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February 23, 2007

Frances Nichols Anglin
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Re: ARB 665

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Comments on Arbitrator's Decision, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla

Carla M. Butler

CMB:
Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 665

In the Matter of LEVEL 3 COMMUNICATIONS, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communication Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions with QWEST CORPORATION	**QWEST CORPORATION'S COMMENTS ON ARBITRATOR'S DECISION**

Pursuant to OAR 860-016-0030, Qwest Corporation ("Qwest") hereby comments on the Arbitrator's Decision of February 13, 2007. For the reasons that follow, the Commission should (1) adopt the Arbitrator's Decision and (2) resolve the Signaling issue (Issue 20) and the VoIP issues (Issues 4 and 16) by adopting Qwest's proposed language.

INTRODUCTION

While there were many issues in this proceeding, perhaps the most important issue was the treatment and intercarrier compensation for dial-up ISP traffic. As an economic and policy issue, the FCC and the Oregon Commission have long recognized that the cost of providing dial-up Internet access should be borne by dial-up callers, not by other customers. As the FCC stated in the *ISP Remand Order*: "There is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access."[1] The Arbitrator's Decision, in several different places, correctly recognizes this fundamental principle.

In this case, the traffic flow between Qwest and Level 3 is largely one-way—from dial-up customers on Qwest's network to ISPs served by Level 3. Virtually all of the ISP traffic at issue in this case is VNXX traffic. Level 3 assigns Oregon telephone numbers to ISPs located in other states to make the calls look like local calls to the dial-up callers. Qwest incurs the cost of originating and transporting these long distance calls to Level 3, which then delivers them to its ISP customers.

The undisputed testimony at the hearing in this matter established that there is only one way to ensure that dial-up customers will bear the full cost of providing dial-up service. Since Level 3 has the relationship with the ISPs, whose customers are placing these dial-up calls, Level 3 should compensate Qwest for Qwest's origination and transport costs, and then pass on

[1] 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,* 16 FCC Rcd 9151, ¶ 87 (2001) ("*ISP Remand Order*").

those costs and Level 3's own costs to the ISPs that Level 3 serves. The ISPs will then pass on all of the costs incurred to provide dial-up service to their dial-up customers as sound economics and public policy dictate.

The Arbitrator's Decision goes part way to ensuring that dial-up ISP customers bear the costs of providing dial-up service. The Arbitrator's Decision creates a limited exception to the Commission's ban on VNXX for ISP traffic. Arbitrator's Decision, pp. 27, 31. It requires Level 3 to pay tariffed rates for the transport costs that Qwest incurs, but does not require Level 3 to compensate Qwest for any of the origination costs that Qwest incurs. By setting the intercarrier compensation rate for terminating ISP traffic at zero, the Arbitrator's Decision in effect requires Level 3 to recover its termination costs from its ISP customers. Thus, two of the three costs incurred to provide dial-up service (transport and termination) are properly attributed to the ISPs that Level 3 serves and their customers. However, Qwest is left uncompensated for its origination costs.

In contrast, under Level 3's proposed language, virtually all of the costs incurred to provide dial-up service would be shifted to Qwest. Level 3 would have Qwest bear the origination cost and some transport without compensation, and then pay Level 3 to terminate the traffic. Under this arrangement, only a small portion of the costs of serving dial-up customers would be paid by the ISPs or by their dial-up customers. It is in this light that the Arbitrator's Decision should be considered.

COMMENTS

I. IN PROVIDING WHOLESALE DIAL SERVICE, QWEST COMMUNICATIONS CORPORATION ("QCC") BEARS ALL OF THE COSTS OF PROVIDING DIAL-UP SERVICE BECAUSE IT PROPERLY OFFERS SERVICE AS AN ENHANCED SERVICE PROVIDER PURSUANT TO THE FCC ESP EXEMPTION

As the Arbitrator's Decision notes, Qwest Communications Corporation ("QCC"), a Qwest affiliate, offers a product known as "Wholesale Dial." Arbitrator's Decision, pp. 22-24.

In order to be able to offer Wholesale Dial, QCC purchases local exchange service in the exchanges from which it seeks to receive calls, and purchases transport at retail private line rates to transport the calls to its Network Access Servers. By purchasing local exchange service in the originating exchanges and paying for transport from those exchanges, QCC bears the cost of originating and transporting calls to its ISP customers. In addition, because QCC offers Wholesale Dial as an enhanced service provider ("ESP"), and not as a telecommunications carrier, QCC does not charge terminating compensation. Thus, QCC bears the full cost of providing dial-up services to its ISP customers.

The Arbitrator's Decision suggested, but did not find, that QCC's Wholesale Dial service may not qualify for the ESP Exemption. Arbitrator's Decision, pp. 23-24. The Arbitrator questioned whether the purchase of "ISDN PRI[2] trunks" "provides QCC with a local presence sufficient to qualify for the FCC's ESP Exemption." *Id.*, p. 23. The Arbitrator's characterization of the issue fails to account for the undisputed facts that demonstrate that Wholesale Dial as QCC provisions it is consistent with the ESP Exemption. Not even Level 3 claims that Wholesale Dial fails to conform to the ESP Exemption.[3]

The clearest statement of the Exemption is in a 1988 FCC decision commonly known as the *ESP Exemption Order*:[4]

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[2] The terms "PRI" and "PRS" are both used in the record. They are synonymous and refer to the same local exchange service offered by Qwest.

[3] In its Opening Brief, Level 3 argued that PRIs and DEOTs are functionally equivalent (Level 3 Opening Brief, pp. 12-13, 31-32), a position that fails to account for the fact that a PRI is a local exchange service sold out of the Qwest Exchange and Network Services tariff while a DEOT is simply another name for a LIS trunk. In its Reply Brief, Level 3 argued that banning VNXX and allowing Wholesale Dial would be discriminatory. (Level 3 Reply Brief, pp. 22-24.) But in making these arguments, Level 3 never suggested—let alone provided any legal argument—that QCC's use of PRIs and private line transport fails to meet the requirements of the ESP Exemption.

[4] Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988) ("*ESP Exemption Order*"). *See also ISP Remand Order*, ¶ 11 ("ESPs . . .are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the . . . PSTN."). That is precisely what QCC does when it buys PRS in a specific local calling area.

> Under our present rules, *enhanced service providers are treated as end users for purposes of applying access charges*. . . . Therefore, enhanced service providers *generally pay local business rates* and interstate subscriber line charges for their switched access connections to local exchange company central offices. *ESP Exemption Order,* ¶ 2, fn. 8. (Emphasis added.)
>
> Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, *enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates* and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users." *Id.*, ¶ 20, fn. 53. (Emphasis added.)

Thus, an ESP is treated just like any other business end user. Instead of paying originating access charges for interexchange enhanced services, ESPs are allowed to purchase local exchange services (1FB, PRS, etc.) from the LEC's local exchange tariff.

The Arbitrator's concern about Wholesale Dial appears to be based on the erroneous conclusion that QCC buys only a single tariffed transport service (i.e., "ISDN PRI trunks") to provision the service. In fact, QCC purchases two separate tariffed products, the combination of which clearly comply with the ESP Exemption. Mr. Brotherson's testimony on this issue is undisputed. (Qwest/37, Brotherson/6-9; Brotherson 8-30-06 Tr. 18-19, 26-34, 38.) He testified that QCC purchases two services to provision Wholesale Dial. The first is Primary Rate Service (also known as PRI service), a local exchange service that QCC purchases out of Qwest's local exchange tariff. (Qwest/37, Brotherson/7; Brotherson 8-30-06 Tr. 18-19.)[5] The second service is private line transport from each local calling area ("LCA") in which QCC buys PRS to the location of QCC's Network Access Server, which performs the IP-TDM/TDM-IP functionality for QCC. In provisioning its service in this manner, QCC pays business local exchange rates in

[5] Mr. Brotherson stated: "QCC pays for the local exchange service and the ability to receive calls in the local calling area. QCC does not ask for free transport. They pay tariff private line for the transport of that. QCC does not charge a local termination charge to the originating company for that traffic." (Brotherson 8-30-06 Tr. 18-19.) Mr. Brotherson further noted that Primary Rate Service ("PRS") is purchased by QCC from "Oregon PUC Oregon No. 33, Exchange and Network Services, Section 14. And then the particular paragraph I was referring to is 14.3.1, Primary Rate Service," which Mr. Brotherson characterized as a "local exchange services offered by the local exchange company to end users." (Brotherson 8-30-06 Tr. 34.) Mr. Brotherson reiterated that "what the telephone company offers is *PRS, and* in this example, *private line*, which QCC then takes and markets to combine ISPs on one circuit as a product called wholesale dial." (*Id.*, p. 38 (emphasis added).)

the local calling area where calls are originated, and it pays full retail rates for its transport to deliver the traffic to the LCA where its Network Access Server is located. This service configuration is consistent with Commission-approved end-user tariffs and is a classic application of the ESP Exemption.

