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May 5, 2006

VIA ELECTRONIC FILING AND FEDERAL EXPRESS

Ms. Frances Nichols Anglin
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

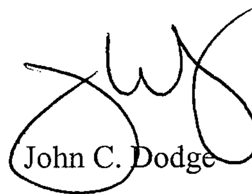
Re: ARB 671

Dear Ms. Nichols Anglin:

Enclosed for filing in the above-captioned matter please find an original and one (1) copy of the Request for Reconsideration of Universal Telecom, Inc.; the Request for Stay of Universal Telecom, Inc.; and, the Affidavit of Jeffrey R. Martin. Copies of the same will be electronically filed and served on the parties electronically.

Please direct any questions regarding this matter to the undersigned. Thank you for your consideration of this matter.

Sincerely,



John C. Dodge

Enclosures

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BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of **Qwest Corporation** for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc.	**ARB 671**

REQUEST FOR RECONSIDERATION OF UNIVERSAL TELECOM, INC.

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May 5, 2006

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BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of **Qwest Corporation** for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc.	**ARB 671**

REQUEST FOR RECONSIDERATION OF UNIVERSAL TELECOM, INC.

Pursuant to ORS 756.561 Universal Telecom, Inc. ("Universal") hereby files its Request for Reconsideration of the decision of the Oregon Public Utility Commission ("Commission") in Order No. 06-190 entered on April 19, 2006 in the above-captioned matter (the "Decision"). Universal hereby incorporates by reference the arguments presented to the Arbitrator in Universal's briefs and other filings during this arbitration proceeding, as well as its Comments on the Arbitrator's ruling filed on December 14, 2005.[1]

I. INTRODUCTION AND SUMMARY.

In its order affirming the Arbitrator's ruling the Commission makes several findings and conclusions which have a significant impact on Universal and its operations in the state of Oregon. As explained below, these findings rely on errors of law and fact and therefore must be reconsidered by the Commission.

[1] Such Comments include, but are not limited to, Universal's arguments that the Commission is obligated to adhere to controlling federal law, as set forth by the FCC and the federal courts.

First, the Commission affirms the Arbitrator's ruling on Issue 1[2] that the traffic exchanged between Qwest and Universal is not telecommunications traffic subject to the FCC's rule that prohibits carriers from assessing charges for traffic, or for facilities that carry such traffic, originating on its network. Decision at 7-10.

Second, the Commission analyzes the preemptive scope of the FCC's ISP Remand Order and concludes that order preempts the state's jurisdiction over the termination of calls, but not the origination of such calls. Thus, the Commission appears to embrace a quasi-two call theory, in that the Commission concludes that it retains authority to regulate the origination of a call, but that the FCC has jurisdiction over the termination of such calls. Decision at 8.

Third, the Commission finds that Universal has violated the conditions of its certificate by utilizing VNXX arrangements. Decision at 5-7. The Commission makes that finding without citing any evidence or facts supporting the finding. Based upon this unsupported finding the Commission concludes that it cannot approve an interconnection agreement that allows parties to "engage in an illegal arrangement." *Id.* at 7.

Each of these elements of the Decision relies upon errors of law and fact which are essential to the substantive merits of the Decision. These elements of the Decision provide the basis for substantive scope of the ruling and therefore undermine the lawfulness of the Decision itself. Specifically, the Decision is in legal error for the following reasons. First, by approving Qwest's proposed charges for facilities used to carry Qwest's own originating traffic (Issues 1(a) and (c)) the Decision fails to meet the

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[2] Issue 1 was framed as: "Should the Relative Use Factor (RUF) be applied to include ISP-Bound Traffic and Virtual NXX (VNXX) Traffic and Should the RUF Apply to Non-Recurring Charges?"

federal statutory standard for arbitration to ensure that the resolution of each issue complies with Section 251 of the Act[3] and FCC regulations promulgated thereunder.

Second, the Decision relies upon errors of law when the Commission fundamentally misconstrues the FCC's ISP Remand Order[4] to (i) conclude that the Commission has jurisdiction over some portions (though not others) of a call delivered to Internet service providers ("ISPs"), and (ii) conclude that the ISP Remand Order provides the necessary authority for the Commission to declare unlawful the use of network arrangements to provide a virtual NXX ("VNXX") service.

Third, the Commission commits legal error by failing to adhere to the binding precedent established by the Federal District Court of Oregon in its decision in *Qwest v. Universal*.[5] The federal court specifically ruled – under the same facts and the same law at issue before the Commission — that Qwest is prohibited ***by federal law*** from assessing charges on Universal for facilities used to carry Qwest's originating traffic to Universal.

Fourth, the Commission commits legal error by violating Universal's due process rights to notice and an opportunity to defend the question of whether its VNXX network arrangements are lawful. Universal asserts that there is nothing illegal or inappropriate about those arrangements but the point here is that the Commission decided the question without providing any notice to Universal that the question was even before the Commission. Consequently, Universal had no opportunity to present evidence or

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3 47 U.S.C. § 251.

4 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Report and Order, 16 FCC Rcd 9151 (rel. Apr. 27, 2001) ("ISP Remand Order").

5 *Qwest v. Universal*, 2004 U.S. Dist. LEXIS 28340 at * 12 (D. Or. 2004) ("*Qwest v. Universal*") (FCC prohibition on traffic origination charges "remain[s] in full effect").

arguments to respond to the Commission's apparent conclusion that its VNXX arrangements are unlawful.

Fifth, and finally, the Commission commits legal error, and exceeds its inherent authority, by prohibiting Universal from providing an interstate service. Section 253 of the Act forbids State or local actions that prohibit entities from providing any telecommunications service. The Commission's declaration as to the legality of VNXX arrangements has the effect of prohibiting Universal from providing an interstate service to its ISP subscribers. As such the Decision violates the preemption clause of the federal constitution and is impermissible under 47 U.S.C. § 253 and Part 52 of the FCC's rules.

ARGUMENT

II. STANDARD OF LAW

The Commission must consider this request for reconsideration pursuant to the standard set forth in OAR 860-014-0095(3), which provides, in relevant part:

> The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:
>
> (c) An error of law or fact in the order which is essential to the decision; or
>
> (d) Good cause for further examination of a matter essential to the decision.

The Commission's decisions in Order No. 06-190 relies upon several errors of law and fact, namely the misconstruction of Section 251 and FCC regulations, which are essential to the Commission's resolution of disputed issues and other matters in the Decision. In addition, good cause exists to reconsider a matter essential to the Decision because the ramifications of the Decision will undermine the lawful and legitimate

services provided by CLECs throughout Oregon and the Pacific Northwest. Accordingly, the Commission should reconsider the Decision for the reasons set forth below.

