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November 4, 2005

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 five (5) copies of the Reply Brief of Universal Telecom, Inc. 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,

K.C. Halm

Enclosures

196116_1.DOC

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**

REPLY BRIEF
OF
UNIVERSAL TELECOM, INC.

UNIVERSAL TELECOM, INC.

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November 4, 2005

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BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION

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REPLY BRIEF OF UNIVERSAL TELECOM, INC.

Universal Telecom, Inc. ("Universal") hereby files its reply brief in this matter, and seeks a ruling that the positions advocated by Qwest Corporation ("Qwest"), as evidenced by the terms of its proffered interconnection agreement, are wrong.

ARGUMENT

PRELIMINARY STATEMENT

Qwest and Universal agree that as of today essentially 100% of the traffic between the parties consists of calls that Qwest's end users make to ISPs served by Universal.[1] Qwest's end users plainly benefit from being able to connect to the Internet using their Qwest-supplied phone lines and would be seriously harmed were that functionality not made available to them. So, there is no question that Qwest's end users need to be able to call up their ISPs in order to use email, find information on the Web, make purchases at Amazon or eBay, and generally continue to participate in the

[1] *See* Direct Testimony of Nancy J. Batz on behalf of Qwest Corporation, ARB 671 (Oct. 21, 2005) at p. 7, lines 13-17.

increasingly Internet-based economy. Without a doubt, being able to use their telephone lines in order to make such connections is an important part of the benefit Qwest's customers receive from buying service from Qwest in the first place. As a result, as long as ISPs are still entitled to receive their connections to the public switched telephone network (PSTN) from competitive LECs like Universal – that is, as long as Qwest is not permitted to monopolize the market for providing ISPs with PSTN connectivity – Qwest and its competitors will have to sort out the economic terms on which traffic from Qwest's end users to ISPs served by Universal will occur.

From the perspective of Qwest's traditional monopoly, it wants to keep all the money from its end users, pay nothing to Universal, and force Universal to pay Qwest as well. This desire is reflected in its proposed contract language. However, the federal law that governs this agreement shows that Qwest is wrong. Universal is entitled to be paid the federally-capped rate of $0.0007 per minute on incoming ISP-bound traffic – including, specifically, VNXX-routed ISP-bound traffic – and is not required to pay Qwest anything in connection with the receipt of that traffic.

This does not constitute Universal taking any sort of advantage of Qwest. In a monopoly environment, both the calling end user and the called ISP would be on Qwest's network. Qwest would incur 100% of the costs involved in carrying such calls end-to-end on the PSTN, until they diffuse into the Internet itself on the "far side" of the ISP's equipment. Those costs would include originating switching, transport to the terminating end office, and terminating switching. When competition allows Universal to serve the ISP, Qwest is relieved of the terminating switching obligation and is required under the FCC's intercarrier compensation rules to pay Universal for that work, again at the very

low rate of $0.0007 per minute. But the fact that a competitor has won ISPs in the competitive market cannot logically mean that suddenly Qwest gets to punish the competitor by exporting transport costs, within Qwest's network. The FCC's rules do not permit this, and it makes no sense. Such a rule would be a direct deterrent to competition.

These commonsense principles are fully in accord with the FCC's specific rules and rulings on this topic, as described more fully below.

I. Issue 1 – Cost Responsibility for Facilities Used to Carry Qwest-Originated Traffic

A. Introduction.

In its opening brief Qwest scolds Universal for failing to explain the purpose or meaning of Universal's proposed contract language. *See* Qwest Initial Brief at 11-12 (herein after "Qwest Brief"). Universal does not think there is any uncertainty, but in case there is, the Commission should understand that the purpose and effect of Universal's proposed contract language is to make sure that Qwest has no right whatsoever under the new contract to bill Universal for the costs Qwest incurs in getting Qwest-originated traffic to Universal. More specifically, this contractual ban on charging Universal for Qwest-originated traffic would apply to 100% of the ISP-bound calls that Qwest sends to Universal, including, without limitation, calls that are delivered on a VNXX-routed basis.

As described below, the charges that Qwest is trying to impose on Universal are specifically and unequivocally banned by federal law. These charges (both recurring and non-recurring) are banned expressly in FCC Rules 51.703(b) and 51.709(b). The courts – including in the federal district court litigation between Qwest and Universal – have

repeatedly ruled that these federal rules prohibit Qwest from imposing these charges.[2] And this Commission itself, in the recent *Wantel* ruling, clearly understands that they are banned as well.

Qwest says that Universal's proposed contract provisions – which would ban Qwest from imposing unlawful charges – are "indicative of Universal's erroneous legal conclusion that each party to an interconnection agreement is always responsible for the cost of facilities on its side of a POI." Qwest Brief at 11. But where the issue is traffic a party's own end users originate, the law is crystal clear that, in fact, that party ***is*** "always responsible for the cost of facilities on its side of a POI." Qwest is desperately trying to create an ***exception*** to this plain legal requirement for ISP-bound traffic. The problem is that what scant legal support there is for such an exception, from other jurisdictions, is based on an erroneous reading of the applicable federal requirements. In fact, the weight of authority – and, without question, the better-reasoned authority – holds that the "ISP exception" Qwest wants to write into the "no charge for originating traffic" rule simply does not exist.[3]

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[2] *See Qwest Corp. v. Universal Tel.*, Civil No. 04-6047-AA, 2004 U.S. Dist. LEXIS 28340 (D. Or. Dec. 15, 2004) (attached hereto as Attachment 1).

[3] *See id.* at *11-12 (citing footnote 149 of the *ISP Remand Order*). *See also* Universal Initial Brief, ARB 671 at 9-14 (citing *Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 at ¶ 52 (2002) ("*Virginia Arbitration Order*"); *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶¶ 8-9 (2001) ("*Unified Intercarrier Compensation NPRM*"); *TSR Wireless v. US West Communications*, Memorandum Opinion and Order, 15 FCC Rcd 11166 at ¶¶ 18, 40 (2000); *Qwest Corporation, et al. v. FCC*, 252 F.3d 462, 467 (D.C. Cir. 2001); *Mountain Communications, Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004); *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)).

FCC Rule 51.709(b) says that Qwest can "***only***" charge Universal for trunks connecting their networks based on how much traffic ***Universal sends to Qwest***. The parties agree that for the moment, essentially 100% of traffic is coming from Qwest to Universal. Since Qwest can only charge Universal for traffic that flows the other way, that means that Qwest may not charge Universal anything. It really is that simple.

Qwest, however, makes it complicated by crafting language regarding the "relative use factor" (RUF) that states the FCC rule backwards. Instead of recognizing that it can "***only***" charge Universal for traffic that Universal sends to Qwest, Qwest's language says that Qwest can charge Universal for 100% of the cost of the facilities, reduced by whatever traffic ***Qwest*** sends. Qwest then conveniently jiggers the definitions of what traffic "counts" for this purpose to exclude – surprise! – virtually every minute of traffic it sends. This is flatly inconsistent with the applicable federal rules, and the Commission should expressly reject it in its order in this case.

Qwest also makes several allusions to interconnection "services" that Qwest provides to Universal. *See, e.g.*, Qwest Brief at 9 (describing several different "interconnection services" Qwest provides to Universal). Qwest's repeated characterization of its federal statutory obligation to interconnect with Universal as a "service" is curious, given that Qwest admitted in discovery responses that Section 251(c)(2) of the Act requires Qwest to interconnect and exchange traffic with Universal,[4] and that Universal does not purchase interconnection services from Qwest.[5] Qwest made the same misleading statements before the federal district court, which clearly rejected

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4 *See* Attachment 2 (Qwest response to Universal Interrogatory No. 01-022).

5 *See* Attachment 3 (Qwest response to Universal Interrogatory No. 01-023).

these assertions in ruling that Qwest is prohibited under federal law from imposing charges on Universal.

In sum, federal law prohibits Qwest from imposing charges on Universal for facilities used to carry Qwest-originated traffic. As a result, the OPUC should reject Qwest's proposed contract language that establishes such charges and instead order the parties to use Universal's proposed language.

B. Qwest's RUF Language Is Exactly Backwards, And Directly At Odds With Governing FCC Rules.

1. *ISP-bound Traffic Originating On Qwest's Network Is Subject to the Prohibition on Traffic and Facilities Charges*

Qwest argues that the disputed issue "comes down to whether ISP traffic should be excluded from the RUF calculation." Qwest Brief at 11. This is actually wrong. The issue is whether Qwest's RUF formula properly states the FCC's rule, which it does not.

The FCC's rule (47 C.F.R. § 51.709(b)) deals with charges between interconnected LECs for the trunking facilities used to connect their networks. The FCC says directly and without any ambiguity that the carrier providing those trunking facilities (here Qwest) can charge the interconnected carrier (here Universal) "***only*** the costs of the proportion of that trunk capacity used by [Universal] to send traffic that will terminate on [Qwest's] network." This language is clear and unambiguous. And – in direct response to Qwest's statement quoted above – traffic that Qwest sends to Universal has, literally, nothing at all to do with what Qwest is allowed to charge Universal. Again: Qwest can "***only***" charge Universal for the proportion of trunk capacity used by ***Universal*** for traffic

that Universal sends to ***Qwest.***[6] Since there is (essentially) no such traffic, Qwest is not allowed to charge Universal anything.

So, the issue is not "whether ISP traffic should be excluded from the RUF calculation." The problem is that the "RUF calculation," as laid out in Qwest's proposed language, is wrong from the start. A proper RUF calculation should have only two elements: (a) the total trunk capacity linking the two networks; and (b) the trunk capacity that Universal uses in sending traffic to Qwest. Dividing (b) by (a) gives the proportion of total trunk capacity that Universal "uses" (i.e., originates) under the FCC's rule. That is the proportion of trunking costs that Universal can be charged – which, as noted above, is zero on the basis of current traffic patterns. This is the only legally correct "RUF" that should be included in the parties' contract.

ISP-bound traffic from Qwest to Universal literally has nothing to do with this issue. It is, in fact, Qwest's backwards framing of its RUF formula that creates the problem in the first place.

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[6] Indeed, as the FCC explained in its *First Report and Order* on Local Competition, the cost sharing principle of FCC Rule 51.709 imposes an obligation on the "interconnecting carrier" (in this case Universal) only to the extent that the interconnecting carrier originates (sends) traffic over the facilities:

> [i]f the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the ***interconnecting carrier should not have to pay*** the providing carrier a rate that recovers the full cost of those trunks. . . Rather, the ***interconnecting carrier shall pay the providing carrier a*** rate that reflects ***only the proportion of the trunk capacity that the interconnecting carrier uses*** to send terminating traffic to the providing carrier.

See First Report and Order on Local Competition, 16 FCC Rcd 115499 at ¶ 1062 (1996). (emphasis added). Accordingly, the rule operates to ensure that "each carrier is **only paying for** the transport of **traffic it originates** ..." *Id.*

Qwest argues that because ISP-bound traffic has been carved out from the definition of "telecommunications traffic" subject to reciprocal compensation under FCC Rule 51.701(b), somehow that allows Qwest to charge Universal for the trunking used to get that traffic from Qwest to Universal. Qwest brief at 13-15. That argument is completely wrong, for several reasons.

