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November 4, 2005

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Re: ARB 671

Dear Ms. Nichols Anglin:

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

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

Sincerely,

Carla M. Butler

CMB:
Enclosures
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 671

In the Matter of the Petition of QWEST CORPORATION for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with UNIVERSAL TELECOMMUNICATIONS, INC.	QWEST CORPORATION'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Qwest Corporation ("Qwest") hereby replies to the Initial Brief that respondent Universal Telecom, Inc. ("Universal") filed on October 21, 2005 (hereafter "Universal Brief").

There are several remarkable characteristics of Universal's opening brief. First is the complete absence of references to the governing Oregon statutes, this Commission's rules, and this Commission decisions that Qwest discussed at length in Qwest's Opening Brief ("Qwest Brief"). Universal's arguments treat the Oregon statutes, rules, and decisions on Virtual NXX ("VNXX") traffic and other issues as though they do not exist. Universal, which has been involved in litigation with Qwest in federal court for nearly two years, is familiar with all of these cases, yet in its brief cites only a single Commission decision (in footnote 63), and even then, for a misleading proposition. Universal ignores at several Commission decisions that directly address issues in this arbitration. Universal's silence on those cases is remarkable. Instead, Universal consistently relies on cases that are inconsistent with Commission decisions, are not binding on this Commission, represent demonstrably incorrect readings of governing authority, and/or are easily distinguishable.

Second, Universal advances several arguments in order to avoid confronting the undeniable fact that under its proposed language, it would receive special treatment. In other words, Universal's language would cause it to be treated in a fundamentally different manner than other competitive local exchange carriers ("CLECs"), local exchange carriers ("LECs"), interexchange carriers ("IXCs"), and wireless carriers, all of whom, for non-Extended Area Service ("EAS") interexchange calls (or, in the case of wireless carriers, for interMTA calls), pay

access charges.[1] Under Universal's proposed language, all of its ISP traffic (which is the only kind of traffic it carries) would, by definition, be subject only to reciprocal compensation, regardless whether the call is between parties located within the local calling area or between parties in different local calling areas and no matter what Qwest must undertake to originate it and deliver to Universal. Qwest would have an obligation to pay Universal terminating reciprocal compensation on every minute of the traffic, no matter where the calls originate and terminate. In a completely empty gesture, Universal acknowledges that access charges would be due on "1+" dialed calls, which Universal refers to "'real' toll traffic." (Universal Brief, at pp. 38-39, fn. 62.) However, since all Universal provides in Oregon is dial-up access to ISPs through "local" telephone numbers (regardless of where the ISPs' modems are physically located), its concession on this point is meaningless, because Universal would characterize all of its traffic as something other than "real toll traffic."

The third remarkable characteristic about Universal's brief is the near-total lack of discussion of specific contract language. Although in limited instances Universal discusses some of the disputed language, for the most part, and on most issues, its brief, like its testimony, is silent on the language of the agreement; yet, the very reason for this docket is to determine which of the disputed language should be included in the agreement that this Commission approves.[2]

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[1] For wireless carriers, the equivalent of a local calling area is a Major Trading Area ("MTA"). In most cases, MTAs are larger geographical areas than the local calling areas that apply to wireline carriers. See First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1036 (1996) ("Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.,* MTA) serves as the most appropriate definition for the local service area for purposes of reciprocal compensation. . . . Accordingly, traffic to or from a CMRS network that originates and terminates with the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.") ("*Local Competition Order*").

[2] Universal mentions specific language only a handful of times in its opening brief (s*ee, e.g.*, Universal Brief, at fns. 9, 11, 33, and 36), even though there are 11 paragraphs in which Universal proposes significant changes to the language Qwest has proposed. As noted in Qwest's brief (Qwest Brief, at p. 12), several of those

KEY FACTS

Qwest has reviewed the facts set forth in Universal's brief (Universal Brief, at pp. 3-6), and has also reviewed Universal's Statement of Material Facts ("Universal Fact Statement"). The facts most critical to the Commission's decision in this arbitration are undisputed. For example: (1) Universal provides services to ISPs, and *100 percent* of its traffic is one-way ISP traffic terminating to Universal; (2) Universal, as a CLEC, obtains local telephone numbers from the North American Numbering Plan Administrator ("NANPA"), which it then provides to ISPs for use in conjunction with Universal's "managed modem service;" (3) customers in the local calling areas where Universal obtains these telephone numbers are able to dial what appears to be a "local" telephone number; (4) in reality, except for customers in the Portland EAS Region and Eugene-Springfield local calling area, the calls to Universal ISP customers are VNXX calls, which are interexchange calls because they are terminated at modems located at Universal's two points of presence ("POPs") in Eugene and Portland; (5) none of the ISP traffic described in subpart (4) above is returned to the local calling area from which it originates (because all of it is instead placed on the Internet); and (6) Universal provides *no local exchange service* in Oregon.

In Qwest's view, those are the core facts that the Commission should consider in ruling on the disputed language in this arbitration. However, in order to make Qwest's position completely clear, Qwest does not agree with each fact statement set forth in Universal's Brief, nor in the Universal Fact Statement. Qwest is cognizant that many of the specific statements in the Universal Fact Statement were taken directly from Judge Aiken's December 15, 2004 decision in *Qwest v. Universal*, 2004 WL 2958421 (D. Ore. 2004). Most of these statements are accurate, but it is important to bear in mind that Judge Aiken was looking at a fundamentally

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language changes were not explained in Universal's response to Qwest's petition, nor were any of them given any greater explanation in Universal's Brief.

different question in that case than the Commission is addressing in this arbitration docket. That is, the court was interpreting an old interconnection agreement to determine how much each party owed the other for past services. This Commission, on the other hand, is addressing the question of the language that should be approved in a new interconnection agreement. Thus, while the facts recited in the December 2004 decision should not be disregarded, they were raised for a different purpose. Moreover, although most of the statements are accurate, both parties have reserved the right to appeal. It would, therefore, be a mistake to treat those facts as absolute truths, particularly when other more detailed information from the record is more relevant and determinative. Finally, in some instances, the facts stated in the December 2004 decision are not specific enough for purposes of this docket. Thus, Universal's suggestion in footnote 6 that Qwest is somehow "inappropriately" challenging fact statements in the December 2004 decision is not true; as the following demonstrates, Qwest's comments are virtually all made in an effort to clarify those statements with facts in the record.

That said, Qwest objects or otherwise clarifies the following "facts" Universal recites:

1. Paragraph 2 states that Universal "provides telecommunications services in Oregon." Qwest does not believe that in using this language Judge Aiken intended to rule that ISP traffic is "telecommunications traffic" as that term is used in FCC rules and statutes. That is a legal issue for the Commission to decide in the arbitration. Likewise, paragraph 8 states that Qwest and Universal have interconnected their networks to exchange "telecommunications traffic." Qwest certainly agrees that Qwest and Universal have interconnected their networks, but Qwest has the same concern in that paragraph regarding the use and meaning of "telecommunications traffic." The same objection and clarification regarding the use of the term "telecommunications service" is true regarding paragraphs 13 and 17.

2. Paragraph 4 states that an ILEC is a carrier which provided services and operated "before the telephone industry was *deregulated* . . . ." (Emphasis added.) While not central to any issues in this arbitration, Qwest doubts very much that the 1996 Telecommunications Act is perceived by most participants in the telecommunications industry, the FCC, or state commissions as having "deregulated" the industry. State commissions, almost 10 years after the Act, continue to regulate certain aspects of ILEC (and even CLEC) activities. Indeed, the fact that the parties are before the Commission in this docket is indicative that state commissions continue to exercise regulatory functions, albeit differently than they did 20 years ago.

3. Paragraph 9 is correct as far as it goes, but fails to recognize that there are a myriad of other terms and conditions addressed in the interconnection agreement.

4. Paragraph 16 is vague, particularly in light of the fact that far more specific information is now available on termination of ISP traffic in light of Judge Aiken's decision on September 22, 2005 that the modems located in Universal's POPs are the termination points for Universal's traffic. (*See* Qwest's Statement of Facts, Exhibit J, at p. 2.)

5. The last part of paragraph 18 is inaccurate. The first sentence discusses Local Interconnection Services ("LIS"), and is correct. However, the second sentence states "Qwest has also provided *other* transmission facilities," and then describes Direct Trunk Transport ("DTT"), Entrance Facilities ("EF") and Multiplexing ("Mux"). To the extent the second sentence suggests DTT, EF and Mux are not the LIS services used to interconnect to Universal, it is incorrect. DTT, EF, and Mux are the LIS services referred to in the first sentence.

6. Paragraph 19 could be construed in a misleading manner. The statement must be read in the context of traffic appropriately subject to reciprocal compensation, and all traffic, of course, is not subject to reciprocal compensation. For example, switched access traffic and

VNXX traffic originate on one company's network and may terminate on another company's network, but neither is appropriately subject to reciprocal compensation. Transit traffic likewise is not subject to reciprocal compensation.

Qwest respectfully suggests that Qwest's Statement of Facts, which is backed by specific citations from the record of the litigation, presents a more accurate and more detailed set of facts for the Commission's consideration.

ARGUMENT

I. PRELIMINARY ISSUES

In several places in its brief, Universal has accused Qwest of doing or saying things that are inappropriate. In another instance, Universal makes a completely unsubstantiated statement. While none of them should be determinative, Qwest believes it should respond to them.

First, in footnote 1, Universal states that "Qwest's arbitration petition did not formally or *properly* identify any specific open issues." The allegation is perplexing, particularly in light of the uncontested fact that Universal has consistently refused to engage in negotiations with Qwest. When Qwest opened negotiations in February 2005, it attached its current template TRO/TRRO-compliant agreement (Exhibit A) as its proposal to Universal.[3] When Universal failed to respond in any substantive manner (other than to challenge the propriety of the arbitration), Qwest filed its Petition and the proposed agreement in July 2005. In seemingly criticizing Qwest for failing to "properly" identify specific open issues, Universal does not explain how Qwest could possibly have done so given that Universal never objected to any particular provision of the agreement. It was not until August 8, 2005, when Universal responded to Qwest's Petition (after a federal court had denied Universal's motion to stay this

[3] "TRO/TRRO" stands for Triennial Review Order/Triennial Review Remand Order.

proceeding in its federal court complaint regarding the Commission's orders in docket ARB 589), that Qwest could have possibly identified the issues Universal was contesting. It is Universal, not Qwest, that was unwilling to negotiate, and thus that did not "properly identify any specific open issues."