III. THE COMMISSION'S DECISION IN ORDER NO. 06-190 RELIES UPON SEVERAL ERRORS OF LAW ESSENTIAL TO THE DECISION.

A. The Commission's Resolution of Issues 1(a) and (c) Constitutes Legal Error Because It Does Not Meet the Requirements of 47 U.S.C. § 251 and FCC Regulations Implementing the Statute

The standard by which the Commission must arbitrate disputed terms between carriers is well settled. Section 252(c)(1) requires that the Commission "ensure" that the arbitrated agreement contains conditions that "meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251."[6] The Commission has no discretion to deny a CLEC any of the rights that the law provides. Instead, the Commission must arbitrate contractual disputes by applying federal law promulgated under section 251.[7]

The FCC has promulgated regulations pursuant to Section 251 which provide certain interconnection and compensation rights to CLECs. Of particular relevance here are the two following indisputable legal rights: (1) a CLEC's right to interconnection with an incumbent LEC ("ILEC") at a single point of interconnection ("POI") within a LATA;[8] and (2) a CLEC's right to have the ILEC to deliver all of its (the ILEC's)

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[6] *See* 47 U.S.C. § 252(c)(1) (prescribing standards for arbitrations).

[7] The Commission is empowered to impose additional pro-competition obligations on ILECs, pursuant to 47 USC §251(d)(3).

[8] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶ 72 (rel. Apr. 27, 2001) ("Intercarrier Compensation NPRM") ("Under our current rules, interconnecting CLECs are obligated to provide one POI per LATA."). *See also* 47 C.F.R. § 51.321; *see also* In the Matter of Application by SBC Communications Inc. *et al.* to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, *Memorandum Opinion and Order*, FCC 00-238 at ¶ 78, n.174 (rel. June 30, 2000).

originating traffic to the CLEC at the POI at no charge to the CLEC.[9] This right is reflected in the FCC regulation that prohibits a LEC from charging for traffic, or facilities used to carry such traffic, originating on its own network.[10] In other words, FCC Rule 51.703(b) prohibits origination charges, whether they are assessed on traffic or facilities used to carry that traffic.[11]

These two legal rights are well established under federal law. As to the first, Universal is a CLEC and as such has a right to a single POI per LATA. Qwest Corporation ("Qwest") has never contested Universal's right to interconnect with Qwest at a single POI in the LATA. Indeed, the two carriers have interconnected their traffic via a single POI in each of Oregon's two LATAs and exchanged traffic via that network architecture for over five years. Nor has this Commission ever suggested that Universal does not have the right to a single POI under federal law.

As to the second, Universal's right to expect Qwest to deliver all of its traffic to Universal at such POIs without charge, the FCC,[12] three federal appellate courts,[13] and one very significant federal district court[14] have all ruled that FCC regulations clearly provide CLECs that right. Indeed, that very question was litigated between Qwest and

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9 *Id.* at 70 ("Under our current rules, the originating telecommunications carrier bears the costs of transporting traffic to its point of interconnection with the terminating carrier.").

10 47 C.F.R. § 51.703.

11 *See Qwest v. Universal*, at *9 (quoting *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCCR 11166, 11189 ay ¶ 40 (2000), aff'd sub. nom. *Qwest Corp. v. F.C.C.*, 346 U.S. App. D.C. 271, 252 F.3d 462 (D.C. Cir. 2001) ("When read together *§ 51.703(b)* and TSR Wireless generally prohibit charges imposed on a CLEC for the cost of transmitting traffic that originates on the ILEC's network or for facilities used to deliver such traffic to the CLEC.")).

12 *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd 11166, 11189 ¶ 40 (2000), aff'd sub. nom. *Qwest Corp. v. F.C.C.*, 252 F.3d 462 (D.C. Cir. 2001).

13 *See MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, (4th Cir. 2003), *Southwestern Bell Telephone Co. v. PUC of Texas*, 348 F.3d 482 (5th Cir. 2003), *Qwest Corporation, et al. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

14 *Qwest v. Universal* at ** 9-12.

Universal before the federal district court of Oregon in 2004. The federal court affirmed that Universal has that right when it ruled that FCC regulations (promulgated under Section 251) prohibit Qwest from assessing such charges.[15] In other words, the court ruled that the FCC regulation prohibiting origination charges applies to Qwest and thereby prohibits Qwest from imposing such charges on Universal.

1. *Approving Qwest's Proposed Recurring Charges (i.e. Origination Charges) Conflicts Directly with FCC Regulations and Therefore Constitutes an Error of Law*

The Commission's decision with respect to Issue 1(a) (on pages 7-9) effectively eliminates Universal's ability to rely upon these two rights established by federal law. Specifically, the decision to affirm the Arbitrator's ruling that allows Qwest to charge Universal for Qwest's own facilities (which are used to carry Qwest's own traffic to the POI) is in direct conflict with Universal's rights under federal law. Qwest's proposed charges are set forth in sections 7.3, 7.3.2.2 and 7.3.2.2.1 of Qwest's proposed interconnection agreement and have been referred to as the "RUF" charges in this proceeding. Surprisingly, the Commission completely ignores the FCC regulation that prohibits such charges, and in fact ***sanctions*** Qwest's attempt to impose liability on Universal in direct contravention to the FCC regulation and the binding decision of the federal district court of Oregon in *Qwest v. Universal.*

Although the Decision is somewhat unclear, it appears that the Commission affirmed the Arbitrator's ruling and determined that Universal must pay Qwest for facilities that Qwest uses to carry Qwest's own traffic to the parties' single POI. Specifically, on pages 7-10 of the Decision the Commission affirms the application of

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15 *Id.*

Qwest's "RUF" charges to "LIS entrance facilities and two-way DTT facilities." Decision at 7. These facilities, as described above, are part of Qwest's network and are used by Qwest to deliver its own originating traffic to Universal.

The Commission describes the RUF as a formula for "sharing costs" of these facilities. Decision at 7. Although the formula, on its face, contemplates a shared cost arrangement Qwest proposes to apply the formula in a way that would establish approximately 99% of the liability for such facilities on Universal. In this way the Decision endorses Qwest's attempt to impose charges on facilities used to carry its own originating traffic to Universal. That ruling contradicts directly with FCC regulations and the federal district court's decision construing that regulation in *Qwest v. Universal.*

Thus, because the Decision directly conflicts with FCC regulations it does not "meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251" as is required by Section 252(c)(1).[16] Accordingly, the Decision does not meet the standard for arbitration established under Section 252(c)(1) and therefore constitutes legal error which must be reconsidered.

2. *Approving Qwest's Proposed Non-Recurring Charges (i.e., Origination Charges) Conflicts Directly with FCC Regulations and Therefore Constitutes an Error of Law*

Similarly, with respect to Issue 1(c) the application of non-recurring charges to Qwest's facilities used to carry Qwest-originated traffic, the Decision applies past precedent to affirm the application of such charges. Decision at 9-10. The Decision conflicts directly with FCC regulations that unequivocally prohibit ***all*** charges (whether recurring or non-recurring) on traffic or facilities used to carry a LEC's originating

[16] *See* 47 U.S.C. § 252(c)(1) (prescribing standards for PSC arbitrations).

traffic.[17] The FCC rule prohibiting origination charges on facilities or traffic "admits of no exceptions."[18] Therefore the decision to approve Qwest's non-recurring charges violates that rule and, as such, constitutes legal error.