First and foremost, as noted above, the directly relevant FCC rule – 47 C.F.R. § 51.709(b) – doesn't say anything about traffic that Qwest might send to Universal. Under that rule, Qwest's right to charge Universal is based totally and completely on the traffic (if any) that Universal sends to Qwest.

Second, the federal courts – including the federal district court here in Oregon – and the OPUC have rejected the notion that either FCC Rule 51.709(b) or the related rule banning per-minute origination or facilities charges, FCC Rule 51.703(b), permit Qwest to charge Universal for such traffic.

Qwest points to the OPUC's 2003 *Level 3 Arbitration Order* to support its claim that the OPUC's policy is to exclude ISP traffic when determining the application of cost responsibility for facilities used by Qwest to send traffic to other CLECs. Qwest Brief at 13-14 (*citing* OPUC Order No. 01-809, ARB 332 (Sept. 13, 2001)). Qwest also points to the AT&T arbitration, OPUC Order No. 04-262, ARB 527 (May 17, 2004), which simply followed the OPUC's decision in the Level 3 arbitration order. Upon these rulings Qwest argues that "the Commission has established a clear policy to exclude ISP traffic from the RUF calculation." Qwest Brief at 14. Qwest then urges the OPUC to rule the same way in this case "[b]ecause ***nothing has*** changed since its decision in the AT&T Arbitration Order ..." *Id.* (emphasis added).

Unfortunately for Qwest, the assertion that "nothing has changed" since the OPUC's previous decisions is quite wrong. First, the Federal District Court of Oregon ruled on this precise issue, against Qwest. Qwest specifically raised this argument before the federal court,[7] and the court specifically rejected Qwest's rationale, explaining that the prohibition of FCC Rules 51.703(b) and 51.709(b) does not except ISP traffic from its broad reach. As the court explained:

> In ISP Remand Order, the FCC explicitly **[*12]** stated that its ruling "does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law provisions." *Id. at 9189*. The FCC further stated that the interim compensation regime established in ISP Remand Order "affects only 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 intercarrier agreements, such as obligations to transport traffic to points of interconnection." *Id.* at n. 149. ***Therefore, the restrictions of § 51.703(b) and § 51.709(b) remain in full effect.***

Qwest v. Universal, at * 11-12 (emphasis added).[8]

Second, based on the federal court's ruling, the OPUC itself has abandoned its earlier reasoning in the *Level 3 Arbitration Order* on which Qwest relies. Specifically, in the recent *Wantel/Pac-West* decision, OPUC Order No. 05-874, IC 8 & 9, at 33 (July 26, 2005), the OPUC specifically rejected its reasoning in the *Level 3 Arbitration Order*. It did so because it recognized that an "important legal rationale underlying the decision in Order No. 01-809 [Level 3 Arbitration Order] to exclude ISP bound traffic from RUF has

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[7] *See Qwest v. Universal* at * 11 ("Qwest argues that *§ 51.703(b)* and *§ 51.709(b)* apply only to telecommunications traffic and that ISP bound traffic is not telecommunications traffic. Therefore, because all of the traffic exchanged between the parties is ISP bound traffic, the restrictions of *§ 51.703(b)*, *§ 51.709(b)*, and TSR Wireless do not apply to facility charges imposed on Universal by Qwest.").

[8] Thus, the federal court in Oregon specifically rejected Qwest's argument on this issue. Moreover, the federal court also declined to follow the OPUC's decision in the *Level 3 Arbitration Order* on this question. *Id.* at * 13-14.

been found to be contrary to federal law."[9] Specifically, the OPUC recognizes that its earlier decision to exclude ISP-bound traffic from the RUF was premised upon the FCC's finding in the *ISP Remand Order* that ISP-bound traffic was not "telecommunications" subject to the reciprocal compensation provisions of Section 251(b)(5) of the Act, but was instead properly classified as "information access" under Section 251(g). But this finding, as the OPUC notes, was "subsequently rejected by the D.C. Circuit in *Worldcom v. FCC*."[10] 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).

So even if FCC Rule 51.709(b) on its face did not forbid Qwest's inside-out RUF language, both the courts and the OPUC have explained that Qwest's approach is legally untenable. Given these recent developments, Qwest's reliance on the *Level 3* and *AT&T Arbitration Orders* – both of which predate recent, controlling legal developments – is completely unwarranted.[11]

For these reasons the OPUC should reject Qwest's arguments that ISP traffic is excluded from the prohibition on facilities charges under FCC Rules 51.703(b) and 51.709(b). The OPUC should, instead, specifically rule that the prohibition under those rules applies broadly, regardless of the form or content of the telecommunications traffic at issue.

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9 *Wantel*, Order No. 05-874 at 33.

10 *Id.* at 32.

11 The cases that Qwest cites from other jurisdictions are not binding here in Oregon. They are also, in all candor, wrongly decided. They do not properly apply FCC Rule 51.709(b) – which, as noted, invalidates Qwest's entire formulation of the RUF calculation – and, even granting that erroneous formulation, they do not give proper weight to *WorldCom's* rejection of the notion that ISP-bound traffic is carved out from Section 251(b)(5).

2. *VNXX Traffic Originating On Qwest's Network Is Subject to the Prohibition on Traffic and Facilities Charges*

Unlike the *Wantel/Pac-West* case (and, indeed, unlike the *Universal* case in federal district court), this case does not involve the interpretation of a pre-existing interconnection agreement. Instead, it involves setting the terms of a ***new*** interconnection agreement on issues where the parties disagree. So, the first place to look to answer any disputed issue is what federal law and FCC regulations call for.

For the reasons described above, governing FCC rules forbid Qwest from imposing traffic origination charges on Universal, even in the case of VNXX traffic. As stated earlier, FCC Rule 51.709(b) allows Qwest to charge Universal ***only*** for the proportion of trunk capacity linking the two networks that Universal uses to send traffic to Qwest. That proportion is zero, and does not increase from zero by virtue of the fact that some of the traffic that Qwest sends to Universal is VNXX-routed. Similarly, nothing in FCC Rule 51.703(b) suggests that the status of Qwest-originated traffic as VNXX or not affects Qwest's right to assess origination charges.

In other words, a simple and straightforward reading of the applicable FCC rules compels the conclusion that Qwest may not assess traffic origination charges – whether on a per-minute or "facilities" basis – for VNXX traffic. Again: it just doesn't matter what type of traffic Qwest might be sending to Universal. Qwest can only charge Universal (either on a per-minute basis, or a facilities basis) for traffic that Universal sends to Qwest.[12] Any other reading of these FCC rules would render meaningless the

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[12] As noted in Universal's opening brief, this approach is consistent with the normal doctrine of cost causation, *i.e.*, that the "cost causer" should pay. In the case of calls to ISPs served by Universal, the cost causers are the Qwest subscribers making the calls. *See Texcom, Inc. v. Bell Atlantic Corp.*, 16 FCC Rcd 21493 (FCC 2001) at ¶¶ 6, 10. *Texcom* directly addressed the question of so-called "transiting" charges, where one carrier acts as a go-between

FCC's repeated decisions that CLECs are entitled to interconnect with ILECs at a single point of interconnection per LATA, and that both parties are obliged to carry their own originating traffic to that point at no cost to the other party.[13]

An Oklahoma federal district court reached the same conclusion when it determined that a competitive carrier has the right to establish local numbers within a rate center ***without*** maintaining a physical point of connection in that rate center.[14] The court reached this decision based on its reading of two key federal appellate decisions (*Mountain Communications, Inc. v. F.C.C.*, 355 F.3d 644 (D.C. Cir. 2004) and *MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003)) finding that the types of charges Qwest proposes here are unlawful.

In this regard, there is no basis for the OPUC to look behind the clear application of these rules to this situation, given that the rules themselves are not unclear or ambiguous. Just as it is wrong to rely on legislative history to interpret a statute that is unambiguous on its face, so too is it inappropriate to rely on "regulatory history" to interpret a clear regulation. It is black letter law that the unambiguous words of a

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for two other carriers who are sending each other traffic. In the course of discussing the transiting question, the FCC reviewed the purpose and operation of its basic intercarrier compensation rules.

[13] *See* Universal Initial Brief at 9 (citing *In the Matter of Application by SBC Communs., Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communs. Svcs., Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommuns. Act of 1996 to Provide In-Region, InterLATA Services in Texas*; CC Docket No. 00-65; Released June 30, 2000; at ¶ 78; *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Unified Intercarrier Compensation NPRM*") at ¶ 112; *Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 at ¶ 52 (2002) ("*Virginia Arbitration Order*") at ¶52.

[14] *Atlas Tel. Co. v. Corp. Comm'n*, 309 F. Supp. 2d 1313, 1317 (W.D. Okla. 2004).

regulation take precedence over any agency interpretation. *See, e.g., In re Sealed Case,* 237 F.3d 657, 667 (D.C. Cir. 2001) ("As the Supreme Court recently stressed ... judicial deference towards an agency's interpretation is warranted only when the language of the regulation is ambiguous.") (internal quotation marks omitted); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n,* 400 F.3d 1256, 1264 (10th Cir. 2005) ("Where the regulations at issue are unambiguous, our review is controlled by their plain meaning."); *Meeks v. West,* 216 F.3d 1363, 1366 (Fed. Cir. 2000) ("In construing a statute or regulation, we begin by inspecting its language for plain meaning. ... If the words are unambiguous, it is likely that no further inquiry is required.") (internal citation omitted).[15]

Judge Aiken's decision in the *Universal* federal case is also instructive in this connection. As noted above, she ruled against Qwest, without qualification, on the "RUF" issue in that case.[16] But it is clear beyond any doubt that she was fully aware that a substantial fraction of the ISP-bound traffic coming from Qwest to Universal was VNXX-routed, because the parties had a direct dispute – in some ways, their key dispute – about whether VNXX-routed traffic counted as "local" within the meaning of the interconnection agreement she was interpreting. While she concluded that VNXX-routed traffic was not "local" within the meaning of that contract, and that therefore Universal could not collect reciprocal compensation with respect to it,[17] she did not in any way limit the scope of her "no origination charges for ISP traffic" ruling to non-VNXX traffic.

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[15] This is not to say that there are not situations in which application of the FCC's rules might not be totally certain; but it is to say that where the rules so clearly and directly forbid origination charges, and require that any facilities charges be based on traffic that Universal sends to Qwest, the OPUC would be totally justified in dismissing out of hand whatever strained readings of underlying FCC orders Qwest might advance to support its effort to weasel out of the terms of the rules.

[16] *See Qwest v. Universal* at *9-16.

[17] *See id. at* *19-21.

Indeed, any such limitation would have been inconsistent with the plenary ban on origination charges which she properly found to be established by FCC Rules 51.703(b) and 51.709(b).

