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May 22, 2006

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

Re: ARB 671

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Response to Universal Telecom, Inc.'s Request for Reconsideration and Comments Regarding Universal's Motion for Stay, along with a certificate of service.

If you have any question, please give me a call.

Sincerely,

Carla M. Butler

CMB:
Enclosures
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 671

In the Matter of the Petition of QWEST CORPORATION for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with UNIVERSAL TELECOM, INC.	QWEST CORPORATION'S RESPONSE TO UNIVERSAL TELECOM, INC.'S REQUEST FOR RECONSIDERATION AND COMMENTS REGARDING UNIVERSAL'S MOTION FOR STAY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Qwest Corporation ("Qwest") hereby files its Response to the Request for Reconsideration that respondent Universal Telecom, Inc. ("Universal") filed on May 5, 2006 ("Request"). In its Request, Universal alleges that the Oregon Public Utility Commission ("Commission") made several errors of law in Order No. 06-190 (dated April 19, 2006).

Universal's primary arguments are that the Commission's adoption of Qwest's proposed relative use factor ("RUF") language violates (1) the 1996 Telecommunications Act ("Act") and the FCC's implementing rules, (2) FCC and federal court decisions, and (3) the Oregon federal district court decision in the *Qwest v. Universal* case. None of these arguments has any merit.

The FCC's rules directly support the Commission's decision. The FCC's *ISP Remand Order* ruled that ISP traffic is "information access" and not "telecommunications traffic," a ruling that is explicitly codified in FCC Rule 701(b)(1). Universal's reliance on Rule 703(b), which applies only to "telecommunication traffic," is therefore entirely misplaced, and thus the Commission is free under Rules 703(b) and 709(b) to adopt language that makes Universal financially responsible for the transport of ISP traffic to its customers on Qwest's side of the POI, a position that the Commission has adopted in numerous other arbitration proceedings.

Neither the FCC decision upon which Universal relies, FCC decision *TSR Wireless*, nor any of the federal decisions that Universal cites, provide any support for its position. This is so because each of them related to financial responsibility for "telecommunication traffic;" none of them addressed ISP traffic in any manner.

For the *fifth* time in this docket, Universal attempts to convince the Commission that Judge Aiken's decision in the *Qwest v. Universal* case requires it to reverse its earlier conclusions in Order No. 06-190 regarding the RUF. However, even a casual review of that decision demonstrates that it was confined to the examination of the parties' pre-2000

interconnection agreement which contained a RUF provision that did not even mention ISP traffic. The court was careful to note that it was ruling only on the existing agreement, and not on what an agreement after the *ISP Remand Order* could lawfully require regarding the RUF issue. Furthermore, the Commission's 2001 decision in the Level 3/Qwest arbitration (Order No. 01-809 in docket ARB 332) ruled that transport for ISP traffic was the CLEC's financial responsibility, and that decision was affirmed by another federal court in Oregon. Thus, the only federal court authority in Oregon that has addressed a RUF provision in a post-*ISP Remand Order* agreement has found that the type of language approved in this case is entirely lawful.

In addition, in the portion of its Request dealing with the foregoing issues (Points III.A and III.B of Universal's Request), Universal makes two other peripheral and equally erroneous arguments. First, it argues that a footnote in the *ISP Remand Order* and one out-of-context statement from the FCC's *Intercarrier NPRM* support its argument. Qwest, however, demonstrates that Universal has grossly mischaracterized the footnote in the *ISP Remand Order*, and that the language from the *Intercarrier NPRM* was never intended to apply to ISP traffic. Second, Universal suggests that there is an inconsistency in certain language in Order No. 06-190. Even if its claim were true, it would be completely irrelevant to the Commission's approval of Qwest's proposed language, which is well-supported by the FCC's rules.

Further still, Universal implies that the Commission violated its due process rights by adopting language that mandates that VNXX traffic shall not be exchanged between the parties. In fact, the issue of the propriety of VNXX traffic was raised in Qwest's proposed language, in exhibits filed with its Statement of Facts, and in its Opening and Reply Briefs. Thus, the Commission's adoption of this language fully complies with the requirements of due process.

Finally, Universal's claim that the Commission cannot ban VNXX service because it is an "interstate" service is not supported by any authority. Indeed, other authority, including a

Vermont federal district court case, on this issue squarely ruled that a state commission has the authority to ban VNXX services and VNXX traffic in a state.

Accordingly, because each of Universal's claims of error is without substance, the Commission should reject them and fully reaffirm Order No. 06-190. Qwest responds to the alleged errors in the same order in which they are presented in Universal's Request. In addition to addressing Universal's claims of legal error, Qwest will also briefly comment on Universal's Request for Stay and the Commission's recent May 12, 2006 order granting a temporary stay of Order No. 06-190.

ARGUMENT

I. UNIVERSAL'S CLAIMS THAT ORDER NO. 06-190 FAILS TO MEET THE REQUIREMENTS OF SECTION 251 AND THE FCC'S IMPLEMENTING RULES (POINT III.A) AND THE *QWEST v. UNIVERSAL* DECISION (POINT III.B) ARE WITHOUT MERIT

Universal's first, and primary, argument is that Order No. 06-190 is inconsistent with the interconnection provisions of section 251 of the Act, the FCC's implementing rules, an FCC decision, federal circuit court authority, and the *Qwest v. Universal* decision. (Request, at pp. 5-16.) Universal makes two basic arguments, one of which is irrelevant, and the other which is simply wrong.

First, Universal argues that a CLEC has a right to interconnect at a single point of interconnection ("SPOI") in each LATA. (Request, at p. 5.) Qwest does not dispute the SPOI principle in any manner. However, this principle it is completely irrelevant to the issues here.[1]

[1] The fundamental error in Universal's reliance on the SPOI requirement is that Universal apparently believes that its right to connect at a SPOI should have not have any impact on intercarrier compensation (i.e., that all calls to a SPOI should be treated as local calls). Assuming technical feasibility, a CLEC has a right to SPOI, but then the intercarrier compensation regime that applies to traffic directed to the SPOI must take into account the fact that a large part (perhaps the vast majority of it) is *interexchange* traffic if the CLEC does not deliver the traffic back to the originating local calling area (in Universal's case, back to the modems or modem banks within the originating local calling area), which thus subjects such traffic to the access charge regime. In other words, the right to SPOI does not confer the CLEC freedom from complying with the applicable intercarrier compensation regime for traffic delivered to the CLEC.

Second, Universal claims that not only does it have a right to a SPOI in each LATA, but it further claims that, as a CLEC, it has the "right to have the ILEC deliver all of its (the ILEC's) originating traffic to the CLEC at the POI at *no charge to the CLEC*." (Request, at pp. 5-6 (emphasis added).) This prong of Universal's argument is, as the Commission clearly recognized in its order, not supported by the law. Universal's position, and its reliance on an FCC decision, federal circuit court decisions, and the *Qwest v. Universal* decision as authority for it, is plainly wrong. These authorities do *not* support the result that Universal advocates. Just as importantly, the FCC's current binding rules plainly support the Commission's conclusions.

On this point (i.e., the claim that Qwest has an absolute obligation to pay for delivering all traffic to a Universal POI), Universal relies on three basic arguments: that the Commission's order (1) is inconsistent with current FCC rules, (2) is inconsistent with the FCC's *TSR Wireless* case and with three federal circuit court decisions, and (3) is inconsistent with the Oregon federal district court *Qwest v. Universal* decision. Universal has packaged its arguments a bit differently in its Request, but none of them are new. Each of these arguments was made in prior briefs and the Commission appropriately rejected them each time.

A. Current FCC rules directly support the Commission's decision

The proper place to begin the analysis is with the existing FCC rules and an analysis of their application to ISP traffic carried on Qwest's facilities on Qwest's side of the POI. The baseline rule on interconnection is that the CLEC that requests interconnection must compensate the ILEC who provides it for the costs that the ILEC incurs.[2] A second baseline principle is the

[2] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶¶ 199-200, 209 (1996) ("*Local Competition Order*").