3. *The Commission's Decision to Affirm the Arbitrator's Ruling Misapplies the FCC's ISP Remand Order and Constitutes an Error of Law*

The Commission also adopts the Arbitrator's ruling, with some modifications, to the effect that the originating traffic which Qwest delivers to Universal is not subject to the prohibition on origination charges under 47 C.F.R. 51.703(b) because such traffic is not "telecommunications" traffic under the meaning of that rule.

This premise, which the Commission adopts in its Decision, undermines the Commission's very assertion of jurisdiction. If, as the Arbitrator and Commission apparently believe, the originating traffic Qwest delivers to Universal is not properly classified as telecommunications traffic then this Commission does not have authority over such traffic. Moreover, as the Commission has repeatedly recognized, "regulation of the terms and conditions in interconnection agreements relating to compensation for ISP-bound traffic has been preempted by the FCC from the Commission."[19] Thus, if the traffic that Qwest delivers to Universal is not subject to FCC Rule 51.703(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.[20]

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17 *See* 47 C.F.R. § 51.703(b).

18 *MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 880 (4th Cir. 2003) (FCC Rules "unequivocal[ly] prohibit LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.").

19 *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order No. 03-0552 at 9 (Sep. 16, 2003).

20 If the Commission is right that ISP-bound traffic is not telecommunications, then the Commission is without authority to regulate it. *See* ORS 756.040, 759.005(g).

Moreover, the Commission and the Arbitrator are internally inconsistent in their assumption that this traffic is not subject to FCC Rule 51.703(b). This is so because they reject the application of such rule to the traffic at issue, but at the same time rely upon another FCC rule, 51.713(c), to establish a presumption of the relative percentage of traffic between Qwest and Universal.[21] Both rules speak to exchange of "telecommunications" traffic; the Commission cannot rely on 51.713(c) without conceding that the Arbitrator and the Commission wrongly decided that 51.703(b) does not also apply to the traffic exchanged by Universal and Qwest.

As to the specific legal errors in its Decision, the Commission's erroneous rulings on issues 1(a) and 1(c) stem from its apparent misreading of the FCC's *ISP Remand Order*.[22] First, the Commission concludes that the Remand Order prohibits physical network interconnection arrangements that require a carrier to transport traffic to another carrier without compensation. *See* Decision at 5. Second, the Decision appears to conclude that the FCC has preempted state regulation of the termination of ISP-bound traffic, but not the origination of such traffic. *Id.* at 8. Third, the Decision relies upon the *ISP Remand Order* as the basis for the Commission's authority to conclude that VNXX arrangements are unlawful. *Id.* at 5-7.

The Decision misconstrues the scope and reach of the *ISP Remand Order* by concluding that the *ISP Remand Order* prohibits physical network interconnection

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[21] The Commission incorrectly cites to FCC Rule 51.711(c). Decision at 8. Although the Commission appears to distance itself from the Arbitrator's reliance on this rule, *see id.* at 8, it is unclear exactly what the Commission's final decision is intended to achieve. *Id.* at 8-9.

[22] *ISP Remand Order*, 16 FCC Rcd 9151 (2001).

arrangements that require a carrier to "transport"[23] traffic to a POI with another carrier without compensation. Specifically, the Commission states that "[t]he FCC clearly saw that arrangements that require a carrier to provide transport without compensation ***are improper*** and an abuse of numbering resources." Decision at 5 (emphasis added). Based upon this determination the Decision then goes on to affirm the Arbitrator's ruling allowing Qwest to impose charges on Universal for facilities used to carry Qwest originated traffic. *Id.* at 8.

Notably, the Decision provides no citation for its construction of the *ISP Remand Order*. This is because the FCC does ***not*** find that the obligation to transport traffic without compensation is improper. In fact, the FCC ***specifically and expressly affirmed*** that its existing rules require a carrier to provide transport without compensation. The FCC did so at paragraph 78, footnote 149 of the Remand Order, where it explained:

> 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 our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as ***obligations to transport traffic to points of interconnection***.

ISP Remand Order at ¶ 78, n. 149 (emphasis added).

In addition, on the same day that it issued the Remand Order, the FCC issued a notice of rulemaking to address some of the concerns raised in the Remand Order. In so doing the FCC restated current legal obligations (as set forth in FCC rules) and asked

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23 On this point it is important to reconcile the terms used by the Commission and Universal in this pleading. The Commission uses the term "transport" repeatedly during its discussion of the issues. Although the Commission does not define this term Universal believes that the Commission uses the term "transport" to mean "origination" of traffic. The term "transport" is defined in the FCC's compensation rules as the delivery from the POI to the terminating carrier's switch that serves the end user. *See* 47 C.F.R. § 51.701(c). Thus, under the FCC's definition it is the second (or terminating) carrier that provides the "transport" from a POI to a switch. The first (or originating) carrier delivers the traffic to the POI. It is this function of delivering traffic to the POI that Universal refers to as "origination" and the Commission refers to as "transport."

interested parties to comment on the merits of the rules. As to the specific question before the Commission here, *i.e.*, Qwest's attempt to impose charges for its own facilities used to carry its own originating traffic, (Issue 1) the FCC said this about the obligation of each carrier to transport traffic to a point of interconnection with another carrier: "[u]nder our current rules, the originating telecommunications carrier bears the costs of transporting traffic to its point of interconnection with the terminating carrier."[24] This principle, of course, would be directly violated by the application of Qwest's RUF charges, which impose liability on Universal for Qwest's costs of transporting traffic to the POI with Universal.

Although the FCC raised questions about the continued use of this rule[25] it has never amended it. The rulemaking remains open (updated in 2005 by a new notice) and the FCC has not yet decided to replace, alter, or amend the rule stated above.

Thus, the FCC, in its own words, directly contradicts this Commission's statement that "[t]he FCC clearly saw that arrangements that require a carrier to provide transport without compensation ***are improper*** ..." Decision at 5 (emphasis added). In fact, the FCC's point is that its existing rules clearly establish that it is improper for the originating carrier to try to impose any charges on the terminating carrier for the facilities used to carry the originating traffic. Although the FCC may decide in the future to change its rule, (as a result of the ongoing rulemakings at the FCC), it has not yet done so. And this Commission cannot ignore or decline to recognize the application of that federal rule.

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24 Intercarrier Compensation NPRM, 16 FCC Rcd 9610 at ¶ 70.

25 *Id.* ("If carriers must recover their transport costs from their end users, does this rule still make sense? What incentives does this rule create regarding location and number of points of interconnection (POIs)? Is there a more appropriate way to allocate transport costs?").