Similarly, the OPUC in *Wantel* found that under the agreements at issue there, the only traffic that "counted" for purposes of the RUF was "local" traffic. In light of that ruling, and in light of the fact that VNXX-routed ISP-bound traffic did not count as "local" under the agreements at issue there, the OPUC found that the RUF in those contracts would be calculated without counting the VNXX-routed traffic. Universal here takes no position on the overall propriety of that ruling; we note, however, that it depends entirely on the OPUC's conclusion that under ***those agreements***, the only traffic counted in the RUF to calculate the CLECs' discounts off the basic tariffed rate is "local" traffic that Qwest sent to them. As noted above, however, under the applicable FCC rules, a properly formulated "RUF" would never be affected in any way by traffic that Qwest sends to Universal, whether "local" or not. Only traffic in the other direction – from Universal to Qwest – can properly lead to any charges to Universal.

In this regard, the OPUC in *Wantel* made two critically important observations. First, the OPUC recognized that in the *ISP Remand Order,* the FCC abandoned the notion of "local" traffic as relevant to determining when reciprocal compensation applies.[18] This realization, of course, is completely accurate. As noted in Universal's opening brief, in the *ISP Remand Order,* the FCC completely reexamined the underlying legal rationale for its original reciprocal compensation rule, which indeed limited such compensation to "local traffic," defined on a purely geographic basis. The FCC stated that it had been

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[18] *See Wantel* at 30-31.

"mistaken to have characterized the issue in that manner;"[19] that it had "erred in focusing on the nature of the service (*i.e.,* local or long distance);"[20] that it had "created unnecessary ambiguity for [itself], and the court, because the statute does not define the term 'local call;'"[21] and that, in sum, in the original "*Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here."[22] 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.[23]

Given this state of the law, it would be plainly erroneous for the OPUC to force Universal, in its new interconnection agreement, to operate under terms that distinguished between traffic, for purposes of intercarrier compensation (including origination charges), on the basis of some analysis of whether the traffic is "local" or not. There is no question that prior to the *ISP Remand Order,* the FCC's rules treated "local traffic" differently from other traffic. But that is simply not what the new rules say; as noted just above, the FCC has affirmatively rejected reliance on the notion of "local traffic" to distinguish traffic subject to Section 251(b)(5) from traffic not subject to it. As the OPUC stated in *Wantel,* "[g]iven that the *ISP Remand Order* abandoned the effort to construe ... § 251(b)(5) using the dichotomy between local and interstate traffic, there is no merit to

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19 *ISP Remand Order.* at ¶ 45

20 *Id.* at ¶ 26

21 *Id.* at ¶ 45

22 *Id.* at ¶ 46. Universal submits that the endless controversy over the status of ISP-bound traffic in general, VNXX traffic in general, and ISP-bound VNXX traffic in particular, as "local" or not, fully vindicates the FCC's wisdom in realizing that the term is "ambiguous" and that it is a "mistake" to rely on it.

23 *See Wantel* at 30, *citing Pacific Bell v. Pac West Telecommunications, Inc.* 325 F.3d 1114, 1128 (9th Cir. 2003).

Qwest's claim that the parties intended to rely upon that distinction when they amended the ICAs to 'reflect' the *ISP Remand Order*."[24] Since ***this*** proceeding entails imposing conditions on the parties consistent with current law, relying on the discredited notion of "local" traffic would be inappropriate.

Wantel also recognizes that the federal court in *WorldCom v. FCC* "precluded" the FCC from relying on Section 251(g) of the Act to carve out "information access" traffic – that is, calls to ISPs – from the scope of Section 251(b)(5) in the first place. *See Wantel* at 25, 32-33. It follows that it would be inappropriate, in establishing a forward-looking contract in this arbitration, to accede to Qwest's language that would have that effect.

In light of these legal principles, it would make no sense to allow Qwest to impose contract terms that ***allow*** Qwest to impose traffic origination charges on Universal, either on the basis that some of the traffic Qwest is sending is ISP-bound, or on the basis that it is not "local." Consequently, there is no basis for the OPUC to limit the application of FCC Rules 51.703(b) and 51.709(b), and the broad prohibitions those rules contain on origination (and facilities) charges, simply on the basis of whether the traffic is deemed to be "local" or not.

C. Qwest's Proposed Nonrecurring Charges Are Also Prohibited by Rule 51.703(b) and 51.709(b).

Qwest also points to the *Wantel/Pac-West* decision to support its argument that nonrecurring charges ("NRCs") for facilities used to carry Qwest-originated traffic should be exempt from the general prohibition on charges under FCC Rule 51.703(b) and 51.709. Qwest Brief at 20-21. Qwest is wrong. *Wantel* was interpreting preexisting

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[24] *See Wantel,* Order No. 05-874 at 30-31.

interconnection agreement language; it was not determining what was required by or appropriate under federal law *ab initio.*

So, the question is whether – in the absence of contract language to the contrary – FCC rules permit Qwest to charge Universal for the non-recurring costs of the trunking arrangements that Qwest sets up to get Qwest-originated traffic to Universal. Clearly, they do not. As noted above and in Universal's opening brief, the basic idea behind intercarrier compensation is cost causation. Calling parties cause the costs of traffic they originate, so it is perfectly appropriate for the calling parties' network to pay those costs – and inappropriate to pass them on to the called parties' network.[25] As the FCC has explained:

> Currently, our rules in this area follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers. Thus, through reciprocal compensation payments, ***the cost of delivering LEC-originated traffic is borne by the persons responsible for those calls, the LEC's customers.*** As we stated in the Local Competition Order, "[t]he local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call." We reflected this thinking in ***section 51.703(b), which bars a LEC from charging for the delivery of traffic that originates on the LEC's own network.***[26]

In this regard, it bears emphasis that the need to incur these costs in the first place is driven by Qwest's desire to minimize the traffic burden on its tandem switches. It would not be unlawful or unreasonable for Universal to simply establish a single large trunk group between its network and Qwest's tandem switch in a LATA, and demand

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25 *See Texcom,* 16 FCC Rcd 21493, 21495 at ¶ 6 (2001).

26 *Id.* (emphasis added) (internal citations omitted).

that Qwest route all Universal-bound traffic though Qwest's tandem. That said, good network engineering practice is to establish direct trunks between Universal's network and particular Qwest end offices when traffic reaches a certain volume threshold, and Universal has done so with Qwest. But the real beneficiary of establishing separate trunks for Qwest-originated traffic is Qwest itself, because the direct trunks mean that the traffic never "hits" the Qwest tandem –saving Qwest money. It makes no sense to expect ***Universal*** to pay Qwest to implement an arrangement that ***Qwest*** needs in order to lower its own costs.

D. The Collateral Estoppel Doctrine Precludes Qwest From Relitigating This Issue

The Commission does not even have to reach Qwest's arguments on the trunking cost issues, because the parties are precluded from relitigating them in this proceeding. By instituting this case and again seeking to avoid its transport obligations, Qwest is effectively seeking to relitigate the issue despite the earlier, binding Oregon federal court decision going against Qwest.[27] Because Qwest litigated the identical issue leading to the earlier federal court decision, it is precluded from relitigating the same issue here again under the doctrine of issue preclusion (collateral estoppel).[28]

In *Nelson v. Emerald People's Utility Dist.*,[29] the court identified five requirements essential to the application of issue preclusion:

(1) the issue in the two proceedings is identical;

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[27] *Qwest Corp. v. Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS 28340 (D. Or. Dec. 15, 2004).

[28] *See Reynaga v. Sun Studs, Inc.*, 97 Fed. Appx. 729, 730 (9th Cir. 2004) (citing *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (noting that "[o]nce an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case")).

[29] 318 Or. 99 (1993).

> (2) the issue actually was litigated and was essential to a final decision on the merits in the prior proceeding;
> (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue;
> (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and
> (5) the prior proceeding was the type of proceeding to which this court will give preclusive effect.[30]

The transport cost issue that has been the subject of litigation and much debate between Universal and Qwest satisfy the collateral estoppel doctrine.

First, Qwest litigated this issue in an earlier proceeding before the Oregon federal district court, Civil No. 04-6046-AA.[31] Judge Aiken's Order characterizes the issues as follows: "[Whether] Universal must pay for interconnection facilities on Qwest's side of the POI."[32] This is precisely the issue under consideration in this proceeding.

Second, this issue actually was litigated and essential to a final decision on the merits in the prior proceeding, as evidenced by Judge Aiken's decision The federal district court's interpretation of the parties' obligations under the *ISP Remand Order* and the parties' obligations under § 51.703(b) and § 51.709(b) were essential to the court's final decision on the merits. The court rejected Qwest's "broad application of [the] *ISP Remand Order*" and determined that the *ISP Remand Order* did not alter existing transport obligations, including the applicability of § 51.703(b) and § 51.709(b).[33] Nevertheless, Qwest now claims in this proceeding that "the term 'telecommunications

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30 *Id.* at 104 (internal citations omitted).

31 *See Qwest Corp. v. Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS at *4-6.

32 *Id.* at *9.

33 *See id.* at *4-6.

traffic' does not include Internet traffic," and therefore ISP bound traffic should be removed from RUF calculations.[34]

Third, Qwest, the party that Universal seeks to preclude, already had a full and fair opportunity to be heard on this issue during the prior federal court case. Qwest had the opportunity to file a complaint, reply to Universal's counterclaim, a summary judgment motion, a response to Universal's summary judgment motion, a reply to Universal's opposition filing, and a response to Universal's letter submitting supplemental authority. Qwest also had the ability to depose Universal employees such as Jeff Martin and Stephen Roderick. Therefore, Qwest had numerous opportunities to express its views on this key issue.

Fourth, because Qwest was a party to the prior federal proceeding, the fourth requirement, the party sought to be precluded was a party to the prior proceeding, is satisfied.

Finally, the fifth requirement is satisfied, because decisions rendered by the United States District Court for the District of Oregon are afforded preclusive effect.[35] There is no issue as to whether this requirement is satisfied, as it does not require giving preclusive effect to an administrative decision.[36]

Accordingly, Qwest should be precluded from litigating these issues here.

E. Conclusion and Summary on Issue 1

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[34] Qwest Brief at 13-15.

[35] Oregon courts have found that there is ***no*** "absolution prohibition of adoption of findings of fact of a federal court, a jurisdiction foreign to the State of Oregon." *Lund v. Dep't. of Revenue*, 17 Ore. Tax 480, 485 (Ore. Tax Court, Mag. Div., 2004).

[36] *Nelson*, 318 Or. at 104, n.4.

As established by the Section 252 of the Telecommunications Act, the OPUC's job in this proceeding is to resolve open issues and impose conditions upon the parties to the agreement to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the FCC pursuant to section 251."[37] In other words, the OPUC must issue a ruling that requires the parties to establish an interconnection agreement with terms and conditions which meet the requirements of federal law, including FCC regulations.

