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December 14, 2004

VIA FEDERAL EXPRESS AND FAX

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

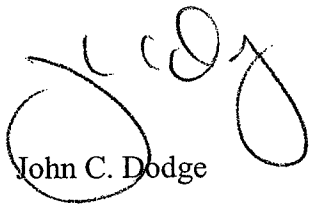
Dear Ms. Smith:

Enclosed for filing in the above-captioned matter please find an original and five (5) copies of the Reply 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

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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 REPLY BRIEF**

REPLY BRIEF OF UNIVERSAL TELECOM, INC.

Pursuant to the November 15, 2004 Briefing Order[1] Universal Telecom, Inc. ("Universal") respectfully submits this Reply Brief in response to Qwest Corporation's ("Qwest") Additional Brief.[2] Qwest's Additional Brief fails to establish any contractual, statutory or common law bases to support Qwest's attempt to terminate unilaterally the Parties' interconnection agreement ("ICA") or initiate negotiations for a new ICA. Qwest's public policy arguments are similarly unavailing. Accordingly, the Commission should dismiss Qwest's Petition for Arbitration, with prejudice.

ARGUMENT

Qwest's Additional Brief sidesteps the two specific questions posed by Judge Smith and instead attempts to repackage them into three inquiries to be briefed in a manner more favorable to Qwest. Qwest's version of questions presented for additional briefing include—

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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").

2 *In the Matter of Qwest Corporation Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecom, Inc.*, ARB 589, Qwest Corporation's Additional Brief on ICA Negotiation Issues (filed Nov. 30, 2004) ("Qwest Additional Brief").

(1) the effect of the ICA's Term of Agreement on these issues, (2) the effect of Oregon and federal common law regarding contracts of indefinite duration on these issues, and (3) the effect of other state commission decisions allowing an ILEC to request negotiations based on the Act itself (rather than a prior contract provision or a CLEC's volunteering to negotiate).[3]

Notwithstanding Qwest's mischaracterization and expansion of the two issues contemplated in the Briefing Order (and reserving all rights to dispute Qwest's "questions presented for additional briefing"), Universal respectfully submits that Qwest's arguments do not change Judge Smith's tentative conclusions that, in the absence of mutual agreement or compelling public policy reasons—neither present here—only a competitive local exchange carrier ("CLEC") may initiate negotiations for an interconnection agreement under federal law.

I. The Parties Agree the ICA is Not "Ambiguous"

Judge Smith requested that the Parties clarify the "Term of Agreement" provision.[4] Qwest argued in response that the ICA is not ambiguous as to negotiations[5] and Universal agrees (although disagreeing with Qwest's conclusions on this point).[6] But Qwest's lengthy arguments miss Judge Smith's basic question—is there an inconsistency between the ICA's Term of Agreement and Severability provisions? Universal understood Judge Smith to use the term "ambiguous" in this context not as a legal term of art, but to express her concern that the ICA appears confusing when trying to reconcile the Term of Agreement and Severability sections. Universal addressed and (hopefully) removed any ambiguity in its Initial Brief.

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3 Qwest Additional Brief at 3.

4 Briefing Order at 2.

5 Qwest Additional Brief at 6-9.

6 *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.*, ARB 589, Universal Telecom, Inc.'s Initial Brief at 3-5 (filed Nov. 30, 2004) ("Universal Initial Brief"). Qwest's assertion that "[i]t is significant that nowhere in its Motion does Universal argue that the provision is 'ambiguous'" is either a straw man strategy or further confusion regarding Judge Smith's question. In either case, Universal stands by its arguments on the ICA and the law.

A. Qwest Overstates Universal's Duty to Negotiate in Good Faith

In providing its view of the public policies underlying the Telecommunications Act of 1996 ("Act"),[7] Qwest references the good faith negotiating requirement from Section 251 of the Act.[8] The plain language of Section 251(c) (1) the Act establishes that Universal (or any CLEC) assumes the duty to negotiate in good faith only *after* negotiations have commenced:

> (c) ADDITIONAL OBLIGATION OF INCUMBENT LOCAL EXCHANGE CARRIERS – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> (1) DUTY TO NEGOTIATE – The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. *The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.*[9]

The headings and language of Section 251(c) (1) are obvious and logical. Subsection (c) (1) applies to the incumbent local exchange carrier ("ILEC"), here Qwest. The ILEC must negotiate in good upon request by a CLEC. And once the CLEC initiates such negotiations, it too must negotiate in good faith. Universal has not initiated negotiations with Qwest, nor is Universal required to do so by the ICA or the Act. Consequently, Universal's duty to negotiate in good faith cannot yet apply. Because Universal's duty does not yet exist, Qwest's argument that Universal somehow violated the Act by *not* negotiating fails.

As a matter of law the Commission's inquiry on this issue can end at the plain language of the Act. Nonetheless Universal notes that whether a party has acted in good faith is based on

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[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[8] Qwest Additional Brief at 4-5. Qwest also points out that Sections 251(a) and 251(b) of the Act apply to Universal. *Id.* at 4. Universal is uncertain as to whether Qwest is implying Universal is not meeting its obligations under these sections, or that the general duties of these sections somehow obligate Universal to respond to Qwest's attempt to initiate negotiations. Universal categorically rejects the former implication, and Universal incorporates by reference its arguments on its duty to negotiate (or not) with respect to the latter.

[9] 47 U.S.C. § 251(c)(1) (emphasis added).

a case-by-case analysis.[10] Here, based on the plain language of the ICA and the Act, Universal in good faith determined that it does not owe Qwest a duty to respond to a Qwest-initiated negotiation. And far from "completely failing" to respond to Qwest's request to negotiate,[11] Universal provided actual and express notice of its intent to end all interconnection negotiations and discussions once Qwest initiated legal proceedings against Universal in federal court.[12] Universal did leave open the possibility of settling the various issues in dispute between the Parties, which is perfectly appropriate under federal law, and not a violation of any good faith duty Universal might have in this circumstance[13] Indeed, "to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive."[14] That is precisely the tack that Universal has taken during the entire course of its dealings with Qwest (and precisely the import of the Term of Agreement in the ICA).

