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October 11, 2005

Frances Nichols
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: IC-9

Dear Ms. Nichols:

Enclosed please find an original and five (5) copies of Qwest's Response to Pac-West's Application for Reconsideration or Rehearing of Order No. 05-874, along with a certificate of service.

If you have any questions, please don't hesitate to give me a call.

Sincerely,

Carla M. Butler

CMB:

Enclosure
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 9

PAC-WEST TELECOMM, INC., Plaintiff, v. QWEST CORPORATION (FKA U S WEST COMMUNICATIONS, INC.), Defendant.	**QWEST'S RESPONSE TO PAC-WEST'S APPLICATION FOR RECONSIDERATION OR REHEARING OF ORDER NO. 05-874**

Defendant Qwest Corporation ("Qwest") hereby responds to the application of plaintiff Pac-West Telecomm, Inc. ("Pac-West") for rehearing or reconsideration of the Commission's Order No. 05-874 ("Order") on July 26, 2005. For the reasons set forth below, and as Qwest has demonstrated in its previous briefs in this case, Pac-West's arguments that the Commission erred in deciding Issue 5 are completely without merit, and thus Qwest respectfully submits that the Commission should deny Pac-West's application in its entirety, including its request for rehearing or its request for oral argument.

ARGUMENT

I. THE *ISP REMAND ORDER* AND D.C. CIRCUIT DECISION DO NOT REQUIRE QWEST TO PAY RELATIVE USE FOR VNXX TRAFFIC USING DTT FACILITIES[1]

Pac-West begins its argument by alleging that the Commission's Order erroneously interpreted federal law when it concluded that the "FCC's *ISP Remand Order* 'did not alter contractual obligations to transport traffic,' including the requirements in [47 CFR] § 51.709 and the RUF [relative use factor]," and that "issues relating to compensation for DTT [Direct Trunk Transport] facilities- including the transport of VNXX traffic are not encompassed by the

[1] At the outset, Qwest notes that Pac-West's application includes an "introduction," purporting to establish background. (Application, pp. 2-4.) Qwest does not necessarily agree with Pac-West's background, which is selective in nature and incomplete. Qwest asserts that the Order already has a very detailed and balanced analysis of the legal

[parties'] ISP Amendment." (See Application, pp. 4-5; see also Order, p. 36.) However, Pac-West ignores two critical facts: (1) this a new argument, which Pac-West had never previously made, but further, (2) Pac-West specifically *conceded* that the *ISP Remand Order*[2] addresses only the termination of ISP traffic, and not to the contractual obligations to transport traffic.

Moreover, even assuming the *ISP Remand Order* had addressed the *transport* of ISP traffic, such that it might have addressed the sharing of costs of facilities (like the DTT facilities at issue here), Pac-West ignores the fact that the *ISP Remand Order* limits the term "ISP-bound traffic" to traffic destined to an ISP that *originates and terminates within the same local calling area*. Finally, Pac-West ignores the fact that the parties' ICA expressly limits the RUF to only "local" traffic. The law in Oregon, including in the recent *Universal* federal court decision, as well as in several Commission orders and the recent ALJ Ruling in docket IC 12 (and relevant Oregon statutes, rules and tariffs), makes it abundantly clear that VNXX traffic, no matter whether destined to an ISP, a calling center or any other recipient, is, by definition, *not local*. Thus, the issues here are simply whether the RUF applies only to "local" traffic, and if so, whether VNXX traffic is "local." The answer to the first question is yes, as the RUF applies only to "local" traffic, pursuant to the express provisions of the parties' ICA. The answer to the second question is no, because by definition VNXX traffic is not local.

For these reasons, Qwest respectfully submits that the Commission did not err in determining that Pac-West is not entitled to the RUF for the DTT facilities that are used to provide VNXX traffic. The Commission should therefore deny Pac-West's application.

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background regarding these issues. See Order, pp. 24-26, 28-34, 34-37. Thus, Qwest will not specifically respond to the introduction, but generally addresses these issues in its specific reply to Pac-West's application.

[2] Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR 9151 (2001) ("*ISP Remand Order*").

A. The *ISP Remand Order* did not alter existing contractual obligations regarding the transport of traffic, such as the ICA requirement that relative use factor (RUF) payments be limited to local traffic

Preliminarily, Pac-West makes much ado about the interplay between sections 251(b)(5) and 251(g) of the 1996 Telecommunications Act. However, as the Order noted, "the *ISP Remand Order* did not alter the contractual obligations to transport traffic, including the requirements in [47 CFR] § 51.709(b) and the RUF." Order, p. 36. Indeed, *Pac-West conceded as much*. See Order, fn. 120; see also Pac-West Reply Brief (November 24, 2004), p. 12.[3] As the Order notes, "the FCC never intended that the *ISP Remand Order* would affect the relative use requirements applicable to the transport of ISP traffic set forth in Rule 51.709(b)." Thus, "the *ISP Remand Order* did not affect arrangements for the transport of traffic under Article V., Section D.2.d. of the parties' ICA, including the applicability of the RUF." See Order, p. 30.

This ruling is also consistent with the Oregon federal court's decision in *Qwest Corporation v. Universal Telecom, Inc*., 2004 WL 2958421 (D. Or. 2004), on December 15, 2004, which is binding on this Commission and on Pac-West. Indeed, the court in *Universal* ruled that the FCC had stated that the intercarrier compensation regime established in the *ISP Remand Order* affected only the *rates* applicable to the delivery of ISP traffic. *Universal*, 2004 WL 2958421, at p. *4; see also Order, pp. 29-30.

Here, it must be remembered that the parties' ICA specifically, and expressly, provides that the RUF applies *only to local traffic*. (See e.g., ICA, §§ V.A., V.B., V.C., and V.D.)[4] Thus,

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[3] Pac-West stated: "In its recent order granting in part the forbearance petition filed by Core Communications [footnote omitted], the FCC clarified that *the ISP Remand Order* was designed to modify r*eciprocal compensation for ISP-bound traffic only, not to disturb any other aspects of ICAs* between ILECs and CLECs, *such as cost-sharing arrangements applicable to DTT facilities*." (Pac-West Reply Brief (November 12, 2004), p. 12 (emphasis added).)

[4] Section V.A. of the ICA states: "[r]eciprocal traffic exchange addresses the exchange of traffic between [Pac-West] end users and [Qwest] end users. *If such traffic is local, the provisions of this Agreement shall apply.** *." (Emphasis added.) Thus, the most fundamental question is whether the traffic is "local." The ICA identifies several categories of traffic, including EAS/local, intraLATA toll, switched access, transit traffic, and others (ICA, § V.B.), and types of exchanged traffic, including termination and transport of local traffic (§ V.C.). If traffic is properly designated

unless there was an amendment that specifically amended these RUF provisions, and there was not, only facilities used for local traffic are subject to the RUF. Further, because the law in Oregon is very clear that VNXX traffic, *by definition*, is not local traffic (as explained in more detail below), it does not matter that the D.C. Circuit reversed the FCC's analysis in the *ISP Remand Order* as to the compensation for termination of ISP traffic. What matters is that (1) neither the *ISP Remand Order* nor the parties' ISP Amendment (which incorporated the *ISP Remand Order*) affects the ICA requirement that the RUF is limited to local traffic, and (2) since VNXX is not local traffic, VNXX traffic is not subject to the RUF.

Finally, Pac-West's argument about the FCC correcting its "mistake" regarding ISP traffic not being "local traffic" (Application, p. 5) is a *non sequitur*. Its argument is reminiscent of the claim that Level 3 recently made in docket IC 12, which was an interconnection enforcement complaint brought by Qwest against Level 3 for Level 3's engaging in VNXX traffic, and demanding compensation for such VNXX traffic. There, Level 3 persisted in attempting to "confuse[] the FCC's description of how ISP-bound traffic is provisioned with the agency's conclusions regarding how the traffic should be treated for reciprocal compensation and jurisdictional purposes." *Compare e.g.*, *ALJ Ruling* in docket IC 12 (August 16, 2005), at p. 9, and its citation to the Ninth Circuit decision in the *Pacific Bell* case (fn. 32), with Pac-West's argument at p. 4. Thus, Pac-West addresses the non-issue of the jurisdictional basis of ISP traffic for reciprocal compensation purposes instead of what is really at issue here, namely,

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as "local," the ICA states the "call termination rates as described in Appendix A will apply reciprocally for the termination of local/EAS traffic per minute of use." (*Id.*, § V.D.1.a.) On the other hand, if the traffic is not local, reciprocal compensation does not apply. (The ICA is attached as an exhibit to Pac-West's complaint.)