As a federal court in Oregon has conclusively determined, FCC regulations prohibit the precise charges that Qwest is attempting to include in the parties' agreement here. Because the federal court has found that such charges are unlawful, as a matter of federal law, the OPUC must heed that ruling and reject Qwest's proposed language. Instead, the OPUC should approve Universal's proposed language because that language reflects federal law and FCC regulations including 51.703(b) and 51.709(b).

II. Issue 2: Reciprocal Compensation for All ISP-Bound Traffic

A. The *ISP Remand Order* is Not Limited to Local ISP-bound Traffic.

Qwest notes that one of the key issues in this case is whether the *ISP Remand Order* applies only to "local" ISP-bound traffic (*e.g.*, ISP traffic that originates and terminates at physical locations in the same local calling area).[38] Qwest incorrectly argues that the *ISP Remand Order*, as well as other state and federal decisions, state that only "local" ISP traffic is subject to the FCC's interim compensation regime and, therefore, Qwest's proposed language should be adopted. Qwest's argument is based on a clearly incorrect reading of the *ISP Remand Order* and the cases that follow.

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37 *See* 47 U.S.C. § 252(c) ("Standards for Arbitration").

38 Qwest Brief at 22.

Universal dealt with this claim in detail in its opening brief.[39] We emphasize certain points below, however, in direct response to Qwest's claims. Qwest incorrectly argues that when the FCC stated that it was "reconsider[ing] the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs),"[40] the FCC did not mean that it was addressing ***all*** traffic delivered to ISPs, but only "local" traffic delivered to ISPs. No such limitation appears in any decisional portion of the FCC's *ISP Remand Order*. Indeed, such a limitation would have made little sense in an order in which the FCC called its use of the term "local traffic" in the *Declaratory Ruling* and *Local Competition Orders* a "mistake" and rejected the "local"/"long distance" dichotomy as defining the scope of reciprocal compensation.[41] Moreover, the FCC in the *ISP Remand Order* was responding to the D.C. Circuit's observation that a call to an ISP does not fit clearly into either the local or long distance category, and thus had good reason to avoid invoking categorization into "local" or "long distance" traffic as a basis for setting ISP-bound intercarrier compensation. Qwest would have this Commission insert language into the FCC's *ISP Remand Order* that simply is not there. Instead, the Commission should recognize that the *ISP Remand Order* applies to ***all*** ISP-bound traffic, including VNXX traffic, and expressly preempts state authority to determine the intercarrier compensation rates for such traffic.

Universal submits that the Commission has already effectively acknowledged this point in *Wantel*. As noted above, *Wantel* recognizes that the ISP Remand Order rejects

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39 *See* Universal Initial Brief at 24-36.

40 *ISP Remand Order* at ¶1.

41 *Id.* at ¶ 46.

the notion of "local" traffic as relevant to reciprocal compensation; it recognizes that the D.C. Circuit, in *Worldcom v. FCC*, obliterated the FCC's effort to exclude "information access" --ISP-bound calls—from the scope of Section 251(b)(5); and it recognizes that the 9th Circuit, in *Pacific Bell v. Pac-West*, has confirmed both that there is no "information access" carve-out and that reciprocal compensation is not limited to "local" traffic.[42] In light of Qwest's refusal to acknowledge these points, however, the Commission in this case should re-affirm them and reject Qwest's contract language that would ignore those findings.

In this regard, the court in *Southern New England Telephone Co. (SNET) v. MCI WorldCom Communs., Inc.*,[43] discussed in Universal's opening brief, the United States District Court for the District of Connecticut recently addressed this precise issue and refused to insert words of limitation where none exist. Like Qwest here, SBC (owner of Southern New England Telephone Company, the ILEC) argued that the *ISP Remand Order* "does not cover all ISP-bound traffic, but only covers 'local' ISP-bound traffic."[44] The court, however, concluded that the *ISP Remand Order* applies to "*all* ISP-bound traffic, without exception."[45]

In rejecting SBC's arguments, the court held that "the language of the *ISP Remand Order* is unambiguous – the FCC concluded that ***section 201*** gave it jurisdiction over all ISP-bound traffic, and it proceeded to set the intercarrier compensation rates for

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42 *See Wantel* at 25, 30-32.

43 359 F. Supp. 2d 229 (D. Conn. 2005).

44 *SNET*, 359 F. Supp. 2d at 230.

45 *Id.* at 230 (quoting *SNET v. MCI WorldCom Communs., Inc.*, 353 F. Supp. 2d 287, 289 (D. Conn. 2005)).

such traffic."[46] The court noted that "the FCC did not use the term 'local ISP-bound' traffic and did not impose any explicit restriction on the term 'ISP-bound traffic.'"[47] The court also found SBC's argument implausible, noting "the FCC expressly disavowed the use of the term "local" making it difficult to believe the Commission nevertheless intended that term to be implicitly read back into its ruling."[48]

In the face of the "plain language" of the FCC's order, SBC nonetheless argued that "in a number of places the language of the *ISP Remand Order* makes clear that the FCC was discussing local ISP-bound traffic."[49] The *SNET v. MCI WorldCom* court recognized, however, that the passages cited by SBC – like the passages relied on by Qwest – were not decisional. As the *SNET* court explained, "these statements indicate the FCC began by addressing the question whether ISP-bound traffic that would typically be subject to reciprocal compensation – which at the time would have consisted of 'local' ISP-bound traffic – was nevertheless exempt."[50] The court recognized, however, that "[w]hat these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*."[51] Noting that the FCC "(a)

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46 *Id.* at 231 (emphasis in original).

47 *Id.*

48 *Id.*

49 *Id.* SBC pointed to paragraph 13 of the *ISP Remand Order*, in which the FCC stated that, after it ruled in the 1996 *Local Competition Order* that section 251(b)(5) reciprocal compensation applied only to traffic that "originates and terminates within a local area," "the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user to an ISP in the *same local calling area*." *SNET*, 359 F. Supp. 2d at 231 (quoting *ISP Remand Order* at ¶13). SBC also pointed to the D.C. Circuit's statement in *WorldCom*, also relied upon by Qwest here, that "[I]n the order before us the Federal Communications Commission held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers ('ISPs") located within the caller's local calling area." *SNET v. MCI WorldCom*, 349 F. Supp. 2d at 231.

50 *Id.*

51 *Id.* at 232.

disclaimed the use of the term 'local,' (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is 'information access,' (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic," the court concluded that "though the FCC started with the question whether 'local' ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that ***all*** *ISP-bound traffic* was in a class by itself."[52] This "class by itself" – "all ISP-bound traffic" – was then subject to the intercarrier compensation mechanism in the *ISP Remand Order*.

The United States District Court for the Northern District of Illinois, in *AT&T v. Illinois Bell*, also concluded that the *ISP Remand Order* applied to all ISP-bound traffic and did not permit the Illinois Commerce Commission to require bill-and-keep for ISP-bound VNXX traffic while retaining compensation at the FCC's $.0007 rate cap for non-VNXX ISP-bound and voice traffic.[53] The court ruled that the *ISP Remand Order* requires that the rate charged for all ISP-bound traffic, whether VNXX traffic or otherwise, must be the same as for traffic under Section 251(b)(5).[54] The court could not have reached this decision without also concluding that the *ISP Remand Order* applies to all ISP-bound traffic, specifically including VNXX traffic.

The conclusion that the *ISP Remand Order* addressed all ISP-bound traffic, not just "local" ISP-bound traffic, is further buttressed by the FCC's statements both at the

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52 *Id.* (emphasis added).

53 *AT&T Communs. Co. v. Illinois Bell Telephone Co.*, 2005 WL 820412, No. 04 C 1768 (N.D. Ill. Mar. 25, 2005). In that decision, the court referred to VNXX traffic as "ISP-bound FX [foreign exchange] traffic."

54 *Id.*

time of and subsequent to the *ISP Remand Order*. First, the FCC acknowledged in the *ISP Remand Order* that it was a mistake to use the phrase "local traffic" in its prior decisions.[55] In fact, in the *ISP Remand Order*, the FCC amended its reciprocal compensation rules (47 C.F.R. Part 51, Subpart H) by eliminating the word "local" in each place it appeared.[56] Second, in its *Intercarrier Compensation NPRM*, the FCC described the *ISP Remand Order* as follows:

> In a related order that we are adopting today ("*ISP Intercarrier Compensation Order*"),[57] we address intercarrier compensation for traffic that is specifically bound for Internet service providers ("ISPs"). We adopt interim measures that, for the next three years, will significantly reduce, but not altogether eliminate, the flow of intercarrier payments associated with delivery of dial-up traffic to ISPs.[58]

The FCC did not in any way indicate that the scope of the *ISP Remand Order* was limited to "local" ISP-bound traffic. To the contrary, it characterized the *ISP Remand Order* as addressing "intercarrier compensation for traffic that is specifically bound for" ISPs – with no concern or qualification about where those ISPs might be located.[59]

Third, the FCC's description of the *ISP Remand Order* in its *Core Forbearance Order*, gave no indication that the *ISP Remand Order* was limited to "local" ISP-bound traffic. To the contrary, the FCC clearly refers to "ISP-bound traffic" or "traffic bound for Internet Service Providers" without further distinction.[60]

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55 Universal Initial Brief at 20.

56 *Id.*

57 *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*").

58 *Intercarrier Compensation NPRM* at ¶ 3 (footnote citing *ISP Remand Order* omitted).

59 *See id.* at ¶ 115 (noting ILEC claims that VNXX arrangements are "inappropriate" and seeking comment).

60 *See, e.g., Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, WC Docket No. 03-171

Further, when the FCC's Wireline Competition Bureau itself acted as an arbitrator in lieu of the Virginia Corporation Commission, the Bureau never gave any indication that the scope of the *ISP Remand Order* extended only to "local" ISP-bound calls, rather than all ISP-bound calls.[61] To the contrary, the FCC's Wireline Competition Bureau required that all calls – whether or not ISP-bound – be rated according to the NPA-NXX of the telephone numbers associated with the calls.[62] Rating all calls according to the NPA-NXX of the telephone numbers associated with the calls treats all ISP-bound traffic exchanged between two LECs according to the interim regime established in the *ISP Remand Order*, without distinguishing between a physically "local" ISP and a distant ISP.

B. The *ISP Remand Order* and Overwhelming Federal Authority Support Universal's Reading of the FCC's Reciprocal Compensation Rules

In the second portion of its argument, Qwest lays out what it believes were the key decisions leading up to the *ISP Remand Order* and those following the Order, and attempts to explain how these decisions support its position. While Qwest's argument does mention the key decisions, it omits key points about the *WorldCom* decision and ultimately does not justify its claim that federal law supports Qwest's reading of the FCC's reciprocal compensation rules. In its review of the *WorldCom* decision, Qwest focused on the D.C. Circuit's statement: "In the order before us the [FCC] held that

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at ¶ 4 (rel. Oct. 18, 2004) (describing "traffic bound for Internet Service Providers" as not subject to the reciprocal compensation requirements of section 251(b)(5) under the *ISP Remand Order*).