Universal has also been open and consistent in its correspondence with Qwest and in its communications with this Commission[15] that another basis for rejecting Qwest's Petition is the pendency of federal litigation over the terms and meaning of the ICA. The Parties genuinely disagree about the ICA's "Relative Use Factor" (regarding facilities cost responsibility) and change-of-law provisions (as they relate to reciprocal compensation).[16] Universal seeks to enforce those contract terms; Qwest seeks to avoid them. Universal should not be forced to

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10 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15566, ¶ 150 (1996) ("*Local Competition Order*").

11 Qwest Additional Brief at 1.

12 *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecom, Inc.*, ARB 589, Universal Telecom, Inc.'s Motion to Dismiss, With Prejudice at 11, n.26 (filed Aug. 9, 2004) ("Universal MOD").

13 *Local Competition Order* at ¶ 153.

14 *Id.*

15 *See supra,* n. 12.

16 *Qwest Corporation v. Universal Telecom, Inc.*, Case No. 04-CV-6047-AA (D. Or. filed Feb. 5, 2004).

commence a negotiation with Qwest either as a matter of convenience for Qwest or because Qwest does not want to abide by the ICA's terms or because Qwest fears it will lose in federal court. Rather, Universal is entitled to the benefit of its rights under Section 252(i) of the Act, and to hear the federal judge's opinion of the ICA's meaning. In addition, it is quite possible that the federal judge's decision concerning the Parties' obligations under *this* contract (which arise pursuant to federal law) will impact the Parties' obligations in the *next* contract. So allowing Qwest to arbitrate now would invite the possibility that the Parties could be subject to inconsistent legal obligations (arising out of both the existing agreement and any new agreement).

B. The ICA's Term of Agreement is Not "Silent"

1. Qwest's Argument that the Term is "Silent" Fails

Qwest uses its mischaracterized ambiguity question as the foundation to argue—without support from a single case, treatise, or hornbook—that the ICA is silent (versus ambiguous) as to negotiations for a new interconnection agreement. Universal disagrees that the ICA is silent in this respect, and instead urges Qwest to "listen more carefully" to the language in the Term of Agreement.

Qwest concedes, as it must, that other of its interconnection agreements identified by Judge Smith contain specific negotiation language in their term sections.[17] Qwest claims in response that "the mere lack of such language in the ICA's Term of Agreement provision is neither material nor instructive."[18] This is incorrect as a matter of legal construction in Oregon (*inclusio unius est exlcusio alterius* ["the inclusion of one is the exclusion of the other"][19]) and is unsupported in any event. Qwest next attempts to discount the clearest evidence against its

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17 Qwest Additional Brief at 8.
18 *Id.* at 7.
19 Universal Initial Brief at 8.

argument—its own SGAT language—by directing the Commission to the ICA's Severability language, which of course has nothing to do with the ICA's term or general negotiations between the Parties. Finally Qwest suggests that because the ICA is a federally-mandated contract only federal law can be used to interpret the ICA, and that to interpret the Term of Agreement or Severability clauses not to allow Qwest to initiate negotiations somehow abrogates Qwest's federal law rights.[20] Qwest is wrong on several counts here:

- As a matter of fact the ICA expressly provides that it "shall be interpreted solely in accordance with the terms of the Act *and the applicable state law in the state where the service is provided.*" ICA at XXXIV.W;

- As a matter of fact the ICA expressly provides that *this Commission* may issue decisions or orders that modify the rules and regulations governing implementing of the Act, and obligating the Parties to amend the ICA in response thereto. ICA at Signature Block, subsection (iv);

- To the extent Qwest references abrogation of "federal rights" not already identified in the Parties' papers, Universal reserves the right to address those rights once identified; and

- The logical import of Qwest's argument that state law is not applicable here is that it should not have cited and cannot rely on the *Beaver Creek*[21] decision or any other state commission decision purporting to interpret the Act in Qwest's favor. Qwest's reliance on *Beaver Creek* and other state decisions thus wholly undercuts its baseless argument here.

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[20] Qwest Additional Brief at 10 ("Oregon and federal common law is not applicable to the interpretation of federally-mandated agreements such as the ICA; ...").

[21] *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Beaver Creek Cooperation Telephone Co.*, Order No. 02-148, ARB 365, Arbitrator's Decision (Or. PUC Feb. 11, 2002).

2. Negotiation is Implied in the Term of Agreement

Universal believes the ICA provision is not silent as to negotiations for a new interconnection agreement. The need for mutual assent toward and negotiations for a new interconnection agreement is, at the least, implied in the Term of Agreement provision, because the Parties can only reach a new contract based on mutual assent. The Ninth Circuit has set out a five-factor test to determine when terms may be implied in the contract. According to this test, terms may be implied only if the following five conditions are satisfied:

(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties;

(2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it;

(3) implied covenants can only be justified on the grounds of necessity;

(4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; and

(5) there can be no implied covenant where the subject is completely covered by the contract.[22]

Implying mutual assent for negotiations to reach a new interconnection agreement between the Parties in the ICA's Term of Agreement provision satisfies these five factors.

First, the Term provision implies that the Parties must mutually agree to a new interconnection agreement to replace the ICA because any legal contract, after all, is formed on mutual assent.[23] Consequently, implying language of mutual assent to reach a *new* contract is simply (and necessarily) effectuating the intention of the Parties in the ICA. Qwest has argued

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[22] *Video Voice, Inc. v. New World Entertainment, Ltd.*, No. 93-55442, 1994 U.S. App. LEXIS 35917, *3-*4 (9th Cir. 1994) (citations omitted).

