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November 30, 2004

VIA FEDERAL EXPRESS

Ms. Christina Smith
Administrative Law Judge
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

Re: In the Matter of Qwest Corporation Petition For Arbitration of an Interconnection Agreement with Universal Telecommunications, Inc., ARB 589

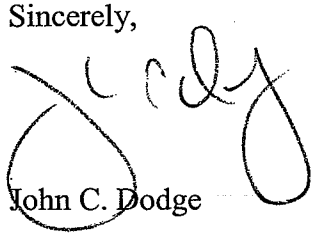
Dear Ms. Smith:

Enclosed for filing in the above-captioned matter please find an original and five (5) copies of the Initial Brief of Universal Telecom, Inc.

Kindly date-stamp the additional copy enclosed and return it to the undersigned in the postage prepaid envelope also enclosed.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



John C. Dodge

Enclosures

186080_1.DOC

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

ARB 589

In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.	)))))	**UNIVERSAL TELECOM, INC.'S INITIAL BRIEF**

INITIAL BRIEF OF UNIVERSAL TELECOM, INC.

Pursuant to the November 15, 2004 Briefing Order[1] in the above-captioned matter Universal Telecom, Inc. ("Universal") respectfully submits this Initial Brief of the legal issues identified in the Briefing Order. At Administrative Law Judge Smith's request, Universal addresses the following issues: (1) the proper means of interpreting the interconnection agreement's "term of agreement" provision; and (2) whether other state commissions have allowed an incumbent local exchange carrier ("ILEC") to request negotiations based on the plain language of Section 252(b) of the Act.

Neither the interconnection agreement between Universal and Qwest Communications, Inc. ("Qwest") nor applicable law or equitable principles nor public policy provides a basis for Qwest's Petition for Arbitration ("Petition"). The Commission should dismiss Qwest's Petition, with prejudice.

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[1] *In the Matter of Qwest Corporation Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecom, Inc.*, ARB 589, ALJ Memorandum Requesting Further Briefing (dated Nov. 15, 2004) ("Briefing Order").

ARGUMENT

This proceeding arises from Qwest's attempt to terminate the interconnection agreement ("ICA") between it and Universal. Rather than citing to a specific provision to terminate the ICA, Qwest instead relies on 47 U.S.C. §§ 252(a)(1)[2] or 252(b)(1) to engage Universal in negotiations toward a new ICA, and subsequently Qwest attempts to bring a purported "impasse" to the Commission's attention for arbitration. These provisions, however, do not entitle an ILEC like Qwest to initiate negotiations for an original or replacement ICA. Rather, particularly read in conjunction with other provisions of the Telecommunications Act of 1996 ("Act") and that law's legislative history, it is evident that Congress meant for only competitive local exchange carriers ("CLECs") to enjoy the statutory right to engage an ILEC in negotiations, and only after a CLEC requests such negotiations must both parties negotiate in good faith, or may either party request arbitration from a state utility commission on unresolved issues.

Issue 1: THE PROPER INTERPRETATION OF THE INTERCONNECTION AGREEMENT'S "TERM OF AGREEMENT" PROVISION.

I. THE ICA DOES NOT AUTHORIZE QWEST TO INITIATE NEGOTIATIONS

A. The ICA is Unambiguous and Should Be Construed Based on Its Plain Language, and in light of Qwest's Subsequent Interconnection Arrangements

The first issue raised concerns the proper means of interpreting the "Term of Agreement" provision of the ICA under both Oregon and federal law.[3]

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[2] Qwest's allegation that it "requested interconnection negotiations with Universal pursuant to 47 U.S.C. § 252(a) of the Act" does not trigger any legal obligation on Universal's part, and Universal incorporates by reference its arguments regarding interpretation of 47 U.S.C. § 252(b) (1) with respect to Qwest's § 252(a) allegation.

[3] Briefing Order at 2.

1. Oregon Law Obligates the Commission to Interpret the ICA According to its Unambiguous Terms, and in light of Qwest's SGAT

Under Oregon law, a contract with unambiguous terms is interpreted according to the "plain meaning" of those terms.[4] A contract term is not considered "ambiguous" simply because the parties to that contract differ on its meaning.[5] Universal is unaware of any federal law that contravenes Oregon's traditional interpretive principles in this regard. Here the ICA's Term of Agreement states that the ICA shall continue in force and effect, after the ICA's expiration, until *both* Parties mutually agree to a new contract:

> . . . the Agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties.[6]

The ICA is unambiguous: It continues in force and effect *unless and until a new agreement becomes effective between Universal and Qwest.* How, then, can the parties reach a new agreement? The ICA answers this question in Section XXXIV.W: The ICA "shall be interpreted solely in accordance with the Act and the applicable state law in the state where the service is provided." In other words, the parties can reach a new agreement only within the bounds of Sections 251 and 252 of the Act, which as Universal has shown previously allows only a CLEC to initiate negotiations with an ILEC, not vice versa. To be sure, under Section 252(a)(1) a CLEC could volunteer to negotiate with an ILEC toward an ICA without regard to the standards of Section 251(b) or (c)[7] and once such negotiations commence the ILEC may

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4 *Value Mobile Homes, Inc. v. Bank of America Oregon*, 887 P.2d 387, 389 (Ore. App. 1994) (citing *Rodway v. Arrow Light Truck Parts*, 772 P.2d 1349, 1351 (Ore. App. 1989)).

5 *Allstate Insur. Co. v. Ellison*, 757 F.2d 1042, 1045 (9th Cir. 1985) (citing *Jarvis v. Aetna Cas. & Sur. Co.*, 633 P.2d 1359, 1363 (Ala. 1981)). *See also United States v. Safeco Insur. Co. of America*, 65 Fed. Appx. 637, 639 (9th Cir. 2003) (quoting *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)) ("The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous").

6 ICA at XXXIV.V.

7 47 U.S.C. 252(a) (1).

request mediation from a state utility commission on unresolved issues. But it is that act of "volunteering" by a CLEC that is tantamount to it initiating negotiations. Here Universal has not volunteered to depart from Section 251 (or any portion of the Act), and in such circumstance the ICA is unambiguous: The parties must mutually agree to a new ICA.

This interpretation of the ICA's Term of Agreement provision is reinforced by Qwest's actions since Universal adopted the ICA. Later versions of Qwest's standard interconnection contract (*i.e.*, the so-called "SGAT") include explicit language that allows either party to initiate negotiations. Under Oregon law, a trier of fact should interpret a statute, in part, by reviewing earlier versions of the statute.[8] Federal courts have found that principles of statutory construction apply to contract interpretation.[9] Because the ICA includes as its "Controlling Law" the Act (federal law) and Oregon law, here the trier of fact must consider prior versions of a contract.[10]

Unlike the ICA, Qwest's SGAT expressly provides Qwest the right to initiate negotiation of a successor agreement with a CLEC:

> Upon expiration of the term of this Agreement, this Agreement shall continue in full force and effect until superseded by a successor agreement in accordance with this Section 5.2.2. ***Any Party may request negotiation of a successor agreement by written notice to the other Party*** no earlier than one hundred sixty (160) Days prior to the expiration of the of the term, or the Agreement shall renew on a month to month basis. The date of this notice will be the starting point for the

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[8] *See, e.g., State v. Mayorga*, 186 Ore. App. 175 (2003).

[9] *See e.g., In re: Dow Corning Corp.*, 244 B.R. 721, 736 (E.D. Mich. 1999) (citation omitted), *rev'd in part on other grounds, In re: Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000); *Pennsylvania Railroad Co. v. Chesapeake & Ohio Railroad Co.*, 229 F.2d 721, 727 (6th Cir. 1956). *See also In re: Amber's Stores, Inc. v. Amber's Stores, Inc.*, 205 B.R. 828, 831 (N.D. Tex. 1997) ("Texas rules of construction provide that the general rules for construction of written documents, such as contracts, apply to the construction of legislative acts.").