61 *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd. 27039, 27158-76 (¶¶ 244-85) (2002) (discussing intercarrier compensation for ISP-bound traffic) ("*Virginia Arbitration Order*").

62 *Id.* at ¶¶ 286-88.

under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to ISPs located within the caller's local calling area.[63] However, Qwest neglects to explain that the court eventually rejected the FCC's central legal claim that would have arguably permitted exclusion of VNXX-routed ISP-bound traffic.

As Universal noted in its initial brief, the FCC, in its *ISP Remand Order*, ruled that "information access" traffic (and other traffic identified § 251(g)) is "carved out" of the reciprocal compensation obligation of § 251(b)(5),[64] and it used its authority under 47 U.S.C. § 201 to establish a regime under which ISP-bound traffic and "normal" traffic are compensated at the same rates.[65] However, as Universal also noted, the D.C. Circuit found that the FCC was "precluded" from establishing a compensation regime under Section 251(b)(5), but allowed the new regime to survive simply because that specific regime – identical compensation for ISP-bound traffic and other traffic, but at lower rates – could probably be justified under §§ 251(b)(5) and 252(d)(B)(i). Reading the *WorldCom* decision in light of the *ISP Remand Order*, it is clear that the court only determined that "information access" traffic was not covered by § 251(b)(5). Without that portion of the analysis, the court eliminated any logical basis for excluding ***any*** "information access" traffic from reciprocal compensation under § 251(b)(5).

Indeed, Qwest also conveniently ignores both the FCC's complete revision of its reciprocal compensation rules to delete references to the term "local" as well as the FCC's repeated disavowal of that term, which it characterized as "ambiguous" and a

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63 Qwest Brief at 27-28 (citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002)).

64 *ISP Remand Order* at ¶¶ 34-41.

65 *Id.* at ¶¶ 77-94.

"mistake." Given that the only thing the *WorldCom* court did was set aside the FCC's reliance on Section 251(g), it follows that these aspects of the FCC's order remain fully effective. Qwest has simply ignored them.

Qwest explained, correctly, that the *WorldCom* court's ruling is binding on other courts and commissions. That holding, however, is that the FCC's interim intercarrier compensation plan –which disavows the term "local" and which provides identical compensation for ISP-bound and other traffic—should survive.

C. Universal's Analysis, Not Qwest's, Is The Interpretation That Is Consistent With Not Only Federal Decisions, But Also Oregon Decisions And Other Authority.

As Universal has explained throughout its initial brief, and its reply, Universal's interpretation of the interim compensation regime established in the *ISP Remand Order* is consistent with federal law, Judge Aiken's decision in *Universal Telecom v. Qwest Corp.*, as well as several other decisions.

For example, the Washington Utilities and Transportation Commission (WUTC) held that the *ISP Remand Order* applied to all ISP-bound traffic, not just "local" ISP-bound traffic. Responding to CenturyTel's argument that references in the *ISP Remand Order* and *WorldCom* decision to "local" traffic demonstrated that the *ISP Remand Order* only applied to "local" traffic, the WUTC stated "[t]he substance of the [*ISP Remand Order* and *WorldCom*] decisions makes no distinction based on the location of the ISP's modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic."[66] The Commission, therefore, upheld the

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[66] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶ 10 (Feb. 28, 2003), *affirming* Fifth Supplemental Order, Arbitrator's

arbitrator's decision rejecting CenturyTel's argument.[67] More recently, two Administrative Law Judges at the WUTC recently rejected the same arguments by Qwest, citing both the WUTC's decision in the *Level 3 – CenturyTel Order* and the *SNET v. MCI WorldCom* decision.[68] The New Hampshire PUC has also concluded that intercarrier compensation for ISP-bound VNXX traffic, not just local ISP-bound traffic, was governed by FCC rules, and thus its dockets concerning VNXX "exclude[] any ruling regarding inter-carrier compensation for ISP-bound traffic."[69]

D. Qwest's Argument Fails to Recognize Universal's Costs Associated with the Transport and Switching of Qwest Traffic.

As Universal noted in its initial brief, all traffic generated by Qwest end users to Universal's customers is exchanged between the Qwest and Universal networks at a POI within a LATA. Qwest has the obligation to bring its traffic to the POI, regardless of where it originated within the LATA. From that point, Universal is responsible for all the transport costs associated with delivering the call to the called party. This is true regardless of whether the Qwest user generates ISP-bound traffic that is "truly local" or VNXX traffic.[70] If Universal expends the same financial costs for switching and

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Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) ("*Level 3-CenturyTel Order*").

67 *Id.*

68 *See Pac-West Telecom, Inc. v. Qwest Corp.*, Docket No. UT-053036, Order No. 03, Recommended Decision to Grant Petition at ¶¶ 31, 37 (Aug. 23, 2005); *Level 3 Communications, LLC v. Qwest Corp.*, Docket No. UT-053039, Order No. 03, Order Denying in part and Granting in part Level 3's Motion for Summary Determination; Denying in part and Granting in part Qwest's Motion for Summary Determination, at ¶¶ 34-35 (Aug. 26, 2005) ("*Level 3 – Qwest Washington Decision*").

69 *See Investigation as to Whether Certain Calls are Local*, Final Order, Order No. 24,080, 2002 N.H. PUC LEXIS 165, *46-47 (Oct. 28, 2002) ("*NH VNXX Order*").

70 *See* Qwest Response to Interrogatory Request No. 6. In this Request, Qwest was asked to describe why Universal's costs of switching terminating traffic would differ as between terminating voice traffic and ISP-bound traffic. In its Response, Qwest did not point to any

transport of truly local ISP-bound traffic and VNXX ISP-bound traffic, then Universal should be compensated in the same fashion for those costs. While Universal's costs for transporting the VNXX call might even be greater than the costs for transporting the truly local call,[71] Universal does not seek any additional compensation.

Further, Judge Aiken's analysis as to whether VNXX traffic was subject to reciprocal compensation was founded on the parties' use of the word "local" in a preexisting contract.[72] In the parties' previous interconnection agreement, they had agreed to limit reciprocal compensation to "local" traffic, which they were permitted to do under the contract, and which Judge Aiken interpreted to include local, but not "VNXX", ISP-bound calls. Here, however, we are arbitrating the terms of a brand new interconnection agreement and Universal wants the new contract to reflect the current state of federal law.

E. Conclusion and Summary on Issue 2.

Qwest's argument that the FCC's intercarrier compensation regime does not apply to Universal's VNXX traffic is fundamentally flawed. Qwest neglects established federal rules and decisions when it attempts to argue that the *ISP Remand Order* is limited to "truly local" traffic. Qwest provides no legal basis for this argument and ignores clear precedent favoring Universal's interpretation of the FCC's reciprocal compensation rules.

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reason why the costs might differ as between truly local ISP-bound traffic and VNXX ISP-bound traffic. Qwest's response spoke to ***all*** ISP-bound traffic.

71 *Qwest v. Universal,* 2004 U.S. Dist. LEXIS at * 25-29.

72 Qwest has acknowledged that Universal may incur high switch termination costs due to the type of traffic Qwest sends to Universal. See Qwest Response to Universal Interrogatory No. 01-006 (Attachment 4).

III. Conclusion

For the reasons stated herein, the Arbitrator should adopt Universal's proposed contract language, and reject Qwest's proposed language.

Respectfully submitted,

By: _____

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November 4, 2005

ATTACHMENT 1: *Qwest Corp. v. Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS 28340 (D. Or. Dec. 15, 2004).

LEXSEE 2004 U.S. DIST. LEXIS 28340

QWEST CORPORATION, a Colorado corporation, Plaintiff, v. UNIVERSAL TELECOM, INC., dba US POPS, fka UNIVERSAL TELECOMMUNICATIONS, INC., an Oregon corporation, Defendant.

Civil No. 04-6047-AA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2004 U.S. Dist. LEXIS 28340

December 15, 2004, Decided

LexisNexis(R) Headnotes

COUNSEL: [*1] Erin Lagesen, Stoel Rives, LLP, Portland, OR; Ted D. Smith, Stoel Rives, LLP, Salt Lake City, Utah, Attorneys for Plaintiff.

Joel S. DeVore, Luvaas Cobb, Eugene, OR; John C. Dodge, Adam S. Caldwell, K.C. Halm, Cole, Raywid & Braverman, LLP, Washington, DC, Attorneys for defendant.

JUDGES: Ann Aiken, United States District Judge.

OPINIONBY: Ann Aiken

OPINION:

OPINION AND ORDER

AIKEN, Judge:

Plaintiff, Qwest Corporation ("Qwest"), filed this breach of contract and unjust enrichment action against defendant Universal Telecom, Inc. ("Universal"). Universal brought a counter claim against Qwest also alleging breach of contract and unjust enrichment. Both parties allege to have performed services for the other and claim that the other failed to pay for such services as required by their contract. The parties have cross-moved for summary judgment. The parties submitted extensive briefing for the court, and then on December 6, 2004, the court heard oral argument on these motions.

BACKGROUND

Qwest is an incumbent local exchange carrier ("ILEC") which provides local telephone services in Oregon. Universal is a competitive local exchange carrier ("CLEC") which provides telecommunication [*2] services in Oregon. A local exchange carrier ("LEC") is a provider of telephone services. An ILEC is a provider of telephone services which was in operation before the telephone industry was deregulated; while a CLEC is a new competitor who began providing telephone services after the industry was deregulated. Universal provides services to internet service providers ("ISPs") by offering local telephone numbers which the ISPs' customers may call using their computers. Universal receives these calls from ISPs' customers, who are seeking to access the internet, converts the calls to internet protocol, and delivers the internet protocol to different internet locations, as instructed by the customer's computer. 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.

In 1999, Qwest and universal entered into an interconnection agreement which set forth how the parties would connect their networks, exchange traffic, finance jointly used facilities, and compensate each other [*3] for delivering traffic received from the other party. The agreement between Qwest and Universal was not negotiated. Instead, pursuant

to federal law, Universal adopted a previous agreement ("MFS agreement") that Qwest had entered into with Metropolitan Fiber Systems. Thus the MFS agreement became the interconnection agreement between Universal and Qwest (hereafter "the agreement"). Under the agreement, the parties have interconnected their networks through a single point of interconnection ("POI") in each of the two Oregon Local Access and Transportation Areas ("LATA").

Telecommunications traffic that begins on one parties network but is destined for the other parties network must pass through the POI. This is known as "originating" the call. Calls originate when a particular LEC's customer calls a customer of a different LEC. Once the call passes through the POI, the receiving party takes over responsibility for delivering the call to its final destination. This is known as "terminating" the call. The exchange of telecommunications traffic allows a customer of one LEC to call a customer of a different LEC.