[23] *See, e.g., United States Fidelity & Guaranty Co. v. Riefler,* 239 U.S. 17 (1915) ("Mutuality of assent is essential to every contract ..."); *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309 (9th Cir. 1996) (stating that "creation of a valid contract requires mutual consent"); *Rex v. Clemens*, 295 F. Supp. 1339, 1341 (D. Or. 1968) (explaining that "an offer is continuing for a reasonable period of time or for a fixed time and if acceptance is made within that period of time the mutual assent necessary to the formation of the contract is supplied").

forcefully that it does not intend that the ICA will continue in perpetuity.[24] Neither does Universal. If the Parties agree that the current contract will not live forever, and that it will only be replaced by a new contract, then the only path to such a new contract is to satisfy the basic elements of forming it. Language regarding mutual assent must be implied.

Second, it appears from the language used that the Parties so clearly contemplated mutual assent to form a new contract that they found it unnecessary to express that concept. The Term provision states in relevant part that "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." There is but one path to a new enforceable contract—parties must mutually assent to its terms.[25] Thus, the Parties had no reason in the ICA to include such a basic requirement.

Third, it is necessary to imply mutual assent because no other reading of the Term provision makes sense. Contracts are to be construed given their most obvious meaning.[26] Qwest has offered no alternative reading of the Term provision, other than to suggest that "silence" must be construed against Universal.[27] By contrast, Universal has offered a common sense interpretation of the Term provision, based on the building blocks of contract law.

Fourth, it is common sense to assume that the Parties would have included mutual assent as an element of forming a new contract, had attention been called to the Term provision. Mutual assent can be rightfully implied because the Term of Agreement provision was *not* arbitrated by Qwest and MFS—the provision simply was not in contention between those parties.

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24 Qwest Additional Brief at 10-12.

25 *See supra*, n.21.

26 "A contract with unambiguous terms is generally interpreted according to the plain meaning of those terms." *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)).

27 Section XXXIV.O of the ICA establishes that the ICA is a "Joint Work Product" and in the event of any ambiguities no inferences shall be drawn against either Party. Universal does not believe the Term of Agreement provision is ambiguous, but even if the Commission determines it to be so, construing the Term provision against Universal and overriding the Act is clearly not countenanced by the ICA itself.

Fifth, there is no other section in the ICA that completely covers new negotiations for an entire interconnection agreement. The Severability clause, as Universal previously demonstrated, applies only to individual provisions found unenforceable, and to the narrow negotiations to replace such provisions.

Therefore, the Commission can and should read mutual assent as implied in the Term of Agreement provision.

C. Qwest's Assertions Regarding the Severability Clause Contradicts the Clear Language of the Provision, State Law, and Recognized Canons of Construction

Regardless of the applicability of the Severability provision on this issue, the Term of Agreement provision addresses *all* of the ICA. In contrast, the Severability provision (Section XXXIV.G) only addresses individual provisions that must be "severed" from the agreement because any "one or more of the provisions" are held to be unenforceable.

As Universal indicated in its Initial Brief, it does not read the "Severability" provision to allow Qwest to unilaterally initiate wholesale interconnection negotiations, and Universal offered four separate rationales—including the express language of the ICA—for concluding that Severability applies only in limited circumstances and to individually unenforceable provisions. In its discussion of severability, by contrast, Qwest did not cite to one Oregon or federal case, or any legal principle in its entire severability discussion.

Qwest also relies heavily on the lack of the express term "mutual assent" in either the Term of Agreement or Severability provisions to prove it can unilaterally terminate the contract.[28] Qwest is raising form over function. Universal seeks to convey to the Commission a legal concept, not a legal term of art. Universal is obviously not relying on the existence of the express phrase "mutual assent," and instead believes it is common sense that in order for the

[28] *Id.* at 9-10.

Parties to reach a new contract, there must first exist between them mutual assent to form such a contract. Similarly, the Parties must engage in negotiations to arrange such a new contract. "Negotiations" in this sense mean that which passes between parties in the course of or incident to the making of a contract.[29] In sum, Universal is merely arguing to the Commission that to form a new contract pursuant to the Term of Agreement provision, Universal and Qwest will have to engage in the ordinary activities that presage a contract, and include in their new agreement the essential elements of a formed contract.

D. The Parties Agree That the ICA Is Not Indefinite, and That Qwest May Not Unilaterally Terminate It.

Judge Smith asked for further briefing to address interpretation of the ICA both pursuant to the Telecommunications Act of 1996 *and* "the relevant cases" under Oregon contract law. If Qwest were permitted to terminate the ICA unilaterally under Oregon contract law, presumably state law would further allow Qwest to force renegotiation of the ICA, as well. In response, Qwest insists that Oregon common law "is not applicable" to the ICA and that the cited cases are "irrelevant."[30] Universal strongly disagrees with this assertion, for the reasons outlined above,[31] and its position is supported by the Ninth Circuit: "[I]nterconnection agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions."[32]

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29 *See United States Dep't of the Interior v. Federal Labor Relations Authority*, 279 F.3d 762, 766 (9th Cir. 2002) (explaining that "the verb negotiate includes within its definition the acts of communication and/or discussion between the parties in reaching a compromise"). Further, the word "negotiate" is defined as "'to communicate or confer with another so as to arrive through discussion at some kind of agreement or compromise about something.'" *Id.* (quoting Webster's Third New International Dictionary, Unabridged, 1986).

30 Qwest Corporation's Additional Brief on ICA Negotiation Issues ("Qwest Additional Brief"), at p. 10. Qwest's arguments, however, undercut its insistence that state contract law is irrelevant. Qwest seems to draw a distinction between the ICA and other bargained-for agreements, by trying to suggest that the terms of the ICA were not the result of a bargained-for exchange. Although Qwest points out that "the services and network access" it provides to CLECs like Universal is federally mandated, it does not dispute that the terms of the parties' ICA – including the controlling law provision quoted above – were reached by mutual agreement, *not* through arbitration.

31 *See* ICA at § XXXIV.W.

32 *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003) (citation omitted).