FCC's finding in the *ISP Remand Order* that ISP traffic is "information access" and not "telecommunications traffic."[3]

Universal attempts to skirt these baseline rules by misinterpreting one rule and ignoring two other critical FCC rules. For example, Universal erroneously claims that 47 C.F.R. § 51.703(b) (Rule 703(b)) prohibits Qwest from charging Universal for the costs of trunks and facilities on its side of a point of interconnection, claiming that the Commission erred in ruling that ISP traffic is not "telecommunications traffic." (Request, at p. 9-10.) Rule 703(b) provides: "A LEC may not assess charges on any other telecommunications carrier for *telecommunications traffic* that originates on the LEC's network." (Emphasis added.) The rule thus applies only to "telecommunications traffic." In making its argument, however, Universal studiously avoids any discussion of 47 C.F.R. § 51.701(b)(1) (Rule 701(b)(1)), which states:

> (b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
>
> (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access, information access*, or exchange services for such access[.] (Emphasis added; citations omitted.)

Based on Rules 703(b) and 701(b)(1), Universal would be correct that Qwest cannot charge for transporting calls to Universal, but *only* if Qwest were originating and Universal were terminating "telecommunications traffic." However, the call flow from Qwest to Universal consists of calls placed by customers of the ISPs that Universal serves. This is significant because, as noted above, the FCC has determined that calls to ISPs are not "telecommunications traffic." Specifically, in its *ISP Remand Order*, the FCC found that "ISP-bound traffic falls under the rubric of 'information access.'" *ISP Remand Order*, ¶ 39. Thus, Rule 703(b) does not

[3] 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, ¶ 39 (2001) ("*ISP Remand Order*").

apply to limit recovery by Qwest of the costs of providing LIS services, such as direct trunked transport or entrance facilities, to Universal so that Universal can serve its ISP customers.[4]

Universal also avoids any discussion of 47 C.F.R. § 51.709(b) ("Rule 709(b)"):

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send *traffic* that will terminate on the providing carrier's network. Such proportions may be measured during peak periods. (Emphasis added.)

The Arbitrator here correctly ruled (and the Commission affirmed) that "the 'traffic' referred to in § 51.709(b) is the 'telecommunications traffic' referred to in § 51.709(a), not information access traffic, as ISP-bound traffic was found by the FCC to be." Order 06-190, Appendix A, at p. 7. Thus, Rule 709(b), like Rule 703(b), does not govern the arrangements between Qwest and Universal because, by its terms, it applies only to telecommunications traffic. Since virtually 100 percent of the traffic that is being transported over the subject facilities is "information access" (and therefore not "telecommunications traffic"), Rule 709(b) does not prohibit Qwest

[4] Even though the court in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) was critical of the *ISP Remand Order*, it is sufficient here to note that the *WorldCom* court did not change the definition of "information access" and, even though the court remanded the matter back to the FCC, it did not vacate the *ISP Remand Order* or invalidate any FCC rules. *Id.*, at 434. Thus, the determination that ISP traffic is not "telecommunications traffic" remains fully in effect. In the recent *Pac-West* case (docket IC 9), the Commission interpreted these same authorities and ruled that ISP traffic is "information access traffic," not "telecommunication traffic," that this conclusion is clearly embodied in the FCC rules adopted in the *ISP Remand* Order, and that *WorldCom* "did not reject the FCC's determination that ISP-bound traffic constitutes 'information access' rather than 'telecommunications traffic.' In fact, the Court specifically declined to vacate the FCC's revised rules or define the 'scope of telecommunications' subject to §251(b)(5)." Order No. 05-1219, dockets IC 8/IC 9 (November 18, 2005), at pp. 6-7. In a footnote to that discussion in Order No. 05-1219, the Commission stated:

> Section 51.701(b) of the FCC rules defines "telecommunications traffic." Subsection (b)(1) of that rule makes specific reference to paragraphs 34, 39 and 42-43 of the *ISP Remand Order*. Paragraphs 39 and 42 clearly articulate that ISP-bound traffic is information access rather than telecommunications traffic. As noted, the D. C. Circuit did not vacate the FCC rules, leaving the agency's determination intact. *Id.*, at pp. 6-7, fn. 20.

See *also Global Naps, Inc. v. New Eng. Tel. & Tel.*, 226 F.Supp.2d 279, 291 (D. Mass. 2001) ("the FCC now views ISP-bound telephone traffic as 'information access' traffic—traffic that is excluded from reciprocal compensation"). The First Circuit, in its recent decision, *Global NAPs v. Verizon New England Inc.*, 444 F.3d 59, 65, 2006 WL 924035 (1st Cir. April 11, 2006), agreed that the *ISP Remand Order* placed ISP traffic into a different category than the traffic subject to section 47 U.S.C. § 251(b)(5).

from recovering interconnection costs incurred so that ISP traffic can be delivered to Universal's ISP customers.

The Oregon Commission is not alone in this interpretation. This precise issue has been the subject to two federal district court decisions in Colorado. This interpretation of Rule 709(b)'s use of the term "traffic" was upheld by the Colorado federal district court in an appeal of a Colorado Commission order that Level 3 filed:

> I conclude that [47 C.F.R. § 51.709(b)] must refer to "telecommunications traffic." The first part of the relevant regulations, 47 C.F.R. § 701(a), provides that "[t]he provisions of this subpart [which include 47 C.F.R. § 51.709(b)] apply to reciprocal compensation for transport and termination of *telecommunications traffic* between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a) (emphasis added). In light of the fact that 47 C.F.R. § 51.709(b), therefore, can only apply to "telecommunications traffic," under 47 C.F.R. § 51.701(a), 47 C.F.R. § 51.709(b)'s reference to "traffic" must be read to mean "telecommunications traffic." *Level 3 Communication v. CPUC,* 300 F. Supp.2d 1069, 1078 (D. Colo. 2003) (emphasis in original) ("*Level 3 Decision*").

This judicial conclusion was challenged again in 2005 by another CLEC, AT&T, in an appeal of an arbitration order in Colorado, *AT&T Communications v. Qwest Corporation.*[5] (A copy of the slip opinion of this case is attached as Exhibit 2 to Qwest's Reply Brief.) In that case, AT&T tried, to no avail, to argue that Rule 709(b) prohibits imposing financial responsibility for facilities on Qwest's side of the POI:

> AT&T has not identified any courts that have reached a contrary conclusion to the one reached in *Level 3.* Therefore, the only case law precedent on this issue is in direct contradiction to AT&T's assertions. While district court opinions are not binding precedent, even if decided by the same judge, the Universal decision provides strong persuasive authority in support of the determination that "traffic" in 47 C.F.R. § 51.709(b) refers to "telecommunications traffic." *AT&T*, slip opinion at 26.

Hence, the Colorado district court has twice engaged in a thorough analysis of the issue and twice reached the conclusion that the scope of Rule 709(b) is limited to "telecommunications traffic," a term that does not include the ISP traffic that is the primary form of traffic that flows between Qwest and Universal.

[5] Civil Action no. 04-cv-00532-EWN-OES (D. Colo., June 10, 2005). (Because the case has never been published, the slip opinion was attached as Exhibit 2 to Qwest's Reply Brief.)

The Commission's decision to adopt Qwest's RUF language in the interconnection agreement is the only conclusion that can be reached that squares with current FCC rules. Universal, on the other hand, ignores two of the rules in its Request, and argues for an interpretation of a third—Rule 703(b)—that is completely inconsistent with decisions of this Commission and other well-reasoned and persuasive authority.

B. *TSR Wireless* and the other federal authority upon which Universal relies do not support its claim of error

Although Universal does not elaborate on its argument, it once again attempts to rely on the FCC's *TSR Wireless* decision,[6] and three other federal circuit court decisions,[7] for the proposition that Qwest is responsible for all costs on its side of the POI. (Request, at pp. 5-7.) Qwest addressed these issues at length in its Opening Brief (at pp. 10-16.), where it demonstrated that each of these cases is readily distinguishable. In light of that detailed analysis, Qwest will provide only an abbreviated argument here.

