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November 18, 2005

Frances Nichols Anglin
Oregon Public Utility Commission
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Re: ARB 671

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Final Brief, along with a certificate of service.

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

Sincerely,

Carla

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 TELECOMMUNICATIONS, INC.	QWEST CORPORATION'S FINAL BRIEF

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INTRODUCTION

Petitioner Qwest Corporation ("Qwest") hereby files its Final Brief in response to the Reply Brief that respondent Universal Telecom, Inc. ("Universal") filed on November 4, 2005 ("Universal Reply"). Although Universal's reply raises many issues to which Qwest could respond, the primary issue Qwest addresses herein is Universal's reliance on Order No. 05-874 (July 26, 2005) in dockets IC 8/IC 9 ("Wantel/Pac-West Order") and the *Universal* federal court decision as the basis of its opposition to Qwest's relative use factor ("RUF") language. Qwest also responds to other issues related to the RUF. Both parties have addressed the issue of the breadth of the *ISP Remand Order* and other VNXX issues at length. Qwest makes no further comment on them other than to reaffirm the legal arguments in its prior briefs, which are consistent with the ALJ Ruling in docket IC 12 (Qwest v. Level 3) on August 16, 2005.

ARGUMENT

I. UNIVERSAL'S RELIANCE ON THE *UNIVERSAL* FEDERAL DECISION AND THE WANTEL/PAC-WEST ORDER (ORDER NO. 05-874) ON THE RUF IS MISPLACED

Universal advances a two-pronged argument to support its claim that the Commission may not exclude ISP traffic from the RUF. One prong is based on the *Universal* decision, while the other is based on the Wantel/Pac-West Order. Universal argues that the decision-makers in these cases ruled that it would be "unlawful" under Rule 709(b) (47 C.F.R. 51.709(b)) to impose financial responsibility on Universal for Local Interconnection Services ("LIS") facilities and services on Qwest's side of the Point of Interconnection ("POI"). (Universal Reply, at pp. 9-10.) Thus, Universal asserts that the Commission must reject Qwest's RUF language. These arguments are flawed and should be rejected.

A. The *Universal* decision does not support Universal's argument

Universal relies on the *Universal* decision for the proposition that Rule 709(b) does not "except ISP traffic from its broad reach." (Universal Reply, at p. 9.) Qwest's reply brief addressed the specific language that Universal relied upon and demonstrated the fallacy of this argument. (See Qwest Reply, at pp.16-18.) Qwest will not repeat that argument here, other than to state that, consistent with a principle articulated by Universal, Judge Aiken's decision related to the "meaning of [the] specific agreement" at issue in *Universal* is not controlling here. (Universal Brief, at pp. 4, fn. 6.)

The decision in *Universal* to include ISP traffic in the RUF of the *pre-existing agreement* at issue was based on the fact that the RUF provision in that agreement, unlike Qwest's proposed RUF provision here, did not contain language excluding ISP traffic. That fact, combined with the court's ruling that the agreement's change of law provision had not been met, led the Court, *based on the language of the existing agreement,* to include ISP traffic in the RUF. *See Universal*, 2004 WL 2958421, at pp. *4, *8-9. This conclusion is demonstrated by the court's characterization of two cases that Qwest cited—the Commission decision in the Level 3/Qwest arbitration in docket ARB 332 (Order No. 01-809) and the Colorado district court decision in *Level 3 Communications v. Colorado PUC*, 300 F.Supp.2d 1069 (D. Colo. 2003). Instead of disagreeing with these decisions, 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*." 2004 WL 2958421, at p. *5. (Emphasis added.) Nothing in the *Universal* decision suggests that Judge Aiken was purporting to rule on the application of Rule 709(b) to a *new agreement*, nor to suggest that approval by the Commission of a RUF that makes the terminating carrier financially responsible for ISP traffic would be somehow "unlawful." That issue was not

before the court, and the court carefully limited its decision to a construction of the existing agreement.[1]

B. The Commission should reject Universal's argument that the Wantel/Pac-West Order requires that Qwest be financially responsible for all ISP traffic

The second prong of Universal's argument is based on the fact that the Commission, in the Wantel/Pac-West Order, noted that the D. C. Circuit, in *WorldCom v. FCC*, 288 F.3d 429 (D. C. Cir. 2002), had found that the rationale the FCC adopted in the *ISP Remand Order* to carve out ISP traffic as "information access" was inconsistent with federal law. (Universal Reply, at pp. 9-10.) Qwest does not dispute that the *WorldCom* court did so, nor does Qwest dispute that the Commission addressed this issue in the Wantel/Pac-West Order. However, Qwest vigorously disputes Universal's characterization of the Commission's ruling on this point. Universal reaches the unsupported conclusion that the Wantel/Pac-West Order somehow mandates the rejection of Qwest's proposed language in the new interconnection agreement that makes Universal financially responsible for ISP traffic terminating to it, a conclusion easily disproved by a simple examination of the Wantel/Pac-West Order.