It is clear, however, that Universal and Qwest agree on three state common law points: (1) the Term of Agreement is not "ambiguous;" (2) the Term of Agreement is not "indefinite;" and (3) Qwest may not unilaterally terminate the ICA.[33] Consequently, the Parties agree that Qwest can invoke no state law theory to terminate the contract, or force Universal into renegotiations.

The Parties disagree, however, on one important point: the ICA is *not,* contrary to Qwest's assertion, "obsolete," and Qwest offers no support to prove otherwise. In fact, Universal has identified at least nine (9) other CLECs[34] that adopted the Qwest-MFS agreement from ARB 1, and Universal can find no record (from the OPUC's e-dockets database) of Qwest filing a petition to arbitrate a new agreement with any of those CLECs. Moreover, the ICA fully meets the Parties' interconnection needs, which are very basic. Universal and Qwest exchange traffic in what essentially amounts to a "meet point" arrangement. That is, each company builds its network to a mutually agreed upon point where actual physical interconnection takes place. The ICA is perfectly well suited for this technical arrangement and sufficient facilities either exist between the companies or can be added pursuant to each company's regular procedures. In addition, Universal and Qwest are able to establish one- and two-way facilities, as needed, on Qwest's side of the point of interconnection, and these facilities are fully and understandably described and contemplated by the ICA. The prices—all current—for any services either party buys from the other are established pursuant to the ICA, by FCC or Commission directive, or by tariff. The rates—all current—each party pays the other for services provided (*e.g.*, terminating

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[33] *See* Qwest Additional Brief at p. 13, stating "the ICA is not a contract of indefinite duration," the Term of Agreement "creates no ambiguity," and that "Qwest is likely limited by federal and state law in its ability to...terminate the parties' interconnection relationship."

[34] CLECs that have adopted the Qwest-MFS interconnection agreement were identified both thru research of the OPUC e-docket database and thru information provided by Qwest. They are: International Telecom (ARB 85), Harmony International (ARB 111), CCCor, Inc. dba Connect! (Arb 113), Level 3 Communications (ARB 120), Allegiance Telecom of Oregon, North County Communications, Pac-West Telecomm, Inc., Rio Communications, Inc., and Wantel Telecommunications.

access or reciprocal compensation) are also provided in the ICA, by FCC or Commission order, or by tariff. Indeed, in the seven year life of the ICA as between Universal and Qwest the Parties have found it necessary to enact only one amendment, concerning collocation. That is hardly the mark of an "obsolete" contract.[35]

To interpret the ICA at issue here as being of "indefinite duration" and allow Qwest to terminate it unilaterally would undercut an important policy goal of the 1996 Act. Accordingly, the ICA should be enforced according to its plain language: in the absence of a new agreement to which *both* parties consent, Qwest cannot force the premature renegotiation of its terms.

III. No State Commissions Have Allowed ILECs To Request Negotiations For An ICA Based Solely On the Plain Language of the Act

A. Qwest Failed to Produce Any New Authority to Support Its Claim That ILECs Can Initiate Negotiations In Contravention to the Plain Language of the Act

The remaining question is whether other state commissions have contravened the plain language of the Act to allow an ILEC to initiate negotiations. Although Qwest affirmatively asserts that yes, several state commissions have allowed an ILEC to request negotiations based on the language of the Act,[36] Qwest does not identify a single decision not already distinguished in previous briefing and by the Briefing Order. Nor does Qwest cite any other legal authority to support its contention that ILECs should be able to initiate negotiations in contravention to the plain language of Section 252(b).

Apparently unable to identify any new authority to support its novel legal arguments, Qwest chooses instead to re-argue the meaning of the handful of state commission decisions

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[35] To be fair, the parties negotiated but failed to sign an amendment concerning flow through of the FCC's *ISP Remand Order*. Universal does not believe the ICA's change-of-law provision obligates such an amendment; Qwest does. That dispute is before the federal court in *Qwest Corporation v. Universal Telecom, Inc.*, Case No. 04-CV-6047-AA (D. Or. filed Feb. 5, 2004). But this amendment, which concerns the *rates* applicable to termination of ISP-bound traffic, does not go to the essence of the ICA and the lack of such an amendment does not suggest that the ICA is in any way "obsolete."

[36] Qwest Additional Brief at 14.

that Judge Smith already found to be factually distinct. Thus, Qwest does not and cannot identify any authority to support its claim that other state commissions have allowed an ILEC to request negotiation based *solely* on the language of the Act.

Instead, Qwest relies only on decisions which are predicated on a determination of a mutual intent to negotiate (either expressed in the contract or by parties' actions) a new agreement. As Judge Smith explains in the Briefing Order, each of the state commissions that Qwest points to are factually distinct because "in making their decisions, the state commissions did not contravene the plain language of the Act. Instead, they based their conclusions on either a contract provision that allowed either party to request negotiations, or a finding that the non-ILEC initiated negotiations."[37]

B. The *Beaver Creek* Decision Is Factually Distinct and Therefore Does Not Represent Binding Precedent

Qwest's primary argument is that the OPUC's prior decision in the Beaver Creek proceeding, ARB 365,[38] was based on the language of the Act.[39] Indeed, Qwest goes so far as to assert that the "general rule" in Oregon is that ILECs, like Qwest can request negotiations with a CLEC.[40] Qwest's assertion that *Beaver Creek* represents a rule of general applicability is wrong as a matter of law, and directly contravened by express language in the arbitrator's decision, which includes not less than *four references* to the unique factual situation presented by that case. Qwest, therefore, would have the Commission turn a blind eye to Arbitrator Crowley's express limitation of her rationale and decision in *Beaver Creek* to the *specific factual situation* present in that case.

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37 Briefing Order at 2 (citing the decisions from and Tennessee, Florida and Alabama that Qwest relies upon in its Initial Brief) (internal citations omitted).

38 *See supra*, n. 20.

39 Qwest Additional Brief at 15.

40 *Id.* at 16.