Second, in footnote 1, Universal suggests that it has a right to raise issues other than the specific issues it raised in its August 8th response. Similarly, in footnote 9, Universal states that the interconnection agreement section references that Universal objected to "are for illustrative purposes only," and that Universal "reserves the right to object to such language, and any related provisions, during the course of this proceeding." (Universal Brief, at p. 8, fn. 9.) To the extent that Universal believes it can raise additional issues beyond the language it has already previously contested, it is wrong. Such a procedure would violate the procedures set forth in section 252 and OAR 860-016-0030, and Qwest would object to any Universal attempt to broaden the issues in this docket.

Third, Universal asserts that Qwest proposes to require Universal to pay Qwest to deliver traffic (by which Universal presumably refers to direct trunked transport and entrance facilities) "that is caused by Qwest's subscribers, and which is carried over Qwest's telecommunications lines and switches, *for which Qwest already is (or should be) compensated through its end user charges*." (Universal Brief, at p. 8 (emphasis added).) Qwest addresses the so-called "cost causer" issue later in this brief. However, the unsupported suggestion that Qwest is already paid for VNXX-routed ISP traffic "through its end user charges" is patently false. Qwest's charges to end-user customers are, for the vast majority of customers, flat-rated charges that were designed to allow customers to call other customers located within the same local calling area. The essence of VNXX, however, is that the traffic does not stay in the local calling area, but is

instead transported over interoffice transport facilities to a Point of Interconnection ("POI") that, in many cases, is well over one hundred miles away. The flat rates that the Commission established for local exchange service were never designed to cover the costs of transporting traffic to a distant exchange. Those costs have always been covered by retail long distance rates or access charges. Thus, Universal's claim that Qwest is already compensated for such traffic has no factual support whatsoever. As to Universal's suggestion that Qwest "should be" compensated, Qwest agrees. And, as Qwest will demonstrate hereafter, and as the Commission has ruled, it is the CLEC (Universal) that should compensate Qwest to deliver VNXX-routed ISP traffic to Universal's POIs.

II. ISSUE NO. 1- UNIVERSAL'S ARGUMENTS REGARDING THE RELATIVE USE FACTOR ("RUF") ISSUE IGNORE GOVERNING LAW IN OREGON, MISCONSTRUE NUMEROUS FEDERAL DECISIONS, INCLUDING THE *UNIVERSAL* DECISION, AND DEMONSTRATE A COMPLETE MISUNDERSTANDING OF RULES 703(B) AND 709(B) OF THE ACT

In the section of its brief dealing with the Relative Use Factor ("RUF") issues, Universal (1) fails to address (let alone acknowledge the existence of) the substantial body of law in Oregon in which the Commission has ordered that ISP traffic be removed from a RUF calculation, (2) misconstrues governing FCC rules—sections 703(b) and 709(b)—and in so doing, relies on authority that is easily distinguishable from the facts of this case, (3) misrepresents the holding of the *Universal* decision on RUF issues, (4) manifests a complete misunderstanding of the RUF provision, (5) suggests, against all logic (and the actions of Universal and its ISP customers), that Qwest is the "cost causer" of the ISP traffic delivered to Universal, and that Qwest should therefore bear all the costs of delivering it to Universal's POIs, and (6) raises a variety of "red herring" issues that Qwest did not raise, and which are not relevant to the issues in this arbitration in any event.

A. The Commission has established a clear policy that ISP traffic should be removed from the RUF

The most notable aspect of Universal's brief is the blind eye it takes to the body of Commission decisions that have consistently held that ISP traffic should be removed from a RUF provision. (*See* Qwest Brief, at pp.13-15.) Qwest does not intend to repeat its analysis here, other than to note that in a previous Level 3/Qwest arbitration, this Commission firmly ruled that Qwest-proffered language that excluded ISP traffic from a RUF "most closely reflects the policies of both the FCC and the Commission by removing the incentives for uneconomic behavior in the provision of telecommunications services to Internet Service Providers." Order No. 01-809 (September 13, 2001), docket ARB 332, p. 15, *aff'd, Level 3 Communications v. Oregon Public Util. Comm'n*, No. CV01-1818-PA (D. Or. November 25, 2002). Moreover, only last year, the Commission again addressed the identical issue in an arbitration between Qwest and AT&T. In that decision, the Commission expressly followed its decision in Order No. 01-809, adding, among other things, an explicit conclusion that "this Commission has already determined that, in light of FCC rules, the term 'telecommunications traffic' does not include Internet traffic." Order No. 04-262 (May 17, 2004), docket ARB 527, Appendix A, at p. 13.

It is remarkable that Universal would address this issue without so much as mentioning these decisions. It is likewise remarkable that Universal made no attempt to distinguish these clear decisions that establish a firm Commission policy to exclude ISP traffic from a RUF calculation. Finally, it is equally remarkable that the only Commission decision that Universal cites is an order in docket UM 1058 (and then for a misleading proposition regarding preemption with regard to ISP traffic), and this citation is in footnote 63, on page 39 of a 42-page brief. The only other reference to an Oregon case is to an Oregon Supreme Court decision (*Coast Range Conifers v. State of Oregon*, 339 Ore. 136 (2005)) relating to the takings clause of the Oregon

Constitution. (Universal Brief, at p. 42.) Other than these, Universal did not cite to a single Oregon statute, Commission rule, or Commission decision relating to Oregon telecommunications issues.[4]

The fact is that the Commission has established a clear policy to exclude ISP traffic from the RUF provisions of interconnection agreements between Oregon carriers. The Commission likewise should do so here.

B. Universal's reliance on FCC rule 703(b) is misplaced and ignores clear authority that distinguishes the cases upon which it relies

The heart of Universal's argument on RUF is its reliance on one FCC decision and four federal circuit court decisions. Each of these cases is easily distinguishable from the issue here: whether Rule 703(b) (47 C.F.R. 51.703(b)) and 709(b) (47 C.F.R. 51.709(b)) apply to ISP traffic.

Universal's primary argument rests on Rule 703(b), which states: "A LEC may not assess charges on any other telecommunications carrier for *telecommunications traffic* that originates on the LEC's network." (Emphasis added.) Universal asserts that this sentence establishes the absolute rule that "originating LECs cannot charge terminating LECs for the cost of carrying traffic to the terminating LEC." (Universal Brief, at p.10.) Further, Universal claims that this interpretation is based on the principle that the cost-causer is responsible for the call, which requires that the "calling party's network pays." (*Id*.) (Qwest will address the cost causer issue below.)

Universal's argument is based on one FCC case, *TSR Wireless v. U S WEST Communications*, 15 FCC Rcd 11166 (2000) ("*TSR Wireless*"), and four federal circuit court decisions, *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) ("*Qwest*"), *Mountain*

[4] Despite the fact that many of the federal district court and state commission cases from other jurisdictions cited in Qwest's brief (Qwest Brief, at pp. 15-17) were cited in briefs in the *Qwest v. Universal* litigation, Universal ignores them as well.

Communications v. FCC, 355 F.3d 644 (D.C. Cir. 2004) ("*Mountain Communications*"), *MCIMetro Access Transmission Servs. v. BellSouth Telecommunications,* 352 F.3d 872 (4th Cir. 2003) ("*MCIMetro Access*"), and *Southwestern Bell Telephone v. PUC of Texas,* 348 F.3d 482 (5th Cir. 2003) ("*Southwestern Bell*"). All of these cases are readily distinguishable.

The fundamental problem with Universal's argument, and the authority upon which it relies, is that the FCC in the *ISP Remand Order*[5] ruled that ISP-bound traffic *is not* "telecommunications traffic." *ISP Remand Order,* ¶ 57; *see also id.,* ¶¶ 52, 65. Thus, the prohibition contained in Rule 703(b) does not apply to ISP traffic. Although Universal cites a variety of distinguishable case law in this section of its Brief, it never once addresses the *ISP Remand Order* on this issue. Nor does it address this Commission's decision in Order No. 01-809 in docket ARB 332, that expressly follows the *ISP Remand Order,* or the Colorado federal district court decisions in *Level 3 Communications v. Colorado Public Utilities Commission*, 300 F.Supp.2d 1069 (D. Colo. 2003) ("*Colorado Level 3*"), the most definitive discussion of these issues, or the same court's recent decision last summer in *AT&T Communications v. Qwest Corp*., Civil Action No. 04-cv-00532-EWN-OES (D. Colo. June 10, 2005). (A copy of the slip opinion is attached as Exhibit 2 to Qwest's Brief.)

In its *ISP Remand Order,* the FCC ruled that Internet traffic is "interstate access" and not "telecommunications traffic": "the LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access." *ISP Remand Order*, ¶ 57. (Emphasis in original.)