In the Wantel/Pac-West Order, the Commission stated as follows: "Since an important legal rationale underlying the decision in Order No. 01-809 to exclude ISP-bound traffic from the RUF has been found to be contrary to federal law, *it cannot provide the basis for interpreting the Pac-West/Qwest ICA*." Wantel/Pac-West Order, at pp. 32-33. (Emphasis added.) In other words, the Commission was only examining the impact of *WorldCom* on a pre-existing

[1] Universal's claim that Qwest is collaterally estopped from arguing for a new RUF provision based on the *Universal* decision is equally flawed. (See Universal Reply, at pp. 18-19.) Among other things, the collateral estoppel doctrine requires that the issues in the two proceedings be identical. While the issue in *Universal* and one of the issues in this docket relate to the RUF provision, Universal ignores the fact that the *Universal* case addressed the interpretation of *pre-existing* RUF contract language in a lawsuit for damages, while this regulatory proceeding is a section 252 arbitration that deals with forward-looking RUF language in a *new interconnection agreement*. To suggest that those two issues are identical is nonsensical. Further, Judge Aiken was clear that she was deciding the limited contract issue before her and did not purport to address RUF in the context of a new agreement. Finally, Universal's collateral estoppel argument ignores the fact that section 252 of the Act allows a carrier to seek arbitration of a new agreement whether or not the issue was addressed in another case.

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agreement. Universal, however, apparently argues that the Commission was in essence making a definitive forward-looking pronouncement of the law, when it claims: "Therefore, under the D. C. Circuit's decision and until the FCC says otherwise, ISP bound traffic continues to fall within the class of telecommunications traffic subject to Section 251(b)(5)." (Universal Reply, at p. 10.) This conclusion is false. As demonstrated hereafter, neither the *WorldCom* court, the FCC, nor the Commission reached this broad conclusion.

1. The Wantel/Pac-West Order dealt with the same pre-existing agreement as the Universal agreement

Contrary to Universal's argument, the Wantel/Pac-West Order, like the *Universal* decision, only addressed the interpretation of pre-existing agreements. Wantel and Pac-West, like Universal, opted into the MFS agreement. Wantel/Pac-West Order, at pp. 3, 28. Thus, although the Commission commented on *WorldCom*'s criticisms of the *ISP Remand Order*, the narrow issue before the Commission was the legal impact of a pre-existing RUF provision, whose language did not purport to exclude ISP traffic. Under those facts, it is not surprising that the Commission, like the court in *Universal*, found that ISP traffic was not excluded from the RUF. However, contrary to Universal's assertions, the Commission made no forward-looking decision on the validity of a RUF provision that excludes ISP traffic in a new agreement.[2] The Wantel/Pac-West Order is simply a replay of the *Universal* decision, in that the issue was the interpretation of existing contract language, a fact that the Commission acknowledged in the Wantel/Pac-West Order: "The *Universal* decision clarifies . . . that the *ISP Remand Order* did not alter *existing* transport obligations, including the applicability of § 51.709(b)." *Id.*, at p. 33, fn. 110. The phrase "existing transport obligations" is an obvious reference to Qwest's obligation under the agreement then in effect, given the Commission's conclusion that the *ISP*

[2] Given that the only issue before the Commission was the interpretation of an old agreement, any statement the Commission made purporting to rule on new agreements would, of course, be nothing more than *dicta*.

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Remand Order "did not alter existing. . . agreements to transport traffic to points of interconnection." *Id.*, 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 ISP traffic. Nothing in the Wantel/Pac-West Order suggests the Commission was purporting to decide that issue.

2. Universal's interpretation of the Wantel/Pac-West Order ignores the rationale of two definitive Colorado district court cases and critical language from *WorldCom*

The issue of the post-*WorldCom* application of Rule 709(b) has been the subject of two Colorado federal court decisions that Universal has ignored. The Commission should give strong consideration to the definitiveness of these courts' analyses and the force of their logic. Both decisions were appeals of Colorado Commission orders that had adopted contract language making CLECs responsible for ISP traffic in allocating financial responsibility for interconnection services. Both were rendered after the *ISP Remand Order* and the *WorldCom* decision.