The second error of law in the Decision is embodied in the Commission's analysis on page 8 of the Decision. Here the Commission "clarifies its intent" with respect to a portion of the Arbitrator's ruling that interprets the application of the ISP Remand Order. The Commission then goes on to make two contradictory, and somewhat confusing, statements concerning the scope of preemption in the Remand Order. Initially, in the second full paragraph on page 8 the Commission states that "transport obligations –and therefore the application of the RUF associated with transport—are ***not*** encompassed by the *ISP Remand Order*." (Decision at 8) (emphasis added). However, later in the same paragraph the Commission then states that "[t]hus, the FCC has (a) preempted state regulation of transport for ISP-bound traffic…" (*Id.* at 8). Then, the Commission concludes with this statement: "Thus, state jurisdiction is retained only for whatever traffic remains–***local transport of non-ISP bound traffic***, and it was to that traffic alone that the Arbitrator correctly found the RUF applies." (*Id.* at 8) (emphasis added).

The scope of the Decision is unclear. Universal assumes that the Commission conclusion here is that it has no authority over the terms or conditions of the origination (or transport) and termination of ISP-bound traffic. But the point of the Commission's analysis here seems to be that it in fact retains authority over certain portions of the call (*i.e.*, the transport or origination of the call to the POI) but that it no longer has jurisdiction over other portions of the call, specifically the termination of the call from the POI to the end user.

If Universal's reading is accurate, this part of the Decision is legally unsustainable in that it relies upon a "two-call" theory to support its determination. It appears that the Commission concludes that it retains authority over the originating portion of the call

while the FCC retains authority over the terminating portion of the call. *See* Decision at 8 (*compare* Commission stating that: "transport obligations –and therefore the application of the RUF associated with transport—are ***not*** encompassed by the ISP Remand Order." *with* Commission stating that: "Thus, state jurisdiction is retained only for whatever traffic remains ***–local transport of non-ISP bound traffic***, and it was to that traffic alone that the Arbitrator correctly found the RUF applies.").

If that is, in fact, what the Commission intended, such a theory is expressly contrary to the FCC's use of an end to end analysis to determine the jurisdictional nature of these calls. In the *ISP Remand Order* and earlier rulings the FCC expressly rejected the two-call theory and the D.C. Circuit affirmed the FCC's decision to do so.[26] Thus, the Commission's apparent resurrection of the two-call theory here constitutes legal error.

B. The Commission's Resolution of Issues 1(a) and (c) Constitutes an Error of Law Because It Fails to Adhere to the Binding Decision of the Federal District Court of Oregon

The Decision also fails to adhere to binding precedent established by the decision of the federal district court of Oregon. Although the Commission expressly acknowledges that the Oregon federal court's decision is binding on the Commission, *see* Decision at fn. 6 (noting that the Arbitrator's Decision acknowledges that "the Commission is bound by the holding in the *Qwest v. Universal* case"), the Commission completely ignores the scope or application of the court's ruling.

Indeed, the Commission completely ignores the factual findings and conclusions of law of the federal district in *Universal.* In that case the *same facts* and *same law* were before the federal court, and the court ruled that Qwest's proposed charges were

[26] *ISP Remand Order* at ¶ 57 (quoting *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000)).

prohibited as a matter of law. Notably, the Commission's Decision is silent on the fact that the federal court made the following factual findings:

- Universal provides ***telecommunications services*** in Oregon. As the Qwest Court explained, "Universal is a competitive local exchange carrier ("CLEC") which provides ***telecommunication services*** in Oregon."

Qwest v. Universal at * 1-2 (emphasis added).

and:

- Qwest and Universal ***exchange telecommunications traffic***. As the Qwest court explained, "Universal provides services to internet service providers ("ISPs") by offering local telephone numbers which the ISPs' customers may call using their computers." *Qwest v. Universal* at * 2. "... Qwest is involved in this process because the calls from the ISPs' customer's computer must pass over Qwest's network to reach Universal's local telephone number. Qwest and Universal have interconnected their networks to ***allow this exchange of telecommunications traffic.***

Id. at * 2 (emphasis added).

Universal repeatedly made the point in its briefs and other filings in ARB 671 that the very same traffic was at issue both before the federal court and the Oregon Commission.[27] Nevertheless, and despite the federal court's finding that the exact same traffic at issue before the Commission in this proceeding (originating on Qwest's network, terminating to Universal's network and ultimately delivered to the Internet) was telecommunications traffic, the Arbitrator and Commission ignored that finding and the court's substantive ruling prohibiting charges on originating traffic.

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27 *See* Universal Statement of Material Facts at ¶¶ 1-6, Pre-filed Testimony of Stephen Roderick on behalf of Universal Telecom, Inc., at 1-4, and Initial Brief of Universal Telecom at 4-6 (all describing the service Universal provides to ISPs, including delivery of telecommunications traffic originating on Qwest's network).

In addition, the Decision also fails to acknowledge (let alone follow) that the federal court also considered the very same legal arguments used in this proceeding. Indeed, the Court ruled that, ***as a matter of law***, FCC regulations 51.703(b) and 51.709 do apply to the traffic that Qwest and Universal exchange and that such regulations prohibit Qwest's proposed charges:

> In the instant case, 100% of the traffic exchanged between the parties originated on Qwest's network and terminated on Universal's. ***Under § 51.703(b) and § 51.709(b), Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest's network*** and terminated on Universal's network. For these reasons, Qwest's claim as to the charges for LIS circuits, DTT, EF, and MUX interconnection facilities fails.

Qwest v. Universal at * 14-15 (emphasis added).

Based upon these findings the federal court concluded: "There is no genuine issue of material fact as to whether Qwest may charge Universal for interconnection facilities used solely to transport traffic for termination on Universal's network. The agreement ***and FCC regulations clearly prohibit such charges***."[28]

Thus, the federal court in *Universal* construed the same facts and applied the same law to find that Qwest's charges are prohibited by FCC regulations and are therefore unlawful. The Commission's Decision, however, declines to acknowledge this decision. As a result, the Commission commits legal error by failing to adhere to the binding ruling (both on the facts and the law) of the federal district court of Oregon. For that reason the Commission should reconsider its determination as to Issues 1(a) and (c) of the Decision.[29]

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[28] *Qwest v. Universal* at * 33-34 (emphasis added).