[10] ICA at Section XXXIV.W; *see State v. Mayorga*, 186 Ore. App. 175, 180 (2003) (explaining that prior versions of a statute should be used to interpret a statute's meaning). *See also Jones v. General Motors Corp.*, 325 Ore. 404, 409 (1997) (stating that modification of a product is a defense to a product liability claim). As in statutory interpretation and product liability claims, a trier of fact should construe a contract, in part, by reviewing changes that were made from prior versions of the contract.

> negotiation window under Section 252 of the Act. This Agreement will terminate on the date a successor agreement is approved by the Commission.[11]

This provision is precisely the type of voluntary departure from Sections 251 and 252 to which a CLEC might agree with Qwest. More to the point in the instant case, Qwest's inclusion of the ability for it to request negotiations of a successor agreement with a CLEC is instructive as to how to construe *this* ICA. Because Qwest included the ability to negotiate a successor agreement in its SGAT, here under governing interpretive principles the Commission must interpret the earlier ICA between Universal and Qwest—which unambiguously does not contain that ability for Qwest—as not departing from Section 251 or Section 252 of the Act. Thus, Qwest may not initiate negotiations with Universal for a successor ICA, and Qwest's Petition lacks any basis in the ICA or law.

2. The ICA Is Not of "Indefinite Duration" and Is Not Terminable At Will

The Briefing Order asks the Parties to "clarify the seemingly ambiguous 'Term of Agreement' provision," in light of state law principles that contracts of indefinite duration may be terminated at will, upon reasonable notice. Only contracts in which the "time, duration, *or manner* of termination" is indefinite are subject to unilateral termination.[12] "Where, however, there is an agreement concerning the manner of termination, the agreement is enforceable unless terminated in that manner although there is no fixed time for termination...."[13] Here, the plain language of the ICA assures that the contract is not "indefinite" under Oregon law. This is because Universal and Qwest specifically agreed the ICA would terminate upon the occurrence

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[11] Section 5.2.2 of SGAT (emphasis added).

[12] *Lichnovsky v. Ziebart Int'l Corp.*, 324 N.W.2d 732, 739 (Mich. 1980) (emphasis in original), *cited in, Cloverdale Equipment Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 940 (6th Cir. 1989).

[13] *Id.* at 739. In *Lichnovsky*, addressing a termination clause providing that the agreement "shall be in full force and effect indefinitely, unless terminated at an earlier date [for cause]," the Supreme Court of Michigan held that the contract's duration was "indefinite" in the second sense of the word, and thus not terminable at will. *Id.* at 739, 740 (emphasis in original). To find otherwise, the Court reasoned, would render "virtually meaningless" the parties' express termination language, in contravention of standard contract interpretation principles. *Id.* at 737.

of a specific triggering event—the agreement to a new ICA.[14] Thus, the express language of the Term of Agreement is "definite."

The Term of Agreement also provides that the ICA shall remain binding "unless" a specific termination event occurs—the parties enter a new agreement. Consequently, the Term of Agreement is "indefinite" only to the extent the "precise date" of termination could not be calculated when the ICA was entered into. The *manner* of termination, however, *is* expressly set forth by the Parties in the ICA, rendering the contract duration sufficiently "definite." The construction of contracts as being of "indefinite duration" is disfavored under the law, "*unless compelled by the unequivocal language of the contract.*"[15] In the instant case, to *ignore* the Term of Agreement and would contravene the parties' clearly expressed intent and nullify the Term of Agreement, an impermissible result under Oregon contract law.[16]

The Fifth Circuit decision in *Delta,* as cited by the Briefing Order, does not command a different result. To the contrary, *Delta* distinguished an earlier decision, *Besco,* in which the contract language "explicitly stated that termination would be allowed *only* upon the happening of specified events."[17] In *Besco,* the termination clause in question provided: "The option shall continue indefinitely, subject always to the right of [the defendant]...to give written notice of its intention to withdraw... The right of [the defendant] to withdraw...shall be based *solely* on [the failure of one of two conditions]."[18] The court concluded that the termination language was not "indefinite" in duration: "While the contract is of indefinite duration in one respect, since its length is not defined in units of time in such a manner that a termination date is clear from its

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14 *See Delta Serv. & Equip., Inc. v. Ryko Mfg. Co.,* 908 F.2d 7 (5th Cir. 1990) ("*Delta*"), citing *Besco, Inc. v. Alpha Portland Cement Co.,* 619 F.2d 447 (5th Cir. 1980)).

15 *Id.* at 9 (emphasis in the original) (citation omitted).

16 *See, e.g., New Zealand Ins. Co. v. Griffith Rubber Mills,* 526 P.2d 567, 569 (Ore. 1973).

17 *Id.* at 9 (emphasis in original) (citing *Besco,* 619 F.2d 447).

18 619 F.2d at 448 (emphasis added).

inception, it may not 'be terminated at any time by either party' because the parties have 'otherwise agreed' to limit [the defendant's] termination rights...."[19] As in *Besco,* the Parties here have expressly provided an event triggering termination: the entry into force of a new agreement. As such, the Term of Agreement is not "indefinite," and Qwest may not terminate the ICA at will.

Even if the ICA is, in fact, "indefinite," this would not necessarily doom the contract. As Judge Smith noted, under Oregon law, "[a]lthough perpetual agreements are disfavored, where clearly provided for they will be enforced according to their terms."[20] The ICA clearly and unambiguously expresses the parties' intent that the contract will remain in force and effect until a new agreement is reached. Therefore, it is enforceable as written.

C. The ICA's Severability Provision Does Not Permit Unilateral Renegotiation by Qwest

The Briefing Order indicates that Judge Smith apparently reads the "Severability" provision of the ICA (Section XXXIV.G) to allow both parties to initiate interconnection negotiations. Universal does not interpret this section so broadly. First, the Severability provision appears premised on potential changes in FCC rules that might address issues in the ICA. Universal is not aware that the FCC has issued a rule regarding the term of interconnection agreements. Second, the Severability clause states, in relevant part, that "[i]n the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable in any respect under law or regulation, the parties will negotiate in good faith for replacement language." Obviously no provision of the ICA has yet been held to be unenforceable. The Severability clause is thus not yet indicated.

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19 *Id.* at 449.

20 *Portland Section of the Council of Jewish Women v. Sisters of Charity of Providence in Oregon*, 513 P.2d 1183, 1187 (Ore. 1973) ("*Sisters of Charity*"), cited in *Gabrilis v. Dahl,* 961 P.2d 865 (Ore. App. 1998).

Next, the plain language of the Severability provision means that *only the provision held unenforceable will be renegotiated*, and thus potentially subject to Section 252(a)(2). Put another way, a severability clause addresses only a provision lost to unenforceability, not an entire contract. Severability is a matter of state law.[21] The ICA's severability clause simply represents the concept, well accepted in Oregon, that if part of the contract is found to be unenforceable all separable, remaining provisions of contract will remain in effect and continue to be enforced.[22] Accordingly, Qwest should not be able to use a standard severability clause to end run Sections 251 and 252 of the Act. Indeed, Universal is unaware of any state utility commission (or court) that has so held.

Finally to Judge Smith's precise point, the inclusion of language in the Severability clause providing that either party has a right of negotiation suggests that the lack of similar language elsewhere is not an accident. Specifically, as noted in the Briefing Order the Severability clause expressly includes language that allows either party to initiate negotiations (under specific circumstances). By contrast, the Term of Agreement provision includes no such express right. Under the doctrine of *inclusio unius est exclusio alterius* ("the inclusion of one is the exclusion of the other")[23] the Commission should construe the lack of any specific or express right to unilaterally initiate negotiations in the Term of Agreement provision as evidence that no such right exists.

