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October 21, 2005

VIA ELECTRONIC FILING

Ms. Frances Nichols Anglin
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

Re: ARB 671

Dear Ms. Nichols Anglin:

Enclosed for filing in the above-captioned matter please find Universal Telecom, Inc.'s Initial Brief, Statement of Material Facts, and the Testimony of Stephen C. Roderick. Copies of the same will be electronically filed and served on the parties electronically.

Kindly date-stamp as timely filed the additional copy enclosed and return it to the undersigned in the postage prepaid envelope also enclosed.

Please direct any questions regarding this matter to the undersigned. Thank you for your consideration of this matter.

Sincerely,



K.C. Halm

Enclosures

**BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION**

In the Matter of the Petition of

Qwest Corporation

for Arbitration of Interconnection Rates,
Terms, Conditions, and Related Arrangements
with Universal Telecom, Inc.

ARB 671

**INITIAL BRIEF
OF
UNIVERSAL TELECOM, INC.**

UNIVERSAL TELECOM, INC.

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October 21, 2005

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ARB 671

INITIAL BRIEF OF UNIVERSAL TELECOM, INC.

Universal Telecom, Inc. ("Universal") hereby files its initial brief in this matter, and seeks a ruling that the positions advocated by Qwest Corporation ("Qwest"), as evidenced by the terms of its proffered interconnection agreement, are wrong.¹

I. Introduction and Summary.

Although there are many problems with Qwest's proposed agreement, at this stage there are two key matters to be resolved: (a) Qwest's effort to get Universal to pay Qwest for delivering Qwest-originated traffic, and (b) Qwest's effort to avoid paying the low FCC rate for much of the ISP-bound traffic that Qwest sends to Universal. Qwest is wrong on both points.

¹ Qwest's arbitration petition did not formally or properly identify any specific open issues. Qwest has not disputed Universal's framing of the two key issues Universal identified in its response. As Universal has noted elsewhere, it does not believe that this arbitration is procedurally appropriate and reserves all of its rights in that regard. Given the unique procedural status of this case, moreover, Universal notes that there are many problems with Qwest's proffered interconnection agreement beyond the two key substantive issues that have been addressed so far. Any final interconnection agreement would need to incorporate negotiated and, if need be, arbitrated rulings on these other issues as well.

Charging Universal for Qwest-Originated Traffic. Qwest proposes language that would saddle Universal with the costs of getting Qwest-originated traffic from Qwest to Universal. Not only is this flatly prohibited by federal law, an Oregon federal district court judge recently reaffirmed this conclusion in a case raising this specific issue as between Universal and Qwest. Qwest's seeks to avoid this clear federal rule (a) characterizing the process of getting Qwest-originated traffic to Universal as a "service" that Qwest provides to Universal, and/or (b) arguing that ISP-bound traffic from Qwest's customers can be ignored when allocating the costs of the facilities Qwest uses to get traffic to Universal, thereby shifting costs to Universal and away from Qwest.² The first argument is wrong because the FCC's ban on charging for Qwest-originated traffic applies no matter how the forbidden charge is characterized. The second argument is wrong both because it misapplies the FCC's rule in a mathematical sense, and also because nothing in that rule purports to exclude ISP-bound traffic from any relevant calculation. As a result, Qwest's proffered language on this point should be rejected.

Avoiding Payment of Intercarrier Compensation. Here, Qwest and Universal disagree about the proper interpretation of the FCC's rule governing intercarrier compensation for ISP-bound traffic. Qwest says that the FCC established a compensation obligation only for ISP-bound calls where the ISP's receiving gear is physically located in the originating caller's local calling area. This argument is simply wrong. Back in 1996 the FCC limited the scope of reciprocal compensation under

² Because Qwest has not properly framed any issues or stated its positions on them, Universal bases its statements regarding Qwest's arguments on Universal's experience with Qwest negotiations and litigating about the parties' current interconnection agreement, as well as its general understanding of positions Qwest has taken in other litigation involving other parties, in Oregon and elsewhere. To the extent that Qwest's actual arguments differ from Universal's understanding, Universal will address them in its reply.