[29] Universal also pointed out in its Comments that the Ninth Circuit has ruled that one cannot rely on the rationale of the *ISP Remand Order* to conclude that ISP-bound calls are not

C. The Decision Relies Upon an Error of Law Because It Violates Universal's Due Process Rights by Deciding a Question Not Formally at Issue before the Commission and Which Universal Had No Opportunity to Defend

The Decision commits legal error by deciding Issues 1(b) and 2–ostensibly the question of what compensation obligations apply to traffic delivered over VNXX arrangements—in a manner that conflicts with traditional standards of due process. The Supreme Court of Oregon has explained that the "heart of procedural due process is (1) notice [] and (2) an opportunity to be heard."[30] The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.[31]

To that end, the Commission has indicated that when an allegation is made that goes beyond the scope of the arbitration process, which was designed to resolve disputes over the terms and conditions of interconnection agreements, the Commission must comport with standards of due process and make a determination in a manner that permits the other party the opportunity to defend and respond to the allegation.[32] It follows that the Commission must not abridge parties' due process rights by actually deciding issues that were not a matter subject to the arbitration process.

Throughout this case, neither Universal, nor Qwest, nor the Arbitrator, nor the Commission, has identified as a disputed issue whether Universal can support its interstate Managed Modem Service through the use of VNXX service. Indeed, by joint

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telecommunications. *See Pacific Bell v. PacWest Telecomm., Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003). And Universal demonstrated with unrefuted evidence in this docket that the traffic exchanged by Universal and Qwest is telecommunications. Universal Comments at 21-22.

30 *Multnomah County v. Dep't of Rev.*, 325 Ore. 230, 236 (1997).

31 *Koskela v. Willamette Industries*, 331 Ore. 362 (2000).

32 *See In the Matter of the Petition of Metro One Telecommunications, Inc.*, 1999 Ore. PUC LEXIS 156, *9 (1999); *see also* Or. Admin. R. 860-016-0010 (2006) (stating that "the Commission will arbitrate disputes so that interconnection agreements will be fair and *will comply with the provisions of the Act*") (emphasis added).

letter dated November 11, 2005 and filed with the Arbitrator on that date, Universal and Qwest stipulated that the *only* issues in the case for the Arbitrator's consideration were limited to those initially raised by the parties (which did not include the propriety of VNXX service), plus "issues the opposing parties raised in their recent reply briefs and any issues raised by Qwest's discovery responses." The issues presented in the parties' final briefs did not include the lawfulness of VNXX. By an order issued on November 14, 2005 the Arbitrator *granted* the parties' requests to so limit the issues, and *cancelled* the evidentiary hearing previously established.

In short, Universal and Qwest agreed—and the Arbitrator sanctioned—that the only issues in this case under 47 U.S.C. § 252(b)(4)(A) were, essentially, the RUF issue and the issue of to what extent Qwest owes Universal reciprocal compensation for terminating ISP-bound telecommunications traffic. Consequently, even if the Arbitrator (or Commission) believed that the lawfulness of VNXX was an issue in this case as a result of the generic pronouncement in UM 1058, the Arbitrator's decision on November 14, 2005 essentially deprived the Commission of the ability to examine this issue in this case.

Notwithstanding the Arbitrator's acquiescence to limiting the issues in this case, he and the Commission found Universal in violation of its certificate and that VNXX is prohibited in Oregon. Decision at 5-7. Based upon these findings the Commission then concludes: "[w]e therefore need not address Universal's arguments regarding the appropriate compensation to be paid for termination or transport of traffic generated by prohibited arrangements." *Id.* at 7. This absolute turnabout is astounding. To reiterate: The lawfulness of VNXX, or Universal's alleged use thereof, was not formally, or

informally, raised in the petition for arbitration or any other official filing in this proceeding. The parties agreed to very limited disputed issues, *and the Arbitrator agreed to the parties' limitations*. The only evidence received in this case has nothing to do with the lawfulness of VNXX, and the evidentiary hearing in this matter was cancelled. Federal law in the form of 47 U.S.C. 252(b)(4)(A) *mandates* the Commission to "*limit* its consideration to any petition . . . *to the issues set forth in the petition and in the response*".

The Arbitrator and Commission's attempts to import an issue from UM 1058—a docket in which the Commission conceded that it does not have general jurisdiction over ISP-bound telecommunications traffic—without notice or opportunity to present arguments or evidence, and then ruling on this issue absent argument or evidence—is a flagrant violation of due process. The Commission has committed reversible error and must on reconsideration remove its finding that Universal is in violation of its certificate.

D. The Decision Exceeds the Commission's Authority by Prohibiting Universal from Providing an Interstate Service

The Decision exceeds the scope of the Commission's jurisdiction by declaring a form of interstate service unlawful as a matter of State law. The legal error here arises from the Commission's ruling (including affirming the Arbitrator's ruling) that Universal has violated the conditions of its certificate by utilizing VNXX arrangements. Decision at 5-7. The Commission makes this finding despite the fact that it cites no evidence or facts supporting the finding. Based upon this unsupported finding the Commission concludes that it can not approve an interconnection agreement that allows parties to "engage in an illegal arrangement." *Id.* at 7.

The Commission's conclusion that the VNXX arrangements are "illegal" appears to stem from its misunderstanding of the FCC's view of the same. The Commission states—without citation—that "[t]he FCC clearly saw that arrangements that require a carrier to provide transport without compensation are improper and an abuse of numbering resources." Decision at 5. The Commission also cites the FCC's 2001 Intercarrier Compensation NPRM for the proposition that the Oregon Commission has the necessary authority to declare the use of VNXX arrangements illegal. *See id.* (citing Intercarrier Compensation NPRM at ¶ 115).

But the Remand Order and NPRM do not provide any such authority. In the former the question was raised as to whether it is appropriate to pay reciprocal compensation on traffic that is delivered via VNXX arrangements. In the latter, the FCC referenced carefully circumscribed authority delegated to state commissions to investigate whether code holders have activated NXXs assigned to them within the time frames specified by the FCC, and to reclaim unactivated or unused thousands-blocks, for the purposes of avoiding number exhaust.[33] But neither FCC decision ruled that the use of VNXX arrangements is in itself unlawful.

It is ironic, too, that the Commission relies on the Intercarrier Compensation NPRM for the proposition that it can, without extending due process to Universal, declare VNXX arrangements unlawful. The FCC expressly directed that state commissions accord code holders due process similar to that embedded in the Industry Numbering Council's reclamation procedures:

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[33] In the Matter of Numbering Resource Optimization, CC Docket No. 99-200, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 7574 at ¶¶ 237, 238 (2000).

> We clarify that the state commissions need not follow the reclamation procedures set forth in the CO Code Assignment Guidelines relating to referring the issue to the INC, *as long as the state commission accords the code holder an opportunity to explain the circumstances causing the delay in activating NXX codes*. This authority is consistent with the delegations of authority granted to several state commissions. *We believe that the CO Code Assignment Guidelines dictate substantial procedural hurdles prior to reclaiming an unused NXX, in part to afford the code holder an opportunity to explain the circumstances that may have led to a delay in code activation.*

Intercarrier Compensation NPRM at ¶239 (emphasis supplied; citations omitted). Here, of course, the Commission has not extended any opportunity to Universal to explain its use of assigned NXX codes.