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21 *See, e.g., Oregon v. McDonnell,* 310 Ore. 98, 116, 794 P2d 780, 790 (Ore. 1990).

22 *W. J. Seufert Land Co. v. Greenfield,* 262 Or 83, 87, 496 P2d 197 (1972).

23 *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Ore. 341, 353, 898 P.2d 1333 (1995) (applying maxim to text of statute at first level of interpretive analysis).

D. Construing the Agreement In A Manner That Levels the Playing Field Between Qwest and Universal Is Consistent With the Purpose of the Act

Qwest suggests that it suffers some inequity if the ICA is interpreted according to its unambiguous terms. It is worth further considering Qwest's argument in light of the Act, which engendered Qwest's obligation to interconnect with Universal, and enter an interconnection agreement with Universal.

Congress designed the 1996 Act to foster immediate competition in the local telephone service market with the aim of transforming the regulated, monopolistic telecommunications industry into a competitive open market.[24] To do so, Congress imposed on each ILEC a host of special duties intended to foster market entry by competitors.[25] An ILEC and CLEC do not share a level playing field. "Indeed the entrant has nothing that the incumbent needs to compete with the entrant, and little to offer the incumbent in a negotiation."[26] The legislative history of Section 251 thus indicates that Congress sought to have the FCC and states use their authority to "provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier."[27]

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[24] *Stein v. Pacific Bell Tel. Co.,* 173 F.Supp.2d 975 (N.D. Cal. 2001) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 726, 142 L. Ed. 2d 834 (1999); *GTE Northwest, Inc. v. Nelson*, 969 F. Supp. 654 (W.D. Wash. 1997)).

[25] *Id.* (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 371.))

[26] *Local Competition Order* at 15566, ¶ 134.

[27] S. Rep. No. 104-23, at 22 (1995).

As part of that level playing field, the "Act puts into place a procedural mechanism [47 U.S.C. § 252] for ILECs and CLECs to create agreements that give CLECs access to an ILEC's preexisting network on fair terms consistent with the Act's provisions."[28]

> [W]e note that § 252(a), according to its title, relates to interconnection agreements arrived at through negotiations. However, the provision where an ILEC's duty to negotiate is specified is in § 251(c) (which also incorporates the duties specified in § 251(b)). The duty to negotiate interconnection agreements, therefore, is itself a §§ 251(b) and (c) obligation, not one arising under § 251(a).[29]

Qwest has not argued that continuation of the ICA will somehow undermine the level playing field envisioned by the Act; rather, Qwest has simply stated that it desires a new agreement with Universal. It is difficult to imagine what set of circumstances could exist that would entitle Qwest to tilt the playing field so obviously in its favor as having the unilateral right—over a CLEC's objection and unambiguous contract language to the contrary—to impose negotiations and a new interconnection agreement on a CLEC.

The real reasons Qwest desires to exit the ICA have to do with terms in it that Qwest finds distasteful and for litigation advantage over Universal in another forum. No doubt Qwest will trot out well worn bromides about fairness and public policy to prop up its equitable arguments, but even they must be considered in light of the Act, which clearly sets out to level the playing field as between ILECs and CLECs. The Term of Agreement actually does this, by obligating *both parties* to agree to a new ICA.

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28 *MCI v. PacBell*, 2002 U.S. Dist. LEXIS 4789, *3 (2000).

29 *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 CenturyTel Eagle, Inc. Regarding Rates, Terms and Conditions for* Interconnection, DOCKET NO. 02B-408T, Decision No. C03-0117, 2003 Colo. PUC LEXIS 109, * 23 (Colo. PUC 2003).

Issue 2: **UNIVERSAL IS AWARE OF NO AUTHORITY CONSTRUING THE PLAIN LANGUAGE OF SECTION 252 TO ALLOW ILECS TO REQUEST NEGOTIATIONS.**

II. THERE IS NO AUTHORITY THAT CONTRAVENES THE CONCLUSION THAT SECTION 252, ON ITS FACE, DOES NOT ALLOW AN ILEC TO REQUEST NEGOTIATIONS

All of the legal authority (not already briefed) that Universal has identified in response to the Briefing Order supports the conclusion that based on the plain language of Section 252(b) of the Act an ILEC cannot request negotiations with a CLEC. For example, in *BellSouth Telecommunications, Inc. v. NOW Communications, Inc.*, the Louisiana PSC construed Section 252(b) in accordance with its plain language, concluding that "the language of the Act only allows a non-incumbent to commence Section 252 negotiations."[30] Indeed, the PSC noted that the statute speaks plainly: "[t]he ALJ determined, and the Act is clear, that under Section 252(b) (1), a CLEC, not an ILEC (BellSouth) may request negotiations under Section 252(b) (2)."[31]

Although the Louisiana PSC ultimately allowed BellSouth to arbitrate an agreement against the CLEC, it did so because it found that the CLEC had initiated, or at least engaged in, negotiations with BellSouth.[32] In this way, this case is factually similar (if not identical) to the decisions of the Alabama and California cases cited by the Judge Smith in the Briefing Order.[33] Thus, although the final outcome is distinguishable for the reasons Universal articulated in its prior filings, the Louisiana PSC's interpretation of Section 252(b) is instructive, and clearly

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30 *BellSouth Telecommunications, Inc. v. NOW Communications, Inc.*, 2000 Louisiana PUC LEXIS 83 at * 4 (La. PSC May 22, 2000).

31 *Id.* at * 1.

32 *Id.* at * 5 ("This Commission believes that [NOW] admits that they were negotiating an interconnection agreement, and in fact, was negotiating.").

33 Briefing Order at 2, n. 5.

supports the conclusion that the plain language of Section 252(b) does not allow Qwest to request negotiations from Universal.

In addition, the U.S. Court of Appeals for the Sixth Circuit ruled that a Michigan PSC order requiring LECs to offer interconnection arrangements via tariff violated Sections 251 and 252 of the Act because it had the effect of forcing the ILEC to initiate negotiations with the CLEC in contravention of the specific requirements of Section 252(b). In *Verizon North, Inc. v. Strand*,[34] the Sixth Circuit based its ruling on the fact that Section 252 sets forth very detailed and specific procedures for the negotiation, arbitration, and approval of interconnection agreements. To that end the court explained that the "detailed scheme—including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review set out in § 252 is central to the [Act]."[35]

The court thus found the Michigan PSC order to be unlawful because it would have forced LECs to act in a manner contrary to those detailed provisions. Specifically, the Michigan PSC Order was deemed unlawful because, as the Sixth Circuit explained in a later decision, it would have "forced the incumbent to commence the negotiation process."[36] Such a result is directly contrary to the express language of Section 252 which, as the Sixth Circuit said, "requires the *competitor* to initiate the bidding."[37]

The Seventh Circuit, following the Sixth Circuit, has also ruled that it is unlawful and contrary to the federal Act for a State Commission to require an ILEC to file an interconnection tariff.[38] Like the Sixth Circuit, the Seventh Circuit also found that such an obligation is unlawful

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34 309 F.3d 935 (6th Cir. 2002).

35 *Id.* at 582.

36 *See Verizon North, Inc. v. Strand*, 367 F.3d 577, 585 (6th Cir. Apr. 28, 2004).

37 *Id.* (emphasis added).