[5] Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*¸16 FCC Rcd 9151 (2001) *("ISP Remand Order")*

The FCC has repeatedly ruled on other occasions that because ISP traffic is interstate in nature, it is excluded from the reciprocal compensation requirements established by section 251(b)(5).[6]

Universal attempts to avoid the effect of these rulings by relying on *TSR Wireless*. That case, however, involved the unique issue whether the FCC's reciprocal compensation rules apply to "one-way" paging carriers—carriers in the business of receiving paging calls over one-way interconnection trunks. It did *not* involve either relative use or the consideration of ISP traffic and, therefore, is completely irrelevant to this case. In *TSR Wireless*, the complainant paging carriers asserted that the FCC's rules relating to reciprocal compensation applied to them, and that under Rule 703(b), ILECs were prohibited from charging the paging carriers for the costs of one-way interconnection trunks used to carry *local* paging calls that originated on the incumbent ILECs' networks. The paging carriers based their claim on the express language of the then-existing Rule 703(b): "'A LEC may not assess charges on any other telecommunications carrier for *local* telecommunications traffic that originates on the LEC's network.'" *TSR Wireless*, ¶ 3. (Emphasis added; citation omitted.) Significantly, the paging carriers limited their claim to local calls, and did not claim that ILECs were prohibited from charging for the interconnection

[6] The FCC issued many of these rulings in connection with applications by the Bell Operating Companies ("BOCs") for entry into the long-distance market pursuant to section 271 of the 1996 Act. The FCC repeatedly confirmed that section 251(b)(5) does not require an ILEC to pay reciprocal compensation for Internet-bound traffic, thus confirming the FCC's continuing view that Internet-bound traffic is not within the scope of section 251(b)(5). *See Application by Verizon New Jersey Inc. et al. for Authorization to Provide In-Region, InterLATA Services in New Jersey*, 17 FCCR 12,275, ¶ 160 (2002) ("AT&T and XO also argue that Verizon's refusal to pay reciprocal compensation for Internet-bound traffic violates checklist item 13. The Commission previously determined that whether a BOC pays reciprocal compensation for Internet-bound traffic 'is not relevant to compliance with checklist item 13.'") (footnote omitted); *Joint Application by BellSouth Corporation et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCCR 9018, ¶ 272 (2002) ("ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2)."); *Application of Verizon Pennsylvania Inc. et al. to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCCR 17,419, ¶ 119 (2001); *Application of Verizon New York Inc. for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCCR 14,147, ¶ 67 (2001).

facilities used to carry *interstate* calls.[7] As the FCC described their claim, the paging carriers were seeking to establish that Rule 703(b) prohibits ILECs "from charging CMRS providers, including paging providers, for *local telecommunications traffic* that originated on the LECs' networks." *Id.*, ¶ 5. (Emphasis added.) In ruling for the paging carriers, the FCC established only that Rule 703(b) prohibits ILECs from charging *paging carriers* for facilities used to carry local "telecommunications traffic" originating on the ILECs' networks. *TSR Wireless,* ¶ 18.[8] Nothing in the order precludes ILECs from assessing charges for facilities used to carry inter-MTA paging traffic (*i.e.*, nonlocal traffic), and nothing in the order even remotely relates to the issue in this case: whether ISP traffic should be excluded from RUF calculations for two-way trunk facilities. Furthermore, because ISP traffic is interstate, the restriction on ILEC facility charges in *TSR Wireless* could not possibly apply in this case.[9]

As Qwest noted in its Opening Brief, the Commission's decision in Order No. 01-809 addressed the question of whether ISP traffic should be considered in RUF calculations and found that it should not be. In reaching that conclusion, the Commission expressly relied on a Colorado commission decision, which was later affirmed by a federal district court in the

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

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

[9] It is telling that the paging carriers did not dispute their responsibility to pay for facilities used to carry interstate calls. That acknowledgement on their part is more relevant to the issue here than is the FCC's restriction on facility charges for local paging calls.

Further, in Order No. 01-809 in docket ARB 332, Level 3 argued that *TSR Wireless* mandated that Qwest is responsible for ISP traffic in the RUF calculation. Order No. 01-809, at p. 12. Despite that argument, the Commission adopted Qwest's proposed language. *Id.*, p. 15.

Colorado Level 3 Decision.[10] The Colorado district court did not casually reach its conclusion. The Colorado court's December 2003 *Colorado Level 3 Decision* is particularly noteworthy for its in-depth analysis of the central issues. It carefully analyzes the relevant federal rules and the FCC and court decisions that have construed them.

After a detailed review of the *ISP Remand Order* and other relevant decisions, the Colorado court concluded that "[t]he *ISP Remand Order's* conclusion that ISP-bound traffic is 'information access' traffic is still good law." 300 F.Supp.2d at 1076. The court noted that the *WorldCom* court's later remand of the *ISP Remand Order* did not overrule the FCC's determination of the status of ISP traffic in the *ISP Remand Order*. *Id*., at 1076 (citing *WorldCom*, 288 F3d at 434).[11] Further, the court distinguished *TSR Wireless*, rejecting Level 3's argument that the *TSR Wireless* case "mandates 'rules of the road' that Qwest is responsible for the costs of the trunks and facilities up to the point of interconnection." *Id*. The court stated:

> *TSR Wireless* dealt only with 'local' traffic, in the context of paging or commercial mobile radio service carriers. 'Local' traffic, the precursor to 'telecommunications traffic' under 47 C.F.R. § 51.701(b)(1), does not include ISP-bound traffic for the reasons set forth above. Pursuant to the language of 47 C.F.R. § 51.703(b), as well as the distinguishing facts of *TSR Wireless*, *TSR Wireless* ' 'rules of the road' language, which requires that the originating carriers are responsible for the costs up to the point of interconnection, are only the 'rules of the road' for 'local' calls, now referred to as 'telecommunications traffic.' For the foregoing reasons, these are not the 'rules of the road' for ISP-bound calls. The holding of *TSR Wireless*, therefore, is inapplicable to the case at hand. *Id.* (Citations omitted.)

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[10] *See In the Matter of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, Decision C01-312, 2001, Colo. PUC LEXIS 377 (Colo PUC, 2001) ("*Colorado PUC Level 3 Decision"*).

[11] The Colorado court noted that the *WorldCom* case remanded, but did not vacate, the *ISP Remand Order*, and that the order is "still in effect." 300 F.Supp. at 1076, citing *Pacific Bell v. Pac-West Telecomm*, 325 F.3d at 1122-23 (9th Cir. 2003) ("*Pac-West*").

Thus, the Colorado federal court rejected the interpretations of Rule 703(b) and *TSR Wireless* that Universal attempts to assert here.

Universal cites four other federal circuit court cases in support of its position that Qwest somehow bears the responsibility to pay 100 percent of the cost of transporting ISP traffic to Universal. None of the cases support that conclusion.

Rule 703(b) applies only to "telecommunications traffic." That fundamental conclusion is not disturbed in any manner by any of the four cases Universal cites. In each case, the issue was whether, for traffic that clearly was "telecommunications traffic," the ILEC could charge another provider for the additional costs of transporting the traffic to the POI. Thus, while in each case the court ruled the ILEC could not charge the other carrier to transport the traffic to the POI, none of them even addressed the question whether Rule 703(b) applies to ISP traffic.

For example, in *Qwest* and *Mountain Communications*, the issues—like those in *TSR Wireless*—related to paging traffic. In *MCImetro Access* and *Southwestern Bell*, the issue related to general telecommunications traffic being exchanged between an ILEC and a CLEC. None of these cases, however, addressed either ISP traffic generally, or the specific question whether ISP traffic falls under Rule 703(b). None of them cited the *ISP Remand Order* either. Each of these four cases is essentially a replay of *TSR Wireless*, a case that had nothing whatsoever to do with the status of ISP traffic under Rule 703(b).

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

Finally, it is important to note that the Colorado district court recently ruled again on exactly the same issue, this time in an appeal of a Colorado commission order requiring the removal of the ISP traffic from the RUF provision between Qwest and AT&T, and it reaffirmed the entire analysis of the court's earlier *Colorado Level 3 Decision*. The court thus ruled that the prohibition in Rule 703(b) applies only to "telecommunications traffic," and that the term "traffic" in Rule 709(b)—the rule that establishes the RUF concept—likewise refers to "telecommunications traffic." Thus, given that ISP traffic is not "telecommunications traffic," the court affirmed the Colorado commission's decision to exclude ISP traffic from the RUF. (See Qwest Brief, Exhibit 2, at pp. 22-26.)

In short, because the traffic at issue in each of the decisions upon which Universal relies on this issue related to "telecommunications traffic," which excludes ISP traffic, they are irrelevant to the RUF issue in this docket.[12] The Commission should therefore reject Universal's arguments on this issue.

C. Universal misrepresents the *Universal* holding on the RUF issue

Universal quotes a portion of the December 15, 2004 decision in the *Universal* case for the proposition that the court ruled that it would be unlawful for Qwest to exclude ISP traffic

[12] In its brief, Universal cites the decisions in the *Virginia Arbitration Order* (Universal Brief, at p. 10, fn. 12) and the FCC's *Intercarrier Compensation NPRM* (*id*., at pp. 10-11, fns. 14-15) in support of its position. Neither decision provides such support.

The paragraph cited in the *Virginia Arbitration Order* states that "[t]he Commission's rules . . . prevent any LEC from assessing charges to another telecommunications carrier for *telecommunications traffic* subject to the reciprocal compensation . . ." Memorandum Opinion and Order, *In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, 17 FCC Rcd 27,039, ¶ 52 (Wireline Competition Bureau, July 17, 2002) ("*Virginia Arbitration Order*").

Universal correctly quotes an isolated sentence from paragraph 70 of the Intercarrier Compensation NPRM, but fails to note that it is part of a section entitled "Bill and Keep for Traffic Subject to Section 251(b)(5)." Thus, the sentence from paragraph 70 (which is the second paragraph after the heading) must be read in the context of that heading. In that context, it is clear that the FCC was not pronouncing the universal principle that Universal claims it was. See Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, heading 6, prior to ¶ 69 (2001) ("*Intercarrier Compensation NPRM*").

from the RUF provision. (Universal Brief, at pp. 13-14.) Universal suggests that the decision in that case is binding on the Commission in this docket. (*Id.*, at p. 14.) Universal's argument is a misrepresentation of the *Universal* decision, however.

Ironically, in footnote 6 of its brief, Universal cites the *Universal* decision and states: "To the extent that the court in [the *Universal*] matter was ruling about the specific meaning of that specific agreement, as opposed to generally applicable federal law, Judge Aiken's decision will not be controlling here . . . ." (Universal Brief, at pp. 4, fn. 6.) Qwest agrees with that statement, but Universal pays only lip service to it because Universal's reliance on the *Universal* decision on RUF is a direct violation of the principle that it purports to follow.

It is critical to understand that, although there was a RUF provision in the interconnection agreement at issue in that case, there was no language in the RUF provision that excluded ISP traffic, or even referred to ISP traffic. In light of that fact, Qwest made an unsuccessful argument (relying on the language of Rule 703(b), the *Colorado Level 3 Decision*, and other authorities) that the court should essentially read the exclusion of ISP traffic into the RUF provision of the agreement. The court rejected that argument, quoting paragraph 82 of the *ISP Remand Order* that the order "'does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law provisions.'" 2004 WL 2958421, at *4. Elsewhere in its decision, the court ruled that Qwest could not rely on a change of law argument, holding that the change of law provision of the existing agreement had not been met. *Id.* at *8-9. Finally, referring to the *Colorado Level 3 Decision* and the Commission's decision in the Level 3/Qwest arbitration (Order No. 01-809), the court concluded: "I find these cases inapplicable. Both cases involved the arbitration of proposed interconnection agreements that were established after the issuance of the *ISP Remand Order*. . . . Neither involved disputes

about *preexisting contracts*." 2004 WL 2958421, at *5. (Emphasis added.) The court thus distinguished the cases upon which Qwest relied, and held that *the existing agreement* did not allow ISP traffic to be removed from the RUF.

