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 OPENING BRIEF

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INTRODUCTION AND PROCEDURAL HISTORY

This arbitration docket has an involved history. In 1999, Universal Telecommunications, Inc. ("Universal") opted into an existing interconnection agreement between U S WEST Communications, Inc. ("USWC"), the predecessor to Qwest Corporation ("Qwest"), and MFS Intelenet, Inc. ("MFS"). The agreement that Universal opted into had previously been approved by the Oregon Public Utility Commission ("Commission") in docket ARB 1.

On September 22, 1999, the Commission, in docket ARB 157, entered an order approving that agreement, which the Commission understood was the same agreement the Commission approved in docket ARB 1. However, through a mistake, the agreement that the Commission approved included a different "Term of Agreement" provision than that which was in the MFS agreement. Order No. 05-206 (May 3, 2005), docket ARB 589, at p. 2. The Commission has since ruled, in docket ARB 589, that the agreement it approved in docket ARB 157 was the MFS agreement and that the "Term of Agreement" provision approved was that which was in the MFS agreement. See Id., p. 4; see also Order No. 05-088 (February 9, 2005), docket ARB 589, at pp. 7-8.

In February 2004, Qwest requested negotiation with Universal of a new interconnection agreement under section 252 of the 1996 Federal Telecommunications Act (the "Act").[1] The 1999 agreement had expired by its terms, but remained in effect until a new agreement could be entered into (i.e., it has continued on a month-to-month basis until a new agreement becomes effective between the parties).[2] Universal never responded to the request for negotiation. See Order No. 05-088, at pp. 1-2.

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[1] In the meantime, Qwest and Universal have been involved in litigation in federal court since January 2004.

[2] Section XXXIV.V of the agreement submitted by the parties in ARB 157 stated:

Therefore, on July 16, 2004, Qwest petitioned the Commission to arbitrate terms, conditions, and prices for interconnection and related arrangements to replace the expired 1999 agreement. The petition was assigned docket ARB 589. Because Universal had not responded to Qwest's request for negotiation, and no negotiations had taken place, Qwest requested that the Commission order that Qwest's Oregon Statement of Generally Available Terms and Conditions ("SGAT") for wireline interconnection be adopted as the interconnection agreement between the parties. Order No. 05-088, p. 2.

On August 10, 2004, Universal moved to dismiss Qwest's petition, contending that neither the terms of the 1999 agreement nor the Act authorized Qwest's petition. Order No. 05-088, p. 2. Universal claimed, among other things, that Qwest, as an ILEC, did not have the right to request negotiations, and that Qwest was obligated to continue with the 1999 agreement, unless and until there was "mutual assent" (by both Qwest and Universal) to enter into a new agreement. After an opportunity by the parties to brief the issues raised by Universal, the Commission issued Order No. 05-088, in which it granted Universal's motion to dismiss. Id., at p. 8. However, the Commission also ruled that the interconnection agreement's "Term of Agreement" had been altered, and that it was unlikely that if the agreement had been properly reviewed, the Commission would have approved such an open-ended Term of Agreement provision, citing to Oregon case law disfavoring perpetual contracts or contracts with indefinite duration, and ruled that "either party, including Qwest, may commence negotiations." Id., at pp. 6-7. Nevertheless, because the underlying agreement (with its Term of Agreement) had been

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> This agreement shall become effective upon Commission approval and shall expire February 20, 2000. Thereafter, the agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of this agreement, becomes effective between the parties.

The Commission has ruled that this provision, which differed from the same provision in the MFS agreement, was included by mistake and that the provision from the earlier agreement was the provision it approved.

nullified (in favor of the original MFS agreement, with the proper Term of Agreement), the Commission directed "that this proceeding should be abandoned in favor of giving the parties a new opportunity to negotiate a contract." Id., at p.8.

Universal sought reconsideration and clarification. The Commission granted reconsideration and slightly modified Order No. 05-088, but nevertheless affirmed that "Qwest retains the right under the [MFS] agreement to initiate negotiations with Universal towards a new interconnection agreement." Order No. 05-206, p. 7.

On February 24, 2005, shortly after the Commission's decision in Order No. 05-088, Qwest again requested negotiations with Universal for a new interconnection agreement. Universal responded to Qwest's February 24, 2005 negotiation request letter on March 7, 2005 by declining to consider Qwest's request until there was a "final, binding and nonappealable order" in ARB 589. The parties then exchanged several more letters between March 15, 2005 and March 29, 2005 regarding these issues.[3]

On July 14, 2005, after Universal again refused to negotiate, Qwest filed a new petition for arbitration, requesting once again that the Commission arbitrate the terms, conditions and prices for interconnection and related arrangements with Universal. In the Petition, Qwest requested that the Commission approve as the interconnection agreement between the parties the current TRO/TRRO-compliant agreement for Oregon, which Qwest attached to its Petition as Exhibit A.

Assuming correctly that Qwest intended to file a renewed petition for arbitration as soon as it was permitted to under section 252 (July 12, 2005), on July 1, 2005, Universal filed a complaint in federal court against Qwest and the Commission (Case No. 6:05-cv-06200-TC)

[3] These letters are attached as Exhibits B to F to Qwest's July 14, 2005 Petition for Arbitration.

seeking an order declaring Order No. 05-206 unlawful to the extent it allows Qwest to request arbitration negotiations under the September 1999 agreement or under section 252. In effect, Universal sought an order requiring the Commission to terminate this arbitration proceeding. On July 29, 2005, Universal filed a motion with the federal court seeking a stay of ARB 671. After argument, Magistrate Judge Coffin entered an order entitled "Findings and Recommendation," wherein he recommended that the motion for stay be denied. Judge Coffin's Findings and Recommendation were formally adopted by Judge Aiken on September 6, 2005. Thereafter, Qwest and the Commission filed separate motions to dismiss the complaint. Judge Coffin denied the motions, but stayed further action in the case until completion of this arbitration.

After Judge Coffin entered his Findings and Recommendation, Universal, on August 8, 2005, filed its Response to Qwest's Petition ("Universal Response"), attaching thereto a Disputed Issues List (Exhibit A) and Universal's version of the interconnection agreement showing the changes to the language proposed by Universal (Exhibit B).