Notably, Arbitrator Crowley's resolution of the disputed issues in that case begins with an explanation that the language of the Act assumes one state of affairs with respect to ILECs and CLECs: the "usual case" is that CLECs will be the entities who desire to interconnect with ILECs. (Indeed, in its Additional Brief Qwest suggests that, but for the Act, it would have the right *not* to enter an interconnection agreement with any CLEC.[41]) But Arbitrator Crowley went on to say that the Beaver Creek facts were not the norm: "However, the factual situation in this proceeding is *not the usual case.*"[42]

It is obvious why Arbitrator Crowley characterized the facts in *Beaver Creek* as "not the usual case." First, Beaver Creek is an established ILEC in its own exchange but, for purposes of the Act, is also a CLEC in Qwest's Oregon City exchange.[43] Second, Beaver Creek was using facilities intended for the exchange of ILEC-to-ILEC traffic to transmit and transport competitive traffic.[44] Third, Beaver Creek could have continued to exchange traffic with Qwest without an interconnection agreement by sending such traffic over EAS facilities to Qwest network.[45]

Thus, it was based on these unique and unusual facts that the Arbitrator allowed Qwest to initiate negotiations with Beaver Creek. And it was because of unique and unusual facts that Arbitrator Crowley repeatedly limited her finding to the particular facts at issue in that case. Specifically, in *each sentence* in which the Arbitrator presents her decision she specifically limits the holding to the specific facts of that unique situation:

> ***Given this situation***, Qwest's recourse to Section 252 furthers competition by giving the incumbent a means of requesting the competitive provider to come to terms on the exchange of traffic, as all other CLECs in Oregon that interconnect

41 *Id.* at 5.
42 Beaver Creek, *Arbitrator's Decision* at *14 (emphasis added).
43 *Id.* at *15.
44 *Id.*
45 *Id.*

> with Qwest have done. Allowing Qwest to invoke the arbitration procedures ***in this case*** levels the playing field for all other CLECs and allows the Commission to exercise the jurisdiction over interconnection arrangements given it in the Act. ***In this situation***, allowing the incumbent to send a request for arbitration furthers the goals of the Act.[46]

Qwest conveniently ignores this limiting language, and instead represents that there were no "extraordinary circumstances" in the Beaver Creek arbitration.[47] Qwest also asserts that the Arbitrator never "implied" that the ruling was based on the unique circumstances of that case.[48] True; the Arbitrator did not imply anything about her holding. Instead she *expressly* ruled that Qwest's recourse to Section 252 was appropriate "given this situation",[49] and therefore "in this case" it was appropriate to allow Qwest to arbitrate a new agreement "in this situation."[50]

Thus, Qwest's assertions notwithstanding, there can be little doubt that *Beaver Creek* was based expressly on the unique facts and equities of the unusual factual situation in that case. It was certainly *not the case* that the Arbitrator based her ruling solely on a straightforward interpretation of the plain language of Section 252(b). Indeed, the only reference made to Section 252 is to establish the "usual case" (CLECs desire to interconnect with ILECs) and to support the Arbitrator's opinion that contravention of the plain language of the Act was proper in order to support certain policy goals.

Qwest suggests that a decision dismissing its Petition here will depart from binding precedent. It is true that Oregon courts generally do not lightly overturn precedent, especially

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46 *Id.* at *15 - *16 (emphasis added).
47 Qwest Additional Brief at 16, n. 10.
48 Qwest Additional Brief at 16.
49 Beaver Creek, *Arbitrator's Decision* at *15.
50 *Id.*

when the state has followed the precedent for a long time.[51] But Universal is not asking (or implying) that the Commission depart from or overrule longstanding precedent. Oregon law provides that an ALJ is bound by a previous ruling and must use it as precedent in determining cases "*where the facts are basically the same.*"[52] Universal has demonstrated that the facts in *Beaver Creek* are entirely distinguishable from the facts in the present case. Consequently, *Beaver Creek* is so factually dissimilar from this case that is does not represent binding precedent upon Judge Smith here.

Next, *Beaver Creek* was expressly limited to the facts of that case. Arbitrator Crowley's rationales have not been employed in any other Commission proceeding in the short three years the decision has been in force. Therefore, to suggest that the Commission or any ILEC would be disadvantaged by limiting *Beaver Creek* to the same fact pattern is just plain wrong.

Further, Oregon courts have set forth three types of disjunctive situations in which it is appropriate to reconsider a nonstatutory rule or doctrine. Universal respectfully suggests that these situations are similarly instructive for determining when a trier of fact may consider departing from legal precedent:

> (1) that an earlier case was inadequately considered or wrong when it was decided; or
>
> (2) that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case; or
>
> (3) that the earlier rule was grounded in and tailored to specific factual conditions, and that some *essential factual assumptions* of the rule have changed.[53]

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[51] *See, e.g., Hammond v. Central Lane Communs. Ctr.*, 312 Or. 17, 26, 816 P.2d 593 (1991) (citing *Keltner v. Washington Co.*, 310 Or. 499, 504, 800 P.2d 752 (1990)).

[52] *Grisby v. Appel*, 1999 U.S. App. LEXIS 32258, *2 (9th Cir. 1999); *Paulson v. Bowen*, 836 F.2d 1249, 1252 (9th Cir. 1988).

[53] *G.K. v. Kaiser Foundation Hospitals, Inc.*, 306 Or. 54, 59, 757 P.2d 1347 (1988) (emphasis added) (citations omitted).