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

In sum, the *Universal* decision does not prevent the Commission from continuing to approve RUF language that excludes ISP traffic. To the contrary, the Commission should approve Qwest's proposed language that excludes ISP traffic from the RUF.

D. Universal's arguments manifest a complete misunderstanding of the RUF provision

Universal makes a confusing argument that Qwest's language is a misapplication of Rule 709(b). (Universal Brief, at pp. 15-18.) This argument is without merit and should be rejected.

First, Universal's argument is largely incomprehensible. However, it appears to be a claim that, even if Qwest prevails on its other arguments, the Commission should reject Qwest's language, and thus should nevertheless adopt language that requires Qwest to pay Universal for all of the costs on Qwest's side of the POI.

Rule 709(b) states that "[t]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between the two carriers' networks shall recover only the cost of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." The first place to start with this analysis is to understand, as discussed earlier in this brief, that Rule 709(b) applies only to "telecommunications traffic," and ISP traffic is not "telecommunications traffic." Second, in a typical situation in which two local exchange carriers are interconnected using two-way trunks and are exchanging "telecommunications traffic," some of the traffic flows in one direction, and some flows in the other direction. Thus, assuming that only telecommunications traffic is exchanged between two networks, and Carrier A (an ILEC) originates 60 percent and Carrier B (a CLEC) originates 40 percent, each is responsible for the cost of those facilities (at the state commission-established TELRIC rates) in proportion to the amount of traffic they originate.

Third, the manner in which RUF provisions have traditionally been established (and the manner in which Qwest's language reads) is for the CLEC to be nominally responsible for 100 percent of the cost, but that amount would be reduced by the percent of "telecommunications traffic" originated by the ILEC. Among other reasons, there is a particularly good reason that the

CLEC should be nominally responsible for the facilities in the first instance: the facilities, after all, were installed by Qwest at the *CLEC's request* to carry traffic that the CLEC wishes to terminate on its network.

Thus, in the example above, the CLEC, while nominally responsible for 100 percent, would effectively pay 40 percent of the TELRIC rates for the interconnection services that the ILEC provides, and the ILEC would effectively pay 60 percent of the TELRIC rates. Qwest's language is entirely consistent with this rule. In both relevant paragraphs (7.3.1.1.3.1 and 7.2.2.2.1), the Qwest-proposed language states: "The nominal charge to the other Party for the use of the [EF or DTT] facility, as described in Exhibit A, shall be reduced by the initial Relative Use Factor." That factor applies for one quarter, and then is adjusted based on actual usage. There is nothing in that formula that is inconsistent in any way with Rule 709(b).

Finally, the most important legal consideration is that ISP traffic does not fall under Rule 709(b). Thus, the question of how Rule 709(b) is applied to ISP traffic is simply irrelevant—it does not apply at all, and neither does Rule 703(b), thus making a CLEC that receives ISP traffic responsible for the charges related to the facilities (services) that carry that traffic. In the case of Universal, *100 percent* of the traffic is ISP traffic that originates on either Qwest's network or on the network of another carrier (i.e., transit traffic). Thus, since neither Rule 703(b) nor Rule 709(b) applies to this traffic, Universal, which *ordered* the services, should be responsible for what it has ordered. The federal district court in the recent Colorado AT&T decision described the impact of the traffic not falling under Rule 709(b) this way: "If ISP-bound traffic is exempt from [Rule 709(b)], then CLECs that service ISPs . . . end up paying more for the interconnection facilities." (See Qwest Brief, Exhibit 2, at pp. 22-23.) In that case, the Colorado commission and the court on appeal found the Qwest-proposed language to be congruent with

Rule 709(b); likewise, this Commission has approved similar language. The Commission should reject Universal's arguments on this point.

E. Universal's cost causer argument fails to recognize that the real cost causers are Universal and its ISP customers

Universal's VNXX proposal is clear. Universal wants to be able to continue to obtain local telephone numbers in local calling areas throughout Oregon, assign them to its ISP customers irrespective of their location, and require Qwest to gather and transport all of the traffic generated to those numbers to Universal's POIs in Portland and Eugene. Universal believes it is entitled to receive these services free, and also that it should be able to charge Qwest $.0007 per minute of use to terminate the traffic. Universal argues that this proposal is fair because Qwest customers make the calls, and therefore Qwest is the "cost causer."

The reality, of course, is very different. As Universal acknowledges in its statement of facts, "Universal provides services to . . . ISPs by offering local telephone numbers which the *ISPs' customers* may call . . . ." (Universal Fact Statement, ¶ 5.) Universal's President stated that "*[t]he ISPs market themselves to end user customers* and advise them of the local telephone numbers to use to access the Internet." (Qwest Statement of Facts, ¶ 11, quoting the Affidavit of Jeffry Martin, ¶ 13 (emphasis added).)

Universal's claim that Qwest is the cost causer is thus completely misleading. These are not just Qwest customers making the calls, but rather, are customers who are simultaneously the dial-up customers of Universal's ISP customers. When those customers dial the "local" ISP access numbers, they undoubtedly think of themselves as ISP customers. It is *Universal* and its *ISP customers*, and *not Qwest*, who have created the services that have caused this traffic to be generated. In a Colorado Level 3 arbitration, the Colorado commission saw through the CLEC's argument: "When connecting to an ISP served by a CLEC, *the ILEC end-user acts primarily as*

the customer of the ISP, not as the customer of the ILEC."[13] This Commission quoted this language with approval in Order No. 01-809, at page 13.

Accordingly, Universal's suggestion that Qwest should bear these costs because Qwest is the cost causer does not square with the facts and with this Commission's past ruling.

F. Mr. Roderick's cost causer testimony misses the point

In his testimony, Mr. Roderick of Universal makes a calculation,[14] the purpose of which is apparently to attempt to convince the Commission that Qwest's costs of delivering VNXX traffic is so small that, in his words, it is "not a significant factor." He further states that "[t]here is no reason to be concerned that Qwest is not recovering this level of cost from its own end users, who are, after all, the ones making these calls." (Roderick Direct Testimony, at p. 9.) Aside from Mr. Roderick's failure to mention that these customers are also the customers of Universal's ISP customers and, as the Colorado commission noted, "[w]hen connecting to an ISP served by a CLEC, *the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC*," his argument has no lawful basis.[15] More importantly, his argument completely misses the point. His argument is based on the false premise that the Commission can simply ignore the difference between traffic that is local in nature and traffic that it is interexchange in nature because, as he suggests, the cost is "not significant" to Qwest.

Mr. Roderick's calculation merely proves the mathematical proposition that when one divides one number by a much larger number, the result is a very small number. For Universal to suggest that Qwest does not incur any material costs for transporting the millions of minutes

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[13] *Colorado PUC Level 3 Decision*, at p. 36. (Emphasis added.)

[14] Qwest notes that it does not agree with Mr. Roderick's calculation, and even he acknowledges that it is not based on a detailed cost study. (Roderick Direct Testimony, at p. 7.)

[15] *Colorado PUC Level 3 Decision*, at p. 36.

of traffic directed to Universal's ISP customers from throughout the state to Portland and Eugene is simply false, and this suggestion further ignores the multiple cost dockets that this Commission has conducted over the past fifteen years. Universal is well aware that Qwest has invested in switches and interoffice facilities throughout its service territory in Oregon. Universal further knows that this equipment must be maintained by Qwest, it must be augmented when traffic exceeds capacity, and it must be repaired when damaged. Whether a retail or wholesale customer orders circuits, Qwest must incur expenses in rearranging and installing the ordered services.

Even under the FCC's TELRIC methodology (as opposed to an embedded cost study), Qwest is entitled to a reasonable return on those assets. 47 U.S.C. § 252(d). Further, the FCC's forward-looking TELRIC methodology—which hypothesizes forward-looking cost levels (as opposed to the actual costs that Qwest incurs) and the most efficient network possible—demonstrates that Qwest incurs significant costs to transport such traffic. For example, as the Commission has established, the recurring monthly TELRIC-based rate for a DS3 entrance facility in Oregon is $363.42, with a nonrecurring cost to install of $361.10. (Exhibit A, Qwest Oregon SGAT, Eighteenth Revision, at 1.) A DS3 direct trunked transport circuit costs $253.13 per month, with additional recurring per mile charges. *Id*. Multiplexing a DS3 to DS1 has a monthly recurring cost of $203.54, and a nonrecurring cost of $161.56. *Id*.

Universal's ISP customers generate millions of minutes of use over such facilities; Ms. Batz testified that over the past thirteen months, Qwest has delivered over *one billion* minutes of traffic to Universal. (Qwest/1, Batz/7.) Thus, doing Mr. Roderick's math in reverse, even though the cost for an individual transport minute may be small, if one multiplies it by a number in the millions (or billions) of minutes, the result is a significant number. For Universal to

suggest that Qwest incurs no significant costs to transport interexchange traffic throughout the entire state of Oregon to Universal's centralized POIs is sheer fantasy.

Mr. Roderick's argument can also be turned around. Universal's business plan is predicated on selling services to ISP customers, who in turn benefit from the ability to generate traffic from 17 separate local calling areas. (Qwest/1, Batz/6-7.) Without the ability to generate this traffic, Universal has no business. Thus, given the direct benefit to Universal that comes from the ability to have millions of ISP minutes transported from all over the state, the small cost per minute that Mr. Roderick estimates would be a small price for Universal to pay to preserve its business plan. And, assuming the validity of Mr. Roderick's numbers, it would be very easy for Universal to pass that small cost on to its ISP customers, whose business plans likewise are dependent on the ability to receive traffic from multiple local calling areas. Indeed, this issue raises the very concern that the FCC raised in the *ISP Remand Order*, in which the FCC noted that instead of the ISPs paying the costs, the burden would be imposed on others, including ILECs. *ISP Remand Order*, ¶¶ 67, 70, 74.