38 *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 444 (tariff requirement requiring ILEC to file interconnection tariff "interferes" with procedures established by the federal Act by requiring the ILEC to state its offer price "so that bargaining begins from there").

because it would require the ILEC to initiate negotiations in direct contradiction to the federal statutory scheme.[39]

That the statute allows only non-ILECs to initiate negotiations is further supported by repeated statements from state commissions. For example, the California PUC specifically included that principle in formal regulations governing the procedures for negotiating, mediating and arbitrating interconnection agreements. In Resolution ALJ 181[40] the California PUC adopted specific rules intended to implement Section 252. In so doing the PUC defined a request for negotiation as the "first date on which an *incumbent* local exchange carrier *receives* a written request to negotiate pursuant to the 1996 Act."[41] Further, the California PUC rules establish that the time for filing a request for arbitration is based upon the time period after the "date on which an *incumbent* local exchange carrier *receives* the request for negotiation."[42] Thus, the California PUC's formal regulations implementing Section 252 processes clearly contemplates that ILECs will only receive requests for negotiations, not initiate such requests.

Although there is at least one state commission decision arbitrating the terms of an interconnection agreement at the behest of an ILEC, that case was not based upon a finding that the ILEC could initiate negotiations under Section 252(b). Instead, in that case the state commission allowed the arbitration to proceed based upon evidence that the non-ILEC had engaged in negotiations with the ILEC.

Specifically, in *Qwest Corporation v. AT&T Communications of the Midwest Inc., and TCG Omaha*[43] the Iowa Utilities Board (the "Board") arbitrated an interconnection agreement

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39 *Id.*

40 *Implementing the Provisions of Section 252 of the Telecommunications Act of 1996*, Resolution ALJ 181, 2000 Cal. PUC LEXIS 864 (Cal. PUC 2000).

41 *Id.* at Rule 1.1 (Definitions) (emphasis added).

42 *Id.* at Rule 3.2 (Time to File) (emphasis added).

43 2004 Iowa PUC LEXIS 280 (Iowa Util. Bd. June 17, 2004).

filed by Qwest against a CLEC. The Board had no need to address the applicability of Section 252(b) to Qwest's request for negotiations because it was clear from the record, and uncontested by AT&T, that "the parties had been voluntarily negotiating an interconnection agreement and were engaged in negotiations for new interconnection agreements in states throughout Qwest's service territory, including Iowa."[44]

Thus, this decision, like those cited in footnote five of the Briefing Order, is distinguishable from the current case because the non-ILEC willingly engaged in negotiations with Qwest. Furthermore, the Board's acceptance of Qwest's petition for arbitration does not address the question raised by the ALJ: whether the plain language of Section 252(b) has been construed to allow an ILEC to request negotiations.

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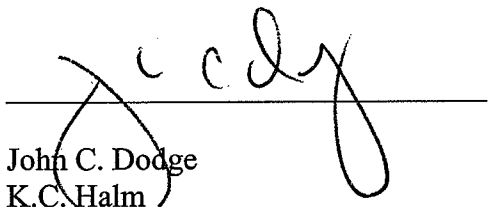
44 *See* Qwest's Petition for Arbitration with AT&T, filed with the Iowa Utilities Board on Feb. 9, 2004, at pp. 2-3. Pertinent portions of Qwest's petition are attached hereto as Exhibit A.

III. CONCLUSION

Wherefore, for the foregoing reasons, Universal respectfully submits that there is no basis in the Parties' interconnection agreement or under applicable law for Qwest's reliance upon 47 U.S.C. §§ 252(a) (1)[45] or 252(b) (1) in the manner suggested in Qwest's Petition for Arbitration. For that reason Qwest's Petition for Arbitration should be dismissed, with prejudice.

Respectfully submitted,



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Counsel for Universal Telecom, Inc.

November 30, 2004

[45] Qwest's allegation that it "requested interconnection negotiations with Universal pursuant to 47 U.S.C. § 252(a) of the Act" does not trigger any legal obligation on Universal's part, and Universal incorporates by reference its arguments regarding interpretation of 47 U.S.C. § 252(b) (1) with respect to Qwest's § 252(a) allegation.

EXHIBIT A

STATE OF IOWA
BEFORE THE IOWA UTILITIES BOARD

IN RE: Petition of QWEST CORPORATION for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T COMMUNICATIONS of the MIDWEST, INC. AND TCG OMAHA	DOCKET NO. ARB-04-_____ PETITION FOR ARBITRATION OF INTERCONNECTION AGREEMENT

COMES NOW Qwest Corporation ("Qwest") and for its petition states:

Pursuant to Section 252(b) of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the "Act"), and 199 IAC 38.7(3), Qwest petitions the Iowa Utilities Board (the "Board") for arbitration of the terms, conditions, and prices for interconnection and related arrangements with AT&T Communications of the Midwest, Inc. and TCG Omaha (collectively, "AT&T").[1] Pursuant to 199 IAC 38.7(3)(b), Qwest requests a hearing. At the conclusion of the hearing, the Board should order the parties to adopt Qwest's proposed interconnection agreement that is attached hereto as Exhibit 1 and incorporated herein by reference. Qwest refers to the attached agreement as the "Agreement Being Arbitrated" or "Exhibit 1."

I. BACKGROUND

A. Contact Information

The names and titles of the persons to whom requests for information and correspondence should be addressed on behalf of Qwest in this proceeding are:

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Tom W. Snyder
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925 High Street, 9 S 9
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[1] Upon the Board's resolution of the terms at issue in this Petition, separate but identical agreements between Qwest and AT&T, and Qwest and TCG Omaha will be presented to the Board for approval.

AT&T's counsel for the negotiations with Qwest and the individuals to whom inquiries relating to this matter should be addressed are:

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B. The Parties

The legal name of Petitioner is Qwest Corporation. Qwest is duly organized and validly existing as a corporation pursuant to the laws of the State of Colorado. Qwest has its principal place of business in Denver, Colorado. Qwest is a telecommunications company with authority to provide, among other things, local exchange service in Iowa. Qwest is an incumbent local exchange carrier ("ILEC") in Iowa within the meaning of Section 251(h) of the Act. Qwest is also a "Bell Operating Company" or "BOC," as that term is defined in Section 153(4) of the Act.[2] The Agreement Being Arbitrated applies only within the geographical areas in which Qwest is the ILEC in Iowa.

The legal names of Respondents are AT&T Communications of the Midwest, Inc. and TCG Omaha. Qwest refers to both Respondents herein as "AT&T" unless otherwise noted. AT&T Communications of the Midwest, Inc. is authorized to provide interLATA, intraLATA, and local exchange services within geographical areas in which Qwest is the ILEC in Iowa. AT&T Communications of the Midwest, Inc. is a "competitive local exchange carrier" as that term is understood and applied under the Act. TCG Omaha is authorized to provide local exchange and intraLATA services and resold interexchange services within geographical areas in which Qwest is the ILEC in Iowa. TCG Omaha is a "competitive local exchange carrier" as that term is understood and applied under the Act.

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[2] 47 U.S.C. § 153(4).

C. Reservation of Rights

As set forth below, Qwest and AT&T have engaged in extensive negotiations over the proposed terms and conditions of a successor interconnection agreement to replace the parties' agreements currently in effect in Iowa. The negotiations encompassed hundreds of hours and resulted in the resolution of numerous issues. Qwest expects that the parties will conduct further negotiations while this arbitration is pending. Accordingly, Qwest respectfully reserves the right to submit revised language for the Agreement Being Arbitrated: (1) to reflect the progress of any further negotiations; and (2) to reflect any changes in existing law during the pendency of this arbitration that may affect the appropriate terms and conditions of the parties' relationship.

D. Documentation Regarding Compliance With the Act

The procedures for negotiating and arbitrating interconnection agreements between ILECs and CLECs are set forth in Section 252 of the Act. Section 252(a)(1) establishes that an ILEC and a requesting telecommunications carrier may negotiate an interconnection agreement upon "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 a request for negotiations is received.