Pursuant to the agreement, the parties have connected their networks using **[*4]** local interconnections service ("LIS") circuits; which have been provided by Qwest. Qwest has also provided other transmission facilities including two-way trunks - also known as direct trunked transport facilities ("DTT")-, entrance facilities ("ETs"), and multiplexing facilities ("MUX"). Qwest initiated this action alleging that the agreement requires Universal to pay Qwest for facilities used to exchange telecommunications traffic. Qwest further alleges the agreement requires Universal to pay Qwest "nonrecurring charges" for the installation of the interconnection facilities.

In addition to the interconnection facilities described above, Qwest has provided Meet Point facilities that allow Universal to interconnect its network with LECs other than Qwest. Specifically, Qwest provided a DS-3 connection between a Universal facility in Portland, Oregon and a location in Beaverton, Oregon. Qwest has also provided a DS-3 connection between a Universal facility in Eugene, Oregon and a location in Coos Bay, Oregon. Qwest asserts that these Meet Point facilities are not provided pursuant to the agreement and, therefore, should be billed under federal tariff, FCC-1. Universal does not dispute **[*5]** that it must pay for these facilities but claims that the facilities should be billed as provided in the Qwest/Universal interconnection agreement. Universal has failed to pay Qwest the full amount billed for the Portland-Beaverton connection.

Universal's claim involves charges for terminating traffic that originated on Qwest's network. Universal asserts that the agreement requires Qwest to pay Universal for terminating all traffic that originates on Qwest's network. This payment for terminating traffic that originated on another LEC's network is known as reciprocal compensation. Qwest's primary argument is that Qwest is not required to pay reciprocal compensation to Universal because all exchanged traffic is ISP bound traffic and such traffic is not subject to reciprocal compensation.

All traffic at issue in this case originated on Qwest's side of the POI, traveled over Qwest's network, was handed off to Universal at the POI, and terminated on Universal's network. No traffic was originated by Universal.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, **[*6]** if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)*. The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id. at 324*.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of ma-

terial fact should be resolved against the moving party; [*7] and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical, 809 F.2d at 630.*

APPLICABLE PRINCIPLES OF CONTRACT LAW

"[Interconnection] agreements themselves and state law principles govern the questions of interpretation of the contracts and the enforcement of their provisions." *Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1128 (9th Cir. 2003)* (quoting *Southwestern Bell v. Pub. Util. Comm'n., 208 F.3d 475, 485 (5th Cir. 2000)).* "As a general rule the construction of a contract is a question of law for the court." *Hekker v. Sabre Construction Co., 510 P.2d 347, 349, 265 Or. 552 (1973).* "Unambiguous contracts must be enforced according to their terms . . ." *Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761, 764, 319 Or. 342 (1994).* To determine if a contract provision is ambiguous, the court may consider "the circumstances under which it was made, including the situation of the subject and of the parties . . . ." *Or. Rev. Stat. § 42.220.* "Words or terms of a contract are ambiguous [*8] when they reasonably can, in context, be given more than one meaning." *Pacific First Bank, 876 P.2d at 764.* The interpretation of an ambiguous contract is to be decided by the trier of the fact. *Meskimen v. Larry Angell Salvage Co., 592 P.2d 1014, 1018, 286 Or. 87 (1979).*

CHOICE OF LAW

The agreement "shall be interpreted solely in accordance with the terms of the Act and the applicable state law in the state where the service is provided." Qwest Compl., Ex. 1 at 79. "In the performance of their obligations under this agreement, the parties shall act in good faith and consistently with the intent of the Act." Id. at 8. The "Act" is defined as "the Communications Act of 1934 (*47 U.S.C. 151 et seq.*) as amended by the Telecommunications Act of 1996, and as . . . interpreted in . . . rules and regulations of the FCC or a Commission within its state of jurisdiction." Id. at 9.

DISCUSSION

Qwest asserts that the agreement requires Universal to pay Qwest for the LIS circuits and other interconnection facilities Qwest provides and that Universal has breached the contract by failing to pay for them. Universal asserts [*9] that the agreement requires Qwest to pay Universal for terminating calls that originated on Qwest's network and that Qwest has breached the contract by failing to make such payments.

1. Qwest's claim that Universal must pay for interconnection facilities on Qwest's side of the POI

"A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." *47 C.F.R. § 51.703(b).* An originating LEC may not impose charges on a terminating LEC for facilities, located on the originating LEC's side of the POI, used solely to transmit telecommunications traffic from the originating LEC's network to the terminating LEC's network. *TSR Wireless, LLC v. US West Communications, Inc., 15 FCCR 11166, 11189 P40 (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)* (hereinafter "TSR Wireless"). 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.

However, [*10] *§ 51.709(b)* is an exception to this general prohibition. "The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by the interconnecting carrier to send traffic that will terminate on the providing carrier's network." *47 C.F.R. § 51.709(b).* n1 Thus, a ILEC may recover the cost of the interconnection facilities from a CLEC but only in proportion to the amount of traffic that originates on the CLEC's network and terminates on the ILEC's network. Overall, though, the FCC "reads *§ 51.703(b)* as entirely congruent with *§ 51.709(b)* confirming the ban on charges, whether labeled as for traffic or for facilities, for LEC-originated calls." *Qwest Corp. v. F.C.C., 252 F.3d at 468* (discussing charges imposed on a CLEC for facilities used to send only one-way traffic from the ILEC to the CLEC).

n1 The applicable relative use provision of the agreement essentially tracks the requirements of *47 C.F.R. § 51.709(b)*. See Qwest Compl., Ex. 1 at 18.

[*11]

Qwest argues that *§ 51.703(b)* and *§ 51.709(b)* apply only to telecommunications traffic and that ISP bound traffic is not telecommunications traffic. Therefore, because all of the traffic exchanged between the parties is ISP bound traffic, the restrictions of *§ 51.703(b)*, *§ 51.709(b)*, and TSR Wireless do not apply to facility charges imposed on Universal by Qwest. To support its argument, Qwest cites *In re Implementation of Local Competition Provisions in Telecomms. Act of 1996, 16 FCC Rcd 9151, 9170* remanded sub. nom. *Worldcom, Inc. v. F.C.C., 351 U.S. App. D.C. 176, 288 F.3d 429 (D.C. Cir. 2002)* (hereinafter "ISP Remand Order"), for the proposition that ISP traffic is not telecommunications traffic but is information access. In ISP Remand Order, the FCC did rule that ISP bound traffic was not telecommunication traffic for the purpose of determining the scope of reciprocal compensation requirements under *47 U.S.C. § 251(b)(5). ISP Remand Order. 16 F.C.C.R. at 9163.*

However, Qwest is mistaken in its broad application of *ISP Remand Order.* In ISP Remand Order, the FCC explicitly **[*12]** stated that its ruling "does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law provisions." *Id. at 9189.* The FCC further stated that the interim compensation regime established in ISP Remand Order "affects only 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 intercarrier agreements, such as obligations to transport traffic to points of interconnection." Id. at n. 149. Therefore, the restrictions of *§ 51.703(b)* and *§ 51.709(b)* remain in full effect.

Qwest asserts that its interpretation of ISP Remand Order is correct and cites *Level 3 Communications v. Colorado Pub. Util., 300 F. Supp. 2d 1069 (D. Colo. 2003)*, and the OPUC Level 3 Decision n2 for further support. In Level 3 Communications, the Colorado District Court held that ISP Remand Order excluded ISP bound traffic from the definition of telecommunications traffic; instead designating it as information access. *300 F. Supp. 2d at 1076.* **[*13]** Based on this premise, the court went on to hold that ISP bound traffic was not subject to the restrictions of *§ 51.703(b)* and *§ 51.709(b). Id. at 1076-1078.* In the OPUC Level 3 Decision, the Oregon Public Utility Commission ("OPUC") affirmed an arbitrator's decision that ISP bound traffic should not be considered when determining the cost to be born by the CLEC for interconnection facilities located on the ILEC's side of the POI. *2001 Ore. PUC LEXIS 458,* * 5. The OPUC relied on ISP Remand Order in affirming the arbitrator's decision. Id. at * 6-7.

n2 In re the Petition of Level 3 Communications, LLC for arbitration Pursuant to Section 252(b) of the Communications Act *of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corp. Regarding Rates, Terms, and Conditions for Interconnection., Arbitrator's Decision, 2001 Ore. PUC LEXIS 458* (Sept. 13, 2001) (hereafter "OPUC Level 3 Decision").

I find these cases inapplicable. Both cases **[*14]** involved the arbitration of proposed interconnection agreements that were established after the issuance of ISP Remand Order. *Level 3 Communications, 300 F. Supp. 2d at 1071-72*; OPUC Level 3 Decision, *2001 Ore. PUC LEXIS 458,* *1. Unlike the present case, neither involved disputes about preexisting contracts. See Id. Here, the parties have a binding contract which contains no open issues in need of arbitration. The contract was established in 1999 prior to the issuance of ISP Remand Order. Under the clear language of the decision, ISP Remand Order "does not alter existing contractual obligations . . . ." *ISP Remand Order. 16 F.C.C.R. at 9189.* Furthermore, ISP Remand Order "does not alter carriers' other obligations under [FCC] Part 51 rules . . . ." Id. at n. 149. Therefore, the cases cited by Qwest are distinguishable.

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 **[*15]** on Universal's network. For these reasons, Qwest's claim as to the charges for LIS circuits, DTT, EF, and MUX interconnection facilities fails.

2. Qwest's claim that Universal must pay nonrecurring charges for the installation of interconnection facilities

Qwest alleges that the agreement requires Universal to pay nonrecurring charges for the installation of the interconnection facilities and that Universal has failed to pay a portion of these charges. Qwest further claims that in June 2003 the OPUC approved the nonrecurring charges, as they complied with OPUC Order 03-209. Mason Aff. in Supp. of Qwest's Mot. for Summary Judgment, P12. Universal failed to address these claims either through its written briefs or at oral argument. If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Celotex Corp., 477 U.S. at 323*. Here, by failing to respond to Qwest's claims, Universal did not meet its burden under Celotex. Therefore, the court credits the testimony of Don Mason and finds that the nonrecurring charges were proper and approved **[*16]** by the OPUC.

3. Qwest's claim that Universal must pay for Meet Point Facilities

A local exchange carrier has:

> the duty to provide, to any requesting telecommunications carrier for the provision of telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and this section and *section 252* of this title.

47 U.S.C. § 251(c)(3).

The parties agreement:

> sets forth the terms, conditions and prices under which [Qwest] agrees to provide . . . certain Unbundled Network Elements . . . to Universal . . . for Universal's own use or for resale to others. The Agreement also sets forth the terms, conditions and prices under which the parties agree to provide interconnection and reciprocal compensation for the exchange of local traffic between [Qwest] and Universal for the purposes of offering telecommunications services.

Qwest Compl., Ex. 1 at 8. The specific Unbundled Network Elements Qwest agrees to "provide [are] **[*17]** all technically feasible transmission capabilities, such as DS1, DS2, and Optical Carrier levels . . . that Universal could use to provide telecommunications services." Id. at 65.