QCC pays for the use of Qwest's local exchange network and local switch that originate calls directed to QCC. Level 3 claims that it has no obligation to cover such costs. QCC pays for transport at retail private line rates to transport the traffic to the location of the Network Access Server, thus accepting full economic responsibility for transporting the traffic. Level 3, on the other hand, argues that it has no obligation to cover any transport costs—even at TELRIC rates—on Qwest's side of the POI. Finally, QCC bears its own termination costs.

QCC's service configuration is completely consistent with the Arbitrator's rulings on cost causation—QCC pays for origination costs, transport costs, and bears its own termination costs. Thus, there is not, and never has been, any basis for Level 3's claim that QCC is receiving preferential treatment. Level 3 could claim the status of an ESP and purchase local exchange services and transport just like QCC does. Level 3 chooses not to because it seeks to shift costs to Qwest that should properly be borne by Level 3's ISP customers and their dial-up customers.

There is nothing questionable about QCC's ESP status, nor is there anything in the record that the service configuration used to provision QCC's Wholesale Dial fails to comply with the ESP Exemption. The undisputed evidence in the record is all to the contrary. And, while Level 3 erroneously claimed that Wholesale Dial discriminates in favor of QCC, even it did not assert that QCC's Wholesale Dial product fails to meet the ESP Exemption. Instead of challenging the ESP status of the Wholesale Dial configuration, Level 3 merely sought a far more advantageous service arrangement for its ISP service.

II. THE ARBITRATOR'S DECISION NOT TO DECIDE ISSUE 20 (SECTION 7.3.8) IS BASED ON THE ERRONEOUS CONCLUSION THAT IT RELATES ONLY TO VoIP ISSUES

The Arbitrator's Decision does not resolve Issue 20 on the ground that it is a VoIP issue. Arbitrator's Decision, p. 47. However, Section 7.3.8 (the only section at issue), as proposed by Qwest, is *not* a "VoIP" issue. The only thing that made it *appear* to be a VoIP issue is the additional language that Level 3 proposed to add to Section 7.3.8. The following is the language proposed by Qwest, with Level 3's additions in bold underlined text:

> 7.3.8 Signaling Parameters: Qwest and CLEC are required to provide each other the proper signaling information (e.g., originating Calling Party Number and destination called party number, etc.) per 47 CFR 64.1601 to enable each Party to issue bills in a complete and timely fashion. All CCS signaling parameters will be provided including Calling Party Number ("CPN"), Originating Line Information Parameter (OLIP) on calls to 8XX telephone numbers, calling party category, Charge Number, etc. All privacy indicators will be honored. If either Party fails to provide CPN (valid originating information), and cannot substantiate technical restrictions (**e.g.** ***i.e***, MF signaling**, IP origination, etc.**) such traffic will be billed as **interstate** Switched Access. **Excluding VoIP traffic which is lawfully originated without CPN,** Traffic sent to the other Party without CPN (valid originating information) will be handled in the following manner. The transit provider will be responsible for only its portion of this traffic, which will not exceed more than five percent (5%) of the total Exchange Service (EAS/Local) and IntraLATA LEC Toll traffic delivered to the other Party. The Switch owner will provide to the other Party, upon request, information to demonstrate that Party's portion of no CPN traffic does not exceed five percent (5%) of the total traffic delivered. The Parties will coordinate and exchange data as necessary to determine the cause of the CPN failure and to assist its correction. All Exchange Service (EAS/Local) and IntraLATA LEC Toll calls exchanged without CPN information will be billed as either Exchange Service (EAS/Local) Traffic or IntraLATA LEC Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information for the preceding quarter, utilizing a PLU factor determined in accordance with Section 7.2.2.9.3.2 of this Agreement.

The apparent reason the Arbitrator concluded this is a VoIP issue is that Level 3's additions refer to "IP origination" and "VoIP traffic," thus making it appear that this is an issue related to VoIP. That impression was confirmed by the briefs, which naturally focused on the disputed language, thus creating the erroneous appearance that the entire section was related to VoIP/IP issues. In fact, when the Level 3 additions are taken out and the original language is examined, it is clear

that Section 7.3.8 defines the requirements for signaling for all traffic subject to the ICA (e.g., EAS/Local traffic, IntraLATA LEC toll traffic)—it does not even mention IP or VoIP traffic.

As noted in Qwest's briefs, Mr. Linse provided the only testimony concerning the proposed changes, and his unrebutted testimony demonstrated that there is no basis for adopting any of them. "IP-Origination" is not a technical limitation that prevents the population of valid origination information on IP originated calls. Specifically, the Charge Number signaling parameter is valid origination information and can be populated by Level 3 in all instances on IP-originated calls. (Qwest/32, Linse 36-37.) It is inappropriate to presume that all traffic without CPN is interstate traffic because some of it will be intrastate. Treating all traffic without CPN as interstate switched access traffic gives Level 3 an incentive to fail to populate CPN on intrastate calls in order to obtain lower interstate switched access rates. Finally, there is no technical limitation that prevents Level 3 from populating CPN for VoIP traffic. (Qwest/32, Linse/35.)

In short, Section 7.3.8 is necessary. The VoIP issues only arose because Level 3 injected them into a section relating to the broader issue of signaling parameters for other traffic exchanged under the ICA. Thus, for the reasons set forth above and in Qwest's briefs, Issue 20 should be resolved by the adoption of Qwest's proposed language for Section 7.3.8.

III. THE COMMISSION SHOULD DECIDE DISPUTED VoIP ISSUES

The Arbitrator's Decision declines to decide VoIP issues in light of the "FCC's clear intentions to establish a comprehensive regulatory framework for IP-enabled services." Arbitrator's Decision, p. 12. The Arbitrator thus concluded that it would not be "productive to attempt to resolve the VoIP-related issues" in this docket. *Id.*

While Qwest appreciates the Arbitrator's reluctance to address these issues (particularly given the current level of uncertainty as to how the FCC will ultimately resolve VoIP issues), it is nonetheless a fact that Level 3 seeks to deliver VoIP traffic to Qwest for termination. Thus,

the VoIP issues are not a theoretical future issue, but are real issues that need resolution. Unfortunately, the FCC's assurance of a quick resolution of VoIP issues may not occur. The FCC has given similar assurances with regard to overall intercarrier compensation issues, yet we are now approaching the sixth anniversary of the Notice of Proposed Rulemaking (NPRM) kicking off that docket[6] (and resolution appears to be anything but imminent). Despite the FCC's assertion of ultimate jurisdiction over VoIP issues, the delegation of authority to the Commission to decide disputed issues covers VoIP issues, just as it covers ISP traffic issues. Finally, even in the face of uncertainty on these issues, both the Arizona and Iowa commissions recently decided the disputed VoIP issues by adopting Qwest's language. Qwest requests that the Commission do the same here.

IV. THE COMMISSION'S DECISION TO IMPOSE A ZERO TERMINATING COMPENSATION RATE FOR VNXX ISP TRAFFIC SHOULD NOT BE SUBJECT TO A TRUE-UP PROVISION

The Arbitrator's Decision would make the zero terminating compensation rate for VNXX ISP traffic subject to a "true-up" based on a hypothetical future FCC decision. Arbitrator's Decision, p. 30. Qwest requests the zero rate not be subject to true-up for the following reasons.

First, the FCC has made it clear that even for the local ISP traffic subject to the *ISP Remand Order*, a state commission may set the terminating rates lower than the *capped* rates established in the *ISP Remand Order*:

> Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be *capped* at a rate of $.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be *capped* at $.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be *capped* at $.0007/mou. *ISP Remand Order*, ¶ 78. (Emphasis added.)