Section 251(b)(5) of the Act to so-called “local” traffic.³ In that context, it made sense to ask whether calls to ISPs counted as “local,” which, at least in casual usage, contains a geographic component. This was the approach to ISP-bound calling the FCC used when it first ruled on the question in 1999. But when the FCC looked at the issue again, in 2001, it expressly rejected reliance on the notion of “locality” and instead established a separate intercarrier compensation regime for *all* ISP-bound traffic.⁴ This interpretation is confirmed by the FCC’s most recent pronouncement on this issue (and court decisions interpreting it), as well as the *Core Forbearance Ruling*,⁵ which repeatedly refers to the FCC’s rules regarding “ISP-bound traffic,” without any suggestion that such traffic, for purposes of its rules, only includes calls where the ISP is physically within the calling party’s local calling area. Given all this, Qwest’s language that has the effect of limiting the scope of its intercarrier compensation obligation for ISP-bound traffic its customers originate should be rejected.

II. Factual Background.

Universal does not believe that it should have to be participating in this proceeding at all. Universal contends that its existing interconnection agreement with Qwest provides that it will remain in effect until both parties consent to a renegotiation.

³ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”) at ¶¶ 1033-35; *id.*, Appendix B (1996 version of 47 C.F.R. § 51.701).

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom v. FCC*”), *cert. den.* 538 U.S. 1012 (2003).

⁵ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) (“*Core Forbearance Order*”).

Logically, over time, the existing agreement would become problematic in various respects for both parties, and both parties would acquire an incentive to renegotiate. At that time all open issues could be dealt with fairly and reasonably.

All that said, because Qwest and Universal have been interconnected for some time, and based on a multi-year history of trying to resolve disputes under their existing agreement, it is clear that there are two key, overarching disputes between Qwest and Universal, summarized above. Universal believes that the facts relevant to these disputes are straightforward and not subject to reasonable dispute. Instead, the real disputes between the parties relate to the interpretation and application of binding FCC rules and rulings, and summary disposition is appropriate with respect to these issues. Consequently, the following factual background is, in Universal's view, sufficient to provide context for this matter.⁶

Universal is a competitive local exchange carrier ("CLEC") authorized to provide telecommunications services in the State of Oregon.⁷ (Universal Telecom, Inc.'s Statement of Material Facts ("SMF") ¶¶ 1, 2). Universal provides telecommunications and other services to Internet Service Providers ("ISPs") and other entities in Oregon. (SMF ¶¶ 3-6). ISPs provide their customers with various types of Internet-related services, including, typically, access to the Internet. Universal's managed modem service

⁶ Qwest and Universal recently litigated a dispute about the key issues in this arbitration as they arise under the terms of the parties' currently effective interconnection agreement. *Qwest v. Universal Tel.*, Civil No. 04-6047-AA, 2004 U.S. Dist. LEXIS 28340 at *1 (D. Or. Dec. 15, 2004). To the extent that the court in that 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, where the only question is what federal law requires. That said, her findings of fact regarding the nature of Universal's operations are directly relevant here, and Universal believes that it is appropriate for the Arbitrator here to rely on them, and inappropriate for Qwest to challenge them.

⁷ There is no official statutory definition of a "CLEC." Any LEC that is not an incumbent local exchange carrier ("ILEC") is generally viewed as a CLEC.

allows Oregon residents who are customers of these ISPs to gain local “dial-up” access to the Internet. (*Id.*; see also Pre-Filed Direct Testimony of S. Roderick) Although ISPs’ various services can include email, web browsing, information retrieval and storage, instant messaging, *etc.*, Universal does not provide these services to its ISPs’ end user customers. (*Id.*). Rather, Universal only provides local “dial-up” access to the Internet for its ISPs’ customers. (*Id.*).