In the first decision, *Level 3 Communications v. Colorado PUC*, 300 F.Supp.2d 1069 (D. Colo. 2003), the court dealt candidly with the impact of the *WorldCom* decision:

> *The ISP Remand Order's conclusion that ISP-bound traffic is "information access" traffic is still good law.* Contrary to Level 3's argument, [*WorldCom*] did not overrule the FCC's determination that ISP-bound traffic is "information access," or may be "interstate . . . exchange access." . . . Rather, *WorldCom* remands the FCC's determination regarding ISP-bound traffic on a different ground, that 47 U.S.C.A. § 251(g) does not provide authority for the FCC to not apply 47 U.S.C.A. § 251(b)(5), the reciprocal compensation rule. In other words, *WorldCom* remanded the *FCC Remand Order* on the basis that 47 U.S.C.A. § 251(g) does not provide the statutory authority that the FCC claims it does regarding reciprocal compensation. This is not the same as remanding on the basis that information access does not refer to ISP-bound traffic. Since the issue is not reciprocal compensation, and *WorldCom* did not change the definition of "information access," *WorldCom* has not undermined the fact that the FCC properly treats ISP-bound traffic as "information access." *Since WorldCom, moreover, did not*

> *vacate the FCC Remand Order, the FCC Remand Order is still good law.* 300 F.Supp.2d at 1076. (Emphasis added; citations omitted.)

Thus, the court concluded that ISP-bound traffic is not "telecommunications traffic," (*Id.*), and, based on a detailed analysis of FCC Rules 703(b) and 709(b), held that "[a] calculation of relative use . . . under [Rule 709(b)] would only take into account telecommunications traffic."

The second Colorado decision, *AT&T Communications v. Qwest Corporation,* was issued in June 2005 (slip opinion attached as Exhibit 2 to Qwest's opening brief). In that decision, the court reaffirmed its analysis in *Level 3*, and also responded to and rejected several other arguments AT&T made that the "traffic" referred to in Rule 709(b) is not the same as "telecommunications traffic" in Rule 703(b).[3]

These decisions are notable because, like the Commission in the Wantel/Pac-West Order, they acknowledge that the *WorldCom* decision challenged the FCC's underlying rationale in the *ISP Remand Order*. Nevertheless, both decisions concluded that the *ISP Remand Order* has not been vacated and that its basic conclusions remain binding. Thus, the mere fact that the Commission likewise noted that the *WorldCom* decision challenged the FCC's rationale does not, as Universal argues, lead to the inescapable conclusion that ISP traffic must be Qwest's responsibility in a new agreement, nor does it mean that the *WorldCom* court or the Commission has prejudged that issue.

It is critical that the *WorldCom* court's ultimate conclusion was to *not vacate* the *ISP Remand Order*. Thus, the *ISP Remand Order* remains in effect. The *WorldCom* court did not vacate the order because "there is plainly a non-trivial likelihood that the Commission has

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[3] It is noteworthy that AT&T does not appear to have challenged the principle that ISP traffic is not "telecommunications traffic." AT&T's primary argument appears to have been that the word "traffic" in Rule 709(b) is not synonymous with "telecommunications traffic" in Rule 703(b), a proposition rejected by the court. (*See* Exhibit 2, at pp. 24-26.)

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authority to elect such a system." 288 F.3d at 434. It is also critical to understand that the issues the court refused to decide:

> "[W]e do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access,' . . . or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of 'telecommunications' covered by section 251(b)(5). . . . Indeed these are only samples of the issues we do not decide . . ."[4]

Id. The point, of course, is that Universal's suggestion that *WorldCom* somehow mandates that Qwest is responsible for ISP traffic in a new agreement finds no support in *WorldCom*.

C. Universal's reliance on other language from the Wantel/Pac-West Order is <u>misplaced</u>

Universal erroneously relies on the Wantel/Pac-West Order for two other propositions. First, Universal quotes the following language from the Wantel/Pac-West Order: "Given that the *ISP Remand Order* abandoned the effort to construe . . . section 251(b)(5) using the dichotomy between local and interstate traffic, there is no merit to Qwest's claim that the parties intended to rely upon that distinction when they amended the ICAs to 'reflect' the *ISP Remand Order*." (Universal Reply, at pp. 15-16, quoting Wantel/Pac-West Order, at pp. 30-31.) On the basis of this language, Universal leaps to this conclusion: "Since *this* proceeding entails imposing conditions on parties consistent with current law, relying on the discredited notion of 'local' traffic would be inappropriate." (Universal Reply, at p.16) (emphasis in original).) The conclusion that Universal attempts to draw—that the Commission has abandoned the concept of local traffic—is wrong as a matter of principle,[5] but is also mischaracterizes what the Commission really said in the Wantel/Pac-West Order. In fact, the Commission stated that it

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[4] If Universal were to argue that the *WorldCom* court did not decide the "scope of 'telecommunications,'" and therefore the Colorado courts should not have addressed that issue, the argument would have no merit. That issue was not before the *WorldCom* court, while it was directly before the Colorado court in both RUF appeals.