Completely aside from the fact that Qwest incurs real costs, Universal's argument is a classic "red herring" that attempts to divert the Commission's attention from the real point. The question for the Commission is not a cost issue, but the proper intercarrier compensation mechanism to apply to interexchange calls. The Florida commission grappled with this precise issue, where a CLEC argued that the ILEC's costs to deliver traffic to a POI did not vary whether the traffic was VNXX or was delivered to a local customer:

> We acknowledge that an ILEC's costs in originating a virtual NXX call do not necessarily differ from costs incurred originating a normal local call. However, we do not believe that a call is determined to be local or toll based on the ILEC's costs in originating the call. In addition, we do not believe the proper application of a particular intercarrier compensation mechanism is based upon the costs incurred by a carrier in

delivering a call, but rather upon the jurisdiction of a call as being either local or long distance.[16]

Finally, perhaps the most telling evidence on this point is that, if the cost of transport is essentially free, as Mr. Roderick suggests, then there is nothing to prevent Universal from building its own facilities to any other area that it wishes to serve Oregon. Of course, such facilities cannot be constructed without incurring significant costs—which is why Universal wants to use Qwest's network. Universal should not be allowed free use of Qwest's network on the basis of such transparently erroneous arguments.

G. Universal raises other issues that are irrelevant and should be ignored

Universal also raises several issues that are irrelevant to the issues in this case.

For example, Universal argues that the concept of a "local interconnection service" is a misnomer because there is no such thing. (Universal Brief, pp. at 7-8.) Yet, Universal does not challenge the definition of "Local Interconnection Service" in the definitions section of the proposed agreement, which defines the terms as "the Qwest product name for its provision of Interconnection as described in Section 7 of this Agreement." Nor does Universal challenge any the provisions of Section 7.4 of the proposed Agreement, which contains provisions that govern the ordering of Local Interconnection Services. Perhaps most importantly, Universal never

[16] Order on Reciprocal Compensation, *In re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996,* Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP, at 30 (Fla. PUC, September 10, 2002). (Emphasis added.) On a different issue (this one relating to reciprocal compensation), Mr. Roderick suggests that Universal incurs switching costs regardless whether the traffic delivered to it is local ISP traffic or VNXX traffic, and that this in some manner means Universal is entitled to reciprocal compensation on all traffic. (Roderick Direct Testimony, at pp. 8-11.) Even if that is true a Universal switch is engaged on all traffic, it is completely irrelevant. Whether Universal incurs some switching costs to terminate the traffic delivered to it is not the test for whether Qwest owes reciprocal compensation. As the Florida commission case makes clear, the issue is not whether costs are or not incurred; rather, the question that should be addressed is the compensation regime that should apply. As Qwest will discuss in a later section, reciprocal compensation is appropriate only for ISP traffic that originates and terminates within the same local calling area.

makes it clear why the issue matters. The fact is that Local Interconnection Services have been defined and have been priced by the Commission for years.

Universal also devotes a section of it brief to support the proposition that it is entitled to a single POI in each LATA, including citations to several FCC decisions to support that claim. (Universal Brief, at pp. 8-9.) The problem, however, is that this is not an issue in this case, and Qwest does not challenge this proposition asserted. In fact, Universal has been interconnected with Qwest at a single POI in each of the two LATAs in Oregon, and there is no contract language at issue on that point.

H. The RUF should not apply to non-recurring charges

Finally, Universal suggests, although it presents no legal argument to support its point, that Qwest should be prevented from assessing non-recurring charges (NRCs) for facilities on Qwest's side of the POI. (Universal Brief, at p. 12.) Qwest addressed this issue in its opening brief, pointing out that the Commission's recent decision in Order No. 05-874 in dockets IC 8/IC 9 (the Wantel and Pac-West complaints) established the principle that the application of Rule 709(b) to non-recurring charges would be inappropriate. (Qwest Brief, at pp. 20-21.) Since Universal has provided no substantive response to Order No. 05-874, Qwest merely reaffirms its argument on this point.

I. Conclusion on RUF issues

The Commission should adopt Qwest's proposed language on RUF issues for the reasons set forth above and in Qwest's opening brief. Qwest's proposed language is consistent with FCC rules, FCC decisions, and with the decisions of this Commission.

III. ISSUE NO. 2- THE *ISP REMAND ORDER'S* INTERIM COMPENSATION REGIME APPLIES ONLY TO ISP TRAFFIC THAT ORIGINATES AND TERMINATES AT ISP MODEMS IN THE SAME LOCAL CALLING AREA

A. The *ISP Remand Order* applies only to ISP traffic that originates and terminates in the same local calling area

The centerpiece of Universal's argument on ISP traffic is its claim that the *ISP Remand Order* applies to "all ISP traffic," regardless of the traffic's points of origination and termination. (Universal Brief, at pp. 23-39.) Universal reaches this conclusion by relying primarily on an opinion of a federal district judge in Connecticut, *Southern New England Telephone v. MCI WorldCom Communication*, 359 F. Supp 2d 229 (D. Conn. 2005) ("*SNET*"), a case that demonstrably misinterprets the *ISP Remand* Order, and which is not binding on this Commission. Universal compounds its error by making other misinterpretations of the governing authorities. Universal can only reach its conclusion by blatantly ignoring governing language in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*") (a case that is binding), not to mention ignoring complete sections of the FCC's analysis in the *ISP Remand Order*. When read in its proper context, the only consistent reading of the *ISP Remand Order* is that it applies only to "local" ISP traffic.[17] Qwest's analysis is also directly supported by the August 16, 2005 ALJ Ruling in docket IC 12 ("IC 12 Ruling") that addressed the identical issue.

In its opening brief, Qwest outlined the history leading up to the *ISP Remand Order*, analyzed the order itself, analyzed the *WorldCom* decision (including governing language that states the *ISP Remand Order* holding), and the IC 12 Ruling. (Qwest Brief, at pp. 23-31.) Qwest's analysis demonstrates conclusively that the *ISP Remand Order* applies only to local ISP traffic, and that other, non-local, ISP traffic does not fall under the *ISP Remand Order's* interim

[17] For purposes herein, "local" ISP traffic refers to ISP traffic that originates with the end-user dial-up customer and terminates with to an ISP's modems that are both physically located within the same local exchange area, as defined by the Commission.

regime, and thus is not subject to reciprocal compensation. Qwest will not repeat that entire analysis here, but will respond to the specific arguments that Universal advanced on this issue.

B. The *SNET* opinion is a demonstrably erroneous reading of the *ISP Remand Order* and the *WorldCom* decision

1. The *SNET* opinion ignores the express language in *WorldCom* and substitutes its own judgement of the *ISP Remand Order*'s breadth

Universal advances several arguments, but the question of the breadth of the *ISP Remand Order* is actually easily answered because the *WorldCom* decision, in which the D. C. Circuit reviewed the *ISP Remand Order*, could hardly have been more clear in stating the *ISP Remand Order's* holding. There, the court concluded that the *ISP Remand Order* "*held* that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5*)* calls made to internet service providers ("ISPs") *located within the caller's local calling area*." 288 F.3d at 430. (Emphasis added.) In addition, the IC 12 Ruling relied explicitly on this same language from the *WorldCom* decision. *See* IC 12 Ruling, at p. 9.

Nevertheless, in the face of the definitive statement in *WorldCom* by the D. C. Circuit (the Hobbs Act reviewing court), the *SNET* opinion, while cavalierly paying lip service to this language, in reality ignores it, and instead, the *SNET* judge substitutes his own judgment for that of the D. C. Circuit.[18] In *SNET*, the ILEC (SBC) had argued that the above-quoted language

[18] Under the Hobbs Act, the federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). (Emphasis added.) 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which apply here. Thus, the Hobbs Act grants exclusive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated under the Hobbs Act to apply and abide by FCC rules and orders.

Further, as state entities implementing a federal act, state commissions must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act. See 47 U.S.C. § 408 (orders of the FCC "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."). This Commission, the courts, and the parties here are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order*. *See Wilson v. A.H. Belo Corp.*, 87

defines the breadth of the *ISP Remand Order*. In response, the *SNET* judge quoted the language but, without saying so, substituted his own judgment for that of the D. C. Circuit. The SNET judge's ultimate conclusion directly contradicts the *WorldCom* court's description of the issue decided in the *ISP Remand Order*.

The *SNET* judge's alternative analysis is a classic result-driven analysis. The opinion begins its analysis by looking at the past litigation history on the ISP traffic issue, and concludes that the FCC "began by addressing" the question whether ISP traffic that would typically be referred to as "local" was subject to reciprocal compensation. 359 F.Supp.3d at 231. The judge, however, concluded that "these statements, taken by themselves, do not reveal how the FCC proceeded to answer the question." *Id.* at 231-32. The *SNET* opinion stated that the FCC did the following in the *ISP Remand Order* to answer the question:

(a) 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 is exempted from reciprocal compensation because it is "information access;"

(d) held that all ISP-bound traffic was subject to FCC jurisdiction under section 201; and

(e) proceeded to set the compensation rates for all ISP-bound traffic.

Id. at 232. Thus, the *SNET* judge concluded that the FCC answered the question "no" on the ground that all ISP-bound traffic is in a category by itself. *Id*.

In a separate section below, Qwest will discuss the *SNET* judge's misunderstanding of the FCC's decision to use statutory terms instead of the term "local" in its analysis (and will demonstrate that this characterization of that issue is wrong). Furthermore, while the *SNET*

F.3d 393, 396-97 (9th Cir. 1996); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *U S West Communications, Inc. v. Jennings*, No. 99-16247, 2002 U.S. App. LEXIS 19798 at *16 (9th Cir. Sept. 23, 2002).

opinion correctly summarizes other actions of the FCC in the *ISP Remand Order*, the fatal error of its analysis is its conclusion that the final four items apply to "all ISP traffic," rather than the traffic that *WorldCom* identified ("calls made to internet service providers ("ISPs") *located within the caller's local calling area*"). 288 F.3d at 430. (Emphasis added.) To claim that the last four items apply to "all ISP traffic" cannot withstand the explicit language in *WorldCom*.

The *SNET* opinion attempts to justify its conclusion by first quoting statements from the *ISP Remand Order*, and it even quotes the critical language from the *WorldCom* decision that describes the *ISP Remand Order* holding. 359 F. Supp 2d at 231. However, having quoted this definitive language, the opinion then dismisses it with its conclusion that "these statements indicate that the FCC *began by addressing*" whether local ISP traffic is subject to compensation. In other words, the *SNET* opinion relegates the *WorldCom* court's statement of the *ISP Remand Order* holding to mere background information describing the beginning of the process. In the *SNET* judge's view, the FCC later expanded its decision to cover all ISP traffic. Universal makes the same argument. (Universal Brief, at p. 28.)