In a telephone prehearing conference on September 16, 2005, the parties agreed to a schedule and a procedure for completing this docket. The parties agreed that they could rely on the factual record, to the extent it is relevant, in the litigation between Qwest and Universal in federal court in Oregon (Civil No. 04-6047-AA) ("Qwest v. Universal"). The parties agreed that each could present, in addition to legal briefs addressing the legal issues raised by the disputed language, fact statements based on facts in the record in Qwest v. Universal, and that such statements did not need to be in the form of an affidavit, so long as excerpts from the record in Qwest v. Universal are attached to the fact statements to substantiate factual assertions made therein. In addition, parties may also file additional direct testimony on issues they deem relevant that were not addressed in the record of Qwest v. Universal.

Qwest hereby files this Brief and exhibits, Qwest's Statement of Facts and attachments, and the Prefiled Direct Testimony of Nancy J. Batz.

NATURE OF THE DISPUTED ISSUES

Attached hereto as Exhibit 1 is a document that sets forth the language disputed by the parties. The starting point for Exhibit 1 is the language that Qwest proposes. Additions to Qwest's language that Universal proposes are set forth in bold/underlined type face; deletions proposed by Universal are set forth in strikethrough format. As Exhibit 1 demonstrates, there are several paragraphs in section 7 of the Agreement that are contested by the Parties. However, despite the fact that several paragraphs are the subject of proposed language changes, there are only two fundamental issues in this arbitration.

The first issue (Issue No. 1) relates to whether Universal should be financially responsible for the Local Interconnection Service ("LIS") facilities and services used to gather and deliver ISP traffic from throughout each LATA in Oregon to Universal or, as Universal puts it, whether "[e]ach Party shall only be responsible for facilities on its side of the POI [Point of Interconnection], including both recurring and non-recurring charges." (Universal Response, at pp. 1-2.) Specifically, this issue comes down to whether the Commission should approve Qwest's language related to a relative use factor ("RUF") that makes Universal financially responsible for LIS (Direct Trunked Transport and Entrance Facilities) used to deliver ISP traffic to Universal and which likewise makes Universal financially responsible for "Virtual NXX" or "VNXX" traffic.

The second issue is different, although it too relates to the financial implications of ISP traffic. The issue is whether, for VNXX ISP traffic (i.e., ISP traffic that is originated in one local calling area but which is delivered to ISP modems in another local calling area), Qwest has an

obligation to pay terminating compensation to Universal at the $.0007 per minute of use rate established in the FCC's ISP Remand Order.[4]

As Qwest will demonstrate hereafter, governing authority of the Commission and federal courts in Oregon exists on both issues that directly support the Commission's acceptance of the contract language that Qwest proposes. The legal and policy rationales for those prior decisions have not changed since the Commission ordered the approval of language consistent with the language that Qwest proposes in this docket (which is based on its current TRO/TRRO-compliant template agreement). Therefore, on the basis of the facts set forth hereafter and on the basis of prior rulings of the Commission, Qwest respectfully requests that the Commission approve the language that Qwest proposes in this docket.

SUMMARY OF KEY FACTS

Although the contested language in this docket lends itself to resolution on legal grounds, there are fundamental facts about Qwest, Universal, and their relationship which are relevant to the Commission's consideration of those legal issues. The issues in this docket are straightforward: (1) whether Universal bears financial responsibility for the gathering and transport to its POIs in Eugene and Portland of millions of minutes of ISP traffic destined to ISP customers of Universal, and (2) whether Universal should be allowed to impose a terminating compensation charge of $.0007 on those portions of that ISP traffic that does not originate and terminate in the same local calling area. Qwest will demonstrate hereafter that the answer to the first question is yes and the answer to the second question is no. To put those issues into context, however, it will be useful for the Commission to understand some basic facts about the two

[4] Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, CC Docket No. 96-98 (April 17, 2001) ("ISP Remand Order").

parties and the manner in which they operate in Oregon. The following factual summary is supported by a more detailed Statement of Facts filed by Qwest, which is supported by specific references to the record in Qwest v. Universal. Indeed, with some limited exceptions, the descriptions of Universal's method of operation are based on affidavits, charts, and deposition statements of Universal's President (Jeffry Martin) and Chairman (Stephen Roderick).

A. Qwest's Oregon operations

Qwest is an incumbent local exchange carrier ("ILEC") for purposes of the 1996 Federal Telecommunications Act (the "Act"). Through its predecessors, Pacific Northwest Bell and U S WEST Communications, Qwest has operated in Oregon for over one hundred years, providing a full range of telecommunications services in large portions of Oregon. Other large companies like Verizon, Sprint, and CenturyTel have substantial operations in Oregon, as do a variety of smaller independent local exchange carriers in the state.

Over the years, Qwest has built an extensive network of local loop facilities, switches (both end office and tandem), and transport facilities that link those switches together. Qwest has scores of switches in Oregon, of which several provide tandem switching functions. Qwest provides local exchange services over more than one million access lines in Oregon. In addition to providing retail services, Qwest provides a full range of interconnection services, unbundled network elements, and other services to competitive local exchange carriers ("CLECs") and wireless carriers in fulfillment of its requirements under section 251 of the Act.

B. Universal's operations

Universal is a certified CLEC based in Corvallis. (Qwest Fact Statement, ¶ 7.) Universal maintains two points of presence ("POPs") in the state of Oregon, one in Portland and one in Eugene. (Id., ¶ 10.)

Universal's business plan is quite simple. It provides no local exchange services (Qwest Fact Statement., ¶ 8), but concentrates on providing dial-up service capabilities to small and medium-sized Internet Service Providers ("ISPs") through a service entitled "Managed Modem Service." (Id., Exhibit F.) Universal provides the service by obtaining local telephone numbers from the North American Numbering Plan Administrator ("NANPA") in local calling areas throughout Oregon by virtue of its status as a certified CLEC. (Id., ¶ 12.)