The ICA utilizes the definition of "Traffic type" (ICA, § II.PP) as the means of defining "local traffic": "'Traffic type' is the characterization of intraLATA traffic as 'local' (local includes EAS), or 'toll' *which shall be the same characterization established by the effective tariffs of the incumbent local exchange carrier as of the date of this agreement.*" (Emphasis added.)

whether traffic that does not originate and terminate within the same local calling area (VNXX) is "local," and thus subject to the RUF. The Commission's Order correctly answered this question in the negative. Moreover, as the ALJ Ruling correctly noted in docket IC 12, and as Qwest discusses in more detail in the next section, "the FCC's decision to abandon its attempt to categorize ISP-bound traffic as local or long distance for purposes of determining whether reciprocal compensation is due under §251(b)(5), is unrelated to its long-standing definition of ISP-bound traffic." See ALJ Ruling, docket IC 12, p. 9.

In short, it does not matter that the D.C. Circuit reversed the FCC's reliance on section 251(g) as a basis to exclude ISP traffic from section 251(b)(5) reciprocal compensation requirements. Rather, what matters is that the FCC in the *ISP Remand Order* did not alter carriers' other obligations under the FCC's Part 51 rules. As such, Pac-West's argument that simply because the D.C. Circuit precluded the FCC's reliance on section 251(g) as a basis to "carve out" from section 251(b)(5) calls made to ISPs, interconnection facilities used to exchange ISP traffic are therefore subject to the RUF, is a leap of logic without any basis.

Accordingly, Qwest respectfully submits the RUF in the ICA *does not* apply to facilities used for VNXX traffic, and that the *ISP Remand Order* did nothing to change that limitation. Therefore, the Commission's Order No. 05-874 did not err in ruling that Pac-West is not entitled to RUF payments for the DTT facilities that are used to exchange VNXX traffic. The Commission should therefore deny Pac-West's application for reconsideration or rehearing in its entirety.

The ICA thus incorporates those portions of Qwest's Oregon tariff, effective on the date of the ICA, that define "local traffic." Qwest's tariffs define "local traffic" as traffic originating and terminating within the same local calling area. (See also fn. 19, *infra*.)

B. The *ISP Remand Order* applies only to ISP traffic originating and terminating *within the same local calling area*, regardless of the numbers dialed

Pac-West also argues that the *ISP Remand Order* did not limit its application only to traffic destined to an ISP that both originates and terminates within the same local calling area. It thus makes an argument that the *ISP Remand Order* applies to "all" traffic destined to an ISP so long as it is traffic "between telephone numbers *assigned* to the same local calling area," (Application, p. 7 (emphasis added).) Pac-West then goes on to make, seemingly in order to create a policy or fact issue in the hopes of reconsideration or rehearing, that that "[w]hile [Qwest's argument about ISP calls being within the same local calling area] is true of end-users located in *urban* areas, it certainly is not the case for end-users who live in the more *rural* locations." (*Id*. (emphasis added).) Pac-West then relies not so much on the text of the *ISP Remand Order* itself, or the D.C. Circuit decision in *WorldCom*, but rather, on a 2003 Washington Commission arbitration between Level 3 and CenturyTel and a Connecticut judge's March 2005 decision. (*Id*., pp. 7-8.)

Pac-West is simply wrong, however. Even assuming that the *ISP Remand Order* had somehow altered carriers' obligations regarding transport of ISP traffic, the *ISP Remand Order* (and the subsequent D.C. Circuit decision) defines ISP traffic to encompass only those situations in which both the customer initiating an Internet call and the ISP equipment (modems, servers, and routers) to which that call is directed, and which controls the end user customer's interaction with the Internet, are located in the same local calling area.

1. The *ISP Remand Order* applies only to ISP traffic within the same LCA

It is clear that the FCC has consistently recognized and understood ISP traffic as being traffic originated and terminated within the same local calling area in determining whether ISP

traffic should be eligible for reciprocal compensation. See e.g., *ISP Remand Order*, ¶¶ 9-16, and specifically, ¶¶ 4, 10, 12, 13, 22; see also *ISP Declaratory Order*,[5] ¶¶ 4, 7, 8, 12, 24 (fn. 77), 27.

For example, in defining ISP-bound traffic in the *ISP Remand Order*, the FCC stated that "*an ISP's end-user customers typically access the Internet through an ISP Server located in the same local calling area*, and that the end users pay the local exchange carrier for connections to the local ISP." *ISP Remand Order*, ¶ 10. The FCC specifically identified the issue it was addressing as "whether reciprocal compensation obligations apply to the delivery of calls from *one LEC's end-user customer to an ISP in the same local calling area* that is served by a competing LEC." *Id.*, ¶ 13. (Emphasis added.)[6] Thus, the *ISP Remand Order* did not address the situation where a CLEC's ISP-customers servers or modems are located outside of the LCA of the calling party.

In another part of the *ISP Remand Order*, the FCC specifically recognized that a separate category of ISP traffic continued to exist that was, and would remain, subject to access charges:

> *Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g).* These services thus remain subject to Commission jurisdiction under Section 201 (or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions), whether those obligations implicate pricing policies as in *Comptel* or reciprocal compensation. *This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic. ISP Remand Order*, ¶ 39. (Emphasis added; footnote omitted.)

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[5] Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶¶ 1, 10-20 (1999) ("*ISP Declaratory Order*").

[6] That the FCC recognized that it was dealing only with "local" traffic is also clear from paragraph 12:

> The 1996 Act set standards for the introduction of competition into the market *for local telephone service*, including requirements for interconnection of competing telecommunications carriers. As a result of interconnection and *growing local competition*, more than one LEC may be involved in the delivery of telecommunications *within a local service* area. Section 251(b)(5) of the Act addresses the need for LECs to agree to terms for the mutual exchange of traffic over their interconnecting networks. It specifically provides that LECs have the duty to "establish reciprocal compensation arrangement for the transport and termination of telecommunications."

The FCC also determined, in the *Local Competition Order*, that section 251(b)(5) reciprocal compensation obligations "apply only to traffic that originates and terminates *within a local area*," as defined by the state commissions." See *ISP Remand Order*, ¶ 12. (Emphasis added.)

In recognizing the existence of such non-local ISP traffic, and providing that it did not fall under its interim regime, it is clear that the FCC did not intend its order to address anything other than local ISP traffic. Thus, as the Commission's Order correctly notes, in rejecting Pac-West's arguments about state jurisdiction over ISP traffic, the Commission is not exercising authority over ISP-bound traffic; it is merely interpreting the terms of the parties' ICA. Order, p. 37. Moreover, as the ALJ Ruling in docket IC 12 noted in rejecting Level 3's attempts to confuse the FCC's description of how ISP traffic is provisioned with the FCC's conclusions regarding how the traffic should be treated for reciprocal compensation and jurisdictional purposes, "the FCC's decision to abandon its attempt to categorize ISP-bound traffic as local or long distance for purposes of determining whether reciprocal compensation is due under § 251(b)(5), is unrelated to its longstanding definition of ISP-bound traffic." See ALJ Ruling in docket IC 12, p. 9, and fn. 33.

The *ISP Remand Order*, as its name suggests, was an FCC order on remand from an appeal of an earlier FCC decision, the *ISP Declaratory Order*. In the decision that remanded the *ISP Declaratory Order* back to the FCC, the D. C. Circuit stated that the issue before the FCC in the *ISP Declaratory Ruling* was "whether calls to internet service providers ("ISPs") *within the caller's local calling area* are themselves 'local.'" *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d. 1, 2 (D.C. Cir. 2000).