Here Universal has demonstrated that the earlier "rule"—that the ILEC could initiate interconnection negotiations—was grounded in and tailored to specific factual conditions, and that *all* of the essential factual assumptions of the rule have changed from the *Beaver Creek* case to this case. Thus, this case clearly falls within the third circumstance listed above.[54]

Moreover, the policy rationales which Arbitrator Crowley relied upon in *Beaver Creek* are already satisfied in the present case. The Arbitrator's decision specifically relied on two specific policy goals: (1) "level[ing] the playing field for all other CLECs" ; and, (2) allowing the OPUC to exercise jurisdiction over interconnection agreements.[55] With respect to the first policy goal, Arbitrator Crowley explained that requiring Beaver Creek to have an interconnection agreement with Qwest (which establishes certain reciprocal compensation obligations) "puts Beaver Creek on equal footing with the other CLECs in Oregon that interconnect with Qwest."[56] Of course, Universal already has an interconnection agreement with Qwest (which establishes certain reciprocal compensation obligations) and is therefore *already* on an equal footing with other CLECs in Oregon that interconnect with Qwest. Moreover, as Universal has previously noted, ensuring a level playing field *in this case* requires that the Arbitrator properly construe the Term of Agreement provision of the ICA, which contemplates that *both* Parties must agree to a new interconnection agreement.[57] And it is obvious the Commission exercises jurisdiction over this agreement, as evidenced by this dispute. Therefore,

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54 "In the usual case, incumbents have telephone networks in place with which CLECs want to connect. The language of §252(b)(1) assumes this state of affairs. However, the factual situation in this proceeding is not the usual case." *Beaver Creek* at 4 (emphasis added).

55 *Beaver Creek, Arbitrator's Decision* at *15.

56 *Id.*, at * 24.

57 Universal further notes that Qwest's argument that "other CLECs with the same ICA or Term language would be able to game the system" (Qwest Additional Brief at 22) is offered with no factual support for the purported harm that would befall Qwest.

there is no risk that denial of Qwest's improper attempt to initiate negotiations in this case will undermine the goals of the Act.[58]

C. Other Commissions Also Based Their Decisions On Specific Facts Or Grounds, Not On The Plain Language of the Act

Having failed to identify any new legal authority that responds to the specific questions posed in the Briefing Order, Qwest simply reargues the impact of the three other state commission decisions that Judge Smith found to be factually distinct. Although this was clearly beyond the scope of issues raised in the Briefing Order, Universal hereby responds to the arguments presented in Qwest's Initial Brief.

The agreement at issue in the Tennessee Commission's decision in *BellSouth/Intermedia,* unlike the ICA at issue in the present case, contained express language regarding the parties' mutual ability to seek renegotiation and arbitration of the existing agreement.[59] Not surprisingly, Qwest attempts to obscure that fact in order to minimize the significance of the express language.

Moreover, Qwest cites extensively from what it apparently believes is the decision of the full Tennessee Commission to support its claim that the Tennessee Commission's decision "was not based solely on [the express language of the agreement], [but that] it was based in part on the language of the Act itself."[60] But Qwest's citation of authority to support this claim is *not* to the full Tennessee Commission decision, but is in fact simply a citation to one of *the parties' publicly filed briefs* in that case.

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[58] In addition, there can be no claim that Universal has not satisfied its duty to negotiate under Section 251(b)(5) a reciprocal compensation arrangement between Qwest and Universal. The parties already have such an arrangement in place, and Universal's adoption of an existing interconnection agreement with such arrangements constitutes satisfaction of its duty to negotiate such an arrangement.

[59] *See* BRIEF OF INTERMEDIA COMMUNICATIONS, INC., filed in Docket No. 99-00948 (*Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*) electronic copy available at 2000 Tenn. PUC LEXIS 572.

[60] Qwest Additional Brief at 18-19 (citing the Brief of Intermedia Communications, Inc., *available at* 2000 Tenn. PUC LEXIS 572).

Understandably, Qwest seems to confuse the document available at 2000 Tenn. PUC LEXIS 572, as a decision of the Tennessee Commission. In fact, upon careful review, it is clear that this document is actually a *legal brief* of Intermedia Communications, Inc. (the CLEC in that case) concerning procedural questions raised by the Tennessee Commission. Although the document begins with a header labeled "Opinion" the next line on the document is a second header labeled "BRIEF OF INTERMEDIA COMMUNICATIONS, INC."[61] In addition, the document begins with a statement that Intermedia "through its undersigned counsel" hereby "submits its brief addressing several procedural issues."[62] Also, the end of the document identifies Intermedia's counsel in the form normally shown on legal pleadings.[63] Thus, it seems evident that this document is not in fact the Tennessee Commission's decision, but is simply the brief of Intermedia Communications.

Accordingly, Qwest's reliance[64] on this document as authority for the proper application of Section 252(b) is clearly mistaken and can not be accepted here. In fact, the actual decision of the Tennessee Commission to allow BellSouth to arbitrate a new interconnection agreement can be found at 2000 Tenn. PUC LEXIS 570 (Tenn. Reg. Util. Comm'n, May 18, 2000). This document, entitled "Opinion: Order Adopting Pre-Hearing Officer's Report, Accepting Arbitration, Appointing Pre-Arbitration Officer and Directing Mediation," is the document which reflects the Tennessee Commission's actions in this case. In this document the Tennessee

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61 *See* 2000 Tenn. PUC LEXIS 572 at 1.

62 *Id.*

63 *Id.*

64 Qwest Additional Brief at 18-19 (citing the Brief of Intermedia Communications, Inc., *available at* 2000 Tenn. PUC LEXIS 572) (Qwest relies upon this document to support its claim that the Tennessee Commission found that: "Section 252(b)(4)(c) 'speaks in terms of the local exchange carriers (and not the incumbent local exchange carrier's) receipt of the interconnection request;'" and, "section 252(b)(1) plainly states that either party may seek arbitration, and that other state commission had similar arbitration petitions;" and that "none of these commissions 'has question the propriety of [the ILEC's] request or petition for arbitration;" and that "[i]t is not unreasonable to assume that these state commissions would have taken issue with the arbitration petition if they believed that the filing was procedurally defective." Obviously, Qwest's assertion that these are the legal findings of the Tennessee Commission is wrong.).

Commission adopts the order of a pre-hearing officer and makes certain procedural findings as to the rest of the proceeding. The only instructive information in this entire document is the finding of the pre-hearing officer (attached as an appendix to the above cited order, or separately reported at 2000 Tenn. PUC LEXIS 571) that negotiations were properly commenced "in accordance with Section III.B of the Amendment to the Interconnection Agreement."[65] Thus, the Tennessee Commission's decision was clearly based on the fact that the existing interconnection agreement allowed *either* party to initiate negotiations.