In a typical dial-up arrangement, a customer’s computer modem uses a normal telephone line to dial a normal telephone call to a telephone number that has been assigned to an ISP’s equipment. Universal’s “managed modem service” offers a variation on this arrangement. Under Universal’s “managed modem service,” customers’ computer modems initiate local telephone calls that travel over Qwest’s network to Universal, where Universal converts the calls into Internet Protocol and delivers them—as instructed by the customer’s computer—to different Internet locations, features, and capabilities (email servers; ecommerce sites such as Amazon.com or eBay; or online services such as Yahoo or America Online *etc.*). (Pre-Filed Direct Testimony of S. Roderick). The local telephone numbers called by 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 access needs. (*Id.*). The ISPs market themselves to customers and advise them of the local telephone numbers to call to access the Internet. (*Id.*).

These services are different from those offered by Qwest to its residential subscribers in Oregon, but are nevertheless important. Although broadband Internet access (such as cable modem service or DSL service) seems to receive more policy

attention, the fact is that hundreds of thousands, if not millions, of Oregon residents obtain access to the Internet by means of a dial-up connection. Dial-up connections to the Internet only exist because telecommunications carriers, such as Universal, provide ISPs with the specialized telecommunications services those entities need in order to be reached by end users seeking dial-up access.⁸

Universal and Qwest interconnect at a single point of interconnection (“POI”) within both of Oregon’s LATAs. (SMF at ¶¶ 8, 12.) As the federal district court noted, all “telecommunications traffic that begins on one party’s network but is destined for the other parties network must pass through the POI.” (*Id.* at ¶ 13) When a carrier passes calls from its network to another carrier’s network, that process is known as “originating” the call. (*Id.* at ¶ 14) Calls “originate” when a particular LEC’s customer calls a customer of a different LEC. (*Id.*) Once the call passes through the POI, the receiving party takes over responsibility for delivering the call to its final destination. (*Id.* at ¶ 15) This is known as “terminating” the call. (*Id.* at ¶ 16) This process is necessary to allow a customer of one LEC to call a customer of a different LEC. (*Id.* at ¶ 17)

Finally, all (or substantially all) traffic at issue in this arbitration proceeding is traffic that originates on Qwest’s side of the POI, travels over Qwest’s network, which will be handed off to Universal at the POI, and terminated on Universal’s network. No significant amount of traffic will be originated by Universal. *See, e.g.*, SMF at ¶ 20 (citing *Qwest Corp. v. Universal Telecom, Inc.*, Civ. No. 04-60470AA, 2004 U.S. Dist. LEXIS 28340, at *5 (D. Or. Dec. 15, 2004)).

⁸ Given its posture in other proceedings, Universal would not be surprised if Qwest were to claim that Universal’s services to ISPs somehow do not “count” as the kinds of services that local exchange carriers are supposed to provide. This claim is baseless, but Universal will await Qwest’s filing to rebut it in detail if, in fact, Qwest makes it at all.

III. Issue 1 – Each Party Bears Full Responsibility for Facilities Used to Carry That Party’s Own Originating Traffic To The Other Party.

► Whether Universal should be required to pay Qwest for facilities located on Qwest’s side of the Point of Interconnection (“POI”) which Qwest uses to carry traffic originated by Qwest end users to Universal.

FCC rules forbid an originating LEC to charge another carrier for traffic that the originating LEC hands off to the other carrier. *See* 47 C.F.R. § 51.703(b). The basic idea is that originating carriers get paid for the origination function from charges they assess on their own end users (who are making the calls in the first place). LECs are allowed to charge each other for two functions: *transport* (which is getting traffic from a point of interconnection, where it is received from another carrier, to the transporting carrier’s switch) and *termination* (which is switching the traffic to the called party). *See* 47 U.S.C. § 251(b)(5) (requiring LECs to establish reciprocal compensation arrangements for transport and termination); 47 C.F.R. § 51.701(c) (defining “transport”); 47 C.F.R. § 51.701(d) (defining “termination”). They are not allowed to charge for getting their own traffic to the other carrier.