Qwest has provided Meet Point interconnection facilities which Universal used to interconnect with Verizon, another LEC. Qwest has billed for these facilities under a federal tariff instead of under the agreement. Qwest argues that the agreement merely governs the terms and conditions for facilities used by Universal to interconnect with Qwest and that facilities used to connect with another LEC fall outside the agreement. Qwest states:

> the Agreement "sets forth the terms, conditions and prices under which the parties agree to provide interconnection and reciprocal compensation *for the exchange of local traffic between USWC* [Qwest] and *Universal* for purposes of offering telecommunications services."

Qwest's Reply Memo at 31-32 (internal quotations omitted) (emphasis in original). However, Qwest quotes only a portion of the agreement and ignores the proceeding sentence. Further, Qwest conveniently omits the word "also" which begins the quoted sentence. The omitted **[*18]** "also" refers to

the proceeding sentence which provides that the agreement "sets forth the terms, conditions and prices under which [Qwest] agrees to provide . . . certain Unbundled Network Elements . . . to Universal . . . for *Universal's own use* or for resale to others." Qwest Compl., Ex. 1 at 8 (emphasis added).

Under the plain language of the agreement, when read in its entirety, Qwest agreed to provide Meet Point interconnection facilities to Universal "for Universal's own use." Qwest further agreed to charge for those services as provided for in the agreement. Therefore, Qwest is precluded from charging under a federal tariff for such services.

4. Universal's claim that Qwest must pay reciprocal compensation for ISP bound traffic which Universal terminates

Each LEC has a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *47 U.S.C. § 251(b)(5)*. "[A] reciprocal compensation arrangement . . . is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications **[*19]** traffic that originates on the network facilities of the other carrier." *47 C.F.R. § 51.701(e)*. Thus, in a typical reciprocal compensation agreement, a LEC whose customer originated a call that terminated on another LEC's network must pay the terminating LEC at the rate stated in their agreement.

"The Parties agree that call termination rates as described in Appendix A will apply reciprocally for the termination of local/EAS traffic per minute of use." Qwest Compl., Ex. 1 at 17. Appendix A, by reference to rates established by the OPUC, set the reciprocal compensation rate at $ 0.00133 for local call termination. Qwest Compl., Ex. 1 at 86; Universal Statement Material Fact P38. To summarize, the agreement requires Qwest to pay Universal at a rate of $ 0.00133 per minute for terminating local calls that originated on Qwest's network.

A. Change of Law

The parties have conceded that, at the time their agreement was established, the OPUC held that ISP bound traffic, like other forms of telecommunications traffic, could be considered local traffic subject to reciprocal compensation. Qwest Mem. in Support of Summary Judgment Motion at 13; Universal Mem. in Support of Summary **[*20]** Judgment Motion at 27 (both parties citing In re the Petition of MFS Communications Co. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to *47 U.S.C. § 252*(b) of the *Telecommunications Act of 1996, 1996 Ore PUC LEXIS 36* (Nov. 8, 1996)) (affirmed by OPUC on Dec. 9, 1996).

In 2001 the FCC ruled, in ISP Remand Order, that ISP bound traffic was not local traffic and, therefore, not subject to reciprocal compensation under *47 U.S.C. § 251(b)(5). ISP Remand Order, 16 F.C.C.R. at 9154*. Instead of ordering an end to reciprocal compensation payments for ISP traffic, the FCC established a 36 month phase-out plan, which lowered the compensation rate and placed caps on the amount of traffic which would be subject to compensation. *Id. at 9187*. The FCC went on to state that "the interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law provisions." *Id. at 9189.* **[*21]**

In 2002 the D.C. Circuit held that the FCC improperly relied on *47 U.S.C. § 251(g)* in issuing *ISP Remand Order. Worldcom, Inc., 288 F.3d at 430*. The D.C. Circuit remanded ISP Remand Order to the FCC for further proceedings but chose not to vacate the order. *Id. at 434*. Hence, ISP Remand Order remains in effect pending further proceedings on remand. See, e.g., *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n., 300 U.S. App. D.C. 198, 988 F.2d 146, 150-51 (D.C. Cir. 1993)*.

Here, Qwest lowered the per minute rate it paid to Universal for terminating traffic, imposed caps on the number of minutes Qwest would pay Universal for terminating traffic, and eventually ceased all payments for reciprocal compensation. Universal argues that Qwest has breached the agreement by failing to pay Universal for reciprocal compensation as required in the agreement. Qwest counter-argues that ISP Remand Order has altered the agreement because the agreement's change of law provision was satisfied. The essence of Qwest's argument is that ISP Remand Order changed the law with respect to reciprocal compensation. Thus, **[*22]**

Qwest claims, the agreement was automatically amended, and Qwest was merely following the interim compensation regime that became part of the agreement through the change of law provision.

The parties concur that the agreement's relevant change of law provision reads:

> This Agreement contains provisions based on the decisions and orders of the FCC and the Commission under and with respect to the Act. Subsequent to the execution of this agreement, the FCC or the Commission may issue decisions or orders that change or modify the rules and regulations governing implementation of the Act. If such changes or modifications alter the state of the law upon which the Underlying Agreement was negotiated and agreed, and it reasonably appears that the parties to the Underlying Agreement would have negotiated and agreed to different term(s) condition(s) or covenant(s) [sic] than as contained in the Underlying Agreement had such change or modification been in existence before the execution of the Underlying Agreement, then this agreement shall be amended to reflect such different term(s), condition(s), or covenant(s). Where the parties fail to agree upon such an amendment, it shall be **[*23]** resolved in accordance with the Dispute Resolution provision of the Agreement.

Qwest Compl., Ex. 1 at 85. Thus, three conditions must be met for the change of law provision to apply. First, the FCC or OPUC must issue a decision that changes or modifies the rules and regulations governing the implementation of the Act. Second, the changes or modifications must alter the state of the law upon which the agreement was negotiated. Third, it must reasonably appear that the parties would have negotiated and agreed to different terms had the changed law been in effect when the agreement was executed.

The OPUC previously held that ISP bound traffic, like other forms of telecommunications traffic, can be local traffic subject to reciprocal compensation. *Electric Lightwave, Inc., v. US West Communications, Inc., 1999 Ore PUC LEXIS 184, *22 (Apr. 26, 1999)*. The agreement was negotiated and agreed to prior to 2001 when the OPUC's holding was the sole voice regarding reciprocal compensation. Even following ISP Remand Order "the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of *§ 251 . . . .*" *Pacific Bell, 325 F.3d at 1130.* **[*24]** Because there is no conflict between the OPUC's decision and federal law, *§ 251* does not preempt the OPUC's decision that ISP bound traffic can be local traffic subject to reciprocal compensation. See *Id. at 1131 n. 15.* Hence, the state of the law, with respect to reciprocal compensation, has not changed since the agreement was negotiated, and Qwest's change of law argument fails.

Even if one were to assume that the change of law provision was satisfied by ISP Remand Order, Qwest's claim that the agreement was automatically amended contradicts the plain language of the agreement. The final sentence of the change of law provision reads: "where the parties fail to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of the Agreement." Qwest Compl., Ex. 1 at 85. Quite plainly, the parties intended a negotiated amendment of the agreement, not one automatically imposed.

I find that the agreement's change of law provision was not satisfied; therefore, the agreement has not been amended. The agreement plainly requires Qwest to pay Universal reciprocal compensation for the termination of local traffic that originated **[*25]** on Qwest's network, with no exceptions for ISP bound traffic. Qwest Compl., Ex. 1 at 17.

B. VNXX Traffic

Qwest further argues that the agreement does not require it to pay reciprocal compensation on VNXX traffic. I agree, VNXX traffic involves a call that is originated in one local calling area ("LCA") and is terminated in a different LCA without incurring the toll charges which would normally apply. The essence of VNXX traffic is that a LEC who does not have a physical presence in a particular

calling area may appear to be local. The LEC gains this local appearance by holding a block of local numbers which the end user, who is located in that LCA, may call. Upon making what appears to be the local call, the call is relayed over the lines of the local LEC, passed off to the distant LEC and terminated by that distant LEC. For example, an ISP located in Portland, Oregon would request a local Bend, Oregon telephone number held by the CLEC. A person in Bend would call that number to connect to the internet. The call would be relayed by the ILEC serving the Bend area, handed off to the CLEC at the POI in Portland and terminated by delivery to the ISP in Portland. Thus the person **[*26]** making the call would be billed at the local rate for a call that was really long distance.

In the instant case, VNXX traffic is generated when an end user, who is not located in the same LCA as Universal's network facilities, calls the local dial-up number they have been provided. The number they call is the local number held by Universal but which Universal allows the ISPs to provide to their customers. The call is transported by Qwest, who has a physical presence in the LCA, to the POI, located in a different LCA, where it is handed off to Universal. Universal then terminates the call by converting it to internet protocol for delivery onto the internet. Thus a call is originated in one LCA and terminated in a different LCA. Qwest argues that VNXX traffic is not local traffic; therefore, it does not owe reciprocal compensation for such traffic.

The agreement requires the payment of reciprocal compensation "for the termination of local/EAS n3 traffic per minute of use." Qwest Compl., Ex. 1 at 17. Traffic exchanged within each of the two Oregon LATAs is classified as "'local' (local includes EAS), or 'toll' which shall be the same as the characterization established by the effective **[*27]** tariffs of the incumbent local exchange carrier as of the date of this agreement." Qwest Compl., Ex. 1 at 13. Thus, the agreement adopted the definition of "local" that was listed in Qwest's Oregon tariff at the time the agreement became effective.

n3 Extended Area Service ("EAS") is essentially a large LCA, which is used to allow local calling within a metropolitan area. See Qwest's Mem. in Res. to Universal's Mot. of Summ. J. at 7-8.

Qwest's Oregon tariff defines "local service" as "telephone service furnished between customer's premises located within the same local service area." Mason Aff. in Supp. of Qwest's Motion for Summary Judgment, Ex. B. The tariff further defines "local service area" as "the area within which telephone service is furnished under a specific schedule of rates. This area may include one or more exchanges without the application of toll charges." Id. A "local service area" is the equivalent of a LCA. Mason Aff. P4. Finally, "premises" is defined as "[a] tract of land" or buildings **[*28]** on such land. Mason Aff., Ex. B.

The interconnection agreement in Electric Lightwave contained the exact same definition of local traffic, as that contained in the present case. *Electric Lightwave, 1999 Ore. PUC LEXIS 184 *15*. The Electric Lightwave agreement further restricted local traffic to traffic originated and terminated within the boundaries of exchange maps approved by the OPUC. *Id. at *14*. Like the present case, the Electric Lightwave agreement did not specifically mention ISP bound traffic within the definition of local traffic. Id. The OPUC held that ISP bound traffic was local traffic subject to reciprocal compensation under the terms of the Electric Lightwave agreement. *Id. at *16*. Implicit in this conclusion, is the finding that an ISP bound call terminates upon delivery to the ISP; otherwise a call could not originate and terminate within the boundaries of the exchange maps as the agreement required. See *Id. at *14*. Hence, delivery of an ISP bound call to the ISP is termination of the call.