[6] Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 (April 27, 2001).

Thus, even for local ISP traffic, the FCC allows state commissions to set rates below the capped levels. In an appeal of a decision of the Colorado Commission to set a zero rate for ISP traffic, AT&T argued that the Colorado Commission lacked that authority. The court firmly rejected that argument, ruling that the "CPUC acted within its authority in adopting a bill and keep compensation structure for ISP-bound traffic." *AT&T Communications v. Qwest Corporation,* No. 04-cv-00532-EWN-OES (D. Colo. June 10, 2005) (slip opinion attached as Exhibit A), page 16.) The court noted that other courts had likewise ruled that the *ISP Remand Order* means that "a state commission could set a rate it chose lower than the cap, but it could not choose a rate higher than the cap." *Id.*, p. 16, *citing Southern New England Telephone v. MCI WorldCom,* 353 F.Supp.2d 287, 295 (D. Conn. 2005) and *Global NAPs v. Verizon New England*, 327 F.Supp.2d 290, 300 (D. Vt. 2004). Thus, a state commission may, even for traffic subject to the *ISP Remand Order*, set a rate lower than the caps, and that rate need not be subject to true-up. Here we are dealing with interexchange traffic that does not even fall under the *ISP Remand Order*.

In addition, the Arbitrator's Decision sets forth a well-reasoned basis for setting a zero rate for VNXX ISP traffic. Arbitrator's Decision, pp. 29-30. One could argue, however, that the Arbitrator's Decision should be changed to require Level 3 to compensate Qwest for the cost of originating VNXX (interexchange) ISP traffic, a cost that is normally recovered through originating access charges. In any event, nothing in the *ISP Remand Order* or any other FCC ruling suggests that the Commission's decisions needs to be subject to true-up.

Finally, a true-up also imposes a heavy administrative burden on both parties, particularly given the fact that the FCC often takes several years to render its decisions. Given that the decision is grounded in proper cost causation principles and is within the power delegated to the Commission, the decision to set a zero rate should be final and not subject to true-up.

CONCLUSION

For the reasons set forth herein, Qwest respectfully requests that the Commission amend the Arbitrator's Decision to address the issues set forth above and that, on all other issues, the Commission affirm the Arbitrator's Decision.

DATED: February 23, 2007

Respectfully submitted,

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CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 04-cv-00532-EWN-OES

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., a Colorado corporation, and TCG-COLORADO, a New York partnership,

Plaintiffs,

v.

QWEST CORPORATION, a Colorado corporation,
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,
GREGORY E. SOPKIN, in his official capacity as Chairman of the Public Utilities Commission of the State of Colorado, and
PAULETTE E. PAGE AND EDWARD JAMES DYER in their official capacities as Commissioners of the Public Utilities Commission of the State of Colorado,

Defendants.

ORDER AND MEMORANDUM OF DECISION

This is a judicial review of an agency decision. Plaintiffs AT&T Communications of the Mountain States, Inc. and TCG-Colorado allege that Defendants Public Utilities Commission of the State of Colorado, Gregory E. Sopkin, Paulette E. Page, and Edward James Dyer erred in their determination of the appropriate language AT&T and Defendant Qwest Corporation ("Qwest") must use in their interconnection agreement.[1] This matter is before the court on the

[1] I refer to Plaintiffs AT&T Communications of the Mountain States, Inc. and TCG-Colorado collectively hereinafter as "AT&T" in the singular. I refer to Defendants Public Utilities Commission of the State of Colorado, Gregory E. Sopkin, Paulette E. Page, and Edward James Dyer collectively hereinafter as "CPUC" in the singular.

parties briefing, specifically "Brief of Plaintiffs AT&T Communications of the Mountain States, Inc. and TCG-Colorado," filed August 24, 2004, and the responses thereto. Jurisdiction is based upon 47 U.S.C. § 252(e)(6) (2004), and 28 U.S.C. § 1331 (2004).

FACTS

The Telecommunications Act of 1996 (the "Act"), 47 U.S.C. §§ 251–276, makes former monopoly telephone companies "subject to a host of duties intended to facilitate market entry. Foremost among these duties is the [carrier's] obligation . . . to share its network with competitors." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The Act requires telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a)(1) (2004). Specifically, the Act sets forth a system by which a competitive local exchange carrier ("CLEC"), a competitor of the former monopoly phone company, can negotiate and enter into a binding agreement for interconnection with an incumbent local exchange carrier ("ILEC"), the former monopoly phone company. 47 U.S.C. § 252(a).

AT&T is a CLEC, and Qwest is an ILEC under the terms of the Act. (Def. Qwest Corp.'s Resp. Br. at 1 [filed Oct. 4, 2004] [hereinafter "Qwest's Resp."].) Qwest and AT&T commenced negotiations to enter into an interconnection agreement, but reached an impasse on a number of issues. (Br. of Pls. AT&T Communications of the Mountain States, Inc. and TCG-Colorado at 8 [filed Aug. 24, 2004] [hereinafter "AT&T's Br."]; Answer Br. by State Defs. at 3 [filed Oct. 4, 2004] [hereinafter "CPUC's Resp."].) When there are unresolved issues over the terms of an interconnection agreement, any party to the interconnection agreement may petition the relevant state commission to arbitrate these unresolved terms. 47 U.S.C. § 252(b); *AT&T*, 525 U.S. at

371. Here, the relevant state commission is CPUC. Once the state commission reaches conclusions on the disputed issues, the parties must incorporate the state commission's conclusions into their final interconnection agreement. 47 U.S.C. § 252(b)(4)(C).

On July 7, 2003, Qwest filed a petition with CPUC to arbitrate the unresolved issues. (R. of Proceedings, Vol. 1 at 1–30 [Qwest Corp.'s Pet. for Arbitration] [filed July 15, 2004] [hereinafter "Admin. R."].) After a series of administrative reviews, CPUC issued its initial decision on October 14, 2003. (Compl. for Declaratory and Injunctive Relief, Ex. A [Initial Comm. Decision] [filed Mar. 19, 2004] [hereinafter "Compl."].)[2] CPUC then issued its decision on reconsideration on November 19, 2003. (*Id.*, Ex. B [Decision on Recons.].) In both decisions, CPUC sided with Qwest on the issues pertinent to this appeal.

On March 19, 2004, AT&T filed a complaint in this court, asserting that CPUC erred as to four of its conclusions in the proceedings below: (1) issue three, (2) issue nineteen, (3) issues fifteen and sixteen, and (4) issue seventeen. (Compl.) AT&T filed its opening brief in support of its allegations of error on August 24, 2004. (AT&T's Br.) Qwest and CPUC filed their response briefs on October 4, 2004, and AT&T filed its reply brief on November 3, 2004. (CPUC's Resp.; Qwest's Resp.; Reply Br. of Pls. AT&T Communications of the Mountain States, Inc. and TCG-Colorado [filed Nov. 3, 2004].) This matter is now fully briefed.

[2]CPUC's initial decision is also available on Westlaw. *See In re Qwest Corp.*, Docket No. 03B-287T, 2003 WL 22399647 (Colorado Public Utils. Comm. Oct. 14, 2003).

ANALYSIS

1. Jurisdiction and Standard of Review

47 U.S.C. § 252(e)(6) provides that when a "[s]tate commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate [f]ederal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). I must consider *de novo* whether the interconnection agreement complies with the Act and the implementing regulations. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 498 (10th Cir. 2000); *US West Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997). In such an analysis, I must defer to the Federal Communication Commission's ("FCC") regulations. *See, e.g., US West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1117 (D. Colo. 1999).[3]

I review all other issues, such as the state commission's findings of fact, under an arbitrary and capricious standard. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002); *Southwestern Bell*, 235 F.3d at 498; *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481–82 (5th Cir. 2000); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117, 1124 n.15 (9th Cir. 1999); *US West*, 986 F. Supp. at 19. Under the arbitrary and capricious standard,

> Generally, an agency decision will be considered arbitrary and capricious if the agency ha[s] relied on factors which Congress had

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[3]As another district court noted in an unpublished decision, "[i]t is only a small exaggeration to say that — at least in this Circuit — if the FCC sneezes, the tissue has the force of law." *Level 3 Communications LLC v. Public Utility Commission of Oregon*, CV 01–1818–PA, slip op. at 3–4 (D. Or. Nov. 25, 2002).