Qwest has been fighting these clear rules for years. Qwest wants to characterize the function of carrying traffic from its own customers to another carrier not as a service that Qwest is providing to its customers (which is logical because they are the ones calling, after all) but rather as a service to the interconnected carrier (which is not logical at all). Hence Qwest’s proffered contract is replete with references to the “local

interconnection service” (“LIS”) that Universal is supposed to be buying in order to obtain the benefit of receiving traffic from Qwest.⁹

Universal is not concerned with how Qwest *labels* the functions at issue. Universal is concerned, however, that it not be charged for functions that Qwest may not properly charge for. Universal believes that Qwest’s position is that it can charge Universal for such facilities, despite the clear prohibition on such charges set forth in FCC regulations and other legal authority. In other words, Qwest is proposing that Universal should be required to pay Qwest to deliver traffic 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.

The Arbitrator should reject these unlawful charges.

A. Universal Is Entitled To A Single POI.

As Universal understands it, one part of Qwest’s justification for charging Universal for originating traffic to Universal is that Universal connects to Qwest at a single POI in each LATA. The idea seems to be that, by using a single POI, Universal is making Qwest carry traffic from the locations where it originates to the centrally-located single POI. This argument fails, both legally and economically.

The FCC has repeatedly considered this issue and repeatedly found that its rules require the ILEC to allow CLECs to use a single POI. Consider the following:

⁹ Specifically in, *inter alia*, Sections 7.3.1.1.1, 7.3.1.1.3, 7.3.2, 7.3.2.1 and 7.3.2.2 of the proposed agreement Qwest proposes contract language that would require Universal to assume cost responsibility (i.e. pay Qwest for) for facilities that Qwest would use to carry its own traffic to Universal. These section references are for illustrative purposes only. Universal identified specific disputed language in its Response to Qwest’s Petition for Arbitration and reserves the right to object to such language, and any related provisions, during the course of this proceeding.

- In June 2000, in considering an SBC request for interLATA authority, the FCC stated: “Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. ***This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.***” *In the Matter of Application by SBC Communs. Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communs. Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommuns. Act of 1996 to Provide In0Region, InterLATA Services in Texas*; CC Docket No. 00-65; Released June 30, 2000; at ¶ 78 (emphasis added).
- In April 2001, in discussing its rules in the course of initiating a proceeding regarding intercarrier compensation, the FCC stated: “As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, ***including the option to interconnect at a single POI per LATA.***” *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (“*Unified Intercarrier Compensation NPRM*”) at ¶ 112 (footnote omitted, emphasis added).
- In July 2002, in resolving an arbitration between Verizon and WorldCom, the FCC stated: “Under the Commission’s rules, competitive LECs may request interconnection at any technically feasible point. ***This includes the right to request a single point of interconnection in a LATA.***” *Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm’n*, Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 at ¶ 52 (2002) (“*Virginia Arbitration Order*”) at ¶52 (emphasis added).

So it is quite clear that Universal is entitled to use its chosen single POI interconnection architecture.¹⁰

B. Qwest May Not Charge Universal For Qwest-Originated Traffic.

Nothing in any FCC rule or ruling suggests that, if a CLEC exercises its right to interconnect at a single, LATA-wide POI, the CLEC may be punished by having to pay the ILEC for the delivery of traffic to that POI. To the contrary, over and over again the FCC

¹⁰ Ultimately this rule derives from 47 U.S.C. § 251(c)(2), which requires ILECs to permit interconnection at “any technically feasible point.” *See also* 47 C.F.R. § 51.315(a).

and the courts have held that no such origination charges are permissible. Yet, this is what Qwest's language would do.¹¹

Consider first the FCC's rule. FCC Rule 51.703(b) states: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that *originates* on the LEC's network." 47 C.F.R. § 51.703(b) (emphasis added). This rule is not inherently difficult to interpret or apply, and its meaning is clear: originating LECs cannot charge terminating LECs for the cost of carrying traffic to the terminating LEC.