The fundamental problem with Universal's reliance on these cases stems from the same issue discussed above, that the FCC in the *ISP Remand Order* ruled that ISP-bound traffic *is not* "telecommunications traffic," but is "information access." *ISP Remand Order,* ¶ 39; *see also* ¶¶ 52, 57, 65. Thus, the prohibition contained in Rule 703(b) does not apply to ISP traffic. Although Universal relies on *TSR Wireless* and other case law in this section of its Request, it never once addresses the *ISP Remand Order* on this issue, nor does it address this Commission's decision in Order No. 01-809 in docket ARB 332 (Level 3/Qwest arbitration), where the Commission expressly followed the *ISP Remand Order*. Universal also pointedly ignores the two Colorado district court decisions described in the previous section.

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[6] *TSR Wireless v. U S WEST Communications,* 15 FCC Rcd 11166 (2000).

[7] *Qwest Corp. v. FCC,* 252 F.3d 462 (D.C. Cir. 2001) , *Mountain Communications v. FCC,* 355 F.3d 644 (D.C. Cir. 2004), *MCIMetro Access Transmission Servs. v. BellSouth Telecommunications,* 352 F.3d 872 (4th Cir. 2003).

Universal attempts to avoid the effect of these rulings by relying on *TSR Wireless*. That case, however, simply involved the unique issue whether the FCC's reciprocal compensation rules apply to "one-way" *paging* carriers—carriers in the business of receiving paging calls over one-way interconnection trunks. *TSR Wireless* did *not* involve either the RUF or the consideration of ISP traffic and, therefore, is completely irrelevant to this case.

In *TSR Wireless*, the complainant paging carriers asserted that the FCC's rules relating to reciprocal compensation applied to them, and that under Rule 703(b), ILECs were prohibited from charging the paging carriers for the costs of one-way interconnection trunks used to carry *local* paging calls that originated on the incumbent ILECs' networks. The paging carriers based their claim on the express language of the then-existing Rule 703(b): "'A LEC may not assess charges on any other telecommunications carrier for *local* telecommunications traffic that originates on the LEC's network.'" *TSR Wireless*, ¶ 3. (Emphasis added; citation omitted.) Significantly, the paging carriers limited their claim to *local* calls, and did not claim that ILECs were prohibited from charging for the interconnection facilities used to carry *interstate* calls.[8]

As the FCC described their claim, the paging carriers were seeking to establish that Rule 703(b) prohibits ILECs "from charging CMRS providers, including paging providers, for *local telecommunications traffic* that originated on the LECs' networks." *TSR Wireless*, ¶ 5. (Emphasis added.) In ruling for the paging carriers, the FCC established only that Rule 703(b) prohibits ILECs from charging *paging carriers* for facilities used to carry local "telecommunications traffic" originating on the ILECs' networks. *Id.*, ¶ 18.[9] Nothing in the order, however, precludes ILECs from assessing charges for facilities used to carry *inter*MTA

[8] *See e.g.*, *TSR Wireless* ¶ 11 (complainant Metrocall requesting ILECs to cease charging for "facilities used for *local* transport"). (Emphasis added.)

[9] The FCC ruled that ILECs cannot charge paging carriers "for the delivery of LEC-originated, intraMTA traffic to the paging carrier's point of interconnection." *TSR Wireless*, ¶ 18. "IntraMTA traffic" is local paging traffic that originates and terminates within the same "Major Trading Area" or MTA, which the FCC has determined is the local calling area for wireless carriers (including paging carriers). *Id*., ¶ 11.

paging traffic (i.e., nonlocal traffic), and nothing in the *TSR Wireless* order even remotely relates to an issue in this case: who bears the financial responsibility for non-telecommunications ISP traffic in a RUF calculation applicable to two-way trunk facilities.

The three circuit court cases that Universal cites are likewise distinguishable. The *Qwest* and *Mountain Communications* cases—like *TSR Wireless*—related to *paging* traffic. In *MCIMetro Access,* the issue related to general telecommunications traffic being exchanged between an ILEC and a CLEC. None of these cases addressed either ISP traffic generally or the specific question whether ISP traffic falls under Rule 703(b). None of them cited the *ISP Remand Order,* either. Each of them, therefore, is essentially a replay of *TSR Wireless*.[10]

Finally, this is not a new issue for the Commission. In its decision in the AT&T/Qwest arbitration (docket ARB 527), the Commission concluded that "this Commission has already determined that, in light of FCC rules, the term 'telecommunications traffic' does not include Internet traffic." Order No. 04-262 (May 17, 2004), Appendix A, p. 13.

C. Universal's claim that the Commission's order is inconsistent with the *Qwest v. Universal* decision (Point III.B) is demonstrably incorrect

Universal now makes its *fifth* attempt to convince the Commission that the adoption of Qwest's RUF language violates the federal district court's *Qwest v. Universal* decision. *Qwest*

[10] In support of its claim that Qwest bears all financial responsibility on its side of the POI, Universal cites the statement from the *MCIMetro Access* decision that FCC rules "unequivocal[ly] prohibits LECs from levying charges for traffic originating on their own networks, and, by its terms, admit of no exceptions." (Request, at p. 9, fn. 18, *quoting* 352 F.3d at 880.) However, that statement is beside the point, and inapplicable here in any event. This is so because Rule 703(b), the rule being construed in that case (which had nothing whatever to do with ISP traffic), does not apply to ISP traffic in the first instance.

Universal also relies on *MCIMetro Access* for its claim that it should not be responsible for non-recurring charges for LIS services. (Request, at pp. 8-9.) For the same reasons that the *MCIMetro Access* case does not apply to ISP traffic, it does not apply to non-recurring charges. It is also illogical to apply a RUF (which is based on relative traffic use over time) to an activity that is one-time in nature occurring at the time of installation.

Corp. v. Universal Telecom, 2004 WL 2958421 (D. Or. 2004). (Request, at pp. 3, 6, fn. 11, 14-16.)[11] Qwest has responded to this argument each time it has had the opportunity to do so.[12]

Universal makes two primary points. First, it argues that Judge Aiken made "factual findings" that ISP traffic is "telecommunications traffic." (Request, at pp. 14-15.) Second, it claims that the Commission ignored Judge Aiken's binding legal conclusions. (*Id.*, p. 16.) These arguments are erroneous for the following reasons.

First, it is certainly curious that Universal asserts that Judge Aiken's interpretation of a 1997-vintage agreement (that Universal opted into in 1999) is binding on the Commission today. This is particularly so in light of Universal's own statement in footnote 6 of its Initial Brief, where Universal cited to the *Qwest v. Universal* decision and then stated: "To the extent that the court in [the *Qwest v. Universal*] matter was ruling about the specific meaning of that specific agreement, as opposed to generally applicable federal law, Judge Aiken's decision will not be controlling here . . . ." (Universal Initial Brief, at pp. 4, fn. 6.) Qwest agrees with that statement, but Universal pays only lip service to it; Universal's reliance on the *Qwest v. Universal* decision on RUF is a direct violation of the principle that it purports to follow.

Second, Universal's claim that the court's background factual descriptions, which use the term "telecommunication traffic," are findings that are binding on the Commission has no merit. Universal characterizes these statements as "factual findings," but what it is really saying is that the court's general factual statements in its "background" section[13] somehow constitute a binding legal conclusion that the ISP traffic in this case is "telecommunications traffic," thus allowing

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[11] Universal previously asserted this argument in its Initial Brief, at p. 4, fn. 6, and p. 14; in its Reply Brief, at pp. 9, 19-20; in its Final Brief, at pp. 1-2, 4; and in its Comments on the Arbitrator's Decision, at pp. 15-17.

[12] See Qwest Reply Brief, at pp. 3-4, 16-18; Qwest Final Brief, at pp. 2-3.

[13] The sections Universal quotes from the *Qwest v. Universal* decision all come from a section entitled "BACKGROUND." 2004 WL 2958421, at p. *1. The court did not characterize them as either "findings of fact" or "conclusions of law."

Universal to argue that Rule 703(b) requires Qwest to bear financial responsibility for ISP traffic delivered to Universal's ISP customers.