For purposes of the issue before the Commission, the most critical statement on the question of the breadth of the *ISP Remand Order* comes in the D.C. Circuit's review of the *ISP Remand Order* in the *WorldCom* decision. There, the D.C. Circuit was clear in its characterization of the issue that was addressed in the *ISP Remand Order*: "In the order before us the [FCC] *held* that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers ("ISPs") *located within the caller's local*

calling area." 288 F.3d at 430. (Emphasis added.) This is not a casual background statement; instead, this plain and unequivocal language is the reviewing court's express statement that the *holding* of the *ISP Remand Order* relates *solely* to local ISP traffic.

Just as the *ISP Remand Order* remains in effect, the *WorldCom* court's characterization of the FCC's holding (that it applies only to local ISP traffic) is binding on all other courts and commissions because the *WorldCom* court is the Hobbs Act reviewing court for the *ISP Remand Order*. Under the Hobbs Act, federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47."[7] Thus, the Hobbs Act grants exclusive interpretive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated to apply and abide by the appellate court's interpretation of FCC rules and orders. Further, state commissions, under authority delegated by the Act, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act. 2 U.S.C. § 2342(1). (Emphasis added.)[8] Thus, the Commission and all parties in this case are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order*.

2. <u>The FCC did not preempt states regarding intrastate access charges</u>

In addition, Pac-West's argument that the *ISP Remand Order* somehow applies to "*all*" ISP traffic (regardless of where the traffic originates and terminates) is, in effect, a claim that the

[7] 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which apply here.

[8] *See* 47 U.S.C. § 408 (Orders of the FCC "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."); *see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm'n*, 827 F.2d 1264, 1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984), *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm'n*, 812 F. Supp. 706, 708 (W.D. Tex. 1993). Further, as state entities implementing a federal act, state commissions must follow decisions of federal courts.

FCC intended in the *ISP Remand Order* to preempt state commissions with respect to *intrastate* access charges by requiring them to treat all ISP traffic under the compensation regime of the *ISP Remand Order*. To reach that conclusion, however, Pac-West is compelled to engage in a tortuous analysis that ignores the explicit language of the order itself, not to mention the language of two federal appellate court decisions by the D.C. Circuit (*WorldCom* and *Bell Atlantic*) that defined the issue before the FCC as whether "local" ISP traffic is subject to the interim regime of *the ISP Remand Order*.

Indeed, completely absent from that analysis is any explicit FCC statement that it was broadening the scope of its inquiry in such a significant manner. To suggest that this was the FCC's implicit intent would require one to ignore the manner in which the FCC normally preempts state authority on an issue as significant as intercarrier compensation. Typically, when the FCC has preempted state commission authority on an issue, it has been very explicit that (1) it is preempting state action, (2) it is clearly defining the extent of the preemption, and (3) it is engaging in a step-by-step basis for the preemption. The FCC did none of those things in the *ISP Remand Order*.[9] Indeed, as the ALJ Ruling in docket IC 12 noted, "it would be highly unusual for the FCC to invoke a policy that would impact state authority (i.e., regulation of intrastate access charges) without making some mention of that fact." *ALJ Ruling*, docket IC 12, pp. 11-12.

Accordingly, the Commission's Order correctly noted that Pac-West's "argument misses the point" because "the Commission is merely interpreting the terms of the [ICA], not seeking to

[9] In other words, on an issue that the FCC perceived to be very important, it did not just casually preempt a state commission; instead, it engaged in a disciplined and detailed analysis that led to an explicit decision on the issue. To suggest that in the *ISP Remand Order*, the FCC preempted state commissions on the breadth of the compensation regime that it was imposing on ISP traffic, particularly in light of statements within the order itself suggesting its scope was ISP traffic originated and terminated within the same local calling area (not to mention the D. C. Circuit decision on appeal that the issue before the FCC was ISP traffic within the same local calling area), is completely inconsistent with the process that the FCC follows. It is simply perplexing to suggest that the FCC, which is a very deliberate body with orders that often number hundreds (and even thousands) of paragraphs and pages, would somehow preempt the existing intrastate access charge regime without so much as a discussion of the preemption concept, let alone a clear statement of the parameters of its decision. That makes absolutely no sense.

exercise authority over ISP-bound traffic" and because, "for purposes of interpreting the [ICA], the critical issue is not whether VNXX traffic is ISP-bound traffic, but whether it is local traffic subject to the RUF." Order, p. 37. Thus, "[s]ince VNXX traffic is not local *by definition*," the Commission did not err in ruling that "the RUF simply *does not apply*." Id. (Emphasis added.)

3. Oregon law is consistent with Qwest's interpretation

This determination is also consistent with Oregon law. For example, Administrative Law Judge Sam Petrillo recently recognized this in the ALJ Ruling on August 16, 2005 in docket IC 12. See *ALJ Ruling*, p. 9, fn. 33. As the ALJ Ruling, which Pac-West fails to even mention, succinctly notes: "The [FCC] decision to abandon the end-to-end analysis [from the FCC's previous *ISP Declaratory Ruling*] in *the ISP Remand Order* did not, however, alter the FCC's understanding of how ISP-bound traffic is provisioned." *Id.* The ALJ also correctly noted that the Ninth Circuit has recognized the distinction "between the jurisdictional analysis of what constitutes 'intrastate' or 'interstate' traffic, and the analysis of what constitutes 'local' or 'interexchange' traffic for the purposes of reciprocal compensation." See *ALJ Ruling*, p. 9, fn. 32 (citing to *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003)).[10]

Prior to docket IC 12, the Oregon federal court in *Universal* had expressly agreed with Qwest that no compensation was due for VNXX traffic because *VNXX traffic is not local traffic*. 2004 WL 2958421, at p. *9-*10. Here, the specific issue is whether the RUF applies to DTT facilities, and the analysis in *Universal* is on point. Since VNXX traffic is not local traffic, by definition, and since the RUF expressly applies only to local traffic, any facilities that Pac-West

[10] Qwest and Level 3 have suspended the complaint at issue in docket IC 12 (as well as other matters between them) while they have been engaged in settlement discussions. Accordingly, the Commission may not have an opportunity to issue an order affirming the ALJ Ruling. Nevertheless, there is no question that the ALJ Ruling correctly analyzes, in great detail, all of the reasons why the FCC and the D.C. Circuit have addressed ISP traffic as that which originates and terminates within the same local calling area.

has used to engage in VNXX traffic are correctly excluded from any RUF calculation, and thus the Commission did not err in its ruling.

Specifically, the federal court in *Universal* recognized that the definition of "local traffic" in the ICA there (essentially the same ICA here) was the definition which was listed in Qwest's Oregon tariff at the time the ICA became effective. The court then concluded: "VNXX traffic *does not meet the definition of local traffic* because it does not originate and terminate in the same LCAs [local calling areas] and EASs [Extended Area Service areas]." *Universal*, 2004 WL 2958421, at p. 10. (Emphasis added.) The court further rejected Universal's argument that the Commission's *MFS* decision in 1996 applied to VNXX traffic. *Id*., at *11. Finally, the court in *Universal* ruled that the Commission's recent decision in docket UM 1058 (Order No. 04-504) "len[t] further support to [its] conclusion" that VNXX traffic is not local traffic. *Id*., at *11, fn. 4.

Accordingly, Pac-West's use of the subject DTT facilities to engage in VNXX traffic precludes the application of the RUF to such facilities. *Universal* makes that abundantly clear.

Further, as the court in *Universal* noted, last year the Commission issued Order No. 04-504 in docket UM 1058, which was its investigation of VNXX calling patterns in Oregon. In that order, which Pac-West again failed to mention, the Commission ruled that a CLEC engaging in VNXX traffic would be violating two of the standard conditions in their certificates of authority (pertaining to local exchange boundaries and EAS routes to distinguish between local and toll services, and limiting NXX codes to a single local exchange or rate center).