The FCC has specifically explained that this rule prohibits one LEC from assessing charges on another interconnected LEC for facilities used to carry the first LEC's *originating* traffic to the second LEC's customers.¹² The key question is which of the two carrier's subscribers *originates* (*i.e.*, sends) the traffic at issue. This rule underpins the principle inherent in the FCC's compensation rules¹³—that the *cost-causer* of the call is responsible for the costs of the call.¹⁴ This principle is known as "calling party's network pays." Of course, the corollary to "calling party's network pays" rule is that the called party's network *does not pay*. As the FCC has stated, under its current

¹¹ See Qwest Proposed Agreement at §§ 7.3.1.1.1, 7.3.1.1.3, 7.3.2, 7.3.2.1 and 7.3.2.2.

¹² Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n, Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 at ¶¶ 52 (2002) (hereinafter "Virginia Arbitration Order").

¹³ 47 C.F.R. § 51.703(a) ("Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.").

¹⁴ See *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶¶ 8-9 (2001) ("*Unified Intercarrier Compensation NPRM*") (existing access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier to compensate the called party's carrier for terminating the call).

rules, “the originating telecommunications carrier bears the costs of transporting traffic to its point of interconnection with the terminating carrier.”¹⁵

At this late date, this point should not be controversial. Instead, it is well-settled law. Five years ago the FCC ruled that its regulations, specifically 47 C.F.R. § 51.703(b), prohibit Qwest from doing the very same thing it is attempting to do to Universal here. In *TSR Wireless v. US West Communications*,¹⁶ the FCC ruled that under Rule 51.703(b) Qwest may not charge an interconnecting carrier for Qwest-provided facilities used to deliver Qwest-originated traffic to the point of interconnection with another carrier. That case arose after several telecommunications companies filed a series of complaints with the FCC claiming that Qwest’s predecessor, US West, had attempted to charge them for those facilities. The FCC concluded that Rule 51.703(b) prevented Qwest from imposing charges for the facilities used to deliver Qwest-originated traffic to the other carriers.¹⁷

The FCC also made clear that Qwest may not avoid the prohibition of Rule 51.703(b) by saying that it is charging for the “facilities” on its side of the POI, as opposed to the “traffic” that it is originating. Specifically, the FCC rejected Qwest’s claims that 51.703(b) governs only the charges for “traffic” between carriers and does not prevent LECs from charging for the “facilities” used to transport that traffic.¹⁸ Instead, the FCC affirmed an earlier conclusion that the rule, when read in conjunction with Rule 51.709(b), “prohibits [Qwest] from charging for facilities used to deliver Qwest-

¹⁵ *Unified Inter-carrier Compensation NPRM*, 16 FCC Rcd 9610 at ¶ 70.

¹⁶ Memorandum Opinion and Order, 15 FCC Rcd 11166 at ¶¶ 18, 40 (2000).

¹⁷ *Id.* at ¶ 31 (stating that “US West must deliver traffic to TSR’s network without charge”).

¹⁸ *Id.* at ¶ 25-26.

originated traffic, in addition to prohibiting charges for the traffic itself.”¹⁹ The FCC also reaffirmed that pursuant to these two rules, an interconnected carrier is only required to pay for dedicated facilities connecting to Qwest to the extent that the carrier uses those facilities to deliver to Qwest traffic that the interconnected carrier originates.²⁰ Thus, the FCC has ruled that the charges that Qwest wants to impose on Universal in this proceeding are unlawful. Moreover, the FCC’s rules apply to all charges, which necessarily means that Qwest is prohibited from imposing both recurring and non-recurring charges for facilities used to carry its originating traffic.

Many court rulings confirm this result. In *Qwest Corporation, et al. v. FCC*,²¹ the D.C. Circuit rejected Qwest’s attack on the “no origination charges” rule, and found the FCC’s interpretation of the rule to be reasonable. The court held that the FCC’s explanation “seems compelling; its interpretation prevents LECs from ‘re-designating the ‘traffic’ charges as ‘facilities’ charges’”²² – just what Qwest is trying to do here.