It is absurd in the first instance to suggest that the Commission is somehow bound by factual findings (even if that is what they were) in the *Qwest v. Universal* case. This Commission has been delegated the task of determining the facts that are relevant to its decision regarding a *new* interconnection agreement between the parties. Thus, Universal's suggestion that Judge Aiken's passing references to "telecommunications traffic" requires this Commission to ignore the undisputed fact that the traffic is really ISP traffic, and to likewise ignore the clear language of Rule 701(b)(1) (that specifically excludes "information access" from "telecommunications traffic"), is unsupported by any authority (and Universal certainly does not cite to any). It is also important to note that Qwest addressed this issue at length in its Opening Brief, where it engaged in a point-by-point response to the statements from the *Qwest v. Universal* decision that Universal erroneously characterized as findings of fact. (See Qwest Opening Brief, at pp. 3-6.)

Third, Universal's contention that the *Qwest v. Universal* decision constitutes some sort of binding legal authority on how this Commission must interpret currently-existing FCC rules is likewise fallacious. This claim completely ignores the different contexts of the *Qwest v. Universal* case and this interconnection agreement arbitration. In the earlier case, there was a RUF provision in the interconnection agreement, but there was no language in the RUF provision that excluded ISP traffic, or even referred to ISP traffic. In light of that fact, Qwest unsuccessfully argued (relying on the current language of Rule 703(b), the two Colorado district court decisions, and other authorities) that the court should essentially read the exclusion of ISP traffic into the RUF provision of the agreement. The court rejected that argument, however, and quoted paragraph 82 of the *ISP Remand Order* that the order "'does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law

provisions.'" *Qwest v. Universal,* 2004 WL 2958421, at *4. Elsewhere in its decision, the court also ruled that Qwest could not rely on a "change of law" argument, holding that the change of law provision of the existing agreement had not been met. *Id.* at *8-9. Finally, referring to the Colorado Level 3 district court case and this Commission's decision in the Level 3/Qwest arbitration (Order No. 01-809 in docket ARB 332), the court concluded:

> I find these cases *inapplicable*. Both cases involved the *arbitration* of proposed interconnection agreements that were established *after* the issuance of the *ISP Remand Order*. . . . Neither involved disputes about *preexisting contracts*. . . . *Here, the parties have a binding contract which contains no open issues in need of arbitration*. The contract was established in 1999 prior to the issuance of *ISP Remand Order*. Under the clear language of the decision, *ISP Remand Order* "does not alter existing contractual obligations...." Furthermore, *ISP Remand Order* "does not alter carriers' other obligations under [FCC] Part 51 rules...." Therefore, the cases cited by Qwest are *distinguishable*. 2004 WL 2958421, at p.*5. (Emphasis added; citations omitted)

Thus, Judge Aiken found these cases *distinguishable* because the case before her was not the arbitration of a new, post-*ISP Remand Order* agreement; she merely held that *the existing agreement* did not allow ISP traffic to be removed from the RUF. Further, Judge Aiken did not rule that the Colorado decisions or Order No. 01-809 were wrong. Thus the judge's statement that the cases upon which Qwest relied "involved . . . agreements that were established *after* the issuance of the *ISP Remand Order*" is highly significant. The judge obviously drew a distinction between the task before it (construing a RUF provision in a pre-existing interconnection agreement that did not mention ISP traffic) and what would happen in the arbitration of a new post-*ISP Remand Order* agreement.[14]

[14] The proper interpretation of the *Qwest v. Universal* decision was made by the Commission in the *Wantel/Pac-West* order (Order No. 05-1219 in dockets IC 8/IC 9), where the Commission concluded that the phrase "existing transport obligations" is a reference to Qwest's obligation under the agreement then in effect, given the Commission's conclusion that the *ISP Remand Order* "did not alter existing. . . agreements to transport traffic to points of interconnection." Order No. 05-874, at p. 33. Ruling that the *ISP Remand Order* has no impact on *pre-existing contractual relationships*, however, is a far different proposition than ruling that a state commission may not adopt an agreement that makes Universal financially responsible for the cost of the facilities used to transport ISP traffic to Universal's ISP customers.

Therefore, Judge Aiken *did not* purport to rule that, in an interconnection arbitration of a new agreement, the Commission could not order that ISP traffic be removed from the RUF provision. The judge also did not declare the Commission's ruling in Order No. 01-809 to be unlawful or disagree with the Colorado district court's Level 3 decision. The only thing that Judge Aiken did was to conclude that these rulings did not apply to the *interconnection agreement at issue* (which long pre-dated all of these decisions, which did not explicitly exclude ISP traffic from the RUF, and which was entered into two years before the FCC ruled that ISP traffic is not telecommunications traffic). Thus, under the principle that Universal stated, "[t]o the extent that the court in [the *Qwest v. Universal*] matter was ruling *about the specific meaning of that specific agreement*, as opposed to generally applicable federal law, *Judge Aiken's decision will not be controlling here . . . .*" (Universal Brief, at pp. 4, fn. 6 (emphasis added).) This is precisely the kind of issue this statement covers, and Universal's effort to rely on *Qwest v. Universal* on this point is without merit and should be rejected.

Finally, Universal's argument that Judge Aiken's decision is somehow *binding* on the Commission ignores the fact that there is an earlier Oregon federal district court decision that upholds a Commission arbitration decision to exclude ISP traffic from a RUF provision. Order No. 01-809 (September 13, 2001), in docket ARB 332, was appealed to the federal district court in Oregon, and the court affirmed the Commission's decision to exclude ISP traffic from a RUF provision. *See Level 3 Communications v. Oregon Pub. Util. Comm'n*, No. CV01-1818-PA (D. Or., November 25, 2002). Judge Aiken did not purport to overrule Order No. 01-809 (she merely found it inapplicable to a preexisting agreement), and she did not even mention the ruling of the federal district court in the appeal of Order No. 01-809. If one were to accept Universal's argument that there is binding federal court authority in Oregon on financial responsibility for the transport of ISP traffic, that decision is the *Level 3* decision because, unlike *Qwest v. Universal*, it dealt with the arbitration of a new post-*ISP Remand Order* agreement.

In sum, the *Qwest v. Universal* decision does not prevent the Commission from continuing to approve RUF language in a new arbitrated interconnection agreement that makes the CLEC financially responsible for the cost of transporting ISP traffic to its ISP customers. The Commission should reaffirm its decision regarding the development of the RUF by approving Qwest's proposed language in the interconnection agreement.

D. Universal's reliance on footnote 149 of the *ISP Remand Order* and the FCC's *Intercarrier NPRM* are without merit

For the first time in this docket, Universal argues that footnote 149 of the *ISP Remand Order* in some manner imposes an obligation on Qwest to transport traffic to Universal's POIs for free. Universal reads far more into that footnote than really exists. Footnote 149 is a footnote to paragraph 78 of the order, which describes the three-year phase-down of terminating compensation for local ISP traffic.[15] The footnote reads:

> This interim regime affects only the intercarrier *compensation* (i.e., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection. (Emphasis added.)

Universal's interpretation is that the FCC affirmed "that existing rules require a carrier to provide transport without compensation." (Request, at p. 11.) There are two obvious problems with that conclusion, however.

First, there is nothing in footnote 149 that states that transport to a POI *must be provided for free*. All that footnote 149 states is that to the extent an ILEC had an obligation to transport traffic to a POI (an obligation that Qwest acknowledges is part of SPOI), it would still have that obligation—but the word or concept of "free" is notably absent.

[15] The recent First Circuit decision in *Global NAPs* ruled conclusively that the *ISP Remand Order* applies only to local ISP traffic. *Global NAPs v. Verizon New England Inc.*, 444 F.3d 59, 65, 2006 WL 924035 (1st Cir. April 11, 2006).

Second, nothing in the footnote suggests that there is an "existing rule" that requires free transport. The plain intent of this footnote is simply to establish that the interim per-minute reciprocal compensation *rates* that the FCC established in the *ISP Remand Order* do not affect carriers' obligations (whatever those obligations may be) to perform transport functions. That point has *nothing to do* with establishing which party bears the *financial responsibility* for transporting ISP traffic. In the 2001 Level 3/Qwest arbitration (docket ARB 332), Level 3 made the same argument. *See* Order No. 01-809, at p. 12. Nonetheless, the arbitrator and the Commission adopted Qwest's RUF language that required Level 3 to be financially responsible for ISP traffic that is delivered to its ISP customers. *Id.*, at p. 15.