It is further ironic that the Commission cites to a case decided by the Maine Public Utilities Commission ("MPUC") for the proposition that it can declare VNXX unlawful. While it is true that the MPUC ordered the Numbering Pool Administrator to reclaim NXXs used by Brooks Fiber for VNXX service, the MPUC took great pains to order at the same time that the incumbent LEC, Verizon, offer a state-wide, flat-rated, discounted service to ISPs that would serve as a substitute for a service offered by Brooks Fiber that the MPUC previously found to be unreasonable and unlawful. Universal does not concede that the MPUC necessarily had the authority to order reclamation of Brooks Fiber's NXXs, but at least the MPUC recognized that it should not do so without putting into place an economically rationale substitute that preserved Mainers' dial-up access to the Internet.

By contrast, the Commission's decision to declare these arrangements unlawful here impermissibly prohibits the use of such arrangements to provide an interstate service. In so doing the Commission has exceeded its jurisdiction and violated the statutory command of Section 253 of the Act which forbids State actions that prohibit any

carrier from providing a telecommunications service. Specifically, Congress expressed its intent through Section 253, to preempt any "State or local statute or regulation, or *other State or local legal requirement*," that prohibits or has "the effect of prohibiting the ability of any entity to provide" any telecommunications service.[34] Further, the Commission's action is directly contrary to the command of 47 C.F.R. § 52.9(a)(2) that the administration of numbers shall not "unduly favor *or disfavor* any particular telecommunications industry segment or group of telecommunications consumers." The Commission must adhere to this mandate by virtue of 47 C.F.R. § 52.9(b).

By broadly declaring unlawful the use of VNXX arrangements, regardless of the type or form of traffic carried over such arrangements, the Commission impermissibly prohibits the use of the provision of an interstate telecommunications service in violation of Section 253 and Part 52 of the FCC's rules. Specifically, by prohibiting Universal from entering into an agreement by which it will exchange ISP-bound traffic with another LEC through the use of VNXX arrangements, the Commission is prohibiting Universal from providing an interstate communications service. Such a result is expressly prohibited by the statutory command of Section 253 and Part 52 and therefore constitutes legal error.

In addition, the Commission itself has repeatedly acknowledged that its authority over interstate services is limited. In UM 1058 the Commission explained that the "regulation of the terms and conditions in interconnection agreements relating to compensation for ISP-bound traffic has been preempted by the FCC from the

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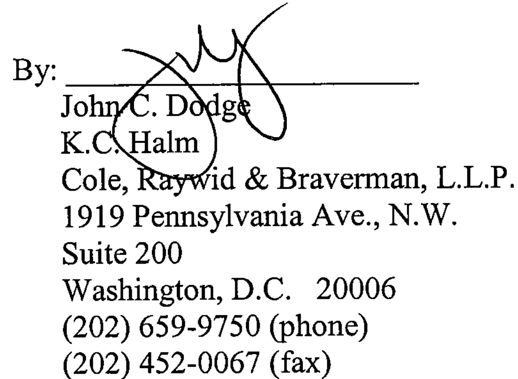
[34] 47 U.S.C. § 253(a) (emphasis added).

Commission."[35] Thus, the Commission, in its Decision here, ignores its own command and impermissibly exceeds the scope of its authority by declaring unlawful an interstate communications service. As such, the Decision commits legal error and must be reconsidered.[36]

V. Conclusion.

For the reasons stated herein, Universal requests that the Commission issue reconsider its determinations in Order No. Decision 06-190 on or before May 12, 2006.

Respectfully submitted,

By: 

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Its Attorneys

May 5, 2006

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35 *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order No. 03-0552 at 9 (Sep. 16, 2003).

36 The Commission also studiously ignores Universal's reliance on Commission Staff's confirmation that the Commission's Final Order in UM 1058 should be interpreted as limiting the Commission's VNXX authority to intrastate, *voice* providers. Universal Comments at 25-26.

CERTIFICATE OF SERVICE

I, Gina Lee, hereby certify that on 5th day of May 2006, I caused copies of forgoing Request for Reconsideration of Universal Telecom, Inc.to be sent by electronically to the following parties:

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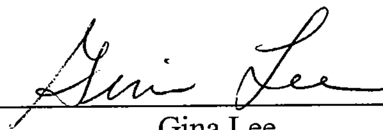

Gina Lee

BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of **Qwest Corporation** for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc.	**ARB 671**

REQUEST FOR STAY OF UNIVERSAL TELECOM, INC.

Pursuant to ORS 183.482(3)(a), Universal Telecom, Inc. ("Universal"), hereby files its Request for Stay of Order No. 06-190 entered on April 19, 2006 in the above-captioned matter. The Commission should stay Order No, 06-190 because: (1) The order causes irreparable injury by wrongly directing Universal to cease certain operations that are jurisdictionally interstate (*i.e.,* outside the jurisdiction of the Commission) and threatens the company's very existence; (2) No substantial public harm will result from the issuance of a stay, while substantial public harm will result from enforcement of the order; (3) Universal can show colorable claims of error with respect to certain of the Commission's rulings in Order No. 06-190.[1]

Order No. 06-190 directs Universal and Qwest Corporation ("Qwest") to file an interconnection agreement complying with the order's terms within 30 days of April 19, 2006. As a result, Universal is filing the instant Request for Stay and its Petition for Reconsideration together well ahead of the deadline established for the latter in ORS

[1] Counsel for Universal and Qwest exchanged emails on May 3, 2006 in which Universal invited Qwest to join in or consent to this Request for Stay. Qwest declined.

756.561. Given the severe consequences to Universal of literally complying with Order No. 06-190, should the Commission rule against or fail to rule on Universal's Request for Stay by **May 12, 2006**, Universal will file for a Preliminary Injunction barring enforcement of Order No. 06-190 with the United State District Court for the District of Oregon. The purpose of this filing will be to preserve Universal's rights under federal law, which are threatened by the Commission's directive that Universal agree to an interconnection agreement with Qwest implementing the terms of Order No. 06-190 by May 19, 2006.

ARGUMENT

STANDARD OF LAW

ORS 183.482(3) provides in relevant part:

> (a)The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:
>
> (A) Irreparable injury to the petitioner; and
> (B) A colorable claim of error in the order.
>
> (b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.

A. Universal Will Suffer Irreparable Harm if It Complies with Order No. 06-190.

To establish a "showing" of irreparable injury under ORS 183.482(3)(a), the moving party must demonstrate at least that irreparable injury *probably* would result if a stay is denied. For these purposes, an injury is irreparable if the moving party cannot

receive reasonable or complete redress in a court of law. *Arlington School Dist. No. 3 v. Arlington Education Assn.*, 184 Or. App. 97, 102-103 (Or. Ct. App. 2002).