The service that Universal provides its ISP customers has three major elements: (1) Universal provides local access numbers that ISPs can provide to their customers in local areas they choose to serve so that their customers call gain Internet access without the necessity of making a toll call (Qwest Fact Statement., ¶¶ 11-12), (2) through Universal's interconnection agreement with Qwest, Qwest gathers and delivers traffic to Universal's POIs from multiple local calling areas in the two Oregon LATAs (id., ¶ 11), and (3) Universal provides the basic Internet functionalities for its ISP customers through a variety of Internet equipment (e.g., modems, servers, and routers) located in each of its two POPs in Oregon (in other words, Universal, on behalf of its ISP customers, delivers the traffic to the Internet and controls the Internet session for its duration) (id., ¶¶ 11, 13-15, 18, 19.d, 19.e). Thus, Universal is a wholesale provider of basic Internet functionalities for its ISP customers, and performs functions for those ISPs that other ISPs provide for themselves. (Id.) While Universal provides these services for ISPs, it is not an ISP itself. (Id., ¶ 16.)

The Qwest end-user customers that generate the traffic to the Internet are simultaneously customers of one of Universal's ISP customers, who provide the end-user customer with the local telephone numbers that they use to gain access to their ISP. (Qwest Fact Statement, ¶ 22.)

Mr. Martin, Universal's President, characterized its managed modem services in these terms in an affidavit filed in Qwest v. Universal:

> Under Universal's "managed modem service," end user customers' computer modems initiate local telephone calls that travel over Qwest's network to Universal, where Universal converts the call into Internet Protocol and delivers them—as instructed by the consumers' computer—to different Internet locations, features, and capabilities (email service; ecommerce sites such as Amazon.com or eBay; or online services such a Yahoo or America Online, etc).
>
> The local telephone numbers called by end user customers are assigned to Universal by virtue of its status as a CLEC, and Universal in turn uses those local numbers to support its ISP customers' local needs.
>
> The ISPs market themselves to end user customers and advise them of the local telephone numbers to use to access the Internet.
>
> . . . .
>
> The majority of those persons are subscribers of local telephone service from Qwest, and therefore use Qwest's local telephone network when placing a call to gain dial-up access to an ISP." (Qwest Fact Statement, ¶ 11.)

Universal's Chairman Mr. Broderick stated that "[t]o our ISP customers, we do consider ourselves to be more of a wholesale type provider." (Id., ¶ 15.)

There are two basic Local Interconnection Services ("LIS") that Qwest provides to Universal that allows for the gathering and transport of this traffic to Universal, Direct Trunked Transport ("DTT") and Entrance Facilities ("EF"). DTT is the service that provides the transport from the end office serving the end-user customer (i.e., the customer calling the Internet) to the end office serving the Universal POI. EF is the transport service from the end office serving the POI to the POI. In some cases, in addition to DTT and EF, Universal also purchases multiplexing ("Mux") service, a service that electronically places the traffic into the type of channels desired by Universal. (Qwest/1, Batz/3-5.)

With only a couple of limited exceptions, Universal's entire "network" in Oregon is confined to the two buildings (one in Portland and one in Eugene) that house its POPs. (Qwest Fact Statement, ¶ 17.e.) Its equipment and facilities within each of its two POPs consists of (1) the cable that links its equipment together; (2) a telecommunications switch; (3) a variety of Internet equipment by which Universal provides Managed Modem service on behalf of its ISP customers (modems, routers, radius servers, DNS servers, caching servers, etc.); and (4) leased broadband circuits that provide Universal with the ability to access the Internet. (Id., ¶ 17.)

With Managed Modem Service, the only piece of equipment that an ISP customer must own is a radius server, whose function is to perform the authentication process by which the ISP determines if the customer attempting to access the Internet is a valid customer of the ISP. (Qwest Fact Statement, ¶ 20.)

Universal offers nine separate plans for ISPs in Oregon, ranging from small geographic areas to plans some covering most of the populated areas of Oregon. (Qwest Fact Statement, ¶¶ 23-24.)

Universal has obtained local telephone numbers in 17 separate local calling areas in Qwest's serving territory in Oregon from which traffic was being generated, including the Portland EAS Region and the Eugene-Springfield local calling area. (Qwest Fact Statement, ¶ 25.) Thus, Universal had obtained local telephone numbers in 15 local calling areas that were not part of either the Portland EAS Region and the Eugene-Springfield local calling area. (Id.) Thus, all traffic from those 15 local calling areas terminates in either Eugene or Portland, and thus such traffic does not originate or terminate in the same local calling area. (Id., ¶¶ 25-27.)

With only insignificant and immaterial exceptions, all traffic exchanged between Qwest and Universal is ISP traffic that is originated on Qwest's side of the POI and terminated on

Universal's side of the POI. (Qwest Fact Statement, ¶ 28.) From September 2004 through September 2005, 99.997 percent of all traffic between Qwest and Universal originates on Qwest side of the POI and is delivered to Universal. (Id.) In the past 13 months, Qwest has delivered in excess of 1 billion minutes of traffic to Universal in Oregon. (Id.)

ARGUMENT

I. ISSUE NO. 1- THE COMMISSION SHOULD ACCEPT QWEST'S LANGUAGE RELATED TO RELATIVE USE FACTOR ("RUF") AND EXCLUDE ISP AND VNXX TRAFFIC FROM THE RUF, AND FURTHER, THE RUF SHOULD NOT APPLY TO NON-RECURRING CHARGES

A. The language at issue

As set forth on Exhibit 1, the contested language on this issue relates to paragraphs 7.1.1, 7.1.2, 7.3.1, 7.3.1.1.1, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.1, 7.3.2.2, and 7.3.2.2.1. While numerous sections are implicated, the issue comes down to whether ISP traffic should be excluded from the RUF calculation.

In paragraph 7.1.1, Universal proposes language that would include "ISP-bound traffic" in the definition of "Telephone Exchange Service Traffic," and "EAS/Local" traffic.[5]

In two paragraphs, 7.1.2 and 7.3.1, Universal proposes the following addition: "Each Party will be responsible (including financially responsible) for providing all of the engineering and facilities on its network on its respective side of the POI." This statement is indicative of Universal's erroneous legal conclusion that each party to an interconnection agreement is always financially responsible for the cost of facilities on its side of a POI. As demonstrated hereafter, this conclusion is without merit, and this language should therefore be rejected.

[5] Universal also adds another term, "Section 251(b)(5)" traffic, to paragraph 7.1.1. Its purpose is unclear, and is not explained in Universal's petition. However, this language appears to be Universal's means to attempt to include all ISP traffic, including ISP VNXX traffic.