> not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997) (internal quotation marks omitted) (citation omitted); *US West*, 986 F. Supp. at 18 (same).

2. Legal Analysis

AT&T sets forth four arguments why CPUC erred. First, AT&T contends that CPUC erred in determining the reciprocal compensation rate regarding AT&T's switches. (AT&T's Br. at 9–14.) Second, AT&T asserts that CPUC erred in requiring a bill and keep rate for ISP-bound traffic under the *ISP Remand Order*. (*Id.* at 15–19.) Third, AT&T argues that CPUC erred in determining that Qwest could use AT&T's private line facilities without compensating AT&T. (*Id.* at 19–24.) Fourth, AT&T maintains that CPUC erred in excluding ISP-bound traffic from proportional use compensation under 47 C.F.R. § 51.709(b). (*Id.* at 24–32.) I address each argument in turn.

a. Reciprocal Compensation Rates Regarding AT&T's Switches

First, AT&T contends that CPUC erred in determining the reciprocal compensation rate regarding AT&T's switches. (*Id.* at 9–14.) This was issue three in the proceedings below. In order to address AT&T's argument, I first provide the relevant legal and technological background on this issue. Then, I review CPUC's decision. Finally, I address whether CPUC erred in reaching its determination.

As background, when a customer of one carrier places a local telephone call to a customer of another carrier, the telephone call must go through both the network of the carrier for the

originating caller and the network of the carrier for the terminating caller. *See MCI Telecomms. Corp. v. Ohio Bell Tel. Co.*, 376 F.3d 539, 543 (6th Cir. 2004) (describing this process in general terms). The originating caller is the person who places the telephone call. *See, e.g., Level 3 Communications, LLC v. Colorado Public Utils. Comm'n*, 300 F. Supp. 2d 1069, 1072 (D. Colo. 2003). The terminating caller is the person who receives the call. *Id.* Thus, the typical telephone call that is routed through two networks begins (originates) on the network of the originating caller's carrier, and is completed (terminates) on the network of the terminating caller's carrier. *Id.* Since the originating party is the one who pays for the telephone call, the originating parties' carrier is the only one who receives compensation from the customer for the call. *MCI Telecomms.*, 376 F.3d at 543. However, this call uses not only the network of the originating customer's carrier, but also the network of the terminating customer's carrier. *Id.* Thus, in the absence of an agreement otherwise, the terminating customer's carrier is not compensated for the use of its network. *Id.*

In order to solve this problem so that the carrier who terminates the call is compensated, carriers enter into interconnection agreements, discussed above. *Id.* The Act requires the carriers to enter into "reciprocal compensation arrangements" to compensate each other for the completion of calls between their networks. *Id.* (quoting 47 U.S.C. § 251[b][5]). These reciprocal compensation rates must be "just and reasonable," which requires that they be "a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). The Act "left the task of implementing the 1996 Act, including the reciprocal rate provision, to the FCC." *MCI Telecomms.*, 376 F.3d at 543.

In 1996, the FCC published its governing regulations regarding reciprocal compensation,

which provided that rates be symmetrical between interconnected carriers. *Id.*; 47 C.F.R. § 51.711(a) (2004). For the purposes of the present motion, this symmetrical compensation structure depends upon the type of equipment used to transfer and complete a particular call. ILECs, which usually have older networks running on older technology, use either an "end-office" switch or a "tandem" switch to transfer and complete the call. *MCI Telecomms.*, 376 F.3d. at 544; *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 384 (7th Cir. 2004).[4] Routing a call through a tandem switch costs more than routing the same call through an end-office switch. *McCarty*, 362 F.3d at 384. CLECs, which usually have newer networks, often use newer technologies such as fiber rings or wireless networks instead of tandem or end-office switches. *MCI Telecomms.*, 376 F.3d at 544. Thus, for the purposes of determining symmetrical compensation, the FCC established a rule for deciding whether the CLEC's switch "generally serves the same role as a tandem switch serves in the [ILEC]'s network." *Id.* This rule states that "[w]here the switch of a carrier other than an [ILEC] serves a geographic area comparable to the area served by the [ILEC]'s tandem switch, the appropriate rate [used to calculate reciprocal compensation] for the carrier other than an [ILEC] is the incumbent [ILEC]'s tandem interconnection rate." 47 C.F.R. § 51.711(a)(3). It is CPUC's interpretation and application of this rule that forms the heart of the issue before the court.

In light of the foregoing background, I address CPUC's decision. AT&T and Qwest disagreed upon the language in their interconnection agreement with regards to reciprocal

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[4]The differences between these two switches, other than cost, is not particularly relevant to the present issues. Nevertheless, as a general matter, a "tandem switch acts as a hub connecting other switches and is generally able to handle calls over a broad geographic area. End-office switches, [on the other hand,] typically serve smaller geographic areas and fewer customers." *MCI Telecomms.*, 376 F.3d at 544.

compensation. (Compl., Ex. A at ¶¶ 14–27 [Initial Comm. Decision].) Qwest's proposed language was that AT&T's switches would be considered to be tandem office switches for the purpose of determining reciprocal compensation rates to the extent that AT&T's switches "*serve* a comparable geographic area as Qwest's Tandem Office Switch." (*Id.*, Ex. A at ¶¶ 14, 27 [Initial Comm. Decision] [emphasis added].)[5] AT&T's proposed language was that its switches would be considered as tandem office switches for the purpose of determining reciprocal compensation rates to the extent that its switches are "*capable of serving*" a comparable geographic area to Qwest's Tandem Office Switch. (*Id.*, Ex. A at ¶¶ 14, 27 [Initial Comm. Decision] [emphasis added].)

In choosing between the competing language, CPUC reviewed both parties' arguments. (*Id.*, Ex. A at ¶¶ 15–25 [Initial Comm. Decision].) Of particular importance to the following analysis, with regards to an argument by AT&T, CPUC noted that

> AT&T presents evidence in an attempt to persuade the Commission that its switches in Colorado are capable of serving a geographic area comparable to Qwest's tandem switches. However, the Hearing Commissioner granted Qwest's motion to strike the issue of whether AT&T's switches qualify as tandem switches under the definition adopted by the Commission. Therefore, the Commission does not decide in this proceeding whether AT&T's switches so qualify.

(*Id.*, Ex. A at ¶ 23 [Initial Comm. Decision] [footnote omitted].) This passage refers to an earlier decision in the CPUC proceedings where a CPUC hearing commissioner granted Qwest's motion to strike the issue of whether AT&T's switches qualify as tandem switches because AT&T's "request is premature in that the Commission has not yet made a determination on the definition

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[5] Although not relevant to this decision, it is unclear what type of a switch AT&T actually uses. (*See id.*, Ex. A at ¶¶ 14, 27 [Initial Comm. Decision]; Ex. B at ¶ 3 [Decision on Recons.].)

of tandem office switch. In general, the purpose of an interconnection agreement arbitration is to determine appropriate *principles* governing the parties' relationship, not to apply specific *facts* to those principles." (Admin. R., Vol. 12 at 2408 [emphasis in original].)

After weighing the parties' arguments and one of its past rulings, CPUC chose Qwest's proposed language, explaining that

> AT&T's argument centers on the decision made by the FCC's Wireline Competition Bureau in the *Virginia Arbitration Decision*[6] that a CLECs [sic] switch need only be capable of serving a geographical area that is comparable to that served by the incumbent LEC's tandem switch. The Colorado Commission is not bound by the Virginia arbitration ruling. We note that the FCC has not changed the language of Rule 51.711(a)(3); nor has the FCC released any orders that would extend the ruling made in the Virginia arbitration to all carriers.

(Compl., Ex. A at ¶¶ 26–27 [Initial Comm. Decision] [footnote added].)