The *SNET* opinion's dismissal of the *WorldCom* court's express language suffers from a demonstrably fatal logical flaw. The *SNET* judge suggests that the *WorldCom* language describes the *beginning* of the process before the FCC. However, this conclusion cannot be true under any rational reading of the language. Contrary to the *SNET* judge's conclusions and Universal's arguments, the *WorldCom* court *was not* describing the *beginning* of the process; rather, its language describes the *end* of the process. The *WorldCom* court did not describe the initial issue that the FCC considered in the *ISP Declaratory Order*; rather, the court's language specifically describes the *holding* in the *ISP Remand Order*. There is simply no way to reconcile the *SNET* judge's conclusion with the *WorldCom* language. Under the Hobbs Act, it is the D. C.

Circuit Court of Appeals, and not a district judge in Connecticut, that was granted "exclusive jurisdiction" to review and interpret the *ISP Remand Order*. Thus, the Connecticut judge's contrary interpretation regarding the breadth of the *ISP Remand Order* violates the Hobbs Act. As between the two interpretations, the parties to this arbitration are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order* holding.

As noted above, the IC 12 Ruling addressed the identical issue. In docket IC 12, Level 3 argued that the statements from the *ISP Declaratory Order*, the *Bell Atlantic* decision, the *ISP Remand Order*, and the *WorldCom* decision that described the issue as relating to only local ISP traffic were merely "background statements." Administrative Law Judge Sam Petrillo then summarized Level 3's argument on this point: "Level 3 argues that the descriptions of ISP-bound traffic used by the FCC and the D. C. Circuit *are really only "background statements"* and were not intended to place a geographical limitation on the placement of ISP servers and modem banks." IC 12 Ruling, at p. 9. (Emphasis added.) If that were the case, one can only wonder why the D. C. Circuit in the *Bell Atlantic Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), described the issue the FCC had addressed in these words: "In the [*ISP Declaratory Order*], [the FCC] considered whether calls to internet service providers ("ISPs") *within the caller's local calling area are themselves 'local*.'" *Id.* at 2. (Emphasis added.) Nor does it explain why, in the *ISP Remand Order* appeal, the *WorldCom* court again defined the issue in terms of calls made to ISPs "*located within the caller's local calling area*." 288 F.3d at 430. (Emphasis added.) These statements are certainly far more than mere background statements.

Judge Petrillo rejected Level 3's arguments as follows:

> *First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending that it have any specific meaning.* Second, it ignores the fact that there are repeated references in both the *Declaratory Order* and the *ISP Remand Order* that make it clear that the FCC intended that an ISP server or modem

> bank be located in the same LCA as the end-user customer initiating the call. Third, Level 3's argument continues to confuse the FCC's jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is "predominately interstate for jurisdictional purposes." The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC's holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-users initiating the call. IC 12 Ruling, at pp. 9-10. (Emphasis added; footnotes omitted.)

With regard to his second point, Judge Petrillo cited five paragraphs from the *ISP Declaratory Order* and three from the *ISP Remand Order*, all of which characterize the ISP-bound traffic at issue as traffic originating and terminating in the same local calling area. IC 12 Ruling, at p. 10, fn. 36 (citing *ISP Declaratory Order*, ¶¶ 4, 7, 8, 12, 24 (fn. 77) and 27, and *ISP Remand Order*, ¶¶ 10, 13 and 24).

The *WorldCom* court did not, by the way it described the *ISP Remand Order* holding, find the FCC's multiple references to ISP traffic that originates and terminates in the same local calling area to be meaningless, and neither did Judge Petrillo. As Qwest demonstrates below, Universal's interpretation nullifies major sections of the FCC's reasoning in the *ISP Remand Order*. In the end, the difference between the IC 12 Ruling and the *SNET* opinion is that the IC 12 Ruling gives meaning to FCC's repeated and straightforward descriptions of the traffic at issue. By failing to do likewise, however, the *SNET* opinion not only directly conflicts with the *ISP Remand Order*, but it also conflicts with the binding *WorldCom* decision.

In effect, the *SNET* opinion and Universal are suggesting that the *WorldCom* court did not really mean what it said when it defined the holding of the *ISP Remand Order* in terms that define ISP-bound traffic as calls to ISPs "*located within the caller's local calling area*." 288 F.3d at 430. (Emphasis added.) To accept Universal's argument and the *SNET* judge's conclusion, one would have to conclude that the D. C. Circuit was incapable of correctly stating either the issue that the FCC considered or the FCC's holding. Such a conclusion is both

presumptuous and wrong. Had the *WorldCom* court believed the issue was as broad as Universal claims, surely it would have defined the issue more broadly. That the *WorldCom* court did not do so speaks far more loudly than the convoluted arguments that Universal advances in order to attempt to distract the Commission from the binding language in the *WorldCom* decision.

It is also curious that, in the face of this *WorldCom* language, Universal includes a three-page section in its brief addressing the *WorldCom* case, in which Universal argues that the *WorldCom* court ruled that "all ISP traffic" is somehow subject to the *ISP Remand Order*. (Universal Brief, at pp. 36-38.) Nevertheless, in that analysis, Universal did not even mention the language in which the *WorldCom* court described the FCC holding as relating only to local ISP traffic.

Further still, Universal cites no language from *WorldCom* that suggests in any manner that the court was broadening its review of the *ISP Remand Order*, or that it intended to reach a broader conclusion than the issue that was pending before the court. Of course, for an appellate court to broaden a ruling beyond the issue pending before it would violate long-standing rules of appellate practice. The D. C. Circuit itself has stated: "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D. C. Cir. 1983). Both the *SNET* opinion's analysis and the arguments that Universal advances assume that the D. C. Circuit, having defined the issue narrowly, then proceeded to violate its own standards by issuing a decision far broader than the issue the court stated was pending before it for decision. These positions further suggest that the *WorldCom* court broadened the *ISP Remand Order's* stated holding without even bothering to mention such fact in its decision. These positions simply make no sense.

2. The *SNET* opinion mischaracterizes the FCC's decision to use statutorily-defined terms and thus not rely on the word "local"

Another distracting and erroneous argument that Universal advances is its suggestion, based on the *SNET* judge's obvious misunderstanding of the FCC's decision to use statutory terms instead of the term "local" in its *ISP Remand Order* analysis, that the FCC "*rejected* the notion that the 'local' status has anything to do with whether that traffic is subject to reciprocal compensation." (Universal Brief, at p. 28 (emphasis in original).) The *SNET* judge characterized the FCC's action as an "express disavow[al of] the term 'local.'" 359 F.Supp.2d at 231. However, that is not what the FCC did in the *ISP Remand Order*. In the *ISP Remand Order*, the FCC was responding to the *Bell Atlantic* decision, which had criticized the FCC's use of the local/long distance distinction in the *ISP Declaratory Order*. Thus, in paragraph 34, the FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' *not being a statutorily defined category*, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)." *ISP Remand Order*, ¶ 34 (emphasis added).) The FCC's decision to focus on statutorily-defined terms, however, is a far cry from deciding, as Universal asserts, to essentially disavow the historical significance of the traditional differences between local and interexchange calling. The *SNET* judge's characterization of the FCC's action ignores the fact that statutorily-defined terms in the 1996 Telecommunications Act retain the local/interexchange traffic distinction.

Far from abandoning the historical distinction between calling within a local calling area and interexchange calling, the FCC was simply shifting its analysis from the word "local," a term not statutorily defined, to statutory terms (in this case, the phrase "information access" in section 251(g)). Thus, *SNET* erroneously transforms the FCC's shift to defined terms into a complete abandonment of all distinctions between local and interexchange calling. Instead of analyzing

the subtle shift that actually took place, the *SNET* judge concluded: "Put simply, the language of the *ISP Remand Order* is unambiguous—the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and proceeded to set the intercarrier compensation rates for such traffic." 359 F.Supp.2d at 231. There is nothing to suggest, however, the FCC completely abandoned the concept of local service; nor is there anything to indicate that the concept of local service was abandoned by the 1996 Act.[19] Instead, as it clearly stated, the FCC based the *ISP Remand Order* on statutorily-defined terms, in this case focusing on the "information access" category as the rationale for its decision to develop a separate compensation regime for ISP traffic that originates and terminates within the same local calling area.

It is also critical to note that in remanding, but not vacating, the *ISP Remand Order*, the *WorldCom* court explicitly stated that it was not ruling on a host of issues that might have bearing on the court's decision not to vacate the order because "there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i))." The court stated:

> [W]e do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act), . . . or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the "telecommunications" covered by § 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5); see § 252(d)(B)(i) (referring to bill-and-keep). *Indeed, these are only samples of the issues we do not decide* . . . . 288 F.3d at 434. (Emphasis added.)

[19] The term "telephone exchange service," another defined term, clearly refers to what is commonly called local service. 47 U.S.C. § 153(47) provides:

> The term 'telephone exchange service' means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

The point, of course, is that the *WorldCom* court clearly concluded that there were a variety of theories upon which the system under the *ISP Remand Order* was lawful. Thus, to suggest that the FCC completely abandoned the local/interexchange call distinction simply because it decided to focus on statutory language is simply wrong. To further suggest that the FCC's holding, as clearly defined by *WorldCom*, and as supported by the *ISP Remand Order's* language, applies to more than local ISP traffic is also wrong.

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

In *SNET*, SBC correctly argued (citing paragraph 37, footnote 66) that the *ISP Remand Order* discloses the FCC's intent not to require that ISP traffic already subject to a compensation regime other than reciprocal compensation (*i.e.*, access charges) be subject to the interim regime. 359 F.Supp.2d at 232. The *SNET* opinion dismissed this argument, however, stating that the quoted language "only indicates that the FCC did not want to disturb the *FCC's regulation* of access charges." *Id*. That, of course, is a misreading of the language of the footnote, since the quoted language from the *ISP Remand Order* also made it clear that the FCC did not want to interfere with *intrastate access* charges either.[20] If that were not enough, the *SNET* opinion's conclusion demonstrates its results-oriented desire to sweep non-local ISP calls into the *ISP Remand Order*. The *SNET* judge stated:

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

[20] Footnote 66 of the *ISP Remand Order* states: "[W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but has no such concerns about effects on analogous intrastate mechanisms.'"