In two paragraphs, 7.3.1.1.1 and 7.3.1.1.3, Universal adds the following phrase to language related to two way LIS trunks and EF: "to the extent such facilities are dedicated to the transmission of traffic between the Parties' networks." Again, there is no explanation of the language in Universal's Response, nor is it obvious why the phrase is necessary. Given the fact that it is the CLEC that orders LIS facilities from Qwest to be interconnected with the CLEC's network, it can be reasonably assumed that such facilities are dedicated to the transmission of traffic between the two networks. It is difficult to conceive of any other purpose for such facilities. Unless Universal can explain the purpose of this language, the Commission should reject it, and the language is unnecessary.

Universal's proposed changes to paragraphs 7.3.1.1.3.1 (which applies to EF) and 7.3.2.2 (which applies to DTT) are essentially identical. In both provisions, Universal removes language that makes Universal financially responsible for ISP traffic carried over EF and DTT. Universal also removes language that would make it responsible for VNXX traffic as well. Universal adds language (1) that would, instead of a 50/50 RUF for the first quarter, require a retroactive true-up and (2) that would make non-recurring charges subject to the RUF. As discussed hereafter, the Commission should reject these changes.

Finally, paragraph 7.3.2.2, as Qwest proposes, states that cost sharing for DTT will take place between the parties. Universal proposes to add the phrase, "unless federal law requires that one Party (or the other) assume the cost of such facility." This is unnecessary and unexplained by Universal. If federal law were to mandate such a requirement, the matter should be handled under the change of law provisions of the agreement.

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

This Commission has addressed the question whether a CLEC should be financially responsible for DTT and EF facilities used to carry ISP traffic at least twice, and in both cases the Commission has ruled that a CLEC should be financially responsible for such traffic under a RUF provision.

In the first of these decisions, the Level 3 Arbitration Order, the Commission approved an Arbitrator's Decision that ruled that ISP traffic should be excluded from the RUF calculation. In that case, the Commission noted that "Level 3 originates almost none of the traffic across the Qwest DTT and entrance facilities; Qwest customers originate virtually all of the traffic by calling Level 3's ISP customers." Order No. 01-809 (September 13, 2001), docket ARB 332; p. 11; aff'd by Level III Communications v. Oregon Public Util. Comm'n, No. CV01-1818-PA (D. Or. November 25, 2002). The Commission relied on the underlying policy of the ISP Remand Order,[6] and noted that the distortions and regulatory arbitrage opportunities that exist in the reciprocal compensation context that the FCC condemned apply with equal force in the context of financial responsibility for DTT and EF:

> The overall thrust of the language of the ISP Remand Order is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier. Order No. 01-801, p. 14.

The Commission also noted that in the section 271 process, "AT&T and WorldCom apparently dropped their objection to the exclusion of Internet traffic from the calculation of relative use,"

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[6] Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) ("ISP Remand Order").

thus resulting in an Oregon SGAT provision that excludes ISP traffic. Order No. 01-801, p. 14. Thus, the Commission concluded that "the adoption of the Qwest-proffered language 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." Id., at p. 15. A federal district court later upheld this decision on appeal.

The second, and more recent, decision came in the order in the arbitration between Qwest and AT&T last year. Order No. 04-262 (May 17, 2004), docket ARB 527. In that docket, AT&T proposed language that would have included ISP traffic in the RUF calculation. The Arbitrator 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, Appendix A, at p. 13. The Arbitrator quoted the same language cited above from the Level 3 Arbitration Order, concluding: "For the same reasons already articulated by this Commission, Internet traffic should be excluded from the definition of telecommunications traffic, and Qwest's wording regarding this sub-issue should be adopted." Id. The Commission adopted the Arbitrator's Decision, noting that the underlying FCC rules "still stand until the FCC takes further action." Id., at 3. The Commission also rejected AT&T's argument that because Internet traffic represents a smaller proportion of its traffic, it should be included in the RUF calculation, by stating: "that does not change the decision made by this Commission and upheld by the federal District Court of Oregon—that Internet traffic is not to be included in the relative use factor calculation for exchange of local traffic." Id.

This Commission has established a clear policy to exclude ISP traffic from the RUF calculation. Because nothing has changed since its decision on that issue in the AT&T

Arbitration Order and all of the underlying legal and policy grounds for that policy continue to exist, the Commission should reaffirm its position by approving Qwest's proposed language.

C. The Oregon policy on this issue has been widely followed in other jurisdictions and federal court decisions

The policy adopted by the Commission has also been adopted by many other state commissions. FCC Rule 709(b), one of the rules referred to in Order No. 04-262, supports Qwest's position that the interconnecting carrier must pay its share of the costs of the facilities used to provide interconnection:

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

Since the FCC rules allow for Qwest to be compensated for the use of facilities on its side of the POI, the question is what constitutes the "traffic" that is appropriately included in the proportional use calculation or RUF.

The same interpretation of the FCC's rules and precedent that this Commission has adopted was explicitly adopted by a federal district court in Colorado, which upheld the Colorado commission's decision to exclude ISP traffic from the RUF calculation. Level 3 v. Pub. Util. Comm'n. of Colorado, 300 F. Supp. 2d 1069 (D. Colo. 2003). The commission's discussion of the policy supporting its conclusion was cited with approval in the District Court opinion:

> The logic underlying our decision on reciprocal compensation for Internet bound traffic dictates a similar result here. 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. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport. Id. at 1079, quoting Colorado PUC Level 3 Decision at 36.

The Colorado district court concluded that the rules that relate to relative use, FCC Rules 703(b) and 709(b), apply only to "telecommunications traffic" and, under the unambiguous terms of the ISP Remand Order, ISP traffic is not "telecommunications traffic."

This analysis was also persuasive to the Arizona commission, which, in an arbitration proceeding between AT&T and Qwest, stated:

> The District Court of Colorado engages in a thorough analysis of the relevant FCC rules concerning compensation and reaches the conclusion that ISP-bound traffic is not "traffic" for the purpose of compensation. . . We note that we agreed that ISP-bound traffic should not be considered in determining the relative use factor [when] we considered the comparable SGAT language. We find that Qwest's proposed language should be adopted.[7]

More recently, the Colorado commission reiterated its reasoning on this point in an arbitration decision involving AT&T.[8] In that arbitration, the Colorado commission again concluded that ISP traffic should not be included in a RUF,[9] and approved Qwest's language that excluded ISP traffic from the RUF. That arbitration decision was appealed to the Colorado federal district court, which reaffirmed the earlier Level 3 appeal and upheld the Colorado commission decision that ISP traffic is not "traffic" for purposes of Rule 709(b)[10] and should

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[7] Decision No. 66888, In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix for Arbitration with Qwest Corporation, at 23 (Ariz. Corp. Comm'n, April 6, 2004).