Specifically, the Commission ruled in Order No. 04-504:

> *A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct described by OTA in its Petition would clearly be in violation of its certificate*.[11] Therefore, rather than requesting a declaratory ruling or a generic

[11] The two standard conditions (nos. 7 and 8) the Commission mentioned are as follows:

> investigation, the most appropriate means for dealing with allegations relating to such activity would be in the context of a complaint or a request for arbitration. Order No. 04-504, p. 5. (Emphasis added.)[12]

See also ORS 759.005(2)(c) (defining "local exchange telecommunications service" as "telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission"); OAR 860-032-0001 (referring to the statutory definition of "local exchange telecommunications service"); see also Arbitrator's Decision, docket ARB 527 (April 19, 2004), pp. 6-7 (refusing to alter the definition of local exchange service as "traffic that originates within the same Local Calling Area as determined for Qwest by the Commission" by exempting VNXX traffic from these requirements).

Finally, Pac-West also fails to mention the Commission's March 17, 1999 decision in Order No. 99-218, in the GTE/ELI arbitration (docket ARB 91). There, the Commission ruled that the terminating end of an ISP call for reciprocal compensation purposes is where the *ISP modems are located*.[13] The Commission agreed with the Arbitrator's findings and affirmed that

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7. For purposes of distinguishing between local and toll calling, applicant shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, applicant shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.

8. When applicant is assigned one or more NXX codes, applicant shall limit each of its NXX codes to a single local exchange or rate center, whichever is larger, and shall establish a toll rate center in each exchange or rate center proximate to that established by the telecommunications utility or cooperative corporation serving the exchange or rate center. Order No. 04-504, p. 5.

[12] There is also no preemption concern. As Order No. 04-504 made clear, any preemption pertains only to *general proceedings*. It does not apply to an *arbitration or complaint proceeding*, such as this docket. Further, although a later order (Order No. 04-704) clarified certain procedural aspects of any complaint or arbitration raising VNXX issues, it does not affect the basic premise here.

[13] In that arbitration, the ILEC (GTE) relied on an end-to-end analysis for its argument that the websites should be considered the end points for reciprocal compensation purposes. The Arbitrator, Administrative Law Judge Sam Petrillo, rejected that argument, however, and ruled that it is the "ISP modems" that constitute the termination point for reciprocal compensation purposes, but also ruled that GTE was liable for reciprocal compensation on traffic *only* when the ISP modems were within the *same local calling area* as the calling party. The language that the Arbitrator used could not be more clear:

> GTE raises concerns that some calls from end users to ISPs are actually routed to ISP modems located outside the local calling area. GTE contends that traffic that does not attach to local call scope *ISP modems* should not be eligible for reciprocal compensation because these services are properly interstate or intrastate intraLATA toll calls. Because the record in this case does not discuss the methods used to distinguish local calls from toll calls, there is no way to know whether there are problems identifying this

portion of the Arbitrator's Decision. Order No. 99-218. Thus, the Commission ruled that the ISP modems are the terminating point for calls for reciprocal compensation purposes, and that only if those modems were *in the same local calling area* as the calling party would the payment of reciprocal compensation be required.[14] The Commission's decision there directly supports the underlying reasoning of the *ISP Remand Order* a couple of years later.

Pac-West's ignoring all of this Oregon precedent on VNXX traffic, especially given this case involves precisely the issue of VNXX-routed traffic destined for an ISP, is remarkably telling. Qwest respectfully submits that this Oregon authority which Pac-West ignores or unsuccessfully attempts to distinguish is not only better-reasoned than the Connecticut, Washington or Virginia decisions, but that it is binding (as is the D.C. Circuit decisions in *Bell Atlantic* and *WorldCom* under the Hobbs Act), and thus that the Commission should completely disregard the new non-binding out-of-state decisions that Pac-West now raises. Thus, since Pac-West seeks relative use adjustments for DTT facilities that are used to provide VNXX service, but the ICA's provisions expressly limit any relative use to local traffic only, and Oregon law expressly provides that VNXX is not local, the RUF simply does not apply to such facilities.

4. <u>The Washington arbitration decision is neither precedent nor persuasive</u>

Pac-West, in apparent desperation to find some support (since it completely ignores all Oregon decisions other than the *Universal* decision), relies not on a decision by this Commission, but rather, on a 2003 *Washington* arbitration decision involving Level 3 and

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type of traffic. Assuming the traffic can be identified, it should be possible to ascertain whether calls from end users are directed to ISP modems located within the local exchange calling area. *To the extent that calls to ISP providers are not directed to an ISP modem within the local calling area, they are not local calls and should not be eligible for reciprocal compensation.* Order No. 99-218, p. 9.

[14] The court in the *Universal* case recently issued a supplemental order clarifying its earlier order on the issue of where ISP traffic terminates. The court ruled that "the 'termination point' is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision and the *ISP Remand Order*. *Universal Supplemental Order*, p. 2. A copy of the Order is attached as Exhibit A.

CenturyTel. However, this Washington Commission decision is neither applicable nor precedent, and it is not persuasive as well.

For example, the issue in that proceeding was the question of compensation for VNXX traffic that was destined for an ISP – CenturyTel claimed that access charges should be paid, while Level 3 argued that "bill and keep" was the proper mechanism under the *ISP Remand Order*. The propriety of VNXX in the first instance was not at issue, much less the proportional costs of facilities for such traffic, and there is no ruling expressly endorsing VNXX. Thus, since the issue was not raised or decided in that case, the decision simply does not offer any persuasive guidance or value.[15]

5. The Connecticut *SNET* opinion is also not precedent and is unpersuasive

Finally, Pac-West also makes much ado about a more than half-year-old opinion by a federal district court judge in Connecticut (*Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 329 F.Supp.2d 229 (D. Conn. 2005) ("*SNET*")). However, it goes without saying that a Connecticut judge's opinion is not binding precedent on this Commission, which is bound by the Oregon rulings discussed above.

Moreover, for the reasons set forth below, this judge simply got it wrong, and the opinion represents a demonstrably erroneous reading of the *ISP Remand Order* and the D.C. Circuit's decisions in *WorldCom* (*WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002)) and *Bell Atlantic* (*Bell Atlantic Telephone Companies v. FCC*, 206 F.3d. 1, 2 (D.C. Cir. 2000)), which decisions are binding under the Hobbs Act. Indeed, Pac-West ignored the express language in *WorldCom*.

[15] Further, the issue of VNXX at a bill and keep rate, with the per-minute-of-use caps that were in place when that 2003 order was entered, in Washington presents a significantly different issue than the question presented here, where Pac-West seeks compensation (relative use) for transport facilities, including facilities used for VNXX traffic. Finally, several years have passed since entry of that order – unlike the Washington Commission back in 2003, this Commission has a better comprehension of the scope and scale of the VNXX problem, and the extent to which VNXX arbitrage is employed, as reflected in its orders on VNXX traffic in the past two years. There is no

Finally, Qwest finds it odd that Pac-West did not cite to this out-of-state district court opinions in its May 11, 2005 brief given that it was (or could have been) aware of this March 2005 opinion when it filed its brief, and given that it apparently now believes that this Connecticut decision somehow trumps the Oregon federal court's decision in *Universal* (and implicitly, that the Connecticut decision somehow trumps the other Oregon authority that Pac-West does not mention).

a. The *SNET* opinion ignores the express *WorldCom* language

The most fundamental error in the *SNET* opinion is the cavalier manner in which the court pays lip service to, but in reality ignores, the *WorldCom* court's conclusion that the *ISP Remand Order* "held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5*) calls made to internet service providers ('ISPs') located within the caller's local calling area*." 288 F.3d at 430. SBC had argued that this language defined the breadth of the *ISP Remand Order*. In response, the *SNET* judge quoted the foregoing language but, without saying so, substituted his own judgment for that of the D. C. Circuit. The judge's ultimate conclusion directly contradicts the D.C. Circuit's *WorldCom* description of the issue decided in the *ISP Remand Order*.

The *SNET* judge's alternative analysis begins with his agreement that the FCC "began by addressing" the question whether ISP-bound traffic that would typically be referred to as "local" was subject to reciprocal compensation. 359 F.Supp.3d at 231. However, the judge concluded that "these statements, taken by themselves, do not reveal how the FCC proceeded to answer the question." *Id.* at 231-232. The *SNET* judge stated (*id.* at 232) that the FCC did the following in the *ISP Remand Order* to answer the question:

- disclaimed the use of the term "local;"

indication in the Washington *Level3/CenturyTel* order that the parties there raised these issues, or that the Washington Commission considered or decided such issues in that case back in 2003.