Universal's next argument is also new. Universal claims that the FCC's *Intercarrier NPRM*[16] in some manner supports its conclusion that Qwest is required to provide free transport for all traffic. (Request, at pp. 11-12.) Universal quotes the following language from paragraph 70: "Under our current rules, the originating *telecommunications* carrier bears the cost of transporting traffic to its point of interconnection with the terminating carrier." (Emphasis added.) Universal, however, does not mention that paragraph 70 is in the section of the *Intercarrier NPRM* that relates to "Bill and Keep for Traffic *Subject to Section 47 U.S.C. § 251(b)(5)*." *See Intercarrier NPRM,* heading prior to ¶ 69. (Emphasis added.) Section 251(b)(5) purports only to address the "duty to establish reciprocal compensation arrangements for the transport and termination of *telecommunications.*" (Emphasis added.) And, of course, the FCC in the *ISP Remand Order* (which the FCC issued the same day as the *Intercarrier NPRM*) specifically concluded that ISP traffic does not fall under section 251(b)(5). *ISP Remand Order*, ¶¶ 3, 30, 36, 39. Thus, the statement in the *Intercarrier NPRM* that Universal cites, by definition, cannot refer to ISP traffic. Instead, the only rational reading of the *ISP*

[16] Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, ¶ 66 (April 27, 2001) ("*Intercarrier NPRM*").

Remand Order and the *Intercarrier NPRM* is that the transport that the FCC referred to in paragraph 70 is the transport of "telecommunications traffic," an analysis entirely congruent with Rules 701(b) and 703(b).

E. Universal's other claims of error are irrelevant

Universal also argues that there is an inconsistency in Order No. 06-190. Referring to page 8 of the order, Universal cites to the Commission's conclusion that the *ISP Remand Order* does not preempt state commissions on determining responsibility for transport issues (i.e., the RUF issue). (Request, at p. 13.) Universal then points out that later on the same page, the Commission concluded that the FCC had preempted state regulation for transport for ISP-bound traffic. (*Id*.)

Universal's point from all of this is unclear. Whether the FCC has or has not preempted on the subject of financial responsibility for transport is not the issue, although Qwest is not aware of any FCC order that has expressly done so. More to the point, however, is the fact that the FCC has established certain rules—Rules 701(b), 703(b), and 709(b)—that state commissions must apply in arbitrating interconnection agreements. Qwest has analyzed the Commission's order in the light of those rules, *supra*, and the Commission's order is in full compliance with such FCC rules, with earlier Commission decisions, and with other persuasive authority. The point here is that Universal quibbles about an issue that is completely irrelevant to the Commission's decision to adopt Qwest's RUF language.

Universal's argument is also irrelevant from another perspective. Earlier in its Request, Universal makes the startling claim that "if the traffic that Qwest delivers to Universal is not subject to FCC Rule 703(b) (because it is not properly classified as telecommunications traffic)[,] then the Commission lacks the authority or jurisdiction to rule on contract terms

governing such traffic." (Request, at p. 9.)[17] Universal's argument, however, ignores the fundamental nature of section 47 U.S.C. § 252 of the Act, which delegates to state commissions the task of arbitrating interconnection agreements under the 1996 Act. Thus, when a state commission addresses the disputed issues in a section 252 arbitration, it has a duty to follow federal law—including any lawful preemptive actions by the FCC, federal court interpretations of federal law, and current FCC rules. This duty, of course, includes the interpretation of rules like Rule 703(b). In other words, because federal law governs a particular issue in an arbitration does not divest a state commission of its delegation under section 252—all that it means is that the state commission must apply governing federal law in deciding the issues before it.[18]

A good example of the application of this principle arose in the FCC's recent *Vonage* decision,[19] in which the FCC specifically preempted the Minnesota Commission from imposing state telecommunications regulatory requirements on Vonage, a VoIP provider, and made it clear that VoIP issues in general were subject to FCC jurisdiction. *Vonage*, ¶ 14. Chairman Powell, in his concurring statement, then noted (at page 2) that "the [FCC] expresses no opinion here on the applicability to Vonage of the state's general laws governing entities conducting business within the state . . . . Just as this ruling does not alter traditional state powers, we do not alter facilities-based competitor rights, *or state authority pursuant to section 252 of the Act*." (Emphasis added.) By asserting primary jurisdiction over VoIP issues, the FCC was not suggesting that

[17] Universal makes a similar argument in footnote 20 of its Request.

[18] See *Global Naps, Inc. v. Verizon New England,* 327 F.Supp.2d 290, 299 (D. Vt. 2004) ("state commissions' power to arbitrate interconnection agreements, including those that involve ISP-bound traffic, has not altered because the FCC has issued rulings that govern intercarrier compensation for ISP-bound traffic. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 385 (1996 Act entrusts state commissions with job of approving interconnection agreements, even though FCC promulgates rules to guide state commission judgments); *see also U S WEST Communications v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002) ("the FCC's implementing regulations . . . must be considered part and parcel of the requirements of the Act" and state commission has a duty to give them effect).

[19] Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation for Declaratory Ruling*, 19 FCC Rcd 22404 (2004) ("*Vonage*").

state commissions have no role in arbitrating VoIP issues. Indeed, Qwest and Level 3 are arbitrating such issues in eight states at present. Universal's argument cannot square with the Commission's delegated authority under section 252.[20]

II. UNIVERSAL'S DUE PROCESS CLAIM (POINT III.C) IS BASED ON A FALSE PREMISE AND THUS SHOULD BE REJECTED

Universal claims that the Commission's conclusion that Universal is in violation of its CLEC certificate of authority in Oregon somehow violated Universal's due process rights and thus should be reversed. (Request, at p. 19.) Qwest does not contest that a fundamental element of due process is the opportunity to be heard, and that the Commission should decide only issues that reasonably fall within the scope of the issues before it. Ninth Circuit authority makes it clear that due process requirements are fully met when a party has the opportunity to brief an issue.[21]

Once the record here is examined, it is clear the Commission should reject Universal's argument. The Commission's consideration of the propriety of VNXX services and traffic and its adoption of language stating the parties shall not exchange VNXX traffic were well within the issues in this case, and Universal had several opportunities to respond to Qwest's arguments on the precise point at issue. Universal chose not to address those issues of its own accord.

Universal's argument is based on its false premise that the issue of the propriety of VNXX service and VNXX traffic, and Universal's responsibilities under its CLEC certificate of authority, were not included within the issues that the parties raised. (Request, at p. 18.) That is

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[20] Universal also makes an incomprehensible argument suggesting that, in approving Qwest's RUF language, the Commission has somehow unlawfully adopted a two-call theory. (Request, at pp. 13-14.) Universal does not cite to anything in the order where the Commission has done so, nor is this issue relevant in light of the Commission's correct application of the FCC's rules. Indeed, there is no small irony in Universal's argument. If, as Universal asserts, all ISP traffic must be treated as one call, then all ISP traffic would terminate at websites throughout the country and the world. Thus, none of it could be classified as local ISP traffic, and Universal could claim no right to *any* terminating compensation under the *ISP Remand Order*.

[21] *See e.g., Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1112 (9th Cir. 2005) (holding, in the context of revocation of a *pro hac vice* admission, that the "the opportunity to be heard does not require an oral or evidentiary hearing on the issue," and that "the opportunity to brief the issue fully satisfies due process requirements") (quoting *Pac. Harbor Capital, Inc. v. Carnival Air Lines*, 210 F.3d 262 , 1118 (9th Cir. 2000); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 268 (10th Cir. 1995) (same with regard to imposition of sanctions).

simply not the case, however. The relevant portions of Qwest's proposed language are sections 7.3.1.1.3.1 and 7.3.2.2.1 (the RUF sections), each of which in the last sentence stated: "Qwest has never agreed to exchange VNXX traffic with CLEC." While it is not clear what Universal thought that language meant, it plainly means that Qwest does not agree VNXX traffic is appropriate and that Qwest claims there is no agreement to exchange such traffic with Universal. That sentence, which Universal proposed to delete,[22] clearly raises the question whether the exchange of VNXX traffic is proper in Oregon, and in particular, whether the exchange of such traffic is appropriate between Qwest and Universal.