In other words, while acknowledging that the FCC intended to avoid impacts on access charges, the *SNET* judge proceeded to ignore that intent, instead concluding that what he characterizes as the clear language of the order is that all ISP traffic be subject to the order. Thus, the *SNET* judge pays lip service to the FCC's express intent, but then adopts an interpretation of the order that does precisely what the FCC said it did not want to have happen. Instead of analyzing whether the FCC really meant to sweep all ISP traffic into the interim compensation regime, the *SNET* judge simply ignores language that demonstrates that his interpretation of the *ISP Remand Order* holding directly contradicts other language in the order.

Accordingly, one can only ask why, if it were truly the FCC's intent to include all ISP traffic, the FCC did not simply say so, or why it would have gone to the trouble to describe the fact that it did not intend to create the inevitable impacts of such a holding on access charges, if it really intended the order to have such impacts. This places in stark contrast the *SNET* judge's strained and contradictory reading of the order; it also demonstrates that the only way for footnote 66 to make any sense is to conclude, as the *WorldCom* court did, that the order applies only to ISP traffic that originates and terminates within the same local calling area.

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

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

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

Further still, footnote 70 states: "We believe that the most reasonable interpretation of that sentence [the first sentence of section 251(g)], in this context, is that subsection (g) was intended to preserve pre-existing regulatory treatment for the enumerated *categories* of carriers, rather than requiring disparate treatment . . . ." *Id.*, ¶ 39, fn. 70.

This language again confirms the FCC's intent not to alter pre-existing access charge mechanisms. Given the reiteration of that recurring principle in the *ISP Remand Order*, the *SNET* opinion's decision to simply ignore these statements is particularly baffling. To reach the *SNET* opinion's conclusions, one would have to conclude that the FCC's statements regarding access are meaningless. Finally, two decisions, one from the Ninth Circuit and the other the *Universal* decision, both of which were cited in the IC 12 Ruling, are instructive on this point. The *SNET* opinion takes as a given that the *ISP Remand Order* conclusively determined that *all* ISP traffic falls within its terms. The IC 12 Ruling, in footnote 38, noted that, in *Pacific Bell* at 1130, the Ninth Circuit held that "the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of § 251 . . . ," thus demonstrating that the Ninth Circuit does not share the *SNET* judge's certainty as to the meaning of the *ISP Remand Order*. Judge Petrillo, in the same footnote, also quoted the following language from *Qwest Corporation v. Universal Telecom*, 2004 WL 2958421 (D. Ore. 2004): "VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA . . ; it instead crosses LCAs . . . .,"

and that VNXX traffic is not local "whether it was ISP-bound or not." *Id*. at *10. Based on these cases, the IC 12 Ruling concluded that "[t]he *WorldCom, Pac-West,* and *Universal* decisions disclose that there remains considerable uncertainly regarding the future application of 'local v. interstate' analysis, as well as the scope of 'telecommunications' under section 251(b)(5)." IC 12 Ruling, at p. 10, fn. 38.

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

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

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

The irony of this statement is the incongruity that the court acknowledges would not exist if he were simply to apply the *ISP Remand Order* with the proper definition of ISP traffic consistent with the *WorldCom* decision.[21]

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

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

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

5. Conclusion on the *SNET* decision

As the foregoing analysis demonstrates, the *SNET* opinion represents a blatant attempt by a federal district judge in Connecticut to substitute his own judgment for that of the D. C. Circuit's *WorldCom* decision, which was rendered by the Hobbs Act court with exclusive jurisdiction to review the *ISP Remand Order*. The *SNET* judge's analysis is rife with inexplicable conclusions and numerous unexplained (or poorly reasoned) inconsistencies with the language of the *ISP Remand Order*. On the other hand, the IC 12 Ruling represents a rational and consistent reading of the governing authorities, and Qwest submits that the IC 12 Ruling's analysis should govern this arbitration proceeding as well.

C. The *Illinois Bell* case is clearly distinguishable

Universal also relies on *AT&T Communications v. Illinois Bell Telephone*, 2205 WL 820412 (N.D. Ill. March 25, 2005) ("*Illinois Bell*") in support of its claims that the *ISP Remand Order* applies to all ISP traffic. (Universal Brief, at p. 29.) This case is clearly distinguishable.

Qwest acknowledges that the term "ISP bound FX traffic" (as used in the Illinois opinion) refers to "long-distance traffic that uses a virtual number so the party making the call is not charged a toll" (which sounds very much like VNXX), and, at least implicitly, that the Illinois judge ruled that ISP-bound FX traffic is subject to the $.0007 *ISP Remand Order* rate. However, the judge there never explicitly addressed the question of the breadth of the *ISP Remand Order*, and thus it is a leap for Universal to argue or imply that the judge made a conscious decision on this issue. The judge did use the generic term "ISP-bound traffic," but he did not explicitly state how broadly he was construing that term. In the *ISP Remand Order*, the FCC likewise used the same term, but in context, and as explained in the D. C. Circuit decision in *WorldCom*, the FCC's use of the term was limited only to ISP traffic that originated and terminated in the same local calling area.

The Illinois case also contains no analysis whatsoever of the breadth issue. While the *Illinois Bell* judge referred to one paragraph of the *ISP Remand Order*, his reference was unrelated to the breadth issue. There was also no reference at all to the *WorldCom* decision. Since the judge never explicitly addressed the breadth of the *ISP Remand Order*, it is impossible to conclude that his lack of a reference to the *WorldCom* decision was the result of a conscious decision to do so. Moreover, one cannot know how the parties briefed the case, although given the limited analysis of the *ISP Remand Order* and the failure to even mention *WorldCom*, there is nothing in the decision to suggest that either party explicitly raised the "breadth" issue. In other words, the premise of the Illinois opinion may have simply been a given that was not specifically briefed, but when examined, as the IC 12 Ruling did (particularly in light of the *WorldCom* characterization of the issue decided in the *ISP Remand Order*), it is clear that the IC 12 Ruling is the most consistent with the *ISP Remand Order*. Given that the D. C. Circuit in *WorldCom* is the reviewing court of the *ISP Remand Order* under the Hobbs Act, the D. C. Circuit's conclusion that the only issue decided related to ISP traffic within the same local calling area is not only correct, but it is also binding.

D. The *Core Forbearance Order* did nothing to alter the breadth of *ISP Remand Order*

Universal also argues that because it refers to the term "ISP-bound" traffic, the FCC's *Core Forbearance Order*[22] confirms "that the FCC understand [sic] its compensation regime to apply to *all* ISP-bound traffic, not just traffic where the ISP is located in the caller's local area." (Universal Brief, at p. 31 (emphasis in original).) This conclusion is clearly wrong, and is inconsistent with the conclusions in the IC 12 Ruling.

[22] Order, *Petition of Core Communications for Forbearance under 47 U.S.C. § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241, WC Docket No. 03-171 (October 18, 2004) ("*Core Forbearance Order*").

The *Core Forbearance Order* dealt with proposed changes to the application of the *ISP Remand Order*, and specifically addressed whether certain provisions in the *ISP Remand Order* (the so-called "new markets rule" and "growth cap rule") should continue to apply to ISP traffic. It did not in any manner address the issue of the breadth of the *ISP Remand Order*. Thus, because the *ISP Remand Order* did not address non-local ISP traffic, and all that the forbearance petition was trying to do was alter some specific elements of the *ISP Remand Order* (none of which dealt with the order's breadth), it is clear that the *Core Forbearance Order* did nothing to address the breadth issue either. Level 3 made a similar claim in docket IC 12, but Judge Petrillo rejected it, ruling: "there is nothing in the *Core Communications Order* that even remotely suggests that the FCC intended to expand its definition of ISP-bound traffic to include VNXX-routed traffic." IC 12 Ruling, at p. 11. He also agreed with Qwest's argument that "it would be highly unusual for the FCC to invoke a policy that would impact state authority (i.e., regulation of intrastate access charges) without making some mention of that fact." *Id*., at pp. 11-12.[23]

E. Universal's Reliance on the *Virginia Arbitration Order* is misplaced

Universal also attempts to rely on the Wireline Competition Bureau's (WCB) *Virginia Arbitration Order* to support its claim that all ISP traffic is subject to the interim regime of the *ISP Remand Order*. (Universal Brief, at pp. 30.) Yet neither of the quotes to the *Virginia Arbitration Order* purport to even address the breadth of the *ISP Remand Order*.

The issue before the WCB in the *Virginia Arbitration Order* was an issue this Commission has addressed several times, and resolved, which is whether the local/interexchange traffic issue will be determined by customer location or by the NPA/NXXs of the telephone numbers called. In paragraph 301 of that order (which Universal quotes in its brief), the WCB

[23] It would not be reasonable to suggest that the FCC would have made such a significant decision without a disciplined and detailed analysis that would have led to an explicit decision on the issue.

found, after applying Virginia law, that it would require the proposed agreement to be based on whether the NPA/NXXs were associated with the same local calling area. That is a far different question than the proposition for which Universal cites the order, which is that the *Virginia Arbitration Order* somehow supports the view that the FCC included all ISP traffic in its *ISP Remand Order* holding. The paragraphs that Universal quotes simply do not address that issue in any manner.

On the issue that the WCB did address, which was how it would determine local from interexchange calls, there is no reason for anyone to conclude that this decision in some manner preempts other states on that issue. Indeed, while under certain circumstances the FCC has the power to preempt, the WCB does not share in that power.

Further still, four Oregon decisions reach conclusions directly contrary to the WCB decision in the *Virginia Arbitration Order* on this point:

1. In Order No. 04-262 in docket ARB 527, the Commission rejected AT&T-proposed language that the local exchange traffic definition "shall not affect compensation for VNXX . . .Traffic." Order No. 04-262, Appendix A, at pp. 5-6.
2. In Order No. 04-504 in docket UM 1058, the Commission expressed its deep concern about the impact that VNXX has on incumbent carriers. For example, after quoting two conditions that the Commission has placed in all Oregon CLEC certificates (including Universal's certificate), both of which require adherence to local calling areas and the appropriate use of NXX codes, the Commission stated: "A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct [VNXX] described by OTA [the Oregon Telecommunications Association] . . . would clearly be in violation of its

certificate." Order No. 04-504, p. 11.[24] It is readily apparent from this order that the Commission views VNXX as inconsistent with Oregon law.