The D.C. Circuit has also set the FCC itself straight when the agency tried to relax its application of the rule. In *Mountain Communications, Inc. v. FCC*,²³ the D.C. Circuit invalidated an FCC ruling allowing Qwest to impose charges on an interconnected telecommunications carrier under the guise of providing that carrier a “wide area calling

¹⁹ *Id.* at ¶ 25.

²⁰ *Id.* As discussed *infra*, this shows why Qwest’s language regarding the “relative use factor,” or “RUF,” is unlawful because it shifts costs of Qwest facilities to Universal even if Universal does not use those facilities for Universal-originated traffic.

²¹ 252 F.3d 462, 467 (D.C. Cir. 2001).

²² *Id.* (citing *TSR Wireless*, 15 FCC Rcd at 11181 ¶ 25). The D.C. Circuit also found the FCC’s interpretation to be reasonable because any other interpretation of the rules would create an artificial distinction that would give LECs like Qwest an incentive to game the system. *Id.*

²³ 355 F.3d 644 (D.C. Cir. 2004).

service.”²⁴ The court noted that the factual circumstances concerning the telecommunications carrier’s interconnection with Qwest were identical to those in the *TSR Wireless* case, and, therefore, rejected the notion that Qwest could impose charges for a service that was in essence an attempt to force that carrier to pay for Qwest-originated traffic.²⁵ The court also found that such an arrangement “seemingly comes into direct conflict” with Rules 51.703(b) and 51.709(b).²⁶

Other federal courts have concurred with the D.C. Circuit and ruled that FCC regulations bar ILECs from imposing charges on interconnecting CLECs for the delivery of traffic that originates on the ILEC’s network. For example, the Fourth Circuit in *MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*²⁷ held that FCC Rule 51.703(b) “unequivocal[ly] prohibit[s] ILECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.” Similarly, the Fifth Circuit, in *Southwestern Bell Telephone Co. v. PUC of Texas*,²⁸ affirmed a district court ruling that prohibited an ILEC from imposing “transport costs” on an interconnected CLEC as compensation for SBC’s costs of carrying traffic outside of a local calling area to the parties’ single POI.

This same issue was recently litigated between Qwest and Universal themselves, in federal district court here in Oregon. Qwest argued in that case that Universal owed Qwest for facilities used to bring traffic to Universal’s single POI in each LATA, but the

²⁴ Qwest was pressing an analogy between an interconnected carrier’s single POI and the kind of services that business customers receive when they buy an “800” number, *i.e.*, the customer pays the carrier for collecting and delivering toll traffic to a single, central location.

²⁵ *Id.* at 648.

²⁶ *Id.*

²⁷ 352 F.3d 872 (4th Cir. 2003).

²⁸ 348 F.3d 482 (5th Cir. 2003).

court, citing the binding federal rules noted above, rebuffed Qwest's claims:

In the instant case, 100% of the traffic exchanged between the parties *originated on Qwest's network* and terminated on Universal's. *Under § 51.703(b) and § 51.709(b), Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest's network and terminated on Universal's network.* For these reasons, Qwest's claim as to the charges for LIS circuits, DTT, EF, and MUX interconnection facilities fails.²⁹

Universal submits that there is no sound basis for Qwest's attempt to shift its own call-origination costs onto Universal.³⁰

Notably, the federal court reached this conclusion with full knowledge and awareness of the fact that the traffic Qwest originates to Universal is essentially entirely ISP-bound.³¹ This confirms – if any confirmation was needed – that ISP-bound traffic is not subject to some unspoken exception to rule 51.703(b)'s clear ban on charging for traffic origination. Indeed, in the Fourth circuit's *MCIMetro* decision ISP-bound traffic was clearly at issue between the two carriers.³² Universal is not trying to avoid paying Qwest for the use of Qwest's facilities when Universal originates traffic to Qwest. Over the term of the parties' new interconnection agreement, it is possible that Universal will

²⁹ *Qwest Corp. v. Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS 28340 at *14-15 (emphasis added).