Here, Universal can demonstrate far more than that irreparable injury *probably* would result if Order No. 06-160 is not stayed, and that Universal cannot receive reasonable or complete redress in a court of law. Order No. 06-190 requires Universal to execute with Qwest, and file, an interconnection agreement that complies with the terms adopted by the Arbitrator's Decision issued on February 2, 2006 as modified by the Commission. Key among the Commission's rulings is that Universal and Qwest must enter an agreement whose terms shall not include VNXX ISP-bound telecommunications traffic. The Ninth Circuit has determined, and the Commission has expressly conceded, that such traffic is an *interstate* service,[2] which is, however, treated similarly to local service for purposes of reciprocal compensation.[3] The deadline for that "compliance filing" is May 19, 2006.

Universal contends that the Commission committed errors of fact and law in Order No. 06-190. Were Universal to execute and file an interconnection agreement with Qwest, Universal would acquiesce to the very errors of fact and law that are the subject of Universal's Petition for Reconsideration and likely appeal under 47 U.S.C. § 252(e)(6). In fact, a primary issue in contention is whether the Commission has the

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2 *Pacific Bell, et al. v. Pac-West, et al.*, 325 F.3d 1114 (9th Cir. 2003) (*cited in* In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns, UM 1058, Order No. 04-504 at 3, n. 7 (2004)).

3 *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F. Supp. 2d 287, 295 (D. Conn. 2005).

authority to order Universal to stop providing a service that the Commission has expressly found is interstate, and this is outside the Commission's jurisdiction.[4]

There are two separate and equally compelling legal grounds supporting Universal's claim of irreparable harm. First, the Commission's ruling that Universal and Qwest cannot exchange so-called "VNXX" ISP-bound traffic under a new interconnection agreement effectively denies Universal the opportunity to run its business, a business that employs seven (7) Oregon residents, that pays Oregon taxes and that has operated in Oregon with the Commission's full knowledge since 1999. Affidavit of Jeffry Martin ("Martin Affidavit," attached hereto). Universal has contracts with its ISP customers to render Internet access and other services to them; the Commission's decision in Order No. 06-190 to outlaw VNXX service for jurisdictionally interstate ISP-bound telecommunications traffic would place Universal in breach of those contracts, and jeopardize the ISPs themselves. Martin Affidavit. Universal has invested considerable sums in its own telecommunications and Internet equipment, among other things, in reliance on the Commission's prior approach to VNXX issues, and absent the ability to sell the full range of services that it has made available for the past seven years, Universal may default on its obligations to its equipment and other vendors.

Second, were Universal to cease providing so-called VNXX service, no court could order reasonable or complete redress for Universal, for the simple reasons that – even presuming positive reconsideration by the Commission or reversal or remand by a

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[4] Although courts generally indulge every reasonable presumption against waiver of fundamental rights and do not presume acquiescence in the loss of fundamental rights in instances of compulsory behavior (*see, e.g., Garner v. United States*, 501 F.2d 228 (9th Cir. 1974)), such cases do not appear to have examined *irreversible* deprivation of property rights at an essentially *interlocutory* phase of compulsion, which status operates here given the Commission's assertion that it can order cessation of an interstate service, and the unique nature of the state agency and federal court processes coexisting in 47 U.S.C. §§ 251 and 252.

federal court pursuant to 47 U.S.C. § 252(e)(6) – Universal's VNXX service would have ceased to exist and its customers would have found other suppliers of telecommunications and Internet access. Universal would not be in a position to re-launch the service or win back those lost customers. Further, the Commission is not susceptible to judgment for monetary damages, which is the traditional consideration for whether harm can be compensated. If ever there were circumstances indicating that a state agency should stay its decision while the parties in interest pursue their legal rights to finality, those circumstances exist here.

B. No Substantial Public Harm Will Result from a Stay.

Not only will no substantial public harm result from issuance of a stay of Order No. 06-190, substantial public harm will result if a stay is *not* issued. With respect to the lack of public harm, Universal submits that it and other CLECs in Oregon have offered and continue to offer so-called VNXX service in Oregon since at least 2001. Martin Affidavit. These services have enabled tens of thousands of Oregonians to obtain Internet access in an efficient and affordable manner. Staying Order No. 06-190 simply will preserve the status quo that has existed in Oregon for at least five years; the public will not be harmed from preservation of the status quo.

By contrast, if a stay is not granted, the public *will* be harmed, immediately and irrefutably. For example, in the case of Universal and those Qwest end users who rely on Internet access and related services provided by the Internet Service Providers served by Universal, more than 76,000 persons will be harmed as they lose their current Internet service. Martin Affidavit. For the vast majority of these Oregonians, dial-up access is

their only means to connect to the Internet; there is no broadband alternative for this group. Martin Affidavit.

In determining where the public interest lies, it has been noted that:

> [I]n cases involving the revocation or suspension of licenses, strong policy reasons support a rule that (except possibly in cases where an immediate threat to public health or safety is presented) an appeal should serve as an automatic stay * * *." (citation omitted).

Von Weidlein International, Inc. v. Young, 16 Ore. App. 81, 89 (1973). To the extent that the Commission actually has the legal authority to "license" (or forbid) Universal's provision of jurisdictionally interstate VNXX services at all, the Commission's actions in Order No. 06-190 have the effect of suspending or revoking that license. There is no immediate threat to public health or safety from the provision of VNXX service. Moreover, Universal has filed, contemporaneously with the instant Request, its Petition for Reconsideration of Order No. 06-190, demonstrating Universal's reasonable, good faith belief that the Order No. 06-190 contains legal and factual mistakes. Further, Universal represents that should the Commission deny the instant Request or fail to rule on it by May 12, 2006, Universal will seek a preliminary injunction from the United State District Court for the District of Oregon. And should the Commission rule against Universal's Petition for Reconsideration, Universal will exercise its rights of appeal under 47 U.S.C. § 252(e)(6). Under Oregon law, in this circumstance, strong policy reasons favor granting of Universal's Request for Stay.

C. Universal Can Show A Colorable Claim of Error by the Commission.

In addition, to secure a stay from the Commission Universal must make a showing of a "colorable claim of error." Or. Rev. Stat. § 183.482(3)(a). The Oregon Court of Appeals has determined that in order to satisfy this requirement, a party moving

for a stay must (1) assert that it is entitled to have the agency order set aside, modified, reversed, or remanded on one or more of the grounds specified in ORS 183.482(8)[5], and (2) show that the assertion is substantial and non-frivolous, or seemingly valid, genuine, or plausible, under the circumstances of the case. *See Bergerson v. Salem-Keizer School District*, 185 Ore. App. 649, 659 (Or. Ct. App. 2003) (noting that if a disposition of a case turns on an agency's interpretation or application of a statute, and a petitioner on judicial review plausibly argues that the agency misinterpreted the statute or misapplied it under the circumstances of the case, then the argument constitutes a colorable claim of error). In other words, as the court in *Bergerson* explained, Universal need only make a substantial and non-frivolous, or seemingly valid, genuine, or plausible, argument, that the Commission has erroneously interpreted or applied a provision of law and that a correct interpretation will result in Order No. 06-190 being set aside, modified, reversed, or remanded. *See id.* at 662.