[8] Decision No. C03-1189, In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b), Docket No. 03B-287T, ¶ 84 (Colo. PUC 2003).

[9] Id. ¶ 84.

[10] AT&T and Level 3 both argued that since Rule 709(b) speaks in terms of "traffic" and not "telecommunications traffic," the fact that FCC has declared that ISP-bound traffic is not "telecommunications traffic" is not controlling. In the first Colorado appeal, which was expressly reaffirmed in the recent AT&T decision, the court expressly rejected that argument and held that the term "traffic" in Rule 709(b) had the same meaning as the term "telecommunications traffic" in Rule 703(b). 300 F.Supp.2d at 1078-79.

therefore be excluded from the RUF.[11] In addition, the federal district court dismissed AT&T's contention that the Colorado commission's decision did not efficiently allocate costs among carriers as "ridiculous" and "unpersuasive in light of the FCC's reasoning regarding the economic inefficiencies created by the one way nature of ISP-bound traffic," citing the ISP Remand Order.[12]

The Utah commission reached the same result:

> If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have a strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic.[13]

The Iowa Utilities Board has likewise ruled on the identical issue, holding that Internet related traffic should be excluded from the relative use of entrance facilities:

> The practical implication of including ISP-bound traffic in the calculation of relative use factors is that Qwest will incur a substantial increase in its apportionment of the costs for the interconnection of trunks and facilities. This outcome would be in violation of section 252(d)(1) of the Act, which requires the setting of "just and reasonable" rates as compensation for the cost of providing interconnection.[14]

The analysis provided by the Colorado district court, and these other state commissions, demonstrate the wisdom of thisCommission's clear policy that ISP traffic should be excluded from the RUF calculation for determining the allocation of costs for LIS facilities.

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[11] Order and Memorandum Decision, AT&T Communications et al. v. Qwest, Civil Action No. 04-cv-00532-EWN-OES, at 21-26 (D. Colo. June 10, 2005). (Attached hereto as Exhibit 2).

[12] Id., at 25.

[13] Report and Order, In the Matter of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of he Telecommunications Act of 1996 with Qwest Corporation Regarding Rates, Terms and Conditions for Interconnection, Docket No. 02-2266-02, at 4 (Utah PSC, February 20, 2004) (http://www.psc.state.ut.us/telecom/04telecomOrders.html).

[14] Arbitration Order, In Re Arbitration of Qwest and AT&T Communications of the Midwest, Inc. and TCG Omaha, Docket No. ARB-04-1 (Iowa. Util. Bd., June 17, 2004).

D. The Commission's recent order in the Wantel/Pac-West complaints adopts a clear policy of removing VNXX traffic from a RUF calculation

As a practical matter, if the Commission adopts Qwest's proposed language to exclude ISP traffic from the RUF calculation, that would exclude 100 percent of traffic originating on Qwest's side of the POI, since it appears that all of it is ISP traffic. Nonetheless, the Qwest-proffered language that also excludes VNXX traffic (whether ISP traffic or not) should remain in the agreement.

The Commission's recent decision of the interconnection enforcement complaints Wantel and Pac-West brought against Qwest (Order No. 05-874 (July 26, 2005) in dockets IC 8/IC 9) specifically addressed this issue in the context of the interpretation of existing agreements that provided that only "local" traffic is subject to the RUF. In that decision, the Commission relied on the definition of VNXX that it had articulated in Order Nos. 03-329 and 04-504, and on the recent decision of the Oregon federal court in Qwest Corp. v. Universal Telecom, 2004 WL 2958421 (D. Ore. 2004), to conclude that (1) VNXX is not local traffic and that (2) because the RUF provision of the interconnection agreement in question applied only to local traffic, VNXX traffic was excluded from the RUF calculation. Order No. 05-874, at pp. 34-37.

Universal has attempted to work its way around this decision by defining "EAS/Local" traffic (in paragraph 7.1.1) to include ISP-bound traffic (apparently including all ISP traffic, no matter where it originates and terminates), and by removing the language in paragraphs 7.3.1.1.3.1 and 7.3.2.2.1 that expressly states that VNXX traffic is not subject to RUF. The Commission should reject both of these proposals. Otherwise, Universal would be able to require Qwest to treat interexchange traffic as though it were local in nature.

Such a result would be both illogical and counter-intuitive, but would also be directly inconsistent with statutes and Commission rules, not to mention Qwest's tariffs. For example,

ORS 759.005(2)(c) defines "Local exchange telecommunications service" as "telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission." (Emphasis added.) Thus, local traffic does not include traffic that originates and terminates in different local calling areas. The Commission's rules tie local exchange traffic to exchange areas. In OAR 860-032-0001(5), a Commission rule defines "local exchange service" as local exchange telecommunications service as defined in ORS 759.005(2)(c). Consistent with these rules, Qwest's proposed language treats traffic as local traffic only if it originates and terminates within the same exchange area.

Qwest's approved Oregon tariffs are completely consistent with Oregon statutes and rules. Among the relevant tariff definitions are the following:

> Local Service: Telephone service furnished between customer's premises located within the same local service area. Oregon PUC No. 29, Exchange and Network Services, Section 21, at sheet 10. (Emphasis added.)
>
> Local Service Area: The area within which telephone service is provided under a specific schedule of rates. This area may include one or more exchanges without the application of toll charges. Id.
>
> Premises: A tract of land. This tract of land may have one or more building structures or individual space or units on its grounds. There may also be individual space or units also within this building structure. Id., at sheet 13. (Emphasis added.)

Thus, pursuant to Qwest's tariffs, local service in Oregon is "between customer's premises located within the same local service area." Premises are defined as an actual physical location. Thus, the physical location of the calling and called parties define local service in Oregon.

Finally, Qwest notes that the Universal's Certificate of Authority (see Exhibit B to Qwest's Statement of Facts) imposes the following requirements on Universal:

> 7. For purposes of distinguishing between local and toll calling, applicant shall adhere to local exchange calling boundaries and Extended Area Service (EAS) routes established by the Commission. Further, applicant shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.