3. The *Universal* VNXX decision concluded that VNXX was inconsistent with the interconnection agreement under consideration and, based on a review of Qwest Oregon tariffs, that local calling must be originated and terminated within the same local calling area. 2004 WL 2958421, at *10.

4. In the Commission's decision in the GTE/ELI arbitration (docket ARB 91), the Commission ruled that the terminating end of an ISP call for reciprocal compensation purposes is where the ISP modems are located. Order No. 99-218 (March 17, 1999), docket ARB 91. The Commission's ruling holds that the ISP modems are the terminating point for calls for reciprocal compensation purposes, and that only if those modems were in the same local calling area as the calling party would the payment of reciprocal compensation be required. Thus, the Commission's decision in Order No. 99-218 directly supports the underlying reasoning of the *ISP Remand Order*.

Further still, as noted in Qwest's opening brief, Oregon statutes, Commission rules, and Qwest's tariffs all define the local/interexchange calling distinction in terms of physical location of the parties to the call. (*See* Qwest Brief, at pp. 18-20.)

Finally, Universal ignores the only relevant portion of the *Virginia Arbitration Order*, which is the WCB's statement "that ISP-bound traffic is not subject to [reciprocal compensation under] section 251(b)(5)." *Virginia Arbitration Order*, ¶¶ 245, 256. The *Virginia Arbitration Order* is easily distinguishable and, in any event, has no binding authority over this Commission, or the Commission's interpretation of Oregon law.

[24] Qwest quotes these conditions in its Opening Memo, at pp. 20-21. The Universal certificate of authority is attached as Attachment B to Qwest Fact Statement, at pp. 6-7.

F. Universal's argument that the FCC was "apprised" of VNXX traffic before issuing the *ISP Remand Order* is irrelevant and should be ignored

In an apparent attempt to bolster its argument that the FCC meant to apply its ruling in the *ISP Remand Order* to all ISP traffic, regardless where the call originates and terminates, Universal argues that the FCC necessarily addressed and resolved the VNXX issue in the *ISP Remand Order*. It does so based on the fact that there were some general comments raising VNXX issues during the comment period prior to issuance of the *ISP Remand Order*. (Universal Brief, at pp. 31-36.)

This tangential argument ignores several obvious problems. First, if the FCC had intended to include all ISP traffic within the terms of its order, one can only ask why it did not simply say so. Furthermore, if Universal's theory were true, the question becomes why the *WorldCom* court would have characterized the FCC's holding as applying *only to ISP traffic within the same local calling area*. Finally, one must also ask why the FCC would have emphasized that it had not intended to upset existing access charge recovery mechanisms.

Universal's argument is based on the false premise that simply because some commenting parties may have referred to VNXX in their comments, the FCC's order necessarily resolved the issue (simply because it was raised). Anyone with even a passing knowledge of FCC proceedings knows that in a docket like the ISP docket, there are literally thousands of pages of comments and supporting documents filed from scores of companies, trade associations, and individuals. Furthermore, these commenting parties often raise numerous issues that the FCC will not decide.[25] To suggest, as Universal does, that because VNXX may have been

[25] For example, Appendix A to the *ISP Remand Order* lists 48 entities or individuals as commenting in response to the FCC's June 23, 2000 public notice, while 38 entities and individuals filed reply comments. The same appendix lists 81 entities and individuals as commenting on the FCC's February 26, 1999 Notice of Proposed Rulemaking, while 41 entities and individuals filed reply comments. *ISP Remand Order*, Appendix A.

mentioned by a single ILEC and a single CLEC (Universal Brief, pp. 34-35), the FCC necessarily both considered and resolved the issue, is simply not credible, particularly when the FCC makes no explicit mention that it was resolving that issue.[26]

G. Universal's proposed VNXX language would directly contravene the *ISP Remand Order's* underlying policy concerns

Finally, one of the curious facets of Universal's position is that, if the Commission were to approve it, the agreement would create and accentuate the precise arbitrage opportunity that the FCC identified in the *ISP Remand Order*. If Universal were allowed to receive compensation at $.0007 for each minute of ISP traffic it terminates, including all VNXX minutes, which historically has represented about 70 percent of its traffic (see Qwest/1, Batz/6), Universal would have a huge and perverse economic incentive to generate as many Internet usage minutes as possible, because every minute that an end-user customer were to spend connected to a Universal ISP would generate additional compensation for Universal.

Contrast the scenario that Universal desires with the world that the drafters of the 1996 Act envisioned. The drafters saw a telecommunications market in which carriers actively

[26] Finally, Universal's reference to the filing by a Qwest expert (Universal Brief, at p. 33) is baffling and misleading. Even a cursory examination of the expert's statement demonstrates that he was addressing an issue very different from VNXX traffic. His point was that CLECs do not need to provide local service to all customers in an area (in other words, they can concentrate on areas with large concentrations of business customers, such as a downtown area, close to serving central offices in which they may collocate), and thus that this strategy causes CLECs' incremental costs to be lower than the costs of an ILEC, which must serve the entire exchange. The expert then noted that ISPs can likewise place their facilities in high-density areas, including collocating their equipment at a CLEC's switch, thus resulting in "[t]ransport costs for such calls [being] lower than the average of all traffic terminating within the local exchange." *Id.* (quoting the expert's own presentation). There is nothing whatsoever to suggest that the expert was discussing VNXX traffic—indeed, the entirety of the material that Universal quotes makes it clear that the expert was simply discussing the cost advantages within a "local exchange" that comes from a CLEC's or ISP's ability to self-select where it places its facilities. Nothing in the quoted comments even remotely suggests that the expert was addressing VNXX traffic (where the central issue is free transport between exchanges and the avoidance of toll and access charges for interexchange calls) in his comments.

Likewise, the fact that the FCC cited Qwest's letter that contained this expert's comments in footnote 189 of the *ISP Remand Order* is also a red herring. The question addressed in paragraph 92 (the paragraph with which footnote 189 is associated) was whether the distance from a CLEC's switch to the ISP equipment was a factor relevant to its decision, and the FCC concluded it was not. That, however, is not the VNXX issue. VNXX relates to the distance from ISP end users to the modems of the ISP that answer the ISP call, and whether they are within the same local calling area. Paragraph 92 of the *ISP Remand Order* does not purport to address that issue.

competed to provide "local exchange service" to customers. Thus, CLECs would actually build alternative networks, all of which would benefit customers and provide them with more competitive choices, create balanced exchanges of traffic, and where reciprocal compensation would provide revenues to companies that built real alternative telecommunications networks. None of those things is present here. Indeed, instead of an alternative network, the evidence from the federal court litigation demonstrates that, with minor exceptions, Universal's entire network is confined to two buildings, one in Portland and the other in Eugene. (*See* Qwest Fact Statement, ¶¶ 17.b through 17.e, and supporting evidence.)

The FCC's analysis in the *ISP Remand Order* is instructive on this point. The FCC recognized that "Internet consumers may stay on the network much longer than the design expectations of a network engineered primarily for voice communications." *ISP Remand Order*, ¶ 19. The FCC also noted that "[t]raditionally, telephone carriers would interconnect with each other to deliver calls to each other's customers," and that it "was generally assumed that traffic back and forth on these interconnected networks would be relatively balanced." *Id*., ¶ 20. This is not so in Universal's case, however. Indeed, Universal provides *no local exchange services*; instead, every minute of use flows one-way to Universal, thus generating revenue, while Universal sends *no traffic back* to Qwest, as it does not even pretend to provide local service.

In the FCC's view, "Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results." *ISP Remand Order*, ¶ 21. This situation led to:

> classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels. *Id.*

The Commission has likewise recognized this distortion as a serious problem in Oregon. For example, in ruling against Level 3 on the RUF issue, the Commission, in Order No. 01-809 in docket ARB 332, relied heavily on the following portions of paragraphs 21 and 23 of the *ISP Remand Order*, stating as follows:

> Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic top ISPs flows one way, so does money in a reciprocal compensation regime. . . . These effects prompted the [FCC] to consider the nature of ISP-bound traffic and to examine whether there is any flexibility to modify and address the pricing mechanisms for such traffic. Order No. 01-809, quoting *ISP Remand Order*, ¶¶ 21, 23.

On the appeal of that decision (which also considered the Commission's decision in Order No. 01-968 in docket ARB 332), the court, in affirming the Commission's decision, cogently discussed the arbitrage problems with ISP traffic:

> But, there is a catch. Most of Level 3's customers are Internet Service Providers (ISPs), which act as gateways to the Internet. ISPs receive vast quantities of incoming local calls from persons trying to access the Internet, but ISPs make few (if any) outgoing local calls. As a result, telephone traffic flows almost exclusively one-way. Qwest customers are expected to place many calls to Level 3 customers, but very little traffic will flow in the opposite direction. If the cost of the equipment at issue is allocated based on the relative percentage of calls originated on each network, then Qwest will have to pay virtually the entire cost. *Level 3 Communications v. Oregon Public Util. Comm'n*, No. CV01-1818-PA, at p. 6 (D. Or. November 25, 2002).

Universal is a perfect example of the economic distortions and arbitrage abuses that the FCC, the Commission and the Oregon federal court have described.

The Commission should, of course, make its decisions in this docket based on current law. However, those legal decisions should be informed by the underlying policies that the FCC, this Commission and other state commissions have crafted in an attempt to rationally apply the 1996 Act to prevent regulatory distortions from destroying the effort to foster meaningful local

exchange competition. Thus, the Commission should reject Universal's proposed language, which would not only enable, but also encourage, these types of arbitrage opportunities.

CONCLUSION

On both the RUF and VNXX issues, Qwest's proposed language is consistent with the federal Act, FCC decisions, and a multitude of decisions of this Commission and Oregon federal courts. Therefore, pursuant to the Commission's authority under section 252 of the Act, Qwest respectfully requests that the Commission approve Qwest's proposed language on the disputed issues and, in addition, that it approve the entire agreement that Qwest has proposed.

DATED: November 4, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

ARB 671

I hereby certify that on the 4th day of November 2005, I served the foregoing **QWEST CORPORATION'S REPLY BRIEF** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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