on the same issue.

B. The Ruling Upon Which Level 3 Relies Does Not Relate To Treatment Of Internet-Bound Traffic Or Relative Use Of Interconnection Facilities.

In an attempt to overcome the clear application of the FCC's relative use regulations and the weight of authority from this Commission and those in other states, Level 3 argues that the "rules of the road" require Qwest to pay for the facilities that carry Internet traffic.³⁷ However, the decision upon which Level 3 relies, *TSR Wireless, L.L.C. v. U S WEST Communications, Inc.*,³⁸ is irrelevant to the issue presented here.

NO. 00B-601T, Decision No. C01-312, at 36 (Colo. PUC March 30, 2001) (A copy of this decision was attached to Qwest Corporation's Response to Level 3 Communications, LLC's Petition for Arbitration).

³⁶ See *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Commission Decision, ARB 332, Order No. 01-809, Arbitrator's Decision at 9 (Oregon PUC Sept. 13, 2001) ("Level 3 Oregon Decision") (A copy of this decision was attached to Qwest Corporation's Response to Level 3 Communications, LLC's Petition for Arbitration).

³⁷ See Level 3 Petition at 6.

³⁸ 15 FCC Rcd 11166 (2000).

TSR Wireless involved billing disputes among ILECs and several paging carriers, which Level 3 is not, arising from the ILECs' attempt to recover the costs of the trunks used to deliver one-way paging traffic from the ILECs' networks to the paging carriers' networks. The paging carriers sought an order prohibiting the ILECs from charging for these trunks.³⁹ Their claim required an interpretation of FCC Rule 51.703(b) and a determination of whether the reciprocal compensation obligations established by that rule apply to paging carriers.

In addressing the narrow issue of whether Rule 51.703(b) applies to paging carriers, the FCC did not address in any way Rule 51.709 and the concept of relative use. That issue was simply not germane to the paging carriers' complaint. Moreover, even if *TSR Wireless* had any relevance to this proceeding, it would be superseded by the *ISP Remand Order* which, as discussed, bears directly on relative use. Indeed, when Level 3 cited *TSR Wireless* in the Oregon arbitration, the Oregon Commission did not deem it relevant.⁴⁰

IV. Conclusion

For the foregoing reasons, the Commission should grant Qwest's motion to dismiss or, in the alternative, for summary determination. In accordance with controlling Commission and FCC precedent, the Commission should adopt Qwest's proposed language relating to the relative use calculations that determine the parties' financial responsibility for interconnection trunks.

DATED: September 17, 2002

Respectfully submitted,

³⁹ *Id.* at 11167.

⁴⁰ Level 3 Oregon Decision at 4. Far more relevant than *TSR Wireless* is the fact that paging carriers acknowledge that the FCC's reciprocal compensation rules do not exempt carriers from paying for interconnection facilities that carry non-local traffic. *See, e.g., Petition of AirTouch Paging, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc.*, Docket No. 99A-001T, Decision No. C99-419 at 15 (Colo. P.U.C. Apr. 23, 1999) ("Notably, AirTouch concedes that it is obligated to pay for the portion of USWC facilities used to deliver exempt traffic (i.e., non-local and transit) to it.").

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CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of the foregoing **QWEST CORPORATION'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY DETERMINATION** were served on the following:

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