[5] Qwest addressed the FCC's decision to use statutory terms instead of the term "local" in the *ISP Remand Order* in its reply brief. (See Qwest Reply, at pp. 34-36.) Qwest demonstrated that the FCC did not disavow the local/interexchange traffic distinction.

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continues to recognize the continuing viability of the concept of local traffic. For example, the Commission stated that "[t]his does not mean that the distinction between local and nonlocal traffic has no meaning for purposes of interpreting ICAs." Wantel/Pac-West Order, at p. 31, fn. 105.

On the same issue, Universal states: "As the OPUC recognized in *Wantel,* the 9th Circuit also recognizes that the notion of whether traffic is "local" or not is no longer part of the analysis." (Universal Reply, at p. 15.) Universal does not, however, quote the next sentence in the Wantel/Pac-West Order, where the Commission quoted the same Ninth Circuit decision for the proposition that "the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of § 251." Wantel/Pac-West Order, at p. 30, quoting *Pacific Bell v. Pac-West Telecom*, 325 F.3d 1114, 1131 (9th Cir. 2003) Contrary to Universal's arguments, neither the Commission nor the Ninth Circuit have abandoned the local/toll distinction, nor has the Commission abandoned the underlying policy concerns it expressed in Order No. 01-809 regarding arbitrage, inappropriate economic signals, and improper cost recovery that results from one-way ISP traffic.[6]

D. Universal's positions about the RUF in the Wantel/Pac-West Order are <u>inconsistent</u>

At the same time that Universal relies on the Wantel/Pac-West Order to argue (erroneously) that the local/toll distinction is meaningless and that the Commission must adopt a new interconnection agreement that makes Qwest responsible for all facilities on its side of the POI, Universal also ignores the Commission's decision in the same order that VNXX traffic is

[6] In the *ISP Remand Order*, the FCC outlined the arbitrage and false economic signals that result from allowing companies like Universal, which create the ISP traffic and benefit from it, to receive services free and thus impose those costs others. *ISP Remand Order,* ¶¶ 19-21,67-76. Adopting Universal's RUF language would allow Universal to continue to pass costs to Qwest that should be Universal's financial responsibility. Those policy concerns were a major factor in the Commission's ruling in Order No. 01-809. The passage of time has not altered these problems.

not subject to a RUF because VNXX traffic is not local traffic. Wantel/Pac-West Order, at pp. 34-37. That decision, of course, requires the CLEC to pay for the LIS facilities used to carry the VNXX traffic. Inherent in that decision is the Commission's rejection of two of Universal's claims: (1) that there is an absolute rule that requires that all traffic on Qwest's side of the POI must always be Qwest's financial responsibility[7] and (2) that the local/toll distinction is dead.[8] The Commission should adopt Qwest's language in this case, which preserves this critical distinction and which requires that Universal bear the cost of facilities used to deliver VNXX traffic to it.

Universal has advanced no arguments to suggest that the order's ruling on VNXX traffic, not to mention Order No. 04-504 in docket UM 1058, should not govern the Commission's treatment of VNXX traffic as it relates to RUF and reciprocal compensation.

E. Universal's argument that the RUF should be based on capacity misses the point of Rule 709(b) and Qwest's proposed language

Universal makes the new argument that the real RUF issue is not whether ISP traffic should be excluded, but instead deals with Universal's concerns that the RUF calculation in Qwest's language is wrong because it is based on relative usage when it should be based on capacity. (Universal Reply, at p. 7.) There are several problems with this argument.

First, although Universal complains that the RUF should be changed to a capacity measure, it made no such proposal in its amendments to the Qwest-proposed RUF provisions.

Second, Universal's argument is wrong. The RUF is designed to allocate the costs of the facilities between Qwest and Universal when they exchange *local telecommunications traffic*.

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[7] Universal's RUF language, which abandons the local/interexchange traffic distinction, is inconsistent with hundreds of agreements in Oregon and elsewhere that a RUF applies only to local traffic.

[8] Qwest clarifies one point regarding its position on RUF in this docket. First, a RUF should apply only to *local* telecommunications traffic (the VNXX discussion in the *Universal* decision provides a clear analysis of the local/toll distinction). See 2004 WL 2958421, at pp. *9-11. The Commission's decision in the Wantel/Pac-West Order to exclude VNXX traffic from the RUF is also an application of this principle. Second, ISP traffic, even if local, should be excluded from the RUF because it is not "telecommunications traffic."