After CPUC's decision, two different circuit courts addressed this issue. In *Indiana Bell Telephone Co., Inc. v. McCarty*, the Seventh Circuit found that the *Virginia Arbitration Decision* "requir[es] deference as the voice of the FCC interpreting its own rules," and determined that state public utility commission was correct in finding that the CLEC "only had to have the *ability* to serve and not *actually* be serving the same geographic area as" the ILEC. *McCarty*, 362 F.3d at 385–86 (emphasis in original). Likewise, in *MCI Telecommunications. Corp. v. Ohio Bell Telephone Co.*, the Sixth Circuit found that the *Virginia Arbitration Order* "should be afforded deference,"and held that 47 C.F.R. § 51.711(a)(3) requires the CLEC's switch "be capable of serving a comparable geographic area, as opposed to . . . [requiring] the new entrant [to] actually

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[6]This decision is *In re Petition of WorldCom, Inc.*, 17 FCC Rcd. 27,039 (July 17, 2002) (hereinafter "*Virginia Arbitration Decision*").

serve customers in that area." *MCI Telecomms.*, 376 F.3d at 548–50. Thus, under 47 C.F.R. § 51.711(a)(3), if the CLEC's switch is capable of serving a comparable geographic area as the ILEC's tandem switch, then the CLEC's rate is the ILEC's tandem interconnection rate.

While neither Qwest nor CPUC deny the legitimacy of the holdings of these two cases, they both argue that CPUC still reached the proper conclusion. (Qwest's Resp. at 9–15; CPUC's Resp. at 9–11.) This argument is premised on the assertion that the issue of whether AT&T's switches qualify as a tandem switch under the interconnection agreement was not determined by CPUC. (*Id.*) Rather, according to Qwest and CPUC, CPUC merely permitted language in the interconnection agreement that follows the precise language of 47 C.F.R. § 51.711(a)(3). (*Id.*)

CPUC and Qwest's argument as to this point misses the mark. CPUC's decision was expressly decided on the mistaken assumption that the *Virginia Arbitration Order* is not controlling. (Compl., Ex. A at ¶ 26 [Initial Comm. Decision].) As CPUC noted earlier in this context, "the purpose of an interconnection agreement arbitration is to determine appropriate *principles* governing the parties' relationship, not to apply specific *facts* to those principles." (Admin. R., Vol. 12 at 2408 [emphasis in original].) Here, CPUC erred on the principles in light of the decisions of *Telephone Co., Inc. v. McCarty* and *MCI Telecommunications. Corp. v. Ohio Bell Telephone Co.*

With the interconnection agreement language as it currently stands, read in light of the decision of CPUC, CPUC has set forth an improper analytical framework that will be applied to the facts in any future disputes over the geographic scope of AT&T's switches. CPUC must correct its legally incorrect decision. Accordingly, I reverse and remand this case to CPUC to readdress issue one here, issue three below, consistent with this opinion, and the opinions of

Telephone Co., Inc. v. McCarty and *MCI Telecommunications. Corp. v. Ohio Bell Telephone Co.*

b. Compensation Rate for ISP-Bound Traffic under the ISP Remand Order

Second, AT&T asserts that CPUC erred in requiring a bill and keep rate for ISP-bound traffic under the *ISP Remand Order*. (AT&T's Br. at 15–19.) This was issue nineteen in the proceedings below. As background, the FCC determined that the reciprocal compensation mechanism, applied to local telecommunications traffic as discussed above, should not apply to ISP-bound traffic. *In re Implementation of Local Competition Provisions in Telecomms. Act of 1996*, 16 F.C.C.R. 9151 (2001) (hereinafter "*ISP Remand Order*"), *remanded but not vacated sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). ISP-bound traffic is traffic where a customer uses a computer and modem to place a call to an internet service provider ("ISP") in order to access the internet. *See Level 3*, 300 F. Supp. 2d at 1073. The FCC's decision is premised upon the peculiar nature of ISP-bound traffic. Unlike most telecommunications traffic, which is usually two-way, "ISPs typically generate large volumes of one-way traffic in their direction," because the ISP is almost never the originating caller, but rather is the terminating caller when people use the ISP's services. *WorldCom*, 288 F.3d at 431. Thus, reciprocal compensation may over-benefit the ISPs' carriers to the detriment of the originating callers' carriers. *Id.*

Due to the economic inefficiencies created by the peculiar nature of ISP-bound traffic, the FCC concluded that "a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically efficient" than the typical reciprocal compensation method. *ISP Remand Order*, 16 F.C.C.R. at 9181 ¶ 67. A bill and keep approach "refers to an arrangement in which neither of [the] two interconnecting networks charges the other for

terminating traffic that originates on the other network." *Id.* at 9204 n. 6. In simpler terms, the carrier billing the call to the customer (usually the originating caller's carrier) gets to keep all of the money it bills for the call as opposed to having to pay a portion of this money to the other carriers who route the call through their networks. *See Newton's Telecom Dictionary* 115 (21st ed. 2005).

The FCC, however, did not require that carriers immediately switch to the bill and keep method. Rather, in order to facilitate a smooth transition from the traditional reciprocal compensation method to the new bill and keep compensation method for ISP-bound traffic, the FCC "adopted several interim cost-recovery rules." *WorldCom,* 288 F.3d at 431. The applicable rule in this case provides that "intercarrier compensation for ISP-bound traffic . . . rate will be capped at $0.0007" per minute-of-use. *ISP Remand Order*, 16 F.C.C.R. at 9187 ¶ 78. This cost-recovery rule forms the center of the dispute between the parties on this issue.

CPUC decided that AT&T would not receive any compensation from Qwest for ISP-bound traffic. (Compl., Ex. A at ¶¶ 105–06, 110 [Initial Comm. Decision].) In other words, CPUC adopted a bill and keep compensation structure for ISP-bound traffic. (*Id.*) CPUC reached this decision on the basis that (1) it had previously determined for public policy reasons that the bill and keep method for ISP-bound traffic is superior, (2) the FCC was working towards the goal of exclusive use of the bill and keep method for ISP-bound traffic, and (3) it was within CPUC's province under the *ISP Remand Order* to set the rate at zero, the bill and keep method. (*Id.*)

AT&T disagrees with CPUC's conclusions, and argues that under the *ISP Remand Order*, CPUC must set the rate at $0.0007 per minute-of-use. (AT&T's Br. at 15–19.) In order to

determine the validity of AT&T's argument, I must determine whether the language in the *ISP Remand Order* supports AT&T's assertions or CPUC's decision. The *ISP Remand Order* repeatedly refers to the rate of compensation for ISP-bound traffic as a "cap." *ISP Remand Order*, 16 F.C.C.R. at 9156–57, 9187–94, 9199 ¶¶ 7, 8, 78, 80, 83–85, 89, 98. AT&T argues, however, that if read in context, the FCC did not intend this rate to actually be a cap, i.e. a ceiling defining the upper but not the lower limit of the rate. (AT&T's Br. at 18–19.) Rather, AT&T argues that the cap is the "prescribed rate[]" that the CLEC must receive from the ILEC, with only one specifically enumerated exceptions that is not applicable to this case. (*Id.*)

The *ISP Remand Order* provides, in relevant part, that the

> intercarrier compensation for ISP-bound traffic . . . rate will be capped at $.0007/mou. . . .
> We also clarify that, because the rates set forth above are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). [Footnote 152 is omitted and set forth below.] The rate caps are designed to provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives, and no such transition is necessary for carriers already exchanging traffic at rates below the caps. Moreover, those state commissions have concluded that, at least in their states, LECs receive adequate compensation from their own end-users for the transport and termination of ISP-bound traffic and need not rely on intercarrier compensation. . . .
> The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for

> ISP-bound traffic, however, state commissions will no longer have authority to address this issue.

ISP Remand Order, 16 F.C.C.R. at 9187–89 ¶¶ 78, 80, 82. Footnote 152 states:

> Thus, if 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.

Id. at 9204 n. 152.

AT&T argues that since the following language in the *ISP Remand Order* — "because the rates set forth above are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis" and the language of footnote 152 — is set forth in the past tense, it only applies to decisions made by state commissions prior to the FCC's promulgation of the *ISP Remand Order*. (AT&T's Br. at 16–17.) Thus, according to AT&T, the word "cap" simply denotes that the rate can be lower than $0.0007 per minute-of-use if the state commission so designated a rate prior to the *ISP Remand Order*. (*Id.* at 18–19.) AT&T argues that this position is bolstered by the language in the *ISP Remand Order* that "state commissions will no longer have authority to address this issue." (*Id.* at 16.) Thus, according to AT&T, the cap is the mandatory rate for all state commission determinations after the FCC's decision in the *ISP Remand Order*. (*Id.* at 18–19.)