Qwest and AT&T have agreed that, for purposes of determining relevant deadlines under the Act, Qwest formally requested to negotiate an interconnection agreement with AT&T on September 17, 2003. The purpose of Qwest's request and the negotiations is to produce a new interconnection agreement to replace the agreement between AT&T Communications of the Midwest, Inc. and Qwest that this Board approved on May 15, 1998 in Docket AIA-96-1 (ARB-96-1) and the agreement between TCG Omaha and Qwest that this Board approved on September 30, 1998 in Docket NIA-98-23. Prior to Qwest's formal request, the parties had been voluntarily negotiating an interconnection agreement and were engaged in negotiations for new interconnection agreements in states throughout Qwest's service territory, including Iowa.

Since approximately December 2002, Qwest and AT&T have met regularly, most often by telephone, and sometimes in person, to review proposed terms and conditions of the successor

interconnection agreement in states throughout Qwest's service territory including Iowa. To address specific substantive areas, subject matter experts from Qwest and AT&T have participated in the negotiation sessions and have met separately from the negotiations to discuss open issues. At this point, numerous sessions have taken place, involving hundreds of hours. These substantial efforts have been productive, as the parties have resolved numerous issues, leaving only a relatively small number of issues to be arbitrated. As noted, negotiations are continuing, and Qwest will apprise the Board of any further progress. Attached hereto as Exhibit 1 is the current version of the Agreement Being Arbitrated that includes the provisions the parties have agreed to and the unresolved provisions that are the subject of this Petition.[3]

Pursuant to the timeline established by the Act, a negotiating party must request arbitration from January 30, 2004 (the first weekday after the 135th day after Qwest's request for negotiations) through February 24, 2004 (the 160th day after Qwest's request for negotiations). Accordingly, Qwest has timely filed its Petition. The nine-month period for the Board to decide the disputed issues, as set forth in 47 U.S.C. § 252(b)(4)(c), expires on June 17, 2004.

Qwest served a copy of this petition and relevant documentation on AT&T such that AT&T has received the documents no later than the day the petition was filed with the Board. Accordingly, Qwest has satisfied the requirements of Section 252(b)(2) and 199 IAC 38.7(3).

E. Resolved Issues

Exhibit 1 contains the contract language negotiated by the parties, including numerous resolved issues. The parties began their negotiations for a successor interconnection agreement against the backdrop of their extensive experience in the Section 271 process in Iowa (Docket Nos. INU-00-2 and SPU-00-11) and in every state in Qwest's local service territory. In the

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[3] Because the parties are continuing to review the Agreement Being Arbitrated for appropriate clerical modifications, as well as continuing to negotiate substantive language at the same time as Qwest must finalize this Agreement Being Arbitrated as part of its Petition for Arbitration, this Exhibit 1 may not incorporate all of the changes, clerical or otherwise, that AT&T has submitted to Qwest within the few days preceding this filing. To the extent that either party's proposed language for any disputed issue is modified from the language reflected in Exhibit 1, these modifications will be brought to the Board's attention in later filings so that the language that the parties ask the Board to consider reflects the most current language in dispute between them. Further, any appropriate clerical modifications agreed upon between the parties will be made to this Exhibit 1 and reflected in future filings.

Section 271 proceedings, AT&T exhaustively scrutinized the positions and precise contract language of Qwest's statements of generally available terms and conditions ("SGATs") and serially brought its critique of Qwest's positions and Qwest's contract language to every state commission and board for a determination that the language and position favored by AT&T should be ordered into Qwest's SGATs.

With fresh state commission and board orders addressing every disputed contract issue AT&T (and other CLECs) raised during the Section 271 process, Qwest believed that its contract negotiations with AT&T should be generally informed by these commission and board orders, with allowance for any change in law, change in facts, or reevaluation of a party's business concerns. In many cases, the foundation established by the Section 271 process allowed Qwest and AT&T to resolve issues. In other cases, however, the parties were unable to resolve issues that had been addressed in the Section 271 proceedings. In Qwest's view, as discussed below, resolution of some of those issues was not possible because AT&T took positions that are inconsistent with the Qwest SGAT language that this Board approved in the Section 271 process.

II. STATEMENT OF UNRESOLVED ISSUES AND PARTIES' POSITIONS

A. Introduction

Qwest respectfully submits that its proposed language and positions comply with applicable law and AT&T's proposed language and positions do not. AT&T's proposals often reflect what AT&T desires, not what FCC or the Board rules and orders allow. Because AT&T challenges the governing law and the Board's recent determinations, the parties have not resolved several important issues concerning the terms and conditions of Exhibit 1.

Qwest respectfully submits that Qwest's proposed language on the unresolved issues meets the requirements of the Act and other applicable law, reflects sound public policy, and should be adopted in full here. Qwest recommends that upon resolution of the disputes set forth in Exhibit 1, the Board direct AT&T and Qwest to finalize the agreement to conform to the Board's order and file it in accordance with the procedures set forth in 199 IAC 38.7(4).

B. Unresolved Issues and Positions

Issue 3[4]: Definition of Tandem Office Switch (Section 4.0)

The parties have been unable to reach agreement regarding the definition of "Tandem Office Switch."

Qwest's Position: Under Qwest's proposed language, a CLEC's end office switch would be considered a tandem office switch for determining reciprocal compensation rates if the switch "serves a comparable geographic area as Qwest's Tandem Office Switch." Qwest's definition is consistent with 47 C.F.R. § 51.711(a)(3), which provides that if a non-ILEC switch "serves" a geographic area comparable to that served by the ILEC's switch, the ILEC's tandem rate will apply to the non-ILEC switch.

In its proposed language, AT&T seeks to classify switches as tandem switches based on capability alone. Under AT&T's approach, when an AT&T switch is "*capable of*" serving a comparable geographic area as Qwest's tandem switch, it is to be classified as a tandem switch. AT&T is reading the term "serves" out of the FCC rule and attempting to replace it with "capable of serving." Such a standard violates the FCC rule and would remove any incentive for AT&T to actually provide tandem switching services. Under AT&T's proposal, AT&T could maintain switches with tandem *capabilities* and charge tandem switching rates without ever offering tandem switching services.

In approving Qwest's Iowa SGAT, the Board has already accepted language identical in all material respects to that which Qwest proposes for its agreement with AT&T.[5] The Board

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[4] The issue numbers that Qwest assigns to the unresolved issues here are the same issue numbers that Qwest and AT&T originally used in their interconnection arbitration in Minnesota (the first state in this recent round of arbitrations) and subsequently used in their arbitrations in Colorado, Washington, and Arizona. Assigning the same issues the same numbers in each state provided a common numbering framework for the parties and avoided the potential confusion that could arise from assigning the same issue different numbers in different states. Gaps in the issue numbers occur because some issues the parties initially listed as disputed are not disputed in Iowa.

[5] *In re: US West Communications, Inc., n/k/a Qwest Corporation*, Conditional Statement Regarding General Terms and Conditions and Order Regarding Change Management Process Comments, Docket Nos. INU-00-2, SPU-00-11, 4-5 (Iowa Util. Board Mar. 12, 2002) (conditionally approving SGAT definitions); *In re: US West Communications, Inc., n/k/a Qwest Corporation*, Final Statement

thoroughly reviewed in an open and fair legal process Qwest's Section 271 compliance and concluded that Qwest satisfied all aspects of the checklist contained in Section 271(c)(2)(B) Track A, the public interest requirements of Section 271(d)(3)(C), and the criteria in Section 272.[6] AT&T did not raise any concerns with the definition of "Tandem Office Switch" with the Board even though the issue was discussed among the parties previously. Indeed, during the multi-state workshops prior to the Board's orders, AT&T requested Qwest to change its definition of "Tandem Office Switch" to more closely track 47 C.F.R. § 51.711(a)(3). Qwest made the requested changes thereby resolving any dispute over the definition of "Tandem Office Switch." The Multi-State Facilitator determined the issue was closed and noted "Qwest agreed to amend its SGAT to provide that a CLEC's switch will be treated as a tandem switch for reciprocal compensation purposes if the CLEC's switch meets the functional and geographic requirements of a tandem switch."[7] The Board should again approve Qwest's definition.