- held that all traffic is subject to reciprocal compensation unless exempted;
- held that all ISP traffic is exempted from reciprocal compensation because it is "information access;"
- held that all ISP traffic is subject to FCC jurisdiction under section 201; and
- proceeded to set the compensation rates for all ISP traffic.

Thus, the *SNET* judge concluded that, even though the FCC started with the question whether local ISP traffic is subject to reciprocal compensation, it answered the question "no" on the ground that all ISP traffic is in a category by itself. *Id.*

As will be discussed below, the *SNET* judge misunderstands the *ISP Remand Order's* decision not to use the term "local" in its analysis. It is true, of course, that the FCC did some of the things listed above. That, however, does not explain, nor even address, the *WorldCom* language, which cannot be read consistently with the *SNET* judge's conclusion that the *ISP Remand Order* really addresses *all* ISP traffic, regardless of the origination and termination points of a call. The *SNET* judge's attempt to justify his conclusion by stating that the FCC "began" with the question of local ISP traffic, but then expanded its decision to cover all ISP traffic, is clearly odd. This is particularly so given the fact that the D.C. Circuit's characterization of the issue in *WorldCom* does not describe the "beginning" of the process, but explicitly describes the end of the process (*i.e.*, it does not purport to be a description of the initial issue being considered in the *ISP Declaratory Order*;[16] rather, the language specifically describes the *holding* of the *ISP Remand Order*). There is simply no way to reconcile the *SNET* judge's conclusion with the *WorldCom* language.

[16] Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (February 26, 1999) ("*ISP Declaratory Order*").

b. The *SNET* opinion misconstrues the FCC's decision not to rely on the word "local" in its analysis

Another fundamental error of the *SNET* opinion is its mischaracterization of the FCC's decision not to use of the term "local" in its *ISP Remand Order* analysis. The opinion characterized this as the FCC's "express disavow[al of] the term 'local.'" 359 F.Supp.2d at 231. That is not what the FCC did in the *ISP Remand Order*, however. In the *ISP Remand Order*, the FCC was responding to the D.C. Circuit's decision in *Bell Atlantic*, which had criticized the FCC's use of the local/long distance distinction in the *ISP Declaratory Order*. Thus, in paragraph 34, the FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)." *ISP Remand Order*, ¶ 34.

The *SNET* opinion's error is that it leaps from this statement to the conclusion that by not using the term "local," the FCC was completely abandoning the historical distinction between calling within a LCA and interexchange (toll) calling. Far from it, the FCC was simply shifting its analysis for "local," a term not statutorily defined, to statutory terms, in this case the phrase "information access" in section 251(g). Thus, the *SNET* opinion transforms the FCC's shift to an emphasis of defined terms into a complete abandonment of all distinctions between local and interexchange calling. Instead of analyzing the subtle shift that actually took place, the Connecticut judge leaped to this conclusion: "Put simply, the language of the *ISP Remand Order* is unambiguous—the FCC concluded that section 201 gave it jurisdiction over all ISP traffic, and proceeded to set the intercarrier compensation rates for such traffic." 359 F.Supp.2d at 231. There is nothing, however, to suggest the FCC completely abandoned the concept of local service, nor does the Act. Instead, as it clearly stated, the FCC based the *ISP Remand Order* on statutorily-defined terms, in this case focusing on the "information access" category as the rationale for its

decision to develop a separate compensation regime for ISP traffic that originates and terminates within the same local calling area.

c. *SNET* ignores references in the *ISP Remand Order* to the FCC's desire not to interfere with existing access charge mechanisms

In *SNET*, the ILEC correctly argued (citing paragraph 37, footnote 66) that the *ISP Remand Order* discloses the FCC's intent not to require that ISP traffic already subject to a compensation regime other than reciprocal compensation (i.e., access charges) be subject to the interim regime.[17] The *SNET* opinion dismissed this argument, however, stating instead that the quoted language only indicates that the FCC did not want to disturb its regulation of access charges. That, of course, is a misreading, since the quoted language also made it clear that the FCC did not want to interfere with *intrastate* access charges either. If that were not enough, the judge's conclusion demonstrates the apparently results-oriented desire to sweep non-local ISP calls into the *ISP Remand Order*:

> . . . this quotation [footnote 66] only indicates the FCC's view that Congress did not want to disturb the FCC's regulation of access charges. It does not support the conclusion that the FCC did not want its own regulations to affect calls that are subject to the access charge regime. Even if it did support such a conclusion, it is not clear that a general indication of an agency's intent could override the clear language of the agency's order." 359 F.Supp.2d at 232.

In other words, while acknowledging that the FCC intended to avoid creating impacts on access charges, the *SNET* judge reached the conclusion that the FCC really must have actually intended to create such impacts because it requires, under the literal terms of the order, that all ISP traffic be subject to the order. One can only ask why, if that were truly the FCC's intent, it would have gone to the trouble to describe the fact that it did not intend to create such impacts. Rather

[17] *SNET*, *supra*, 359 F.Supp.2d at 232. Footnote 66 of the *ISP Remand Order* states: "[W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but has no such concerns about effects on analogous intrastate mechanisms'" (quoting *Local Competition Order*, 11 FCC Rcd at 15869).

than the *SNET* opinion's strained and illogical reading of the *ISP Remand Order*, the only way to rationalize footnote 66 with the holding is to conclude, as the *WorldCom* court did, that the order applies only to ISP traffic that originates and terminates within the same local calling area.

It is also worth noting that footnote 66 is not the only part of the *ISP Remand Order* that the *SNET* judge had to ignore in order to reach his conclusion. There are several others, not the least of which are the last two sentences of paragraph 37, where the FCC, referring to the three traffic categories of section 251(g) (which the FCC characterized as having one thing in common: "they are all access services or services associated with access"), stated: "It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such traffic from the purview of section 251(b)(5)." *ISP Remand Order*, ¶ 37.

Other portions of the *ISP Remand Order* track the principles stated in paragraph 37 and footnote 66. These too were ignored by the *SNET* opinion. The *ISP Remand Order* states:

> Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g). These services remain subject to [FCC] jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions). This analysis properly applies to the access services that incumbent LECs provide . . . to connect subscribers with the ISPs for Internet-bound traffic. *ISP Remand Order*, ¶ 39.

Further still, footnote 70 of the order states: "We believe that the most reasonable interpretation of that sentence [the first sentence of section 251(g)], in this context, is that subsection (g) was intended to preserve pre-existing regulatory treatment for the enumerated *categories* of carriers, rather than requiring disparate treatment . . . ." *ISP Remand Order*, fn. 70.

In light of this language which clearly states the FCC's intent not to alter pre-existing access charge mechanisms, one can only ask why, if the FCC had intended such language to be meaningless in the *ISP Remand Order*, it would have bothered to include it. If the FCC had intended the FCC to include *all* ISP traffic (regardless of such traffic's origination and

termination points), it could have simply said so, instead of including so much discussion in the order that leads to the direct opposite conclusion.

d. The *SNET* opinion demonstrates a fundamental misunderstanding of intercarrier compensation regimes

Perhaps the *SNET* judge's most telling statement is his response to the ILEC's argument that, if the *ISP Remand Order* were to apply to all ISP traffic, the result would be the elimination of access charges on that traffic and the opportunity for far greater arbitrage opportunities (which, after all, was the primary reason for the FCC's decision to phase out terminating compensation on ISP traffic in the first place). In response, the *SNET* judge stated:

> Assuming, without deciding, that SBC is correct that application of the *ISP Remand Order* to all ISP-bound traffic will result in a change of the access charges applicable to such calls and that such a change would give rise to arbitrage opportunity, that is not a sufficient reason to amend the Decision. This court must apply the clear language of an FCC order, even if the result of that application might be harm to certain elements of the telecommunications industry. 359 F.Supp.3d at 232-233.