While quite clever, AT&T's argument is misplaced. The FCC specifically and repeatedly used the word "cap" when referring to the compensation rate for ISP-bound traffic. *ISP Remand Order*, 16 F.C.C.R. at 9156–57, 9187–94, 9199 ¶¶ 7, 8, 78, 80, 83–85, 89, 98. *Black's Law*

Dictionary defines "cap" as "[a]n upper limit, such as a statutory limit on the recovery in a tort action or on the interest a bank can charge." *Black's Law Dictionary* 199 (7th ed. 1999). In other words, when an agency places a cap on a rate, that cap is the ceiling — the highest rate that a party can charge another party. It does not preclude a rate lower than the cap.

If the FCC intended to establish the $0.0007 per minute-of-use rate cap as a mandatory rate, it could have simply stated that "the rate is" that amount. If it intended that there would be only one exception to such a mandatory rate as suggested by AT&T, it would have stated that there is an exception in the case of *ex ante* state commission decisions. The repeated use of the word "cap" to modify the word "rate," in this court's opinion, is the critical term that provides the context for the FCC's other statements. The FCC's above quoted statements in the past tense provide an example of the fact the stated rate is merely a cap — these statements do not indicate that they are the exclusive situations where the cap is indeed a cap as opposed to a mandatory rate. Moreover, the FCC's statement that the "state commissions will no longer have authority to address this issue" refers to the state commission's authority to reach a conclusion at odds with the FCC. *ISP Remand Order*, 16 F.C.C.R. at 9189 ¶ 82. Here, CPUC's decision is not at odds with the FCC's decision in the *ISP Remand Order*, because it sets the rate at zero, which is less than the $0.0007 per minute-of-use cap.

Other portions of the *ISP Remand Order* support this conclusion. For example, in the *ISP Remand Order*'s executive summary, the FCC explains that "these rates are appropriate *limits* on the amounts recovered from other carriers." *Id.* at 9156 ¶ 7 (emphasis added). The FCC's use of the word "limit" to describe the nature of its promulgated rates further supports the fact that it meant for its promulgated rates to be the upper limit as opposed to the exclusive and mandatory

rate. Furthermore, in other parts of its order, the FCC uses the words "cap" and "ceiling" interchangeably, *id.* at 9156 ¶ 8, suggesting that the FCC views the word "cap" in its dictionary meaning — as a term to describe an upper limit or ceiling.

This conclusion, moreover, is in accord with the case law that indirectly addresses this issue. The parties have not presented any case law directly on point, and my research has also revealed no case law directly on point. The validity of the foregoing analysis, however, is confirmed by the *dicta* of another district court. A district court in the District of Connecticut, in *dicta*, interpreted the *ISP Remand Order* to mean that a state commission could set any rate it chose lower than the cap, but it could not choose a rate higher than the cap. *S. New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F. Supp. 2d 287, 295 (D. Conn. 2005) ("under the transitional regime established by the FCC, though the [state commission] may not declare ISP traffic subject to 'reciprocal compensation' under section 251(b)(5), it may still set rates for ISP compensation so long as those rates do not exceed the caps imposed by the *ISP Remand Order.*"); *see also Global NAPS, Inc. v. Verizon New England, Inc.*, 327 F. Supp. 2d 290, 300 (D. Vt. 2004) (stating in *dicta* that under the *ISP Remand Order*, "intercarrier compensation is *at most* $.0007/mou.") (emphasis added). For the foregoing reasons, CPUC acted within its authority in adopting a bill and keep compensation structure for ISP-bound traffic.

c. Compensation for Use of Private Line Transport Facilities

Third, AT&T argues that CPUC erred in determining that Qwest could use AT&T's private line transport facilities without compensating AT&T. (AT&T's Br. at 19–24.) This was issue fifteen and issue sixteen in the proceedings below. As background, when a call originates on one carrier's network and terminates on a different carrier's network, the call must switch

from the originating carrier's network to the terminating carrier's network. *See, e.g., Level 3*, 300 F. Supp. 2d at 1072. In order for the "call to switch from one network to the other, it must go through trunk and interconnection facilities. Trunks are cables . . . which connect the parties' networks so that traffic can be exchanged between them. The point where the call switches between networks is called the point of interconnection." *Id.* (citations omitted) (internal quotation marks omitted). As a general matter, the two carriers must share the costs of the interconnection facilities based upon their relative use of the interconnection facility. *See* 47 C.F.R. § 51.709(b); (Compl., Ex. A at ¶ 56 [Initial Comm. Decision]). Moreover, if two carriers share transmission facilities, the two carriers must share the costs of these facilities. *See* 47 C.F.R. § 51.507(c); (Compl., Ex. A at ¶ 56 [Initial Comm. Decision]).

In the case at hand, the point of interconnection at issue is at Private Line Transport Service ("PLTS") facilities.[7] (Compl., Ex. A at ¶¶ 55–56 [Initial Comm. Decision].) AT&T leased PLTS facilities from Qwest. (*Id.*, Ex. A at ¶ 67 [Initial Comm. Decision].) AT&T leased these facilities for long distance traffic. (*Id.*) AT&T, however, did not use all of the capacity of its leased PLTS facilities for long distance traffic. (*Id.*) Since these facilities had spare capacity, AT&T decided, with Qwest's permission, to use this spare capacity in the PLTS facilities for two-way local traffic. (*Id.*, Ex. A at ¶¶ 56, 67 [Initial Comm. Decision].) The result of AT&T's decision to use the spare capacity of the PLTS facilities for two-way local traffic is that both AT&T and Qwest's local traffic traveled through the PLTS facilities. (Admin. R., Vol. 10 at

[7]The parties have not set forth a precise description of a PLTS and various definitions of a private line or private line service, *see* 47 C.F.R. § 101.3 (2004); *Newton's Telecom Dictionary* 671 (21st ed. 2005), do not appear to comport with the term as used in this case. Nevertheless, based upon the facts set forth regarding the role of PLTS facilities, I can resolve all the matters before this court.

1906 [Answer Testimony of Brotherson]; *see* Compl., Ex. A at ¶¶ 56, 67 [Initial Comm. Decision].)

In the proceedings before CPUC, AT&T argued that Qwest must pay for the costs of its traffic on AT&T's leased PLTS facilities. (Compl., Ex. A at ¶¶ 57–59 [Initial Comm. Decision].) CPUC disagreed, and set forth the reasoning behind its decision in one paragraph. This paragraph states, *in toto*:

> Generally, we agree that costs of interconnection facilities should be shared by the users and that the fairest way to share those costs is by calculating a relative use factor. Here, however, even though there is no requirement for PLTS facilities leased for long distance traffic to be used as interconnection facilities, Qwest allows spare capacity in such leased facilities to also be used for local traffic. Because Qwest does not charge an additional amount to AT&T when AT&T chooses to use its spare capacity in leased PLTS facilities for local traffic, we agree with Qwest that there is no cost to share associated with these facilities, and the normal cost sharing for interconnection facilities should not apply. Further, we find that local traffic carried on spare capacity on leased PLTS facilities should not be accounted for in calculating a relative use factor.

(*Id.*, Ex. A at ¶ 67 [Initial Comm. Decision].) AT&T contends that CPUC erred in reaching this conclusion, and that this conclusion "ignores the controlling federal law and is arbitrary and capricious." (AT&T's Br. at 22.)

Although not stated with absolute clarity, CPUC determined that AT&T did not incur any cost in choosing to have two-way local traffic on the PLTS facilities. (Compl., Ex. A at ¶ 67 [Initial Comm. Decision] ["we agree with Qwest that there is no cost to share associated with these facilities"].) There is testimony in the administrative record that supports the conclusion that AT&T incurs no costs in having two-way local traffic on the PLTS facilities. (Admin. R.,

Vol. 8 at 1454–55 [Direct Testimony of Brotherson], Vol. 10 at 1906 [Answer Testimony of Brotherson].)[8] A challenge to this factual finding is under the arbitrary and capricious standard. *Michigan Bell*, 305 F.3d at 586; *Southwestern Bell*, 235 F.3d at 498; *Southwestern Bell*, 208 F.3d at 481–82); *US West*, 193 F.3d at 1117; *US West*, 986 F. Supp. at 19. AT&T has cited to no reason why this factual determination is arbitrary and capricious. Indeed, AT&T does not even cite to any portions of the administrative record in support of its contention. Accordingly, I find that CPUC's determination on this point is not arbitrary and capricious.