Despite this, Universal's argument states point-blank that "the lawfulness of VNXX . . . was not formally, or informally, raised in the petition for arbitration or in any other official filing in this proceeding." (Request, at pp. 18-19.) That is clearly and simply not true.

Qwest filed a copy of Universal's certificate of authority as Exhibit B to its Statement of Facts on October 21, 2005. In Qwest's Opening Brief filed the same day, Qwest quoted conditions 7 and 8 from the certificate, and then stated:

> Thus, Universal has a legal obligation to comply with fundamental industry standards related to the distinction between local and toll calling, to comply with exchange and EAS boundaries in Oregon, and to comply with industry standards related to the assignment of telephone numbers. *Universal's attempt to eliminate the VNXX concept from the language and to treat interexchange calling as though it were local is inconsistent with its operating authority in Oregon.*
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> In short, Universal, without any explanation in its Response, suggests a dramatic change of policy by proposing that local and VNXX (interexchange) traffic be treated as though it was the same for RUF purposes. This change in policy is directly contrary to Oregon law and Commission policy, and thus the Commission should therefore reject it. (Qwest Opening Brief, at p. 20 (footnote omitted; emphasis added).)
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> Further, in the footnote (footnote 15) to this language, Qwest also stated:
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> In Order No. 04-504 in its VNXX investigation (docket UM 1058), the Commission expressed its deep concern about the impact that VNXX has on incumbent carriers. For

[22] See Exhibit 1 to Qwest's October 21, 2005 filing, which shows the competing language. Universal proposed to delete the sentence at issue in both places where it appeared.

> example, after quoting the two conditions set forth above, that the Commission has placed in all Oregon CLEC certificates, which require adherence to local calling areas and the appropriate use of NXX codes, the Commission stated: "A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct described by OTA [the Oregon Telecommunications Association] . . . would clearly be in violation of its certificate." Order No. 04-504, at p. 11. (Qwest Opening Brief, fn. 15.)

Further still, in Qwest's Reply Brief on November 4, 2005, Qwest repeated the point made in footnote 15 of its Opening Brief, and then stated: "It is readily apparent from this order [Order No. 04-504 in docket UM 1058 (the Commission's VNXX investigation)] that the Commission views VNXX *as inconsistent with Oregon law*." (Qwest Reply Brief, at p. 44 (emphasis added).)

In short, Qwest's review of Universal's briefs in this matter indicate that Universal apparently chose not to respond to the any of these statements, even though it had every opportunity to do so. But, even though it did not respond to these statements, Universal also never suggested that they were beyond the scope of the issues in the case, nor did it ever move to strike them. For Universal to now suggest that the conditions of its certificate of authority or the propriety of VNXX services and traffic were not raised in the record, or to claim that it had no opportunity to take a position on those points, is simply without merit.

In the end, the real issue here is not the finding that Universal is in violation of its certificate of authority, but the language which the Commission adopted. After analyzing a variety of authorities, including the language of Universal's certificate, Qwest's arguments related to the certificate, and Universal's silence in the face of Qwest's arguments, the Commission concluded that Qwest's proposed language should be changed to: "Qwest and CLEC shall not exchange VNXX traffic." While this is not the exact language that Qwest proposed, it is entirely consistent with Qwest's proposed language and is based on the evidence and argument in the record, as well as prevailing Oregon law.

Finally, it is entirely consistent with the Commission's section 252 authority to adopt language that neither party proposed, so long as it falls within the issues presented. State commissions often do so in arbitration proceedings. The Commission did so in this case, and its action is entirely appropriate. *See e.g.*, 47 U.S.C. § 252(b)(4)(c) (allowing state commissions to resolve issues by establishing appropriate conditions).

In sum, the Commission did not violate Universal's due process rights in this docket.

III. UNIVERSAL'S ARGUMENT THAT ORDER NO. 06-190 IMPROPERLY PROHIBITS UNIVERSAL FROM PROVIDING AN INTERSTATE SERVICE (POINT III.D) HAS NO MERIT

Universal's final point focuses once again on the Commission's finding that Universal's use of VNXX traffic is a violation of its CLEC certificate of authority. (Request, at pp. 19-23.) As noted above, however, the real question in this arbitration is not the finding that Universal is in violation of its certificate,[23] but the language that the Commission adopted, which states that the parties *shall not* exchange VNXX traffic. The essence of Universal's claim apparently is that this language is somehow unlawful because it prohibits VNXX service, which it characterizes as an "interstate service. (*Id.*, at p.19 (Heading D).)

Although Universal's heading makes this claim in terms of VNXX traffic being an *interstate* service, Universal does not mention that issue until the last paragraph on page 22. In reality, however, the primary thrust of Universal's argument is not that it is an interstate service, but its claim that the Commission apparently does not understand and therefore misinterpreted the FCC's position on VNXX traffic. (Request, at pp. 20-22.) On these points, it is Universal that misunderstands what the FCC has and has not done with regard to VNXX traffic.

First, the FCC has neither ruled that VNXX traffic is appropriate or that a state commission lacks the power to ban VNXX in its state. That this is so is demonstrated by

[23] The Commission's adoption of the language that the parties were not to exchange VNXX traffic could certainly have been made independent of a finding that Universal is in violation of its CLEC certificate of authority.

paragraph 115 of the *Intercarrier NPRM,* where the FCC stated that certain parties "have indicated that some LECs are inappropriately using virtual NXXs to collect reciprocal compensation for traffic that the ILEC is then forced to transport outside the local calling area." Later in that same paragraph, the FCC asks interested parties to comment on VNXX issues. This conclusion is also consistent with the FCC's *Amicus Brief* filed in the First Circuit's *Global NAPs* case (copy attached as Exhibit A). After the *Global NAPs* case was fully briefed and argued by the parties, the First Circuit panel took the unusual step of seeking input from the FCC on several questions related to VNXX traffic, including whether the FCC has made a final decision on how VNXX should be handled. On that issue, the FCC stated: "The Commission itself has not addressed application of the *ISP Remand Order* to ISP-bound calls outside a local calling area. Nor has the Commission decided the implications of using VNXX numbers for intercarrier compensation more generally." (*Amicus Brief,* Ex. A. at pp. 10-11). Thus, the FCC has not made a determination on how it will deal with VNXX traffic.

It is also important to note another sentence in paragraph 115 of the *Intercarrier NPRM*, where the FCC noted that it has "delegated some of its authority to state public utility commissions in order that they may order the North American Numbering Plan Administrator (NANPA) to reclaim NXX codes that may not be used in accordance with the Central Office Code Assignment Guidelines." The FCC then noted action that the Maine Commission has taken in that regard. The only reasonable interpretation of that language is that the FCC acknowledges that state commissions have a clear role to play on administration of numbering resources, including how those resources may be used with regard to VNXX traffic.