The irony of this statement is the incongruity that the judge acknowledges would not exist if he were simply to apply the *ISP Remand Order* with the proper definition of ISP traffic.[18]

Accordingly, neither the Washington Commission nor the Connecticut court opinion are applicable here, and neither is persuasive. Oregon law is clear that VNXX traffic is simply not local traffic, regardless whether it is destined to an ISP or that the caller dials a telephone number assigned to the same local calling area (i.e., a "locally-dialed number"), and since the ICA limits the RUF to local traffic, the Commission did not err in holding that Pac-West is not entitled to the RUF for any VNXX traffic, including VNXX traffic that is destined to an ISP.

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[18] Finally, in a footnote to the quoted language, the *SNET* judge demonstrates a near-total lack of understanding of the telecommunications industry and the compensation mechanisms that govern it:

> I confess that I am not sure why SBC believes the *ISP Remand Order* would relieve ISPs of the obligation to pay access charges. . . . The order imposes a cap on compensation; it does not eliminate compensation. 359 F.Supp.2d at 233, fn. 3.

To the extent the judge believes that access charges and terminating compensation can simultaneously apply to traffic, the judge is hypothesizing an incredible result.

C. The *Universal* decision applies, and is binding on the Commission and Pac-West

Further still, Pac-West argues that the Oregon federal court decision in *Universal*, which it dismissively calls an "unpublished decision," is "inapplicable." (Application, pp. 8-9.) However, for the reasons that the Commission correctly expressed (see Order, pp. 36-37), *Universal* is applicable and on point. Indeed, as the Commission correctly noted, the court in *Universal* concluded that "VNXX traffic was not local 'whether it was ISP-bound or not.'" Order, p. 37, fn. 128, citing *Universal*, 2004 WL 2958421, at p. *10.

Moreover, as the court in *Universal* (and the Commission in the Order) recognized, "'VNXX traffic does not meet the definition of local because it does not originate and terminate in the same LCA or EAS; instead it crosses LCAs and EASs.'" Order, p. 36; *Universal*, at p. *10. It is thus irrelevant that the *Universal* court interpreted an ICA that had not incorporated the requirements of the *ISP Remand Order* because the *ISP Remand Order* has nothing to do with the RUF, or with VNXX traffic that may be destined to an ISP. What is relevant is that the court, like this Commission, has determined that VNXX traffic, *by definition*, is not local traffic, and thus it does not matter that such non-local traffic may also happen to be destined to an ISP.

Accordingly, there is simply no merit to Pac-West's argument that the *ISP Remand Order* and the D.C. Circuit decision in *WorldCom* require Qwest to pay any relative use for the costs of interconnection facilities (DTT) that carry VNXX traffic that is destined to an ISP. Thus, Qwest respectfully submits that the Commission did not err in deciding Issue 5 that Pac-West is not entitled to RUF for VNXX traffic, and therefore, Qwest respectfully requests that the Commission deny Pac-West's application for reconsideration or rehearing in its entirety.

II. The parties' ISP Amendment does not address RUF or transport

Pac-West further argues that the *ISP Amendment* that the parties entered into incorporates the FCC's "redefinition" of the traffic subject to section 251(b)(5). (Application, pp. 9-10.)

That is, Pac-West continues to insist, incorrectly, that the FCC's *ISP Remand Order* includes not only "all" ISP traffic, regardless of where it originates and terminates, but also includes the cost of facilities, such as the RUF. (*Id*., p. 10.) In other words, Pac-West first makes the leap of logic that the *ISP Remand Order* applies to the relative use of the DTT facilities at issue. It then makes yet another tortuous leap by arguing that because the FCC has backed away from its characterization of ISP traffic as "local," therefore, *all references* in the ICA to "local traffic" can no longer mean local traffic, but rather, "must be construed to mean 'traffic that is not excluded by section 251(g)'." (*Id*., p. 10.)

A. <u>The ICA limits RUF to local traffic, and Qwest's tariffs define "local traffic"</u>

However, as the Order correctly noted, and as Qwest previously argued, the terms of the ICA clearly and unambiguously specify that the RUF applies only to the transport of "local" traffic. (See e.g., ICA, §§ V.A., V.B., V.C., and V.D.; see also fn. 4.) In turn, the ICA specifies that, consistent with Qwest's tariffs,[19] local traffic must originate and terminate with the same local calling area or Extended Area Service (EAS). See Order, p. 36, and fn. 121; ICA, § III.PP.

B. <u>The ISP Amendment does not apply to the RUF or compensation for transport</u>

The fact the parties thereafter amended the ICA with the ISP Amendment, and thus that the ISP Amendment incorporates the requirements of the *ISP Remand Order* into the ICA, does not change the analysis. First, as Pac-West conceded, the *ISP Remand Order* addresses only *the*

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[19] Qwest's Exchange and Network Services Tariff, in effect when the ICA was entered into in 2000, defines "local service" based on the actual physical location of the calling and called parties: "Local Service: Telephone service furnished *between customer's premises* located within the same local service area." (Qwest [U S WEST Communications, Inc.] Exchange and Network Services Tariff, P.U.C. No. 29, at sheet 10 (emphasis added).) The term "local service area" is, of course, synonymous with "local calling area" in Oregon. The tariff's definition of "Premises" underlines the fact that it is the physical location of customers that matters: "Premises: A tract of land. This tract of land may have one or more building structures or individual space or units on its grounds. There may be individual space or units also within this building structure." (*Id.* at sheet 13.)

Thus, under the Oregon tariff—the cited tariff has not changed since 2000, and thus remains in effect today—and the ICA, if the parties to the call are physically located within the same local calling area, the traffic is local; if they are not, the traffic between them is not local.

termination (and not transport) of ISP traffic. See Order, p. 36, fn. 120; see also Pac-West Reply Brief, pp. 4, 12. More importantly, however, as the Order noted regarding whether (non-VNXX) ISP traffic was subject to the RUF, "the ISP Amendment[] do[es] *not* mention the *RUF* or the *transport* of ISP-bound traffic," and "there is *no mention* of compensation for *transport* facilities or the *RUF*." Order, pp. 29 and 30 (emphasis added).) As the Commission further noted, "[h]ad the parties intended the ISP Amendment[] would encompass compensation for DTT facilities, it seems reasonable that they would have made reference to that fact." Order, p. 30. Thus, it is clear that the ISP Amendment does not apply to the RUF or to compensation for transport.

C. The *Universal* federal court decision applies to the VNXX issue here

Again, Pac-West argues that the *Universal* court's decision does not support a result different from that which Pac-West advocates. (Application, p. 10.) However, as the court in *Universal* (and the Commission in the Order) recognized, "'VNXX traffic does not meet the definition of local because it does not originate and terminate in the same LCA or EAS; instead it crosses LCAs and EASs.'" Order, p. 36; *Universal*, at *10. It is therefore irrelevant that the *Universal* court interpreted an ICA that had not incorporated the requirements of the *ISP Remand Order*. This is so because the *ISP Remand Order* does not have anything to do with the RUF, or with VNXX traffic that may be destined to an ISP. What matters is that *Universal*, like this Commission, has determined that VNXX traffic, by definition, is not local traffic, and thus it is irrelevant that such non-local traffic may also happen to be destined to an ISP.