Since CPUC properly determined under the arbitrary and capricious standard that AT&T incurs no costs in using two-way trunking for local calls on the PLTS, I must determine, *de novo*, whether CPUC erred under applicable law. AT&T argues that CPUC's decision violates two FCC rules: 47 C.F.R. § 51.507(c) and 47 C.F.R. § 51.709(b). (AT&T's Br. at 19–24.) 47 C.F.R. § 51.507(c) provides that "[t]he costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users." 47 C.F.R. § 51.507(c) (2004). 47 C.F.R. § 51.709(b) provides that

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[8]Qwest witness Larry B. Brotherson repeatedly testified to this fact. For example, he testified at one point that

> [w]hen AT&T places its traffic on PLTS, AT&T pays the same charge for flat-rated transport with or without local interconnection traffic on the span. AT&T's claim that Qwest should "share" this cost is misplaced. Because Qwest assess no additional charge when the AT&T [sic] elects the two-way PLTS option, AT&T has no cost to share.

(Admin. R., Vol. 10 at 1454 [Direct Testimony of Brotherson].)

> [t]he 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. Such proportions may be measured during peak periods.

47 C.F.R. § 51.709(b) (2004). Thus, both of these rules provide that, under certain circumstances, carriers must share the costs of facilities. 47 C.F.R. § 51.507(c); 47 C.F.R. § 51.709(b).

Here, CPUC determined that AT&T incurred no costs for Qwest's use of AT&T's leased PLTS facilities. (Compl.; Ex. A at ¶ 67 [Initial Comm. Decision].) As stated above, I must follow this factual determination. Since AT&T incurred no costs, there are no costs to share. Without costs to share, the FCC rules requiring carriers to share costs are simply inapplicable. Thus, Qwest need not pay AT&T for the use of these facilities because AT&T incurred no costs in using these facilities for the relevant two-way transport of local traffic. For the foregoing reasons, CPUC did not err in its decision on this issue.[9]

AT&T's citation to an unpublished decision of a district court in the District of Minnesota, which reached the opposite conclusion on a nearly identical issue, does not alter this analysis. (*See* Notice of Supplemental Authority [filed Apr. 18, 2005], Ex. 1 [*Qwest v. The Minnesota Public Utilities Commission, et al.*, Civil No. 04–1164 (JRT/SRN), slip op. (D. Minn. Mar. 31, 2005)].) In that case, the Minnesota Public Utilities Commission determined that AT&T incurred a cost when Qwest sent local traffic over AT&T's leased PLTS facilities. (*Id.*,

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[9]Qwest raises several other arguments in support of CPUC's decision. (Qwest's Resp. at 25–27; 31–39.) Since AT&T's argument fails for the reasons set forth above, I need not address Qwest's other arguments.

Ex. 1 [*Qwest*, Civil No. 04–1164 (JRT/SRN), slip op. at 6–7].) The district court concluded that this factual determination by the Minnesota Public Utilities Commission was not arbitrary and capricious. (*Id.*) The district court's conclusion that the Minnesota's state commission's factual determination was not arbitrary and capricious is not inconsistent with this court's conclusion that CPUC's factual determination to the contrary was not arbitrary and capricious. In other words, the fact that two state commissions reached diametrically opposed factual conclusions does not mean that one of the decisions must be reversed when courts review both decisions under an arbitrary and capricious standard. Moreover, there is no indication that the Minnesota Commission's decision has any estoppel effect on CPUC's decision, or vice-versa. Accordingly, I affirm CPUC's decision as to this issue.

d. Compensation under 47 C.F.R. § 51.709(b) for ISP-Bound Traffic

Fourth, AT&T maintains that CPUC erred in excluding ISP-bound traffic from proportional use compensation under 47 C.F.R. § 51.709(b). (AT&T's Br. at 24–32.)[10] This was issue seventeen in the proceedings below. Briefly, this issue concerns the apportionment of costs for the facilities interconnecting AT&T and Qwest's networks. (*See* AT&T's Br. at 24–25; Qwest's Resp. at 21.) Each party's cost responsibility for these interconnection facilities is based

[10]The parties do not clearly enunciate the differences between this issue and the second issue in the present case. The differences between the two issues is pertinent because, at first glance, it would appear that there is significant legal overlap between the two issues. These two issues, however, rely upon different legal frameworks. In issue four in the present case, AT&T is requesting compensation from Qwest under the FCC regulations regarding reciprocal compensation for transport and termination of telecommunications traffic. In issue two, AT&T is requesting compensation from Qwest, not under the FCC regulations regarding reciprocal compensation for transport and termination of telecommunications traffic, but rather under the interim compensation mechanism set forth by the FCC in its *ISP Remand Order*. Thus, beyond the factual differences of the types of compensation at issue, these two issues differ on the legal foundation requiring the purported compensation. *But see Analysis* § 2.d. n.13, *infra*.

upon the amount of traffic originating on that party's network and sent to the other party's network over these facilities. (*Id.*) In its decision, CPUC excluded ISP-bound traffic from this cost allocation scheme. (Compl., Ex. A at ¶¶ 83–87 [Initial Comm. Decision].) AT&T argues that this decision is legally incorrect because ISP-bound traffic falls under the rubric of "traffic" as used in 47 C.F.R. § 51.709(b), and therefore when apportioning costs, the parties should include ISP-bound traffic. (AT&T's Br. at 24–32.)

This court addressed this precise issue in a previous case, *Level 3 Communications, LLC v. Colorado Public Utilities Commission*. *Level 3*, 300 F. Supp. 2d 1069. In *Level 3*, I determined that "ISP-bound traffic is not 'telecommunications traffic'" as defined by the applicable FCC regulations regarding reciprocal compensation for transport and termination of telecommunications traffic. *Id.* at 1075–76. Next, I looked to whether the word "traffic" in 47 C.F.R. § 51.709(b) was "telecommunications traffic." *Id.* at 1077–78. This issue is pertinent because the carriers only need to apportion cost under 47 C.F.R. § 51.709(b) for the transmission of "traffic." As stated above, 47 C.F.R. § 51.709(b) provides that

> [t]he 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. Such proportions may be measured during peak periods.

47 C.F.R. § 51.709(b). Thus, if the word "traffic" in this regulation refers to "telecommunications traffic," then ISP-bound traffic, which is not "telecommunications traffic," is exempt from this rule. *Level 3*, 300 F. Supp. 2d at 1077–78. If ISP-bound traffic is exempt from this rule, then CLECs that service ISPs, such as AT&T, end up paying more for the

interconnection facilities. *Id.* Accordingly, a critical issue in both this case and *Level 3* is whether the word "traffic" in 47 C.F.R. § 51.709(b) refers to "telecommunications traffic." *Id.* In *Level 3*, I analyzed this issue as follows:

> Qwest[11] argues that 47 C.F.R. § 51.709(b)'s reference to "traffic" means "telecommunications traffic" as defined in 47 C.F.R. § 51.701(b)(1). Naturally, Level 3 disagrees with this proposition. Qwest provides no citations or arguments, beyond brief conclusory statements, to support the proposition that "traffic" under 47 C.F.R. § 51.709(b) means "telecommunications traffic." Level 3 provides no citations to support its contention that "traffic" is not "telecommunications traffic," but does argue that the FCC must have intentionally chosen the word "traffic" when drafting 47 C.F.R. § 51.709(b), and that, logically, the word "traffic" has a broader meaning th[a]n "telecommunications traffic." My own search of case law, and FCC decisions, reveals no explanation for the use of the word "traffic" as opposed to "telecommunications traffic" in 47 C.F.R. § 51.709(b). While it is a close call whether the word "traffic" in 47 C.F.R. § 51.709(b) means "telecommunications traffic," or has a broader meaning, I conclude that it must refer to "telecommunications traffic." The first part of the relevant regulations, 47 C.F.R. § 51.701(a), provides that "[t]he provisions of this subpart [which include 47 C.F.R. § 51.709(b)] apply to reciprocal compensation for transport and termination of *telecommunications traffic* between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a) (emphasis added). In light of the fact that 47 C.F.R. § 51.709(b), therefore, can only apply to "telecommunications traffic," under 47 C.F.R. § 51.701(a), 47 C.F.R. § 51.709(b)'s reference to "traffic" must be read to mean "telecommunications traffic."
>
> My decision is bolstered by the fact that in other contexts, the FCC has read 47 C.F.R. § 51.709(b) as congruent with 47 C.F.R. § 51.703(b).[12] *Qwest*, 252 F.3d at 468 (stating that "[t]he Commission reads § 51.709(b) as entirely congruent with §

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[11]In *Level 3*, Qwest was the ILEC and Level 3 was the CLEC that served many ISP customers.