AT&T's Position: As Qwest understands AT&T's position on this issue, AT&T asserts that its switch must be "capable of serving" a geographic area comparable to Qwest's tandem office switch if the AT&T switch is to be considered a tandem switch for purposes of reciprocal compensation. AT&T claims that the tandem switch need not "actually serve" a comparable geographic area under 47 C.F.R. § 51.711(a)(c) and the *Verizon Virginia Arbitration Order*.[8]

Regarding Qwest Corporation's Compliance with 47 U.S.C. §§ 271 and 272 Requirements, Docket Nos. INU-00-2, SPU-00-11, 7 (Iowa Util. Board Jun. 12, 2002) (approving Qwest's Iowa SGAT).

[6] *Id.*

[7] Multi-State Workshop, Second Report – Workshop One, 110 (May 15, 2001).

[8] *Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc. and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration*, Memorandum Opinion and Order, CC Docket Nos. 00-218, 00-249 and 00-251, DA 02-1731 (rel. Jul. 17, 2002) ("*Verizon Virginia Arbitration Order*"). In the *Verizon Virginia Arbitration Order*, the Wireline Competition Bureau ("WCB") of the FCC was sitting in the place of the Virginia Commission in an arbitration between Verizon and several Virginia CLECs when the Virginia Commission declined to exercise its authority to arbitrate the parties' dispute. The WCB was serving as the arbitrator to resolve the disputes as then-framed between the parties before it based on the evidence those parties presented and its interpretation of existing FCC rules.

Issue 5: Definition of Exchange Service (Section 4.0)

The parties have been unable to reach an agreement regarding the definition of "Exchange Service."

Qwest's Position: Here again, the definition Qwest proposes is identical to the definition that the Board has approved for Qwest's SGAT. Qwest's proposed language for the definition of "Exchange Service" incorporates the local and intraLATA toll boundaries determined by the Iowa Board. Qwest's proposed definition of "Exchange Service" is "traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Board." By contrast, AT&T proposes to divorce the classification of calls from the geographic boundaries set by this Board. Qwest's proposed language respects the relationship this Board has properly recognized between the origination and termination of calls in local calling areas, the characterization of traffic as exchange service, exchange access, or interexchange service, and the compensation for such calls. As the FCC determined, wireline traffic that originates and terminates within a local calling area is subject to reciprocal compensation, and traffic that travels outside the local calling areas is toll traffic. As set forth in the FCC's *Local Competition Order*, the Board, not the parties, has the authority to determine what geographic areas should be "local areas."[9]

AT&T's proposed definition of "Exchange Service" would impermissibly redefine local calling areas and eliminate access charges due to Qwest. AT&T proposes to treat so-called "virtual NXX" ("VNXX") calls as if they were local, despite the fact that they originate and terminate in different local calling areas. By virtue of assigning VNXX numbers to a customer in calling areas in which the customer has no physical presence, AT&T can establish for its customer a "local presence" in every local calling area in the LATA or state. And, under its proposed definition, calls to or from that customer would be treated as local calls even though the calls are not originated or terminated within the same local calling area. Thus, AT&T's proposal

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[9] See, e.g., *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 at ¶ 1035 (1996) ("*Local Competition Order*").

creates LATA-wide or interstate local calling for customers to whom AT&T assigns VNXX numbers, and is a near functional equivalent of AT&T's now-withdrawn LATA-wide local calling proposal.[10]

AT&T's proposal is not only inconsistent with the Board's determinations of local calling areas, it would eliminate the charges that are due to Qwest for calls that terminate outside the local calling area. AT&T has conducted no analysis or study of the impact its proposed definition would have upon access revenues that support universal service, or the impact upon other Iowa carriers, such as independent local exchange carriers or other interexchange carriers. Against this backdrop, there is no evidence that AT&T's definition is in the public interest or nondiscriminatory.

Qwest's proposed definition tracks the Board's determinations of local calling areas and longstanding classification of exchange by geographic area. Qwest's proposed definition is fully consistent with the Board's recent Final Decision and Order in *In Re Sprint Communications Company, L.P., and Level 3 Communications, LLC*, Dkt. Nos. SPU-02-11 and SPU-02-13 (IUB June 6, 2003), where the Board concluded that VNXX service is *not* local exchange service because the calls do not originate and terminate in the same local exchange, and further concluded that the proposed use of the telephone numbers would be inconsistent with the applicable Central Office Code Assignment Guidelines and federal rules and guidelines.

Qwest's definition is also consistent with the definitions in the Act, which set forth the regulatory framework within which all carriers have long operated. The Act defines "exchange access," "telephone exchange service" and "telephone toll service" as follows:

> The term "exchange access" means the offering of access to *telephone exchange services* or facilities for the purpose of the origination or termination of telephone toll services.
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> * * *

[10] In the parties' arbitration in Minnesota, the first state in this recent round of arbitrations in which AT&T and Qwest arbitrated the terms of a new interconnection agreement, AT&T took the position that the parties' new interconnection agreement must abolish local calling areas and provide for LATA-wide local calling. AT&T withdrew its novel and unsupportable position on the eve of the arbitration hearing in Minnesota and has not pressed this specific proposal since.

> The term "telephone exchange service" means (A) service *within a telephone exchange*, or within a connected system of telephone exchanges *within the same exchange area* operated to furnish to subscribers intercommunicating service of the character *ordinarily furnished by a single exchange*, or (B) *comparable service* provided through a system of switches, transmission equipment, or other facilities (or a combination thereof) by which a subscriber can originate and terminate a telecommunications service.[11]
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> The term "telephone toll service" means telephone service *between stations in different exchange areas* for which there is made *a separate charge* not included in contracts with subscribers for exchange services.[12]

Under the Act, telephone exchange service is a service provided to subscribers that enables a particular subscriber to originate *and* terminate calls *within a single exchange* or within an area *ordinarily served by a single exchange*, or *comparable* service. Telephone toll service, in contrast, applies when a customer places a call to end users located beyond the calling area covered by local exchange boundaries. Such calls are subject to additional charges designed to compensate the toll provider for carrying calls over what could be considerable distances and exchange access providers for originating and terminating the calls. Here, AT&T is attempting to change the mapped local service areas that the Board has established for basic residential and business local exchange services. Unambiguously, the effect of AT&T's proposed definition is to eviscerate local calling areas and treat toll calls as local calls.

Finally, AT&T's proposed definition of "Exchange Service" directly contradicts its advocacy during the multi-state workshop process employed by the Board in Qwest's Section 271 proceedings and the definition ultimately adopted by the Board. In the multi-state workshops, AT&T challenged Qwest's proposed definition of "Exchange Service" because it included the phrase "as defined by Qwest's then-current EAS/local serving areas." As set forth by the Multi-State Facilitator, "AT&T contended that *the Commissions determine the boundaries of the local*

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[11] 47 U.S.C. § 153(47) (emphasis added).