D. The *Starpower* decision is not only not precedent, but factually different

Pac-West also relies on a Virginia case involving Starpower and Verizon, *In the Matter of Starpower Communications, LLC v. Verizon South Inc.*, 18 FCCR 23,625 (2003). (Application, pp. 11-12.) This case, which is contrary to the long list of cases holding that VNXX traffic is not subject to reciprocal compensation, is unusual because it involved the FCC

sitting in place of the Virginia Corporation Commission, which refuses to decide cases that have been delegated to it under the Act, including cost dockets and arbitrations.[20]

In that case, the FCC, sitting in place of the Virginia Commission, and applying Virginia law, required the payment of reciprocal compensation on VNXX traffic, focusing on the fact that Verizon rates calls to Starpower's customers on the basis of the telephone number of the Starpower customer, as opposed to the physical location of the Starpower customer,[21] and noting that "the [Verizon Virginia] Tariff does not expressly address whether the 'location' of a customer station turns on physical presence or number assignment . . . ." *Starpower*, 18 FCCR at 23,632, ¶ 5. However, because there is *no such ambiguity in Oregon*, *Starpower* is easily

[20] For example, the vast majority of state commissions that have addressed whether VNXX traffic is local have firmly concluded that VNXX traffic is not local and not subject to reciprocal compensation. See e.g., *In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a SBC Indiana*, Cause No. 42663 INT-01, at 81 (Ind. Util. Reg. Comm'n, December 22, 2004); Arbitrator's Order No. 10, *Re Level 3 Communications, LLC*, Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, ¶ 271 (Kan. SCC, February 7, 2005); *In the Matter of Petition of Qwest Corp. for Arbitration of an Interconnection Agreement with AT&T of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C.*, 2003 Colo. PUC LEXIS 1149, *45, n. 52 (Oct. 14, 2003); Arbitrator's Recommended Decision, *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T of the Midwest and TCG Omaha*, Docket No. C-3095 (Neb PSC, May 4, 2004); Final Decision and Order, *In Re Sprint Communications Company, L.P., and Level 3 Communications, LLC*, Docket Nos. SPU-02-11, SPU-02-13, 2003, Iowa PUC LEXIS 229, *10-*12 (Iowa Utils. Bd., June 6, 2003); Order, *Re New England Fiber Communications, LLC*, Nos. DT 99-081 & DT 99-085, 2003 N.H. PUC LEXIS 128 (NH PUC, Nov. 12, 2003); Order, *Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Docket No. 6742, 2002 Vt. PUC LEXIS 272 (Vt. PSB, Dec. 26, 2002); Order, *Re Adelphia Business Solutions, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *76 (Vt PSB, July 16, 2003); Order, *Petition of Global NAPS, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45, 2002 Mass PUC LEXIS 65 at *50 (Mass Dep't of Tel and Energy, Dec. 12, 2002); Opinion and Order, *Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000 (Pa PUC, Apr. 21, 2003) at 45 (available at http://puc.paonline.com/PcDocs/392849.doc); *Re Global NAPs, Inc.*, No. 02-879-TP-ARB, 2002 OhioPUC Lexis 644, *22-*23, *25 (Ohio PUC, July 22, 2002); Decision Approving Arbitrated Agreement Pursuant to Section 252, Subsection (e), of the Telecommunications Act of 1996 (Act), *In the Matter of Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application 02-03-059, Decision 03-05-031, 2002 Cal CPUC Lexis 1047, *6-*7 (Cal. PUC, May 8, 2003); *Re Verizon California, Inc.*, Application 02-06-024, Decision 03-12-021, 2002 Cal PUC LEXIS 1047, *8 (Cal. PUC, Dec. 4, 2003).

[21] *Id.* at 23,629, ¶ 9. The FCC agreed that, in the absence of the VNXX arrangement, Verizon's customers would have incurred toll charges.

distinguishable from this case. The Qwest tariff in Oregon directly focuses on calls "between *customer's premises* located within the same local service area." (Emphasis added.) The definition of "premises" makes it clear that the tariff is referring to a specific physical location.

Thus, under the ICA, it is the tariff language that defines local traffic—and local traffic under the tariff is explicitly tied to physical location. The language of Qwest's tariff in Oregon, in conjunction with the conditions in the Pac-West certificate of authority[22] and the numerous decisions in Oregon, including the decision in the Qwest/AT&T arbitration (docket ARB 527) adopting Qwest's definition of "local exchange service," could not be more different from the situation in *Starpower*.[23] Although the underlying logic of the *Starpower* decision is highly questionable, the proper application of Oregon law compels a different result even if one were to accept its underlying analysis.

III. No oral argument is necessary, and Pac-West's policy arguments are irrelevant

Finally, Pac-West urges the Commission to hold oral argument, which it claims will greatly assist it in considering certain alleged "consequences," as well as the requirements of

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[22] The conclusion that the Qwest local calling areas govern the determination of whether traffic is local is bolstered by the language and conditions of the Order granting Pac-West a certificate to operate in Oregon. Order No. 99-229, docket CP 574 (March 18, 1999). In that Order, the Commission imposed several conditions, two of which are directly pertinent to the issues in this case:

> 7. For purposes of distinguishing between local and toll calling, applicant [Pac-West] shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, [Pac-West] shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.
>
> 8. When applicant [Pac-West] is assigned one or more NXX codes, [Pac-West] shall limit each of its NXX codes to a single local exchange and shall establish a toll rate center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange.

Thus, Pac-West has a legal obligation to comply with fundamental industry standards related to local exchange and EAS boundaries in Oregon, as well as industry standards relating to the assignment of telephone numbers. As this Commission knows, the industry standards related to telephone number assignments are based on the premise that a call to a local number is a call that remains in the local calling area. VNXX is an effort by certain CLECs like Pac-West to turn those fundamental principles on their head.

[23] Lest the Commission grant undue deference to *Starpower* because the decision was rendered by the FCC, the Vermont board recently ruled that the *Starpower* decision is not binding upon it, because the FCC was applying Virginia law and "acting in the place of the Virginia State Corporation Commission." *Re Adelphia Business Solutions of Vermont, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *61 (Vermont PSB, July 16, 2003).

federal law, in determining the disposition of Pac-West's application for reconsideration or rehearing. These "consequences" stem from a number of policy arguments that Pac-West makes.

There is no need for oral argument, however. First, the issues here are legal issues, which the Administrative Law Judge and full Commission have already addressed in this docket, as well as in other related dockets. These issues have been briefed and briefed, and no amount of "oral argument" is going to change what is a legal issues of both federal law (*ISP Remand Order* and the D.C. Circuit decision) and state law (the Oregon requirements for local traffic).

In addition, Pac-West itself agreed that these were legal issues, and thus agreed in this docket that it made sense for the Commission to decide the issues on the briefs, and that, depending on how the Commission ruled on the legal issues, the parties would probably be able to resolve the issues regarding the amount and type of facilities and traffic involved, and thus what amounts, if any, would be owed on such facilities and traffic. Now, however, having lost on the VNXX issue, Pac-West wants to have its cake and to eat it too by now asking for reconsideration, rehearing and oral argument. There is no such need, however.

As stated, Qwest does not believe that the alleged policy issues that Pac-West has raised are necessarily pertinent here. Nevertheless, to the extent that the Commission determines to consider policy arguments, the public policy considerations actually greatly favor Qwest's position. Sound public policy counsels against permitting Level 3 to recover intercarrier compensation on VNXX traffic. The customer who places the call to an ISP is acting as a customer of the ISP on Pac-West's network. If Level 3 were allowed to collect intercarrier compensation for traffic that is properly considered to be Level 3's own toll traffic, the end result is regulatory arbitrage, from which Level 3 would profit at Qwest's expense. If permitted to get away with these arbitrage schemes, Level 3 would collect revenue primarily from *other carriers*,

rather than from its own customers. Such a result would create incentives for inefficient entry of LECs intent on serving ISPs exclusively, and not offering viable local telephone competition, as Congress had intended in the 1996 Telecommunications Act. Moreover, the large one-way flows of cash would make it possible for LECs serving ISPs to afford to pay their own customers to use their services, driving ISP rates to consumers to uneconomical levels. See e.g., *ISP Remand Order*, ¶¶ 70-71, 74-76. In the *ISP Remand Order*, the FCC sought to curtail these market-distorting incentives, and not to expand them. *Id.*, ¶¶ 4-7. Indeed, these policy issues are in part what has driven the FCC's (and this Commission's) decisions on ISP and VNXX-routed traffic issues. See e.g., Order No. 01-801 in docket ARB 332; see also *Level 3 Telecommunications, LLC v. Public Utility Commission of Oregon*, United States District Court, District of Oregon, Case No. CV 01-1818-PA, Opinion and Order (November 25, 2002), p. 6.[24]

Responding specifically to the new arguments that Pac-West has raised, including the "rural card" that Pac-West seems to play, Pac-West appears to argue that is permissible to have its ISP customers ride their traffic on Qwest's back simply because "ISPs [allegedly] cannot economically place a modem in every local calling area in Oregon." (Application, p. 12.) Thus,

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[24] For example, in the Commission's decision in Order No. 01-801, involving an arbitration between Level 3 and Qwest (docket ARB 332), the Commission quoted the Arbitrator's Decision as follows:

> The same arbitrage opportunities that the FCC cites with respect to the termination of ISP traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes of use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the ISP Remand Order is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensation interconnecting carriers transporting Internet-related traffic. Order No. 01-809, p. 4, fn. 3, quoting from Arbitrator's Decision, p. 8. (Emphasis added.)