This was clearly stated in the Brief of Intermedia, which noted that "Intermedia and BellSouth mutually and voluntarily agreed in the Interconnection Agreement that *either* party may seek negotiation of a new interconnection agreement."[66] Thus, it seems apparent that the Tennessee Commission allowed BellSouth to initiate negotiations and arbitrate a new agreement because the agreement explicitly permitted either party to initiate interconnection negotiations at the appropriate time.[67] There is no basis to conclude that the Tennessee Commission based its decision on the language of Section 252(b).

Nor is the Florida PSC's decision reliant upon an application of the plain language of Section 252(b). Qwest incorrectly represents that the Florida PSC's decision rested on a construction of Section 252 to address BellSouth's right to initiate negotiations. Specifically, Qwest asserts that "the Commission's decision denying the CLEC's motion to dismiss was based purely on the Act."[68] But the language which Qwest relies upon addresses only the PSC's jurisdiction over BellSouth's request for *arbitration*, and specifically does not extend to

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65 Order Adopting Pre-Hearing Officer's Report, *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*), 2000 Tenn. PUC LEXIS 570 (Tenn. Reg. Util. Comm'n, May 18, 2000).

66 *See* Brief of Intermedia Communications, Inc., *available at* 2000 Tenn. PUC LEXIS 572..

67 *Id.*

68 Qwest Additional Brief at 19.

BellSouth's right to initiate *negotiations*. This is a critical distinction, and it is the crux of the instant dispute. Universal does not disagree that once negotiations begin either party can seek mediation under the Act. Rather, Universal's position is that, under the Act and absent contractual agreement to the contrary, only a CLEC can initiate negotiations. In Florida, as Judge Smith noted,[69] the PSC had already determined that the parties' agreement allowed either party to initiate negotiations.[70] Qwest's argument thus does not go to the central issue of this case.

The Florida PSC decision dedicates approximately half of its opinion explaining that the parties there had traded negotiation request letters, and had additional correspondence and communications concerning how and when to establish a new agreement.[71] For example, the PSC noted that "Supra states that BellSouth did not receive a request for negotiation *from Supra* until June 9, 2000, and so BellSouth's filing of an arbitration petition on September 1, 2000, was premature."[72] And, the PSC further noted that "BellSouth sent Supra a request for negotiation by letter dated March 29, 2000"[73] and that "negotiations were held, and they were attended by the same persons [from both BellSouth and Supra]."[74]

Based upon these factual findings the FPSC then noted that specific language in the agreement allowed either party to initiate negotiations. Specifically, the PSC quoted agreement language stating that if, in the process of negotiating a new agreement, "the parties are unable to satisfactorily negotiate new terms, conditions and prices, *either party may petition* the [FPSC] to

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69 Briefing Order at 2, n. 4.

70 *Re BellSouth Telecommunications, Inc.*, Docket No. 001305-TI PSC-01-1180-FOF-TI, at 4-5 (Fla. PSC May 23, 2001) (emphasis added) (*BellSouth/Supra*).

71 *Id.* at pp. 2-6.

72 *Id.* at 3 (emphasis added).

73 *Id.*

74 *Id.* at 4.

establish an appropriate follow-on agreement *pursuant to 47 U.S.C. § 252*."[75] Thus, the FPSC concluded that the parties had contractually agreed that *either* party could initiate negotiations. Of course, there is no similar language with respect to the agreement at issue in this case.

Accordingly, and under those specific circumstances, where the parties had clearly engaged in communications regarding a new agreement and where the existing agreement *expressly* allowed either party to initiate negotiations for a new agreement, the FPSC found in favor of the ILEC. The FPSC's decision was not, however, based solely upon any asserted determination that Section 252(b) allowed an ILEC to initiate negotiations. It was, in fact, a determination that it had jurisdiction to arbitrate the terms of a new agreement based upon the facts, and agreement, present in that situation.

Similarly, the decision from the Alabama PSC is also predicated upon a determination that the CLEC *engaged* in negotiations with the ILEC, and therefore waived any right to contest the ILEC's right to initiate negotiations. In this regard, the Alabama PSC spent a significant amount of its order detailing the multiple rounds of discussion and correspondence between the BellSouth (the ILEC) and NOW Communications (the CLEC) and concluded that the NOW Communications' "well established conduct" belied its statement that negotiations had not occurred between the parties.[76] Clearly NOW's conduct served as a predicate for the Alabama PSC to rule that it was appropriate for BellSouth to arbitrate the terms of a new interconnection agreement in that instance.

First, the Alabama PSC noted that its decision was based upon the actions taken in Louisiana and Kentucky between BellSouth and the NOW. The Louisiana PSC, we know,

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[75] *Id.* at 4 and 5 (emphasis added).

[76] *Petition for Arbitration of the Interconnection Agreement Between Bellsouth Telecommunications, Inc. And NOW Communications, Inc., Pursuant To The Telecommunications Act Of 1996*, DOCKET 27461, 2000 Ala. PUC LEXIS 1052 at § III (Ala. PSC June 23, 2000) (*BellSouth/Now*).

determined that Section 252(b) does not allow an ILEC to initiate negotiations.[77] Although the Louisiana PSC ultimately allowed BellSouth to arbitrate an agreement against NOW, it did so because it found that NOW had engaged in negotiations with BellSouth.[78] In addition, the Kentucky PSC also concluded that NOW had engaged in negotiations with BellSouth.[79]

Second, the Alabama PSC concluded, based upon repeated factual findings, that NOW had *engaged in negotiations* with BellSouth. The order notes that: "NOW concedes that it participated in negotiations with BellSouth ...;"[80] and that repeated correspondence between the two parties, including a letter of January 26, 2000, "also recognized that NOW had requested 'to move from negotiating a stand-alone resale agreement to negotiating a full-blown interconnection agreement' ..."[81] Based upon these findings (and much more) the PSC concluded that NOW's "well established conduct" supported its conclusion that NOW engaged in the negotiations of a new agreement with BellSouth.