8. When applicant is assigned one or more NXX codes, applicant shall limit each of the NXX codes to a single local exchange and shall establish a toll center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange. (Id., Exhibit B, at 11-12.)

Thus, Universal has a legal obligation to comply with fundamental industry standards related to the distinction between local and toll calling, to comply with exchange and EAS boundaries in Oregon, and to comply with industry standards related to the assignment of telephone numbers. Universal's attempt to eliminate the VNXX concept from the language and to treat interexchange calling as though it were local is inconsistent with its operating authority in Oregon.[15]

In short, Universal, without any explanation in its Response, suggests a dramatic change of policy by proposing that local and VNXX (interexchange) traffic be treated as though it was the same for RUF purposes. This change in policy is directly contrary to Oregon law and Commission policy, and thus the Commission should therefore reject it.

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

Universal's proposed changes to paragraphs 7.3.1.1.3.1 (which applies to EF) and 7.3.2.2.1 (which applies to DTT) both include language that requires that the RUF apply to "both recurring and non-recurring charges." This Commission also addressed this issue in Order No. 05-874 in dockets IC 8/IC 9 (the Wantel and Pac-West complaints). While the issue in that case was the interpretation of an existing agreement, the Commission's discussion of the issue articulates underlying principles that demonstrate that the application of FCC Rule 709(b) to non-recurring charges would be inappropriate.

[15] In Order No. 04-504 in its VNXX investigation (docket UM 1058), the Commission expressed its deep concern about the impact that VNXX has on incumbent carriers. For example, after quoting the two conditions set forth above, that the Commission has placed in all Oregon CLEC certificates, which require adherence to local calling areas and the appropriate use of NXX codes, the Commission stated: "A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct described by OTA [the Oregon Telecommunications Association] . . . would clearly be in violation of its certificate." Order No. 04-504, at p. 11.

The Commission noted that the RUF provisions apply to monthly recurring charges, which "typically recover ongoing costs associated with a particular service or element" and this type of cost tends to be "usage-based." Order No. 05-874, at p. 18. On the other hand, non-recurring charges "are designed to recoup the nonrecurring cost of installing—as opposed to using—telecommunications facilities" and "are customarily assessed on a one-time, up-front basis." Id. Thus, while a RUF provision is calculated based on "costs that are ongoing in nature" based on busy hour usage, this "is neither a logical or practical method of recovering one-time costs." Id., at p. 19. The Commission noted that the RUF language and Rule 709(b) contemplate "the apportionment of the costs associated with DTT facilities will be based upon usage of those transport facilities" and that applying "the RUF to NRCs results in a bizarre scenario whereby NRCs are continually reapportioned without ever being finalized. There is nothing in the ICAs that suggests that the parties contemplated such an illogical result." Id., at p. 22. Finally, the Commission noted that the "FCC clearly recognized that § 51.709(b) applies to costs incurred to deliver traffic. While such costs certainly include monthly recurring DTT charges, they do not encompass DTT NRCs, which recover only the costs of installing those transport facilities." Id., at p. 23. (Italics in original.)

In this case, Universal has not proposed to change the language that states that the RUF is based on "the use" of the DTT or EF facility. Thus, for the reasons articulated in Order No. 05-874, it makes no more sense to apply RUF to non-recurring charges in this agreement than it did in the interconnection agreements at issue in that case. The Commission should reject Universal's proposed language.

F. Summary on RUF language

For the reasons set forth above, Universal's proposed language changes are inconsistent with clearly articulated Commission policy and Commission orders, the policy underlying the

ISP Remand Order, Oregon statutory law, Commission rules, and Qwest tariffs. Universal's proposed language should be rejected and Qwest's language adopted.

II. ISSUE NO. 2- THE INTERIM COMPENSATION REGIME ORDERED BY THE FCC IN THE ISP REMAND ORDER SHOULD BE APPLIED ONLY TO ISP TRAFFIC THAT ORIGINATES AND TERMINATES AT ISP MODEMS LOCATED IN THE SAME LOCAL CALLING AREA

A. The disputed language

The language in dispute on this issue is in paragraphs 7.3.4.4.1 and 7.3.4.5. The differences are set forth on page 5 of Exhibit 1. The difference in the language is simple. Qwest's proposed language would, consistent with the ISP Remand Order and the ALJ Ruling in Qwest's interconnection enforcement complaint against Level 3 regarding VNXX traffic (docket IC 12), require that Qwest pay terminating compensation at $.0007 per minute of use on local ISP traffic (ISP traffic that originates and terminate within the same local calling area). Consistent with the recent ruling of the Court in the Universal case (Qwest Fact Statement, Exhibit J, at p. 2), the termination point for purposes of applying this language is the modems located in the two Universal POPs in Portland and Eugene. Universal's proposed language would require Qwest to pay compensation on all ISP traffic, irrespective of where it originates and terminates.

The core issue that emerges from the competing language is whether the ISP Remand Order applies only to ISP traffic that originates and terminates at physical locations in the same local calling, or whether it applies to all ISP traffic, no matter where it originates or terminates. As Qwest demonstrates hereafter, both the ISP Declaratory Order, the ISP Remand Order, and the decision of the D. C. Circuit in WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002), and the recent ALJ Ruling in docket IC 12 on August 16, 2005 demonstrate conclusively that only

local ISP traffic is subject to terminating compensation at $.0007 per minute of use. Thus, Qwest's proposed language should be adopted.

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

Universal claims that the ISP Remand Order applies to all traffic destined for ISPs, including the VNXX ISP traffic generated in Oregon by Universal and its ISP customers. (Universal Response at pp. 5-8.) Thus, it argues that the Commission is bound to require Qwest to compensate Universal for all ISP traffic.

1. Universal's interpretation of the ISP Remand Order is demonstrably incorrect; the ISP Remand Order Applies only to ISP Traffic that is local in nature (i.e., that originates and terminates in the same local calling area)

Universal's fundamental argument is that in the ISP Remand Order, the FCC required that terminating intercarrier compensation be paid on all ISP traffic, including VNXX ISP traffic. (Universal Response at 5-8.) However, the ISP Remand Order addressed compensation only for ISP traffic[16] where the ISP is physically located in the same local calling area as the customer placing the call, and did not address the treatment of VNXX traffic.