³⁰ In this regard, Qwest's proposed agreement provides (in a provision to which Universal does not object) that the FCC's rules are part of the "controlling law" that governs that agreement. Interconnection Agreement at § 5.19. It would be inconsistent with that provision to permit Qwest to impose traffic-origination charges on Universal.

³¹ *Qwest v. Universal* at *2, *12-14.

³² *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872 (4th Cir. 2003); decisions below N.C. PUC LEXIS 398 (NCUC 2001) and 2001 NC PUC LEXIS 821 (NCUC 2001). In this regard, the FCC's *ISP Remand Order* made clear that intercarrier compensation for ISP-bound calling must parallel compensation for other non-toll traffic. *See infra*. Reading an exception into Rule 51.703(b) for ISP-bound traffic would contravene this requirement.

expand its business to include entities that originate traffic. In that situation, as discussed *infra*, Universal will pay Qwest the FCC-set rate of \$0.0007 per minute. When that occurs, Universal knows that the FCC's rules permit Qwest to charge for a share of the cost of facilities that are used both to send Qwest-originated traffic to Universal and Universal-originated traffic to Qwest. *See* 47 C.F.R. § 51.709(b). Qwest's proposed contract provisions regarding the "relative use factor," or "RUF," however, mathematically distort this FCC rule and must be rejected.

Qwest's proposed language says that Universal must pay for the entire capacity of facilities that Qwest uses to connect the two networks, *reduced by* any outbound-to-Universal usage that Qwest might generate. That is, Qwest's "base case" is that Universal pays 100% for connections between Qwest's end offices and Universal. Qwest-originated traffic then generates a discount off this "base case."³³

But that is not what the FCC's rule says. The FCC's rule (set out at 47 C.F.R. § 51.709(b)) says that the interconnecting carrier – here, Universal – can *only* be charged for such a facility based on the *proportion of its capacity* that Universal *actually uses*. So when Qwest establishes a transport facility to link the two networks, the *only* charge that can be assessed on Universal, consistent with the FCC's rule, is the proportion of the facility that Universal *actually uses* to send traffic to Qwest. Neither the amount of traffic, nor the type of traffic, that Qwest might send to Universal has any possible relevance under the FCC's rule. To be perfectly clear: the FCC does not permit Qwest to charge Universal for facilities used to deliver traffic to Universal, and then calculate a "discount" off that price to reflect Qwest's delivery of traffic to Universal. The only

³³ Interconnection Agreement at § 7.3.1.1.3.

charge Universal can be assessed *at all* is one that reflects the proportion of the capacity of the facilities that *Universal* uses to send traffic to Qwest.

This precise formulation of the rule matters in practical terms because Qwest has taken the position that a lot of the traffic it sends to Universal doesn't really "count" in calculating Universal's supposed "discount." Most notably, as Universal understands it, Qwest asserts that ISP-bound traffic should be disregarded in calculating the discount that Universal "earns" for Qwest-originated traffic carried on the facility. So, if Qwest establishes a large trunk group to Universal to carry traffic outbound to Universal's ISP customers, in Qwest's view all of that traffic counts as "0%" in calculating Universal's the "relative use factor" discount. Again, however, the FCC's rule is stated in exactly the opposite manner: Universal does not get a "discount" off a full-price "base case." The FCC's rule requires that the "base case" is that Universal pays *nothing*. Any charge to Universal *must be* limited to the proportion of the trunk capacity that Universal-originated traffic represents.³⁴

The conclusion that Qwest may not charge Universal for Qwest-originated traffic makes perfect economic sense. Telecommunications regulatory policy dictates that costs should be recovered from the cost causer. When a Qwest end user makes a call, that end

