

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
FAX (202) 452-0067
WWW.CRBLAW.COM

JOHN C. DODGE
DIRECT DIAL
202-828-9805
JDODGE@CRBLAW.COM

LOS ANGELES OFFICE
2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

December 7, 2005

VIA OVERNIGHT DELIVERY

The Honorable Allan J. Arlow
Oregon Public Utility Commission
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

**Re: ARB 671; Request of Qwest Corp. to Take Official Notice of Oregon
PUC Decision No. 05-1219**

Dear Judge Arlow:

This letter responds to Qwest's recent filing in this docket dated November 28, 2005 asking the Commission to take official notice of OPUC Order No. 05-1219.¹

Universal Telecom, Inc. ("Universal") does not object to the arbitrator, or the Commission, taking official notice of the decision in 05-1219; and in fact believes that the arbitrator would have done so even if Qwest had not formally requested such action. Given this, Universal believes that the only reason Qwest made its filing was to make additional arguments in this proceeding. This is clear from Qwest's pleading, the last two pages of which (specifically paras. 6-8) contain additional argument. Thus, in the interests of fairness, Universal takes this opportunity to respond to Qwest's new arguments.

1) Wantel/Pac-West Interpreted an *Existing* Interconnection Agreement

The Commission's decision in the *Wantel/Pac-West* case (Dockets IC-8 and 9) entailed a ruling on the meaning of an *existing* interconnection agreement. *See* 05-1219 at 1. As the Commission notes, the agreement there must be "interpreted based upon the law in effect at the time [it] was executed in 2000." In this case, by contrast, the Commission must set new agreement terms based on the law as it exists today. 47 U.S.C. § 252(c)(1). Where the law has not changed, the interpretation of the older contract might be instructive today; where the law has changed, the older contract is irrelevant.

¹ To the extent Universal might be required to move for leave to file the instant pleading, Universal respectfully requests that this pleading be treated as such a request.

December 7, 2005

Page 2

Here, the most recent relevant law is the federal district court decision in *Qwest Corp. v. Universal Telecom, Inc.*, where the court determined that federal law, specifically FCC regulations 51.703(b) and 51.709(b), prohibits Qwest from imposing the charges at issue here.² Indeed, the Commission recognized in Order 05-1219 that “*Universal* is controlling” on its decisions. Order No. 05-1219 at n. 7. The *Universal* court found (as the Commission recognizes – see Order No 05-1219 at 7) that the ISP-bound traffic at issue between Qwest and Universal here is subject to these same FCC regulations, which prohibit charges for originating telecommunications traffic, including charges for the facilities used to carry such traffic.³

Moreover, the court also found that the traffic exchanged between Qwest and Universal is telecommunications traffic.⁴ Qwest’s arguments in its most recent “request to take official notice” appear to be an attempt to persuade the Commission that the traffic at issue in this case is not telecommunications traffic under the *ISP Remand Order*. See Qwest “Request” at ¶ 6. Universal, of course, was not a party to the *Pac-West/Wantel* case, and does not know what evidence was before Judge Petrillo on this issue. However, in the present case Qwest’s discovery responses essentially concede that the ISP-bound traffic at issue in this proceeding is, in whole or at least in part, telecommunications.⁵ This evidence is consistent with the federal court’s findings and must be considered and addressed by Your Honor in this proceeding.⁶

2) The Ninth Circuit’s Finding That the FCC Has Yet to Resolve Whether ISP-bound Traffic Is “Local” Within the Scope of Section 251 Still Stands

Qwest tries to twist the Commission’s reconsideration decision in 05-1219 into a rousing endorsement of the FCC’s current compensation regime, but it can not deny that no matter what the status of that regime might be, the question of whether or not ISP-bound traffic is local within the scope of Section 251 remains open. As this Commission knows (and as the *Universal* court found), in *Pacific Bell v. Pac-West Telecomm., Inc.*,⁷ the Ninth Circuit held that in light of the D.C. Circuit’s decision in *WorldCom v. FCC*, even after the *ISP Remand Order*, “the FCC has yet to resolve whether ISP-bound traffic is ‘local’ within the scope of § 251.”

² *Qwest Corp. v. Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS 28340 (D. Or. Dec. 15, 2004).

³ *Id.* at * 14-15 (“Under [FCC rules] § 51.703(b) and § 51.709(b) Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest’s network and terminated on Universal’s network”).

⁴ *Id.* at * 2 (“Qwest and Universal have interconnected their networks to allow this exchange of telecommunications traffic.”)

⁵ See Universal Final Brief at 4-5 (citing Direct Testimony of Nancy J. Batz for Qwest Corporation, ARB 671 (Oct. 21, 2005) (*Batz Testimony*) at p. 4, lines 1-23 (describing call routing through the use of telephone numbers, local loops, and telecommunications end office and tandem switches); and Qwest Responses to Universal Data Requests Nos. UTI 01-3, and UTI 01-27 (describing telecommunications equipment used by Qwest to deliver calls to Universal)).

⁶ *NCE Employers Ins. v. Hardy*, 155 Ore. App. 231, 236, 963 P.2d 97, 99 (Ore. Ct. Appeals 1998) (“ALJ was required to determine, *considering all of the evidence* in the record ...”).

⁷ 325 F.3d 1114, 1130-31, n.15 (9th Cir. 2003).

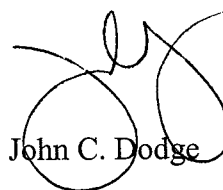
December 7, 2005

Page 3

This ruling shows that federal law does *not* hold that ISP-bound traffic is not local traffic. Moreover, while it may be appropriate to get into questions about what the parties expected in the past when interpreting an old agreement, as in the *Wantel/Pac-West* case, what matters today is the state of the law today. The Ninth Circuit's ruling *WorldCom* leaving the law on this matter unsettled means that for purposes of this arbitration decision (establishing terms of a new contract) the arbitrator cannot find that the Parties intend to treat certain traffic as "not local."

Should you have any questions concerning this matter please contact me at the telephone number listed above.

Sincerely,



John C. Dodge

cc: Alex Duarte, Qwest Corp.
Ted Smith, Stoel Rives