In order to understand these issues, and the FCC's ruling, it is important to place the ISP Remand Order in its proper context. Thus, Qwest will briefly address four critical decisions: the FCC's ISP Declaratory Order and ISP Remand Order, and two decisions of the Court of Appeals for the D.C. Circuit, in particular the WorldCom decision.

[16] The FCC has repeatedly ruled that ISP traffic is interstate in nature because the ultimate end points of the calls are at websites across the country or in many cases in other parts of the world. Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, ¶¶ 1, 10-20 (1999) ("ISP Declaratory Order"); ISP Remand Order, ¶¶ 14, 58-62. Nonetheless, for intercarrier compensation purposes, the relevant end points are the physical location of the calling party and the physical location of the ISP's modem banks and servers.

2. The ISP Remand Order, the WorldCom decision, and other relevant authority demonstrate that universal's interpretation is invalid

Administrative orders such as the ISP Remand Order, like statutes, should be interpreted by reading them in a consistent manner, giving meaning to all parts thereof, and reading them in the context in which they were decided by the agency. A corollary principle is that an administrative order should not be read so as to ignore or obviate substantive portions of the order. The clear statements of the FCC and the Circuit Court identifying the breadth of the issue decided in the ISP Remand Order demonstrate that it applies only to local ISP traffic (which the FCC, in the ISP Remand Order, refers to by the phrase "ISP-bound traffic"). Any other reading of the order violates these interpretive principles. Furthermore, courts and state commissions are bound by the federal Hobbs Act to follow the rulings of the federal appellate court reviewing FCC decisions. Here, the reviewing court concluded that the only issue decided in the ISP Remand Order is the proper compensation regime to be applied to local ISP traffic.

The starting point for analysis is the FCC's 1996 Local Competition Order (also often referred to as the First Report and Order), in which the FCC concluded that reciprocal compensation under section 251(b)(5) applies only to "traffic that originates and terminates within a local calling area as defined by the state commissions."[17] Thus, from the inception of the Act, the FCC defined the reciprocal compensation obligation in terms of local calls. This, of course, was entirely rational because other compensation mechanisms had long been in place for interexchange calls (i.e., the intrastate and interstate access charge regimes). Since 1984, state commissions (for intrastate interexchange calls) and the FCC (for interstate interexchange calls) have implemented and continue to follow tariffs that govern the appropriate compensation for

[17] First Report and Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499 ¶ 1034 (1996) ("1996 Local Competition Order") (emphasis added); see also ISP Remand Order, ¶ 12.

interexchange traffic. Those tariffs remain effective because, under section 251(g), the Act explicitly preserved pre-existing compensation mechanisms.

Within two years of the Act's passage, the FCC had received many requests to clarify whether, given its unique one-way characteristic (where all the traffic flows to the CLEC that serves ISP customers and the hold times were significantly longer than for voice calls), "local" traffic bound for ISPs should be subject to reciprocal compensation under section 251(b)(5). As a consequence, the FCC opened a docket (CC Docket No. 99-68) to address this question, which it combined with its original docket to implement the local competition provisions of the 1996 Act (CC Docket No. 96-98). In February 1999, the FCC entered its ISP Declaratory Order, wherein the FCC concluded that ISP traffic is interstate in nature, based on the fact that the ultimate destinations of ISP calls are websites scattered across the country and the world. It is critical to understand the situation, as described in the order, that faced the FCC: "ISPs purchase analog and digital lines from local exchange customers to connect to their dial-in subscribers. Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines 'computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.'" ISP Declaratory Order, ¶ 4. (Emphasis added.)

In Bell Atlantic Telephone Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000, the D.C. Circuit vacated and remanded the ISP Declaratory Order on the ground that the FCC had failed to adequately explain why the end-to-end jurisdictional analysis was relevant to deciding if ISP calls fit into the local/long distance model. 206 F.3d at 1, 5, and 8. The court could hardly have been more clear in describing the issue the FCC had addressed: "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.) There is nothing to suggest in Bell Atlantic that either the FCC or the court was addressing anything other than the proper treatment of local ISP traffic.

On remand, the FCC considered the proper treatment of ISP traffic in light of the Bell Atlantic decision. Instead of relying again on the end-to-end analysis, the FCC held that section 251(g) allowed it to "carve out" the ISP traffic under consideration from the provisions of section 251(b)(5). ISP Remand Order, ¶¶ 42-47. The FCC holding is critical. It held that the traffic in question "at a minimum, falls under the rubric of 'information access,' a legacy term imported in the 1996 Act from the MFJ . . . ." Id., ¶ 42. In other words, other elements of section 251(g) could likewise support the FCC's decision, though they were not addressed in the ISP Remand Order. On the basis of this analysis, the FCC concluded that the traffic was at least "information access," and thus does not fall under section 251(b)(5); therefore, the FCC held that it could define a separate compensation regime for such traffic. The FCC then defined the interim compensation regime applicable to the traffic in question, which it stated applied to "ISP-bound traffic." See e.g., Id., ¶ 7. The critical issue, then, is what traffic the FCC intended to include within "ISP-bound traffic" for purposes of the interim compensation regime: Was it all ISP traffic or local ISP traffic?

The first place to look is the ISP Remand Order itself. The context of the order makes it clear that the only traffic being considered was ISP traffic that originates and terminates in the same local calling area – in other words, local ISP traffic (or, to use the FCC's nomenclature, "ISP-bound traffic"). For example, the FCC commences its background discussion by reiterating its statement from the ISP Declaratory Order that:

> an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area. Customers generally pay their LEC a flat monthly fee for

> the use of the local exchange network, including connections to their local ISP. They also generally pay their ISP a flat monthly fee for access to the Internet. ISPs then combine 'computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.'" ISP Remand Order, ¶ 10. (Footnotes omitted; all footnotes cite to ISP Declaratory Order.) (Emphasis added.)