The Alabama PSC's decision to allow BellSouth to arbitrate the terms of a new agreement was, therefore, based largely on the fact that NOW had engaged in a course of conduct suggesting that it had engaged in negotiations and could therefore not credibly claim that BellSouth had no right to initiate negotiations.

The only consideration of law that the Alabama PSC adds to this analysis is the statement that their review of "controlling law" suggests that ILECs can initiate negotiations

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77 *See* Universal Telecom Initial Brief, ARB 589 (filed Nov. 14, 2004) at 11-12 (citing *BellSouth Telecommunications, Inc. v. NOW Communications, Inc.*, 2000 Louisiana PUC LEXIS 83 at * 4 (La. PSC May 22, 2000)).

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

79 *See In the Matter of the Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and NOW Communications, Inc. Pursuant to the Telecommunications Act of 1996*, 2000 Ky. PUC LEXIS 1373 (Ky. PUC June 7, 2000).

80 *BellSouth/NOW* at § III (sixth paragraph).

81 *Id.* at § III (fourteenth paragraph).

under Section 252(b).[82] However, there is no citation to legal authority supporting this statement, nor is any statement from the Alabama PSC as to its reason for departing from the clear language of the Act. In fact, the Alabama PSC indicates only that it would undermine the "spirit" of Section 252(b) if CLECs were allowed to exclusively determine when agreements are renegotiated.[83]

However, unlike the agreement between BellSouth and the CLEC in Alabama (NOW Communications), the Universal/Qwest ICA does not contain a one-party termination provision. Rather, as noted above, the Universal/Qwest ICA includes a provision obligating *both* Parties to agree to terminate the agreement and move to a successor agreement. Consequently, unlike the *BellSouth/NOW* circumstance, Universal here cannot "exclusively determine" when its agreement with Qwest can be renegotiated. The Parties must mutually agree to renegotiate their contract. There is no detriment to Qwest any more than there is a detriment to Universal.[84]

To the extent that the Alabama decision can be read to have concluded that Section 252(b), on its face, allows an ILEC to initiate negotiations Universal believes that such an interpretation is simply wrong. This conclusion is supported by express finding to the contrary by the Louisiana PSC[85] (ironically, a state in which the Alabama commission found NOW Communications to have voluntarily engaged in negotiations with BellSouth) as well as the California PUC's adoption of rules[86] that clearly limit the right to initiate negotiations to CLECs. Indeed, as the Louisiana PSC plainly stated: "[t]he ALJ determined, and the Act is

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82 *BellSouth/NOW* at § III (11th paragraph).

83 *Id.*

84 *BellSouth/NOW* also makes clear that the parties had engaged in considerable negotiations toward a new agreement, including an agreement by NOW to extend the arbitration window. Neither of these facts, which the Alabama PSC found compelling, exists here.

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

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

clear, that under Section 252(b)(1), a CLEC, not an ILEC (BellSouth) may request negotiations under Section 252(b)(2)."[87] Universal further incorporates by reference its prior arguments on the Alabama decision.

D. Qwest's "Policy" Justifications for Its Position Do Not Support A Decision That Requires the Judge to Directly Contravene the Plain Language of the Act

Qwest offers various "policy" arguments to support its claims. Individually, these arguments are essentially recitations of prior arguments already made by Qwest. Collectively, they provide no basis for a decision that directly contravenes the plain language of the statute. Nevertheless, Universal responds to each argument as presented by Qwest.

First, the state commission decisions cited by Qwest are distinguishable from the present case, and were based upon a factual finding that either the agreement, or the parties' express actions, indicated intent to allow either party to initiate negotiations. Moreover, to the extent that Qwest asserts that state law is not applicable here[88] its reliance on other state commission decisions is precluded.

Second, it is not Universal's position that the ICA should continue in perpetuity. Instead, as explained above, it is Universal's position that renegotiation of the terms of this contract, at least while litigation continues in federal court over both parties' legal rights and obligations related to interconnection, is premature. The decision in that case will inform the Parties' duties in any future interconnection agreement.

Third, to the extent that the Commission considers the benefits of competitive entry as a basis for ruling on which carrier can initiate interconnection negotiations, Qwest's arguments about the competitive nature of the Oregon market actually work against it. Qwest suggests that

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87 *Id.* at * 1.

88 Qwest Additional Brief at 10 ("Oregon and federal common law is not applicable to the interpretation of federally-mandated agreements such as the ICA; ...").

the Act has been so successful in leveling the playing field between Qwest and CLECs in Oregon that public policy should favor a regime in which enables an ILEC to request negotiations for a new interconnection agreement. Unfortunately, that claim is not supported by the FCC's most recent review of the competitive telecommunications market in Oregon. In its most recent analysis of local telephone competition the FCC determined that, as of June 2004, CLECs controlled approximately 12% of the end user access lines in Oregon.[89] By implication, therefore, Qwest maintains control over 88% of the access lines in its service territory. More to the point, Qwest controls 100% of the access lines over which its subscribers originate traffic that is terminated by Universal. Universal is aware of no finding, or even any suggestion, that a telecommunications market in which one provider controls 88-100% of the access lines is subject to "effective competition" as Qwest would have the Commission believe. Consequently, the public policy goal inherent in the Act—creation of a level playing field as between CLECs and ILECs—has yet to be achieved in Oregon.

[89] Local Telephone Competition: Status as of December 31, 2003, Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004, at Table 6, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC_State_Link/IAD/Icom0604.pdf.

IV. 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)[90] 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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Dated: December 14, 2004

[90] 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.

CERTIFICATE OF SERVICE

I, K.C. Halm, hereby certify that on 14th day of December, 2004, I caused copies of forgoing Reply Brief of Universal Telecom Inc. to be sent by first-class mail, postage pre-paid to the following:

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