Thus, for a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA or EAS **[*29]** and terminated at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the ISP. VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. Therefore, VNXX traffic, whether

ISP bound or not, is not subject to reciprocal compensation.

Universal argues that the OPUC's decision In re the Petition of MFS Communications Co., Inc., for Arbitration of Interconnection Rates, Terms and Conditions Pursuant to *47 U.S.C. § 252*(b) of the *Telecommunications Act of 1996, Commission Decision, 1996 Ore. PUC LEXIS 125* (Dec. 5, 1996) (hereafter "MFS Decision"), demands a different result. Universal claims that the MFS Decision conclusively established that VNXX traffic is local and subject to reciprocal compensation. Since the MFS agreement, at issue in the MFS Decision, was adopted by Universal and became the Universal/Qwest agreement, the MFS Decision would seem **[*30]** instructive because it involved interpretation of the exact same agreement that is the focus of the instant case. Universal further argues that Qwest was a party to the MFS Decision and is precluded from arguing that VNXX traffic is not subject to reciprocal compensation.

In the MFS Decision, MFS entered into an interconnection agreement with Qwest. See Id. at *1. Under the agreement MFS was to terminate traffic originated on Qwest's network using switch facilities. See Id. at *7. MFS argued that it should be paid reciprocal compensation at a higher rate usually reserved for traffic terminated on tandem facilities. Id. at *7-8. MFS asserted that it should be paid at the tandem rate because it's switch facilities terminated traffic from a wider geographic area than is normal for switch facilities. Id. at *7-8. The OPUC merely held that MFS should be compensated at the lower end office rate, normal for traffic terminated on switch facilities. Id. at *9. The OPUC decided what rate should apply to traffic subject to reciprocal compensation, not, as Universal argues, what traffic was subject to reciprocal compensation. See Id. at *6. The OPUC **[*31]** apparently assumed that all traffic terminated by MFS was subject to reciprocal compensation, as the issue of VNXX traffic was never raised. Thus, the MFS Decision is inapplicable to the question of whether VNXX traffic is subject to reciprocal compensation and has no preclusive effect. n4

N4 Lending further support to this conclusion is the recent OPUC decision *In re the Investigation into the Use of Virtual NPA/NXX Calling Patterns, 2004 Ore. PUC LEXIS 425 (Sept. 7, 2004)* (hereafter referred to as the VNXX General Docket Decision. In the VNXX General Docket Decision the OPUC declined to issue any formal ruling as to whether VNXX traffic violated current telecommunications regulations. *Id. at *11.* The OPUC declined to issue any such ruling because the recent Ninth Circuit case *Pacific Bell v. Pac-West, 325 F.3d 1114*, held that state commissions lacked authority to conduct general docket investigations. *Id. at *5.* However, prior to the Pac-West decision, the OPUC conducted a general docket investigation to decide whether VNXX traffic violated the requirement that all LECs abide by OPUC designated exchange boundaries. *Id. at *8-9.* The OPUC conducted this investigation as if the issue of VNXX traffic was entirely new and no mention was made of the MFS Decision. See *Id. at *8-11.* If the OPUC had held in the MFS Decision that VNXX traffic was local traffic and a legitimate practice, as Universal alleges, one would expect the MFS Decision to have been cited in the VNXX General Docket Decision. In fact if the MFS Decision stood for the proposition that Universal alleges, the VNXX General Docket Decision would be unnecessary as the issues it addressed would have been previously decided.

[*32]

C. Transit Traffic

Finally, the parties agree that a portion of the traffic terminated by Universal originates on a third party carrier's network (Verison). This traffic passes over Qwest's network on its way to Universal's network. Qwest argues that it is not required to pay reciprocal compensation for such transit traffic.

In section V.B. of the agreement transit traffic and local/EAS traffic are defined. See Qwest Compl., Ex. 1 at 15. "Transit traffic is any traffic other than switched access, that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Car-

rier's network." Id. As described above, local/EAS traffic is "telephone service furnished between customer's premises located within the same local service area." Mason Aff., Ex. B.

Reciprocal compensation is due only for local/EAS traffic. See Qwest Compl., Ex. 1 at 17. The FCC defines reciprocal compensation as an arrangement between two carriers "in which each of the two carriers receives compensation from the other carrier for the transport and termination . . . of telecommunications traffic **[*33]** that originates on the network facilities of the other carrier." *47 C.F.R. § 51.701(e)*. The agreement "shall be interpreted solely in accordance with the terms of the Act . . . ." Qwest Compl., Ex. 1 at 79. Thus, under the agreement as interpreted in accordance with the Act, reciprocal compensation is not due for third party originated calls.

The agreement provides an alternative cost recovery method for transit traffic which reads: "where either party interconnects and delivers traffic to the other from third parties, each party shall bill such third party . . . for such third party terminations." Id. The agreement goes on to establish a separate rate structure for transit traffic and requires that the originating third party carrier pay such charges. Id. at 19. § F. It is clearly the intent of the parties that charges for transit traffic should be billed to the LEC who originated the traffic. Therefore, I find that Qwest is not required to pay reciprocal compensation to Universal for traffic that did not originate on Qwest's network.

CONCLUSION

There is no genuine issue of material fact as to whether Qwest may charge Universal for interconnection facilities used **[*34]** solely to transport traffic for termination on Universal's network. The agreement and FCC regulations clearly prohibit such charges. There is also no genuine issue of material fact as to whether Universal is required to pay the nonrecurring installation charges billed by Qwest. Qwest and Universal litigated these charges before the OPUC, and the OPUC approved such charges as lawful. Furthermore, there is no genuine issue of material fact as to whether Qwest must charge for Meet Point facilities as provided in the agreement. In the agreement, Qwest promised to provide such facilities and to charge a specific rate for them; Qwest can not now charge a different rate under a federal tariff. Finally, there is no genuine issue of material fact as to whether Qwest must pay reciprocal compensation for ISP bound traffic. The agreement requires the payment of reciprocal compensation for local traffic with no exclusion for ISP bound traffic. However, VNXX traffic and transit traffic are not subject to reciprocal compensation under the terms of the agreement. Therefore, defendant's motion for summary judgment (doc. 28) and plaintiff's motion for summary judgment (doc. 32) are granted in part and **[*35]** denied in part as stated above. This case is dismissed.

IT IS SO ORDERED.

Dated this 15 day of December 2004.

Ann Aiken

United States District Judge

JUDGMENT

This action is dismissed.

Dated: December 16, 2004.

ATTACHMENT 2: Qwest Response to Universal Interrogatory No. 01-022

Oregon
ARB 671
UTI 01-022

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 022

Admit or deny that pursuant to 47 U.S.C. § 251(c)(2), Qwest has a duty to provide for the facilities and equipment of Universal, interconnection with Universal's network for the transmission and routing of telephone exchange service and exchange access.

RESPONSE:

Qwest hereby objects to Request No. 22 on the ground that it calls for a legal conclusion and is therefore an inappropriate subject for a request for admission. Without waiving that objection, Qwest hereby responds as follows: Section 251(c)(2) speaks for itself. The request is a partial quotation of section 251(c)(2). Including all subparts, Qwest admits that, as an ILEC, it is subject to section 251(c)(2).

ATTACHMENT 3: Qwest Response to Universal Interrogatory No. 01-023

Oregon
ARB 671
UTI 01-023

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 023

With respect to the statement in Qwest's Initial Brief in ARB 671, at the bottom of page 9, that "Universal also purchases multiplexing ("Mux") service"; please identify all services that Universal "also purchases" from Qwest, and proof of any remuneration by Universal of any services identified here.

RESPONSE:

Given that, with limited exceptions, Universal has not paid for LIS services, Qwest's statement should more appropriately have stated that Universal "has ordered and received multiplexing ("Mux") services" from Qwest.

ATTACHMENT 4: Qwest Response to Universal Interrogatory No. 01-006

Oregon
ARB 671
UTI 01-006

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 006

Please identify and describe any technical reasons why Universal's costs of switching terminating traffic (as described generally in Ms. Batz's testimony), would differ as between terminating voice traffic and ISP-bound traffic?

RESPONSE:

Qwest hereby objects to Request No. 6 on the ground that it is not calculated to lead to the discovery of relevant evidence and the reference to "technical reasons" is undefined and ambiguous. Without waiving those objections, Qwest responds as follows:

Although Qwest has no specific information related to Universal's cost structure, it would be reasonable to assume that there are fundamental differences in cost between terminating voice traffic and ISP traffic.

Qwest has no reason to believe that Universal's per-minute switching costs to switch an ISP call would differ from Universal's costs of switching a voice call (although the latter is purely hypothetical since it does not appear that Universal switches voice calls). However, other costs to Universal related to the two types of traffic can be significantly different. One factor contributing to the costs difference would be the time spent on the call(s). The amount of usage and the hold times per call impact the costs of transport terminations as well as the cost of setting up the call and the conversation minutes. Generally, there are longer hold times for ISP traffic; therefore, more call time would be expended and higher costs for ISP traffic would result.

The following uses the Astoria example used in Ms. Batz's testimony. If, hypothetically, Universal provided local exchange service in Astoria, Oregon, and a Qwest customer in Astoria placed a local call to a Universal customer physically located in Astoria, Qwest would deliver the call to Universal's POI in Portland. At that point, Universal would bear the financial obligation to deliver the traffic back to its customer in Astoria, which is over 70 miles from Portland. This, of course, would require Universal to build or lease transport facilities from Portland to Astoria. In the case of ISP traffic, it is Qwest's understanding from Universal's testimony in the federal court litigation that an ISP call from an Astoria customer, once it is delivered to Universal's POI in Portland by Qwest, is answered by the modems provided by Universal which are located near the POI (a few feet away in the same building). Universal servers and routers at the same location then deliver the call to the Internet. Based on Universal's testimony, Universal leases a facility that allows traffic to be routed to the Internet to which Universal interconnects in the Pittock building. Thus, to deliver the ISP call to the Internet, Universal must transport the call a few feet, while to terminate the voice call to Astoria, Universal would need to build or lease over 70 miles of transport facilities. It is reasonable to conclude that the cost to transport the traffic to Astoria would be significantly higher than to deliver the traffic to an Internet facility located a few feet from Universal's

modems, servers, and routers in the Pittock Building.

If the call originated and terminating within the same LCA, Universal's termination costs may also differ depending on the length of the local loop connecting the terminating customer to Universal's equipment.

CERTIFICATE OF SERVICE

I, K.C. Halm, hereby certify that on 4th day of November, 2005, I caused copies of forgoing Reply Brief of Universal Telecom Inc. to be sent by electronically to the following parties:

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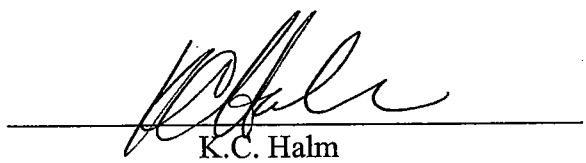

K.C. Halm