In the next paragraph, the FCC's focus remains on ISP connections to local calling areas. The FCC notes that ISPs qualify for the Enhanced Services Provider ("ESP") exemption, which allows them to be "treated as end-users for the purposes of applying access charges and are, therefore, entitled to pay local business rates for their connection to LEC central offices and the public switched telephone network (PSTN)." ISP Remand Order, ¶ 11; emphasis added.) The importance of this language cannot be overstated because, once again, it demonstrates that the FCC's attention was fixed solely on local ISP traffic. In the next paragraph, the FCC retains its focus on "local competition," and the role that reciprocal compensation plays in its development. Id., ¶ 12.

Having articulated the foregoing as background, the FCC then identified its reason for opening the ISP traffic docket: "[T]he question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC." ISP Remand Order, ¶ 13. Thus, nothing in the FCC's analysis of the nature of the traffic or its implementation of the interim regime suggests that the FCC had broadened the scope of its inquiry in the ISP Remand Order. The FCC's silence on the subject is noteworthy.

For purposes of the issue before the Commission , the most critical statement on the question of the breadth of the ISP Remand Order comes in the D.C. Circuit's review of the ISP Remand Order in the WorldCom decision. There, the D.C. Circuit was clear in its characterization of the issue that was addressed in the ISP Remand Order: "In the order before

us the [FCC] 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.) This is not a casual background statement; instead, this plain and unequivocal language is the reviewing court's express statement that the holding of the ISP Remand Order relates solely to local ISP traffic.

The WorldCom court found that section 251(g) did not provide the FCC with a basis for its action, but, at the same time, the court made it clear that it was not deciding other issues that may be determinative and that would justify the FCC's decision, including (1) whether ISP calls are "telephone exchange service" or "exchange access," or neither; (2) the scope of "telecommunications" under section 251(b)(5); or (3) whether the FCC could adopt a bill and keep regime. 288 F.3d at 434. Furthermore, because there was a "non-trivial likelihood that the Commission has authority to elect such a system" (id.), the court remanded, but did not vacate, the ISP Remand Order. Thus, properly interpreted in light of WorldCom, the ISP Remand Order is the applicable law for the treatment of local ISP traffic.

Just as the ISP Remand Order remains in effect, the WorldCom court's characterization of the FCC's holding (that it applies only to local ISP traffic) is binding on all other courts and commissions because the WorldCom court is the Hobbs Act reviewing court for the ISP Remand Order. Under the Hobbs Act, 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." 2 U.S.C. § 2342(1). (Emphasis added.)[18] Thus, the Hobbs Act grants exclusive interpretive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC

[18] 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which apply here.

determination by a federal appellate court, federal district courts and state commissions are obligated to apply and abide by the appellate court's interpretation of FCC rules and orders. Further, state commissions, under authority delegated by the Act, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act.[19] Thus, the Commission and all parties in this case are bound by the WorldCom court's characterization of the breadth of the ISP Remand Order.

3. Qwest's interpretation of the ISP Remand Order is consistent with two recent Oregon decisions and with other authority

Qwest's interpretation of the ISP Remand Order is directly supported by the ALJ Ruling in docket IC 12 on August 16, 2005. In that case, Level 3 argued that the statements from the ISP Declaratory Order, the Bell Atlantic decision, the ISP Remand Order, and the WorldCom decision that interpreted the ISP Remand Order as relating to only local ISP traffic, were mere "background statements." The ALJ Ruling rejected that argument, ruling 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. ALJ Ruling, docket IC 12, at pp. 9-10. (Footnotes omitted.)

The ALJ Ruling 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

[19] 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."); see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm'n, 827 F.2d 1264, 1266 (9th Cir. 1987); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984) vacated on other grounds, 476 U.S. 1167 (1986); Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm'n, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

terminating in the same local calling area.[20] The ALJ Ruling is consistent with the language of the ISP Remand Order and the WorldCom court's explicit description of the holding of the ISP Remand Order. Any other interpretation requires the decision maker to ignore major portions of the ISP Remand Order, not to mention substituting its judgment for that of the WorldCom court, and thus violating the law that requires that deference be granted to the decisions of the Hobbs Act court.

The Universal decision, including the recent order in that case clarifying the termination point of traffic, is also relevant on this issue. In that case, Universal argued that Qwest should pay reciprocal compensation on VNXX traffic. The Court first discussed the definition of "local traffic" as contained in Qwest's Oregon tariff and the parties' ICA:

> [F]or a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA or EAS and terminated at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the ISP. VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal compensation. 2004 WL 2958421 at *10. (Emphasis added.)

Thus, a clear underlying assumption of the Universal decision is that ISP VNXX traffic is not preempted by the ISP Remand Order. Furthermore, at the time that Qwest filed its Petition, cross-motions were pending before the Universal on the termination point of ISP traffic. Qwest argued, consistent with the ISP Remand Order and this Commission's order in a ELI/GTE arbitration proceeding (Order No. 99-218 (March 17, 1999), docket ARB 91), that the termination point is where the calls are answered at the modems serving the ISP. On September 22, 2005, the Court in Universal ruled:

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[20] Id. at p. 10, fn. 36, citing paragraphs 4, 7, 8, 12, 24 (fn. 77) and 27 from the ISP Declaratory Order, and paragraphs 10, 13, and 24 of the ISP Remand Order.

> The court intended compensable traffic to include traffic that originates in one LCA or EAS area and "terminates" in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. In other words, the "termination point" is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision and the ISP Remand Order. (Qwest Fact Statement, Exhibit J, at p. 2.)

Thus, consistent with the Commission's rulings on this issue, the Universal court has again reaffirmed that only local ISP traffic is subject to terminating compensation under the ISP Remand Order. The Commission, therefore, should adopt Qwest's proposed language and reject Universal's proposed language.

CONCLUSION

For the reasons stated here and those that Qwest will present in this arbitration proceeding, Qwest respectfully requests that the Commission adopt Qwest's current template TRO/TRRO-complaint agreement (Exhibit A) for Oregon for the language for the terms, conditions, and prices of interconnection with Universal.

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Respectfully submitted,

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Alex M. Duarte, OSB No. 02045
Qwest
421 SW Oak Street, Room 810
Portland, Oregon 97204
503-242-5623
503-242-8589 (facsimile)
Alex.Duarte@qwest.com

and

Ted D. Smith, Utah Bar No. 3017
STOEL RIVES LLP
201 South Main St. Suite 1100
Salt Lake City, UT 84111
801-328-3131
801-578-6999

tsmith@stoel.com
Admitted Pro Hac Vice

Attorneys for Qwest Corporation