Further, the only federal court authority on this issue is that a state commission *can* ban VNXX services in its state. In *Global Naps, Inc. v. Verizon New England,* 327 F.Supp.2d 290 (D. Vt. 2004), the court affirmed a Vermont Public Service Board decision banning VNXX (a "service [that] converts what would otherwise be toll calls into local calls"). 327 F.Supp.2d at

295. The court also ruled that even though the FCC determined that ISP traffic is "interstate in character," the "historical practice of allowing state commissions to define local service areas was not altered by the FCC." *Id.*, at 298. With those principles in mind, the court turned to the Vermont Board's ruling. Noting with approval the Board's ruling that the local/toll distinction is based on "the physical termination points of the calls," the court analyzed the legality of the Vermont Board's decision to ban the CLEC's use of VNXX in Vermont. *Id.*

The CLEC (Global) then raised numerous objections to the Board's decision on appeal, one of which was the identical claim that Universal asserts here, namely, that the state commission lacked "jurisdiction to ban Global's use of VNXX to provide information access services because ISP-bound traffic is interstate in character and therefore subject exclusively to FCC authority." *Id.*, at p. 299. The court firmly rejected that argument:

> The Remand Order made no such sweeping preemptive claim. It expressly stated that access services remain subject to FCC jurisdiction, "or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions." It also acknowledged that ISP-bound traffic has interstate and intrastate components that cannot be reliably separated. ([I]n practice, dual federal and state regulation over telephone service does not divide neatly into interstate and intrastate domains). . . . Moreover, state commissions' power to arbitrate interconnection agreements, including those that involve ISP-bound traffic, has not altered because the FCC has issued rulings that govern intercarrier compensation for ISP-bound traffic. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 385 (1996 Act entrusts state commissions with job of approving interconnection agreements, even though FCC promulgates rules to guide state commission judgments).
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> Although Global characterizes the Board's Order as "determin[ing] who can or cannot serve ISPs" . . ., the Board did not bar Global from providing service to ISPs. It merely ruled that Global could not obtain an unfair advantage in the market by offering VNXX with Verizon footing the bill. *Id.*, at pp. 299-300. (Some citations omitted.)[24]

Likewise, an Administrative Law Judge in Arizona recently rendered a recommended decision in an arbitration between Level 3 and Qwest on this issue. The ALJ there concluded that "[t]he FCC has left the decision of whether VNXX should be permitted to the states."

[24] The federal district court also rejected the CLEC's numerous other objections to the decision to ban VNXX, including claims that the Vermont order resulted in unlawful discrimination and violated the filed rate doctrine. 327 F.Supp.2d at 301.

Relying on the Vermont *Global NAPs* decision and the Arizona Commission's ruling in an earlier AT&T arbitration case, the ALJ ruled that VNXX arrangements should not be allowed in Arizona, pending a generic docket in which all interested parties can participate. The ALJ stated: "Consistent with our understanding of federal law, our existing rules and our holding in the *AT&T Arbitration Order*, we decline to alter a long-standing regime for rating calls. Level 3 proposes the use of VNXX arrangements that undermine that compensation regime. *Thus, we find that Level 3 should not use VNXX service to provide service to ISP and VoIP providers*."[25]

The import of these cases is clear. The FCC has not prohibited state commissions from banning VNXX services and VNXX traffic, and this Commission was acting well within its delegated power in adopting language the prohibits the exchange of VNXX traffic.[26]

IV. COMMENTS ON UNIVERSAL'S REQUEST FOR STAY

Finally, Qwest is not seeking a reversal of the Commission's recent May 12, 2006 order (Order No. 06-229) granting a temporary stay of Order No. 06-190. Nevertheless, Qwest wishes to make a few general comments on that issue and to clear up a few possible misunderstandings, especially because Qwest was not given the opportunity to respond substantively before the Commission issued the order granting the temporary stay.[27]

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[25] Recommended Opinion and Order, *In the Matter of the Petition of Level 3 Communications LLC for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket Nos. T-03654A-05-0350 & T-01051B-05-0350, at 28-29 (ALJ Rodda, April 7, 2006). (Emphasis added.)

[26] Universal reliance on section 253 is misplaced. (Request, at pp. 21-22.) First, section 253 applies only to "telecommunications service[s]," and service to ISPs is not a "telecommunication service." Second, the Commission has not banned Universal from providing service to ISPs. Rather, the Commission has merely ruled that Universal cannot do so by using VNXX services. *See Global NAPs*, 327 F.Supp.2d, at p. 300 (Vermont Board did not ban CLEC from serving ISPs, "[i]t merely ruled that that Global could not obtain an unfair advantage in the market by offering VNXX with Verizon footing the bill").

[27] As Qwest assured the Commission and Universal in its May 12, 2006 letter to the Commission, Qwest had no intentions "to 'disconnect' or otherwise interfere with service to Universal while the Commission and its Staff review the conforming interconnection agreement and the request for reconsideration is pending." (See May 12, 2006 letter, p. 2.) Indeed, the only reason that Qwest wrote the letter was "because Universal ha[d] requested that the Commission grant extraordinary relief within only a week's time, and before the time that Qwest ha[d] to respond to such request for extraordinary relief" (a threatened federal court preliminary injunction). (*Id*., fn. 1.) Nevertheless, Qwest noted that its "comments therefore should not be considered Qwest's formal or complete

First, although Qwest does not believe the stay was necessary, the fact is that the temporary stay that the Commission recently granted (i.e., until the Commission issues its final order on Universal's request for reconsideration) is no different from what Qwest was informally describing in its May 12, 2006 letter to the Commission. In that May 12th letter, Qwest noted that under the Commission's rules (OAR 860-016-0020), the interconnection agreement could not become effective until after the Commission had reviewed the interconnection agreement to ensure it was compliant with Order No. 06-190, which could take up to 90 days under OAR 860-016-0020.[28] Qwest's purpose, therefore, was merely to assure the Commission that it had no intention of taking any immediate action (such as disconnection or blocking of traffic) that would have interfered with services provided to Universal. Qwest certainly was not suggesting it did not intend to abide by any agreement, or intended to violate any agreement in the near term. See e.g., Order No. 06-229, p. 2 (last paragraph). Indeed, Qwest's intent was precisely the opposite.

Second, because the Commission has already granted a temporary stay, Qwest was not able to speak generally about the types of alternatives that could be considered in the event that, as Qwest strongly proposes, the Commission affirms Order No. 06-190. Although this is not the time to address these issues in detail, there are certainly a variety of alternatives that could considered, although ultimately, assuming the interconnection agreement is approved pursuant to Order No. 06-190, it would be up to Universal to choose an interconnection architecture that

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response to Universal's requests for reconsideration or for a stay." (*Id*.) Qwest further noted that "by providing this letter to Your Honor, Qwest [was] not waiving its right to formally respond to those requests within the time frame provided for in the Commission's rules" (which, pursuant to OAR 860-014-0095(4), is May 22, 2006). (*Id*.) The Commission, however, apparently mistook Qwest's letter as a substantive response. Order No. 06-229, p. 2 ("Qwest does not deny the implementation of the terms of the interconnection agreement will irreparably harm Universal. Neither does it assert that Universal offers no plausible legal arguments in its Request for Reconsideration."). Thus, the Commission issued its order granting the requested stay a couple of hours after Qwest filed its letter.

[28] That 90-day period is longer than the 60-day period that the Commission has to rule on Universal's motion for reconsideration. See OAR 860-014-0095(6).

complies with the approved interconnection agreement.[29] Among the various alternatives are the following:

- Universal could reassign telephone numbers to its ISP customers to reflect the physical locations of the ISP modems. This arrangement would, of course, result in current end-user customers that presently rely on VNXX arrangements to make 1+ (toll) calls in order to reach their ISP, with those calls being carried by the end-user customers'

[29] As the following alternative methods of operation demonstrate, the grounds upon which Universal relied in its overwrought Request for Stay are without merit. There are alternatives that would allow Universal to continue to provide service. Yet, among other things, Universal argued that implementation of the interconnection agreement would essentially put it (and its seven employees) out of business, that it would cause Universal to breach contracts, and that it would cause it to lose its investment in equipment. (Motion for Stay, at p. 4.)

The fact is, however, that Universal chose its method of operation, that it has known for years that Qwest believed VNXX to be unlawful, that a variety of Commission orders have been highly critical of VNXX (including stating its belief that carriers that use VNXX are in violation of their operating certificates), that VNXX is completely inconsistent with the existing intercarrier compensation for interexchange traffic (whether interstate or intrastate), and even that states like Vermont had banned the use of VNXX. The fact that Universal is in denial about all of this is demonstrated by its statement in its Request for Stay referring to VNXX as "so-called VNXX service." *Id.* Surely, when Judge Aiken issued her decision in December 2004, Universal should have realized that, as a matter of law, VNXX is not some sort of legal mirage that it could simply ignore.