[12] *Id.* § 153(48) (emphasis added).

calling areas and that permitting Qwest to unilaterally modify this definition is inappropriate."[13] The Multi-State Facilitator agreed with AT&T and stated "[t]o make it clear to all parties that the commissions will continue to define the boundaries of EAS/local service area boundaries, it is appropriate that Qwest should delete the phrase."[14] Now AT&T argues against its prior position and in favor of a radical change to the definition of "Exchange Service" to eviscerate the boundaries for local calls. The Board should reject AT&T's proposal, and reaffirm the definition of "Exchange Service" that it approved in Qwest's SGAT and that Qwest proposes here.[15]

AT&T's Position: AT&T asserts that the Board should adopt AT&T's definition of "Exchange Service." As Qwest understands AT&T's position on this issue, AT&T asserts that the determination of the nature and compensation of a call should *not* be based on the physical location of the calling and called party, that Board-established local calling areas should *not* govern the classification of a call and that calls accomplished by way of VNXX "provisioning options" should be deemed Exchange Service for purposes of intercarrier compensation. AT&T relies on section 251(b)(5) of the Act and the *ISP Remand Order,*[16] which it claims does not restrict the Board from requiring that intraLATA traffic be subject to reciprocal compensation arrangements.

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[13] Multi-State Workshop, Second Report – Workshop One, 117 (May 15, 2001) (emphasis added).

[14] *Id.*

[15] *In re: US West Communications, Inc., n/k/a Qwest Corporation*, Conditional Statement Regarding General Terms and Conditions and Order Regarding Change Management Process Comments, Docket Nos. INU-00-2, SPU-00-11, 4-5 (Iowa Util. Board Mar. 12, 2002) (conditionally approving SGAT definitions); *In re: US West Communications, Inc., n/k/a Qwest Corporation*, Final Statement Regarding Qwest Corporation's Compliance with 47 U.S.C. §§ 271 and 272 Requirements, Docket Nos. INU-00-2, SPU-00-11, 7 (Iowa Util. Board Jun. 12, 2002) (approving Qwest's Iowa SGAT).

[16] Order on Remand and Report and Order, *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, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*")

Issue 14: Trunking Requirements (Sections 7.2.2.9.6, 7.2.2.9.6.1)

The parties have been unable to reach an agreement regarding whether AT&T must order a direct trunk if it decides to interconnect at Qwest's local or access tandem switches and terminates more than a DS1 amount of local traffic.

Qwest's Position: Qwest agrees that AT&T may interconnect at the local or access tandem switches to exchange local traffic. However, if AT&T chooses to interconnect at the access tandem switch and would terminate a DS1 worth (512 CCS) of local traffic, AT&T must order a direct trunk group to Qwest's local tandem switch.

Again, the Board addressed this issue during the Section 271 proceeding and has already approved Qwest's proposed language which fully incorporates the Board's ruling on this issue. In the 271 proceeding, the Board determined that CLECs must order a direct trunk group to the Qwest end office switch where there is a DS1 level of traffic (512 CCS) between a CLEC's switch and a Qwest end office switch.[17] The Board also determined that when a direct trunk group to Qwest's local tandem is required, the additional costs of the trunk group shall be offset by other network savings. The Board should reaffirm its prior resolution of this issue and approve Qwest's proposed language here.

AT&T's Position: As Qwest understands it, AT&T believes it has the legal right to interconnect at any technically feasible point in Qwest's network, whether it be at an access tandem, local tandem or end office, without limitations, under 47 U.S.C. § 251(c)(2)(B). AT&T believes that it should not have to establish a direct trunk group to Qwest's end office, regardless of the volume of traffic.

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[17] *In re: U S West Communications, Inc., n/k/a Qwest Corporation*, Conditional Statement Regarding May 15, 2001 Report, Docket Nos. INU-00-2, SPU-00-11 at 9-10 (Oct. 12, 2001).

Issues 15 and 16: Reciprocal Compensation: Cost of Interconnection Transport and Termination When Private Line is Used for Interconnection Traffic (Section 7.3.1(b)) [Issue 15]; Inclusion of Relative Use Factor in the Rate for Private Line Transport Service (Section 7.3.1.1.2) [Issue 16]

The parties have been unable to reach agreement regarding the cost of interconnection transport and termination when Private Line Transport Service ("PLTS") is used for interconnection.

Qwest's Position: Qwest's proposed language excludes PLTS from the cost-sharing otherwise associated with flat-rated transport underlying a two-way local trunk group. Issue 15 involves an exception to the agreement to share the transport cost associated with a two-way trunk group that is supported by dedicated transport based on directional relative use. The exception is when the CLEC elects to employ a portion of a private line transport service (purchased from Qwest's interstate tariff or from Qwest's retail catalog offering) to support a local trunk group.

Relatedly, Issue 16 involves application of a relative use factor for PLTS purchased from Qwest's interstate tariff or from Qwest's retail catalog offering. AT&T would add a sentence that would apply a relative use factor to such facilities. AT&T's proposed language would inappropriately require Qwest to share the cost of such facilities. Under Qwest's proposed language, use of a Qwest PLTS circuit for transport underlying a two-way local trunk group is an option of AT&T, not a requirement. AT&T is under no obligation to choose this configuration for any of its trunking. AT&T pays the same charge for this flat-rated transport with or without local interconnection traffic on the span. Because Qwest assesses no additional charge when the CLEC elects the two-way PLTS option, AT&T has no cost to share. Where AT&T has purchased PLTS from Qwest's tariff and uses that facility for commingled two-way flat-rated transport, Qwest should not share the cost of the PLTS. Qwest's proposed language thus properly excludes a relative use factor in the rate for PLTS.

The Board decided a similar issue in Qwest's Section 271 proceeding. In that proceeding, the Board addressed the appropriate rates for spare special access circuits that were used for

interconnection service. AT&T argued that such facilities should be priced at TELRIC rates. According to AT&T, the rates for facilities purchased as PLTS should be "ratcheted" to "reflect the local usage" on those facilities.[18] The Multi-State Facilitator rejected AT&T's proposal and recommended Qwest's language for the SGAT, which provided that the tariffed rates for such facilities would apply, out of concern for the impact that AT&T's proposal would have on universal service because of lost access charges.[19] The Multi-State Facilitator found that using spare special access circuits for interconnection without "ratcheting" the rates still allowed CLECs to exploit economies while preserving the pricing system. "Qwest's proposal, to permit the use of spare special access facilities for local interconnection but with the stipulation that all circuits used are to be priced at special access rates, provides AT&T the opportunity to enjoy the available efficiencies but protects the integrity of the pricing system."[20] The Board adopted the Multi-State Facilitator's recommendation and rejected AT&T's argument.[21] The Board also affirmed its decision when AT&T sought reconsideration.[22]

The same rationale applies here – AT&T is receiving benefits from using spare capacity from PLTS for interconnection without incurring any additional costs, so Qwest should not be required to share the costs of those facilities.

AT&T's Position: As Qwest understands AT&T's position on this issue, AT&T claims that when a party to the Agreement Being Arbitrated provides a two-way trunk group that is supported by dedicated transport, the parties should share the transport cost associated with such

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[18] Multi-State Workshop, Second Report – Workshop One at 115-16 (May 15, 2001).

[19] *Id.* at 117.

[20] *Id.*

[21] *In re US West Communications, Inc. n/k/a Qwest Corporation*, Reconsideration of Conditional Statement Regarding Checklist Item 13: Reciprocal Compensation, Docket Nos. INU-00-2, SPU-00-11 at 5-6 (May 31, 2002); *In re: US West Communications, Inc. n/k/a Qwest Corporation*, Conditional Statement Regarding May 15, 2001 Report, Docket Nos. INU-00-2, SPU-00-11 at 36 (Oct. 12, 2001).

[22] *In re US West Communications, Inc. n/k/a Qwest Corporation*, Reconsideration of Conditional Statement Regarding Checklist Item 13: Reciprocal Compensation, Docket Nos. INU-00-2, SPU-00-11 at 5 (May 31, 2002).

span based on their relative use. AT&T relies on 47 C.F.R. § 51.703(b) and 47 C.F.R. § 51.709(b) for this proposition.