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[5] ORS 183,482(8) provides:

> (8)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
>
> > (A) Set aside or modify the order; or
> >
> > (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:
>
> > (A) Outside the range of discretion delegated to the agency by law;
> >
> > (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
> >
> > (C) Otherwise in violation of a constitutional or statutory provision.
>
> (c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

As evident from its Comments and its Petition for Reconsideration, Universal has asserted that the Arbitrator's Decision and Order No. 06-190 contain numerous mistakes of fact and law in violation of ORS 183,482(8)(b)(C), as well as violations of provisions of federal law. These assertions of error include: (i) Order No. 06-190 does not meet the requirements of 47 U.S.C. § 251 and FCC regulations, in that the order approves Qwest's proposed recurring and non-recurring charges in violation of FCC rules, and Order No. 06-190 misapplies the Federal Communications Commission's ("FCC") *ISP Remand Order*;[6] (ii) Order No. 06-190 fails to adhere to the federal district court decision in *Qwest v. Universal*;[7] (iii) Order No. 06-190 violates Universal's due process rights; and (iv) Order No. 06-190 exceeds the Commission's authority by prohibiting Universal from providing an interstate service in violation of 47 U.S.C. 253(a) and Part 52 of the FCC's rules. Universal's assertions are more than merely plausible in that, *inter alia*, they rely on the Commission's own concession that it lacks authority over VNXX ISP-bound telecommunications traffic, express federal court decisions contrary to the Arbitrator's Decision and Order 06-190, and valid interpretations of FCC rules and decisions.

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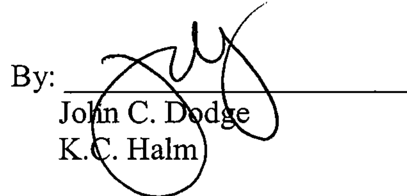
6 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 6 FCC Rcd 9151 (2001).

7 Civil No. 04-6047-AA (D. OR), Sept. 22, 2005.

CONCLUSION

For the reasons stated herein, Universal requests that the Commission issue a Stay of Decision 06-190 on or before May 12, 2006, such stay to be effective through the issuance of a final order not susceptible to appeal by a court of competent jurisdiction.

Respectfully submitted,

By: 

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Its Attorneys

May 5, 2006

CERTIFICATE OF SERVICE

I, Gina Lee, hereby certify that on 5th day of May 2006, I caused copies of forgoing Request for Stay of Universal Telecom, Inc. to be sent by electronically to the following parties:

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Gina Lee

Before The
Oregon Public Utilities Commission

In the Matter of the Petition of **Qwest Corporation** for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc.	**ARB 671**

STATE OF OREGON)
) ss.
COUNTY OF BENTON)

AFFIDAVIT OF JEFFRY R. MARTIN

I, JEFFRY R. MARTIN, being first duly sworn, depose and state:

1. I am an employee of Universal Telecom, Inc. ("Universal"). I am submitting this declaration in support of Universal's Request for Stay in the above-captioned docket. I have personal knowledge of the following facts and am competent to testify thereto.
2. I am the President of Universal. My business address is 1600 SW Western Boulevard, Suite 2490, Corvallis, Oregon 97333.
3. As President, I have knowledge of all of Universal's facilities and contracts, including Universal's facilities and contracts throughout the State of Oregon.

4. Universal is a corporation organized under the laws of the State of Oregon, whose principle place of business is 1600 SW Western Boulevard, Suite 2490, Corvallis, Oregon 97333.

5. Universal is authorized by the Oregon Public Utility Commission ("PUC") to provide local exchange and specialized communications services in Oregon. As such, Universal operates as a competitive local exchange carrier ("CLEC") in Oregon.

6. The terms and conditions of interconnection between Qwest and Universal were established under an "interconnection agreement" (the "Agreement"), which was approved by the PUC.

7. The terms of the Agreement are identical to an interconnection agreement between US West Communications, Inc. (now known as Qwest) and another Oregon CLEC, MFS Intelenet, Inc.

8. The terms are identical because Universal "adopted" the terms of the MFS agreement, which was approved by the Oregon PUC in 1997.

9. The Agreement between Qwest and Universal was executed by both parties in April and May of 1999. The Oregon PUC approved the Agreement in September of 1999.

10. Universal and Qwest have exchanged traffic under the terms of the Agreement governing the exchange of local traffic each month since approximately April 1, 2000.

11. The Agreement remains in full force and effect between the Parties.

12. As of the date of this Affidavit, Universal employs seven (7) residents of Oregon.

13. As of the date of this Affidavit, Universal has paid more than $24,000 to the State of Oregon or other taxing authorities in property taxes, excise and miscellaneous telecommunications taxes since 2000.

14. Universal has 33 contracts with 32 Internet Service Providers ("ISPs") for Managed Modem Service, by which in part the end user customers of those ISPs reach the Internet. Were Universal to shut down its so-called VNXX service Universal would be in breach of each of its ISP contracts.

15. If the Commission ordered Universal to cease providing VNXX immediately Universal likely would close down its business. This is so because any going telecommunications concern must have time to adjust to new regulatory mandates. Universal could not afford to duplicate Qwest's circuits to comply with Order No. 06-190 and would have to abandon providing service to many small towns whose residents will be forced to use a competitor such as Qwest or be without Internet service. Universal would be forced to abandon customers who are under contract leaving tens of thousands of end users without service. The financial impact could result in the bankruptcy of the company and a number of ISPs.

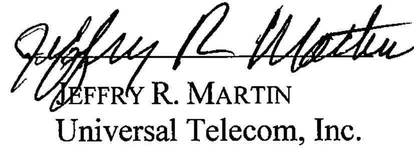
16. Upon information and belief, approximately 76,160 Oregonians rely on Universal's ISP customers for Internet access and other Internet-related functionalities.

17. Upon information and belief, Universal does not believe that these Oregonians have access to or the financial resources to afford broadband Internet access.

18. Universal has invested at least $3 million ($1.2M in equipment plus another $1.8 in start-up costs or losses through 2001) in its telecommunications, network and Internet equipment since 1999.

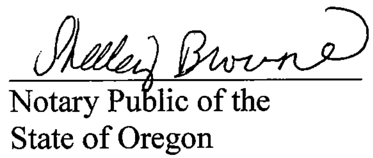
19. Upon information and belief, Universal is aware of at least six (6) other CLECs providing so-called VNXX service for ISPs in Oregon as of the date of this Affidavit.

The foregoing is true and correct to the best of my knowledge.



JEFFRY R. MARTIN
Universal Telecom, Inc.

Sworn to and subscribed before me on this the 4th day of May, 2006.



Notary Public of the
State of Oregon

My Commission Expires June 15, 2007