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These costs are determined by two factors: (1) the TELRIC prices that the Commission has established for the specific local interconnection services, and (2) the quantity and type of facilities (e.g., DS1 v. DS3) that Qwest puts into service *at Universal's request* (generally, the quantity and size of the facilities are designed to accommodate peak usage periods and to avoid blockages due to insufficient capacities). To the extent that the facilities are designed to provide for these peak usage periods, it is fair and reasonable, and entirely consistent with Rule 709(b), that both parties share in the associated costs based on actual traffic usage. Therefore, Qwest's RUF must be based on its actual usage for "telecommunications traffic" relative to the total usage (not capacity) of the facilities. Performing the calculation in this manner is the only rational way to properly apportion the capacity used by each party.[9]

Third, Universal must be held responsible for the ISP traffic generated by its business plan. Under Universal's method of operation, all of the traffic is *one-way ISP traffic* (most of it is also VNXX traffic). (Qwest/1, Batz/6.) Many of the circuits are used solely for VNXX traffic. All of the traffic is the result of ISP customers calling ISPs served by Universal, an issue discussed in greater depth in Qwest's reply brief. (See Qwest Reply, at pp.21-25). Under appropriate principles of cost causation, the cost of interconnection to carry this traffic should be borne by Universal and its ISP customers.

Finally, when Qwest provides interconnection to Universal, Qwest is entitled to be compensated for the interconnection it provides "on rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D). Section 252 in turn provides that determinations by a state commission of the just and reasonable rate for the interconnection shall be "based on the cost…of providing the interconnection," "nondiscriminatory" and "may

[9] This Commission, and other state commissions where Qwest operates as well, has adopted the RUF language at issue here, or language very similar to it.

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include a reasonable profit." 47 U.S.C. § 252(d)(1). As the FCC has recognized, these provisions make clear that CLECs must compensate incumbent LECs for the costs incumbent LECs incur to provide interconnection. See *Local Competition Order* ¶¶ 200, 209. Universal's position would deprive Qwest of compensation altogether, a result that is completely at odds with the Act.

II. NONE OF QWEST'S RESPONSES TO DATA REQUESTS PROVIDE SUPPORT FOR UNIVERSAL'S POSITIONS

At this point, it is impossible for Qwest to anticipate which of Qwest's data responses Universal intends to file, or what it intends to say with regard to them. In the event that Universal were to suggest that they support a claim that Qwest's cost to deliver traffic to Universal's POIs is relevant, or that Universal incurs costs to terminate ISP traffic, such claims would be irrelevant for the reasons that Qwest has already addressed. (See Qwest Reply, at pp. 24-25.) In the event that Universal were to claim, on the basis of Qwest's responses, that each call to a Universal ISP customers flows through a Universal switch, this argument likewise would be irrelevant. The test for whether reciprocal compensation is or is not appropriate has nothing whatever to do with the issue whether the terminating carrier must switch the call.[10] There is no legal theory that supports any claim that Universal may make that it would be entitled to reciprocal compensation for all minutes that flow through its switch.[11]

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[10] If Universal were to suggest that the test for whether reciprocal compensation applies is whether the terminating carrier's switch is in use, then all minutes, no matter where originated and no matter where terminated (whether within the local calling area or between local calling areas), would be subject to reciprocal compensation. That, of course, has never been the test for the application of reciprocal compensation.

[11] Two data requests remain at issue in a pending motion to compel filed by Universal. The apparent purpose of the data requests is for Universal to locate and cite state commission decisions from other states that may have ruled that ISP traffic should be included in a RUF. Given that this is the final brief and Qwest will not have an opportunity to respond in the event Universal cites decisions from other states, Qwest strongly urges the Commission not to accept such cases at face value. They are, of course, not binding and they may be completely irrelevant for a variety of reasons, including different prevailing circumstances at the time of the order, different state interconnection policies, requirements and precedent, and potentially different prevailing law (especially given

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CONCLUSION

Qwest requests that the Commission enter an order approving the agreement with Qwest's proposed language.

DATED: November 18, 2005.

Respectfully submitted,

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the 10-year time frame of Universal's data requests). Such cases may also have arisen under different scenarios (e.g., interpretation of old or existing language v. arbitration of new language for a new ICA).

CERTIFICATE OF SERVICE

ARB 671

I hereby certify that on the 18th day of November 2005, I served the foregoing **QWEST CORPORATION'S FINAL BRIEF** 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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DATED this 18th day of November, 2005.

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