Further, Universal is not the only provider of services to ISPs. Other companies have found ways to provide service without using VNXX, and Universal has certainly been on notice for years that VNXX, as a method of operation in Oregon, was highly at risk. In the recent First Circuit *Global NAPs* case, the CLEC argued that the imposition of access charges would cause harm to competition and be an obstacle to the goals of Congress. The court stated, in response:

> Global NAPs does not point us to any clear evidence, in the *ISP Remand Order* or elsewhere, that the [Massachusetts Commission's] imposition of access charges on interexchange VNXX ISP-bound calls will obstruct the implementation of federal objectives.
>
> . . . . As to [the CLEC's] second point about access charges serving as an obstacle to the goal of universal service and competition for that service, Global NAPs says that the access charges will "virtually eliminate competition in the non-broadband internet access market." In the face of the FCC's long-standing recognition of state authority over intrastate access charges, and in the absence of clear evidence that the access charges here would impede competition, this argument is insufficient to find implied preemption. 444 F.3d at 75.

The court approvingly cited the *Local Competition Order* for the proposition that "[t]raffic originating and terminating outside the applicable local area would be subject to interstate and intrastate access charges." 444 F.3d at 63. Further, the court noted that the *ISP Remand Order* "reaffirmed the distinction between reciprocal compensation and access charges." *Id.*, at 73.

In reality, Universal's argument is not that implementation of the interconnection agreement would hurt competition, but that, because of Universal's conscious choices, the implementation of the agreement would hurt Universal. Qwest has no desire to cut off service to Universal, but it does believe the interconnection agreement that the Commission will adopt should recognize the principle that interexchange traffic (which is all VNXX really is) is subject to a different compensation scheme than local traffic. Universal has long known this position. Qwest does not believe it is the proper role of a state commission to protect the particular business model of a single competitor, especially when that competitor's business plan is premised on being treated in a discriminatorily-advantageous manner in relation to other competitors, such as interexchange carriers.

presubscribed interLATA or intraLATA carrier (depending on the location). Access charges would apply, and no reciprocal compensation would be paid to Universal.

- Universal could also relocate its ISP modems to physical locations within the local calling areas of the current virtual NXX telephone block. These calls would properly be classified as local ISP calls, and thus would be subject to the I*SP Remand Order's* $.0007 per minute of use terminating compensation. However, Local Interconnection Services ("LIS") facilities would not be available for Universal to transport the traffic between the ISP modems and the Internet because those facilities would be part of Universal's network, and LIS is not available for that purpose. Under such an approach, Qwest should have the right to independently confirm that the calls were being answered by modems in the same local calling areas as the calling parties. Interestingly, Universal has already begun this alternative approach and thus has notified Qwest that it is seeking three such location changes of their ISP modems. Thus, Universal, by its own actions, has demonstrated that it has a viable alternative to maintain its ISP services within the parameters of the Commission's order, making hollow its fundamental argument that the Commission's order somehow jeopardizes its ability to remain a viable business or that it forces Universal to breach its contracts with its ISP customers.
- Universal could also utilize one of the following services for its ISP customers: Feature Group D with 8XX, Feature Group A, and/or Primary Rate Service with Transport.
- Finally, the most drastic alternative would be turn down the trunks carrying VNXX traffic. However, there certainly could be negative consequences to the end-user customers trying to access the ISPs that Universal serves. For obvious reasons, this is not an alternative that Qwest would prefer.

In order for both companies to be in compliance with the Commission order that they shall not exchange VNXX traffic, one or more of these alternatives would need to be implemented by the time the Commission has approved the conforming interconnection agreement.

CONCLUSION

For all of the reasons set forth above, Qwest respectfully requests that (1) the Commission reject Universal's Request for Reconsideration in its entirety and (2) the Commission enter an Order making the filed conforming interconnection agreement, as ordered in Order No. 06-190, effective on the date of that Order.

DATED: May 22, 2006

Respectfully submitted,

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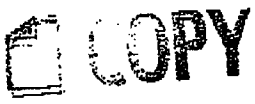
EXHIBIT A

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ARGUED



NO. 05-2657

GLOBAL NAPS, INC.,

Plaintiff-Appellant,

v.

VERIZON NEW ENGLAND, INC., ET AL.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF INTEREST AND QUESTIONS PRESENTED

Amicus curiae Federal Communications Commission (FCC) is the federal regulatory agency charged by Congress with "regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151. In particular, the FCC regulates many aspects of the compensation scheme among telecommunications carriers that collaborate to complete a telephone call. *See, e.g.*, 47 U.S.C. § 251(b)(5). This case involves the Court's interpretation of an FCC order pertaining to compensation for telephone calls placed to internet service providers (ISPs). By order entered January 4, 2006, the Court requested that the FCC file a brief addressing the following questions:

1. Whether, in the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the Commission intended to preempt states from regulating intercarrier compensation for *all* calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet providers in the same local calling area?

2. Whether, if the FCC did not intend to preempt state regulation of all calls, a state regulator's decision to impose access charges on certain calls violates the Telecommunications Act of 1996?

3. What is the standard of review for a reviewing court assessing a state commission's interpretation of an FCC order?

BACKGROUND

I. Reciprocal Compensation and Access Charges.

This case concerns the compensation paid by or to the carriers of telephone calls when more than one carrier collaborates to complete a call. Congress has placed on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). In implementing that provision, the FCC determined that the statutory obligation "appl[ies] only to traffic that originates and terminates within a local area," as defined by state regulatory authorities. *Local Competition Order*, 11 FCC Rcd 15499, 16013 ¶1034 (1996) (subsequent history omitted).[1] *See* 47 C.F.R. § 57.701 (2000) (requiring reciprocal

[1] Although the *Local Competition Order* was the subject of various appeals that ultimately resulted in its partial reversal, no party challenged that aspect of the Order.

compensation for "[t]elecommunications traffic ... that originates and terminates within a local service area established by the state commission"). Thus, when a customer of one carrier places a local, non-toll call to the customer of a competing carrier, the originating carrier must compensate the terminating carrier for completing the call.

In the *Local Competition Order*, the Commission also decided that "the reciprocal compensation provisions of section 251(b)(5) do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Local Competition Order* at 16013 ¶1034. Interexchange traffic is traffic that terminates beyond a local calling area, and it is governed by a different compensation regime. When a customer places a toll or long distance call, the long distance carrier, known as an interexchange carrier or IXC, pays "access charges" to both the originating and terminating local carriers. *See Access Charge Reform*, 12 FCC Rcd 15982, 15990-15992 (1997); *Local Competition Order* at 16013 ¶1034. The Commission decided that the states should "determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local services areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different." *Local Competition Order* ¶1035.

II. Compensation For ISP Access.

In several recent orders, the FCC has addressed the intercarrier compensation regime that applies to calls placed to dial-up internet service

providers (ISPs). Dial-up access involves a customer who seeks to access the Internet via telephone. To do so, the customer dials a telephone number, usually but not always a local number, and is connected with the ISP's equipment. From there, the ISP connects the call to computers throughout the world. *See ISP Declaratory Ruling*, 14 FCC Rcd 3689, 3691 ¶4 (1999). In many cases, such as this one, the ISP is served by one telephone company, typically a competitive local exchange carrier (CLEC), and the dialing-in customer by a different company, typically the incumbent local exchange carrier (ILEC).

Disputes arose between ILECs and CLECs about the intercarrier payment mechanism that governs such calls. The CLECs argued that calls to ISPs are local calls, subject to reciprocal compensation payments, because the calls terminate at the ISP's equipment. The ILECs argued that such calls are not subject to the reciprocal compensation regime because they terminate only at the far-flung computer servers that constitute the world-wide-web.

The FCC first addressed the matter in the *ISP Declaratory Ruling*, 14 FCC Rcd 3689. The Commission noted that in the "typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area." *Id.* at 3691 ¶4. Even though the initial part of the call is local, however, the Commission found that the call, looked at "end-to-end," does not "terminate at the ISP's local server ... but continue[s] to the ultimate destination ... at a[n] Internet website that is often located in another state." *Id.* at 3697 ¶12. ISP-bound calls were not considered local calls subject to reciprocal compensation

CERTIFICATE OF SERVICE

ARB 671

I hereby certify that on the 22nd day of May, 2006, I served the foregoing QWEST CORPORATION'S RESPONSE TO UNIVERSAL TELECOM, INC.'S REQUEST FOR RECONSIDERATION AND COMMENTS REGARDING UNIVERSAL'S MOTION FOR STAY in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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