The federal court then affirmed the Commission's Order Nos. 01-809 and 01-968. The court cogently discussed the *arbitrage* problems with ISP traffic ("who pays for it"), stating as follows:

> But, there is a catch. Most of Level 3's customers are Internet Service Providers (ISPs), which act as gateways to the Internet. ISPs receive vast quantities of incoming local calls from persons trying to access the Internet, but ISPs make few (if any) outgoing local calls. As a result, telephone traffic flows almost exclusively one-way. Qwest customers are expected to place many calls to Level 3 customers, but very little traffic will flow in the opposite direction. If the cost of the equipment at issue is allocated based on the relative percentage of calls originated on each network, then Qwest will have to pay virtually the entire cost. *Level 3 Telecommunications, LLC v. Public Utility Commission of Oregon*, United States District Court, District of Oregon, Case No. CV 01-1818-PA, Opinion and Order (November 25, 2002), p. 6.

Pac-West goes on to talk about "FX or 'VNXX' services enabl[ing] ISPs to offer reasonably priced dial-up Internet access to all local exchange customers." (*Id*.) Pac-West then goes on to try to bait Qwest into engaging in a factual argument by making a double-negative charge that "there is no reasonable to believe that Qwest does not offer the same type of service to ISPs, including its unregulated affiliate that provides dial-up access." (*Id*.) Pac-West then tries to tie these claims to the present dispute by claiming that "Qwest seeks to competitively disadvantage Pac-West by increasing its costs to serve ISP customers by refusing to pay Qwest's proposal share of the interconnection facilities used to transport 'VNXX' ISP-bound traffic." (*Id*., pp. 12-13.) Finally, Pac-West goes on to make numerous claims about *Qwest's "FX"* service and customers. (*Id*.)

Pac-West's arguments cannot be taken seriously. First, it is simply amazing that Pac-West goes on and on about "FX services" (Application, pp. 3-4, 12-14), and yet it fails to acknowledge that in Oregon, the Commission put an end to FX services more than 22 years in 1983, other than for grandfathered customers. See Order No. 83-869. Pac-West even goes so far as claim that if Qwest's petition to deregulate its switched business services in docket UX 29 is granted, it "would permit Qwest to charge excessive rates to ISPs for FX services." (*Id*., pp. 13-14.)[25] Thus, the Commission should completely disregard Pac-West's entire arguments because, apart from being inappropriate policy argument, and being factually incorrect,[26] the entire discussion about "FX service" is simply not credible or applicable in Oregon.

Finally, what Pac-West seems to be saying that since someone has to pay in order to increase ISP services in the non-urban or non-metropolitan areas, that someone should be *Qwest*,

[25] FX services are not at issue in docket UX 29.

[26] Even in states where Qwest does provide FX services, such services are a far cry from Pac-West's VNXX services. For example, Qwest's FX customers actually *pay for the transport* for the FX services by purchasing a private line to compensate for the toll charges. In addition, Qwest does not seek reciprocal compensation, or relative use payments, from any other carrier for the use of FX services like Pac-West does for its VNXX services.

and not Pac-West's ISP customers themselves.[27] That is, Pac-West claims that in order to increase ISP services in these areas, Pac-West and its ISP customers should be permitted to receive *free toll transport* services (for transporting VNXX traffic across local calling areas or EAS areas), at *Qwest's expense*, so that its ISP customers do not have to pay for such traffic.[28] And, in addition, Pac-West itself (as a CLEC) gets to receive *reciprocal compensation*, *from Qwest*, for Qwest's privilege of providing free toll transport to Pac-West and its ISP customers. All this because Pac-West decides to assign "local" telephone numbers for its customers to make non-local calls. There is simply no compelling policy argument in Pac-West's favor.

[27] Pac-West professes concerns about alternatives for dial-up Internet access in the rural or non-metropolitan (or less populous) areas of the state. The Commission, however, should recall it was the small rural companies, represented by the Oregon Telephone Association, and not CLECs like Pac-West, that petitioned the Commission to address concerns regarding the effects of VNXX in those rural or less-populous areas that led to the Commission's VNXX investigation proceeding, docket UM 1058. Indeed, Pac-West was one of the most active opponents to the rural companies' concerns, and it filed testimony and briefs in opposition to those concerns.

[28] Doing what Pac-West requests would mean that *Qwest* would be the one who loses because Qwest would end up footing the bill for what is essentially a subsidy to Pac-West's ISP customers. Qwest should not be required to subsidize these ISPs. Taking a toll call and dressing it up as if it were local by the manner that Pac-West has assigned its telephone numbers, and then demanding that it be treated as local, is simply arbitrage. Further, as for Pac-West's argument that "Qwest seeks to competitively disadvantage Pac-West by increasing Pac-West's costs" (Application, pp. 12-13), Pac-West could not be more wrong. First, Qwest is not "increasing" Pac-West's costs; it is merely asking that Pac-West take responsibility for its costs. Second, Pac-West seeks to *competitively disadvantage Qwest* by shifting its non-toll transport costs to Qwest, and thus unjustly increasing Qwest's costs. At the risk of sounding glib, this is like a pizza parlor deciding that it could sell more pizza if it offered a free bottle of Pepsi with every pizza, and then going to Pepsi and demanding that Pepsi give it the pop for free, or the pizza parlor will not be competitive.

CONCLUSION

Accordingly, Qwest respectfully submits the Commission did *not err* in ruling in Order No. 05-874 that any facilities that Pac-West uses or has used for VNXX traffic should be excluded from the calculation of any relative use factor (RUF) that may otherwise apply. As such, the Commission should deny Pac-West's application for reconsideration and rehearing in its entirety.

DATED: October 11, 2005.

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF OREGON

QWEST CORPORATION, a Colorado corporation,

Plaintiff,

v.

UNIVERSAL TELECOM, INC., dba US POPS, fka UNIVERSAL TELECOMMUNICATIONS, INC., an Oregon corporation

Defendant.

Civil No. 04-6047-AA

ORDER

AIKEN, Judge:

Defendant's motion in limine (doc. 89) is denied. Plaintiff's cross-motion in limine (doc. 92) is granted, however, plaintiff's alternative motion for scheduling conference (doc. 92) is denied. In further clarification of this court's opinion filed December 12,

2004 (doc. 66), and responding to an issue that has been raised during settlement negotiations concerning damages, the court finds the following:

> Regarding the court's statement in the Opinion and Order:
>
> for a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA or EAS and terminate at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the ISP.

Qwest Corporation v. Universal Telecom, Inc., 2004 WL 2958421, *10 (D. Or. 2004).

The court intended compensable traffic to include traffic that originates in one LCA or EAS area and "terminates" in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. In other words, the "termination point" is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision[1] and the ISP Remand Order[2].

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[1] Commission Decision, In the Matter of the Petition of Electric Lightwave, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Inc., Pursuant to the Telecommunications Act of 1996, ARB 91 (March 17, 1999).

[2] Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001).

The parties are ordered to return to Judge Coffin to resume settlement negotiations.

IT IS SO ORDERED.

Dated this 12 day of September 2005.

Ann Aiken
United States District Judge

CERTIFICATE OF SERVICE

IC-9

I hereby certify that on the 11th day of October, 2005, I served the foregoing **QWEST'S RESPONSE TO PAC-WEST'S APPLICATION FOR RECONSIDERATION OR REHEARING OF ORDER NO. 05-874** in the above entitled docket on the following person via U.S. Mail, by mailing a correct copy to him in a sealed envelope, with postage prepaid, addressed to him at his regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

*Mark P Trinchero
Davis Wright Tremaine LLP
1300 SW Fifth Avenue
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DATED this 11th day of October, 2005.

QWEST CORPORATION

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