Issue 17: Reduction of Direct Trunked Transport Rate Element When Two-Way Trunking Is Established for Reciprocal Compensation and Exclusion/Inclusion of ISP-Bound Traffic (Section 7.3.1.1.3.1 and 7.3.2.2.1)

This issue involves how ISP-bound traffic is treated with respect to allocating the costs of local interconnection facilities in proportion to their relative use. Specifically, the primary question presented is whether traffic that is bound for the Internet should be included in the relative use factor applied to two-way trunking interconnection facilities.

Qwest's Position: Qwest's language excludes Internet-bound traffic from relative use calculations. Again, Qwest's proposed language is the language in its Iowa SGAT, the SGATs in Qwest's other in-region states, and was found compliant with Qwest's checklist obligations by the FCC.[23] Further, Qwest's language and position have been subject to federal court review in both Oregon and Colorado and both courts upheld the commissions' orders adopting Qwest's language in interconnection agreement arbitrations with Level 3.[24]

Under AT&T's proposal, Qwest would assume all of the interconnection facility costs associated with delivering Internet traffic to AT&T's ISP customers. Requiring Qwest to pay for transmission facilities used to send Internet traffic to AT&T's ISP customers violates the core FCC determinations that ISPs and their customers, not other carriers, should assume the costs they cause.[25] In this regard, there is no basis to distinguish the dedicated transport used to send Internet-bound traffic from the switching of the same traffic. To the extent both are used to

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[23] Memorandum Opinion and Order, *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Dkt. No. 02-314, FCC No. 02-332 , 17 FCC Rcd 26303 at ¶ 325 (2002).

[24] *Level 3 Communications, LLC v. Public Utils. Comm'n of Oregon*, CV01-1818, Opinion and Order (D. Or. Nov. 25, 2002) (slip op); *Level 3 Comm., Inc. v. Public Utils. Comm'n of Colorado*, Civil Action No. 01-N-2455 (CBS) (Dec. 8, 2003).

[25] *E.g., ISP Remand Order* ¶¶ 4-5, 7, 69-71.

provide service to ISPs, the costs of both should be recovered from the ISPs, not from other carriers.

The Board should endorse Qwest's language as well-grounded in governing law and sound public policy and tested by appellate review.

AT&T's Position: As Qwest understands AT&T's position on this issue, AT&T claims that "Internet Related" traffic should be included in the computation of the cost of sharing Entrance Facilities and Direct Trunked Transport. AT&T claims that 47 C.F.R. § 51.709(b) allows recovery for all traffic and 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 terminates on the providing carrier's network. AT&T also claims that the *ISP Remand Order* does not support Qwest's proposed language.

Issue 18: Reciprocal Compensation and Calculation of Tandem Transmission Rate (Section 7.3.4.1.2)

The parties have been unable to reach agreement regarding the calculation of the Tandem Transmission Rate.

Qwest's Position: Issue 18 concerns the calculation of the per minute of use call termination rate for Exchange Service (EAS/Local) traffic. The parties' dispute centers on the appropriate calculation of the tandem transmission rate. AT&T asserts that it is entitled to charge and receive the call termination, tandem switching and tandem transmission rate elements when AT&T's switch meets the definition of a tandem switch under 47 C.F.R. § 51.711(a)(3). AT&T proposes to include an assumed nine miles of common transport at the tandem transmission rate to determine per minute of use call termination. Qwest opposes the inclusion of an assumed nine miles of common transport because the FCC rule governing calculation of call termination does not include such transport. Moreover, there is no mileage based transport rate in Iowa. AT&T's language creates asymmetry of intercarrier compensation because Qwest does not apply such a charge for tandem transmission.

First, 47 C.F.R. § 51.711(a)(3) does not specify that an incumbent LEC should pay a CLEC for nine miles of transport (parenthetical three of AT&T's language) in addition to call termination, tandem switching, and the fixed component of tandem transmission. The FCC rule provides that where 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 for the carrier is the ILEC's tandem interconnection rate. Qwest's proposed language reflects the FCC rule.

Moreover, AT&T's interpretation of the rule would improperly require not only that all Qwest calls be subject to two switching charges plus a fixed rate for tandem transmission, but also a distance-sensitive charge even though there is no actual common transport mileage involved in terminating the call. By contrast, Qwest does not charge AT&T for common transport.

Finally, the only time Qwest applies an assumed mile charge for tandem transmission is for transiting calls. A transited call is one that is neither originated nor terminated by Qwest. AT&T seeks to apply the assumed mileage rating to non-transited calls, even though AT&T terminates these calls itself.

AT&T's Position: As Qwest understands AT&T's position on this issue, AT&T claims that it is entitled to charge and receive the call termination, tandem switching, and tandem transmission rate elements when its switch meets definition of a tandem switch under 47 C.F.R. § 51.711(a)(3).

Issue 35: Section 22 – Pricing

The parties have been unable to reach agreement regarding the pricing of certain services provided by Qwest to AT&T pursuant to Exhibit 1.

22.1 General Principle

The parties dispute whether the Agreement Being Arbitrated should include the general principle that the rates in Exhibit A to the Agreement Being Arbitrated apply to services provided by AT&T to Qwest, as well as to service provided by Qwest to AT&T.

Qwest's Position: Qwest's language clearly and simply states that, when applicable, the rates apply to the services provided by AT&T to Qwest. AT&T, on the other hand, seeks to

insert vague pricing language that fails to specify any products or services, or the terms and conditions associated with these services. To the extent AT&T plans to provide services to Qwest, the parties should negotiate the details of each service and the terms and conditions under which it will be offered and specific pricing, just as they have in the Agreement Being Arbitrated with regard to the services that Qwest will provide to AT&T.

AT&T's Position: As Qwest understands AT&T's position on general pricing principles, AT&T claims that Qwest's proposed language inappropriately would impose obligations upon AT&T that are the same as Qwest's obligations as an ILEC under the Act. AT&T seeks pricing language that would allow it to use different pricing structures and higher rates in charging Qwest for interconnection services provided by AT&T to Qwest that are the same as the interconnection services Qwest provides to AT&T under the Agreement Being Arbitrated.

22.4 Interim Rates

Qwest's Position: The parties acknowledge that some rates in Exhibit A to the Agreement Being Arbitrated are interim. The parties disagree about which rates should be considered interim. AT&T's proposed language in section 22.4.1 would make *all* rates interim that have not been approved by the Board in a cost proceeding. Such language is overbroad because the Board need not approve all rates that may be included in an interconnection agreement. Qwest's proposed language would make interim the rates that have not been approved by the Board and that require Board approval. Qwest's language is more specific and accurate than AT&T's proposal.

AT&T's Position: AT&T proposes that all rates that have not been approved by the Board be considered interim rates.

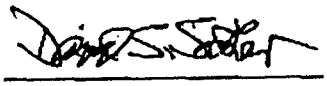
Issue 36: Exhibit A Pricing

AT&T is reviewing Exhibit A. No specific disputed issue concerning Exhibit A pricing has been identified by the parties. Qwest anticipates that any questions AT&T may have concerning Exhibit A will be resolved in the parties' on-going negotiations. If a dispute concerning a specific rate is identified, Qwest will respond in prefiled testimony or other filing that will be part of the fact record upon which the dispute will be decided.

IV. CONCLUSION

For the reasons stated here and those that Qwest will present in testimony, and other evidence and argument in connection with this arbitration proceeding, Qwest respectfully requests that the Board adopt Qwest's proposed language for the terms, conditions, and prices of interconnection with AT&T.

RESPECTFULLY SUBMITTED: February 9, 2004.



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CERTIFICATE OF SERVICE

I, K.C. Halm, hereby certify that on this 30th day of November, 2004, I caused copies of forgoing Initial Brief of Universal Telecom, Inc. to be sent by first-class mail, postage pre-paid to the following:

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