[12]47 C.F.R. § 51.703(b), discussed in an earlier part of the *Level 3* decision, states that an " LEC may not assess charges on any other telecommunications carrier for *telecommunications traffic* that originates on the LEC's network." 47 C.F.R. § 51.703(b) (2004) (emphasis added).

> 51.703(b)" and citing *TSR Wireless*, 15 F.C.C.R. at 11182). The fact that these provisions have been read together in other contexts supports the notion that these provisions apply to the same "traffic" — "telecommunications traffic."

Id. at 1078 (footnotes added) (citations to the record omitted) (second, third, and fourth alterations in original).

In the present case, AT&T argues that (1) *Level 3* was wrongly decided because of the lack of adequate briefing by the parties as noted in the decision, and (2) with proper briefing that it sets forth in this case, I will reach the opposite conclusion as the one I reached in *Level 3*. (AT&T's Br. at 24–32.) In briefing this issue, AT&T sets forth four reasons why it believes that "traffic" in 47 C.F.R. § 51.709(b) does not mean "telecommunications traffic." (*Id.*)

First, AT&T argues that 47 C.F.R. § 51.709(b) specifically uses the word "traffic" as opposed to "telecommunications traffic," and therefore the FCC must have intended a different meaning. (*Id.* at 27–30.) This argument was raised, addressed, and rejected in *Level 3*, quoted above. *Level 3*, 300 F. Supp. 2d at 1077–78. AT&T has not proffered any new arguments not already discussed in *Level 3*.[13] Accordingly, AT&T's contention as to this point fails.

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[13]Indeed, *Level 3*'s conclusion is further supported by the *ISP Remand Order*. The *ISP Remand Order* specifically excludes ISP-bound traffic from reciprocal compensation obligations. *ISP Remand Order*, 16 F.C.C.R. at 9167 ¶ 35 ("we conclude that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251[b][5].") Since 47 C.F.R. § 51.709(b) is under subpart H of the FCC rules on interconnection, and subpart H deals with "reciprocal compensation for transport and termination of telecommunications traffic," it is likely that the FCC does not intend for 47 C.F.R. § 51.709(b) to apply to ISP-bound traffic because 47 C.F.R. § 51.709(b) is part of its reciprocal compensation scheme. Accordingly, the rule of 47 C.F.R. § 51.709(b) is inapplicable to ISP-bound traffic. While the vitality of this holding of the *ISP Remand Order* is subject to some doubt in light of *WorldCom*'s remand of the *ISP Remand Order, see, e.g., Level 3*, 300 F. Supp. 2d at 1076 (discussing the nature and issues of *WorldCom*'s remand of the *ISP Remand Order*), the *ISP Remand Order*'s conclusion still lends some further credence to *Level 3*'s pertinent holding.

Second, AT&T maintains that the quoted passage from *Qwest Corp. v. FCC* in the *Level 3* decision was only *dicta* and therefore does not provide support for the proposition that "traffic" in 47 C.F.R. § 51.709(b) means "telecommunications traffic." (AT&T's Br. at 30–31 [citing *Qwest Corp. v. FCC*, 252 F.3d 462, 468 (D.C. Cir. 2001)].) This argument is equally unpersuasive because the *Level 3* decision specifically acknowledged that "*in other contexts*, the FCC has read 47 C.F.R. § 51.709(b) as congruent with 47 C.F.R. § 51.703(b)." *Level 3*, 300 F. Supp. 2d at 1078 (emphasis added). Although it is only *dicta*, the statement in *Qwest* has some persuasive value. Thus, AT&T's argument on this point is unavailing.

Third, AT&T contends that the result of the decision by CPUC below, and the decision in *Level 3*, is that costs are not efficiently allocated among carriers. (AT&T's Br. at 31–32.) AT&T's argument is ridiculous. In CPUC's decision, CPUC set forth its policy rational behind its determination that the terminating carrier in ISP-bound traffic should bear the costs of joint facilities. (Compl., Ex. A at ¶ 84 [Initial Comm. Decision].) AT&T supports its argument that CPUC's policy rationale is incorrect with two conclusory and unsupported sentences. AT&T does not cite to the administrative record or any authority in support of its argument. Assuming, *arguendo*, that AT&T set forth a logical and detailed argument on this point supported by facts, it would still be unpersuasive in light of the FCC's reasoning regarding the economic inefficiencies created by the one way nature of ISP-bound traffic. *See ISP Remand Order*, 16 F.C.C.R. at 9162 ¶¶ 20–21. Since AT&T has not presented any reasoned or supported argument on this point, I reject its argument.

Fourth, AT&T asserts that *Level 3* was erroneously decided because it is contrary to several decisions of public utility commissions in other states. (AT&T's Br. at 32.) State public

utility commissions appear to be split on this issue. (*Compare id.* [collecting decisions]; *with* Qwest's Resp. at 48 [collecting decisions].) Thus, no clear consensus has emerged on this issue among state public utility commissions. (*Id.*) Accordingly, AT&T's argument as to this point provides no support for its conclusion that *Level 3* was wrongly decided and that CPUC erred.

Moreover, AT&T has not identified any courts that have reached a contrary conclusion to the one reached in *Level 3*. Therefore, the only case law precedent on this issue is in direct contradiction to AT&T's assertions. While district court opinions are not binding precedent, even if decided by the same judge, 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.02[1][d] (3d ed. 1999 & Supp. 2005) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."), the *Level 3* decision provides strong persuasive authority in support of the determination that "traffic" in 47 C.F.R. § 51.709(b) refers to "telecommunications traffic."

For the foregoing reasons, AT&T has provided no justification to depart from the analysis and conclusions set forth in *Level 3*. In accord with *Level 3*, I find that 47 C.F.R. § 51.709(b) does not apply to ISP-bound traffic. Consequently, AT&T is not entitled to proportional use compensation for its ISP-bound traffic on interconnection facilities. CPUC did not therefore err on this issue.

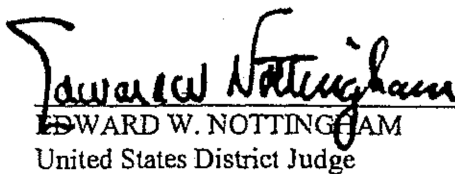
3. Conclusions

Based on the foregoing it is therefore ORDERED that CPUC's decision is AFFIRMED in part and REVERSED in part. CPUC's decision is AFFIRMED as to (1) issue two in the present proceeding, issue nineteen below, (2) issue three in the present proceeding, issues fifteen and

sixteen below, and (3) issue four in the present proceedings, issue seventeen below. CPUC's decision is REVERSED and REMANDED for additional proceedings consistent with this opinion as to issue one in the present proceeding, issue three below.

Dated this 10 day of June, 2005.

BY THE COURT:



EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04–cv–00532–EWN–OES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on June 10, 2005 was served on June 10, 2005 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the electronic mail address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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GREGORY C. LANGHAM, CLERK

By
Deputy Clerk or Secretary

CERTIFICATE OF SERVICE VIA E-MAIL

I do hereby certify that a true and correct copy of the foregoing QWEST CORPORATION'S COMMENTS ON ARBITRATOR'S DECISION was served on the 23rd day of February, 2007 via e-mail electronic transmission upon the following individuals:

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