³⁴ Universal disagrees with any claim that ISP-bound traffic does not "count" under FCC Rule 51.709(b). Certainly nothing in the language of the rule suggests or supports such a conclusion. Because of the way the actual rule is written, however, the claim that ISP-bound traffic doesn't "count" is actually irrelevant to the operation of the rule. Consider, under that rule, a hypothetical facility between Universal and Qwest that is carrying no traffic at all in either direction. Because the rule only allows Universal to be charged for the proportion of the capacity that it is using for Universal-originated traffic, Universal would be responsible for none of the cost of that facility, since it would be using none of the capacity (even though, in this hypothetical example, Qwest would be using none of the capacity either). Now assume that instead of both parties letting the facility lie idle, Qwest uses it to send ISP-bound traffic to Universal. Even if for some reason that ISP-bound traffic doesn't "count," *Universal's* proportionate use of the facility for Universal-originated traffic remains at zero, so the amount it can be charged also remains at zero.

user causes the costs involved in getting the call to its destination. Cost responsibility does not magically shift if the called party gets its service from another network. So, it makes no economic sense to charge another network for the privilege of receiving calls. To the contrary, the originating LEC should recover the costs involved in getting the call to the terminating LEC from the cost causer – the originating LEC’s own end user.

These rules – “no charge for originating traffic” and “no charge for facilities on your side of the POI” – also make economic sense from the specific perspective of encouraging competition. Prior to the 1996 Act, Qwest faced no significant competition, so both the calling and called party would be on Qwest’s network. When one Qwest customer called another, Qwest would incur three kinds of costs: (a) originating the call at the calling party’s switch; (b) transporting the call (possibly via a tandem) to the terminating party’s switch; and (c) terminating the call at the terminating party’s switch. Once a customer has left Qwest’s network, when Qwest end users calls that customer, Qwest still has to switch the traffic at the caller’s end office switch, but no longer has to transport it to the terminating switch, or to actually perform terminating switching. Instead, it only has to transport it to the POI, to hand it off to the competitor.

Qwest, therefore, actually incurs *fewer* costs in a competitive environment, as competitors win customers and undertake half the job of completing calls to the customers they win. This is so because the CLEC incurs switching costs that Qwest would otherwise incur if it served both the calling and called party, and therefore was responsible for both the origination and termination of the call. But that, of course, is not at all what happens today. Today, it is Universal that is responsible for termination, which relieves Qwest of the switching costs that Universal bears. It would be truly

bizarre in these circumstances to permit Qwest to *charge* the CLEC for delivering originating traffic to the meet point-POI. Qwest would have to incur those costs whether the CLEC existed or not. Charging the CLEC for them amounts to nothing less than a penalty on the CLEC for the temerity of winning business away from Qwest.³⁵

In sum, there is neither a legal nor economic basis for Qwest to charge Universal, either for the facilities that Qwest might use in getting traffic from a Qwest end user to the POI between the two networks, or any sort of per-minute charges for getting such traffic to the POI. Such charges violate FCC Rule 51.709(b) and make no economic sense. As a result, federal law requires the Arbitrator to reject Qwest's contract provisions that result in such charges, and to rule plainly and directly that Qwest may not charge Universal for traffic that Qwest's own end users originate.

IV. Issue 2 – Each Party is Entitled to Collect Reciprocal Compensation on All Traffic.

► Whether Qwest can deny payment of reciprocal compensation where the ISP is not geographically “local” to the originating caller.

The parties apparently agree that intercarrier compensation under their new agreement will be consistent with the FCC's regime, established in 2001, capping such compensation at \$0.0007 per minute for *all* traffic exchanged, both traditional “local” traffic and ISP-bound traffic, in both directions. They disagree, however, about how that regime applies to ISP-bound calls where the ISP is not located in the originating caller's

³⁵ Because Qwest has not tried to justify its position, at this juncture Universal notes that the actual cost to Qwest of carrying traffic over an efficiently-engineered fiber optic facility is essentially negligible. This is particularly true with respect to the pre-existing interoffice fiber that Qwest uses (or should be using) to gather traffic from the end offices in a LATA to the central collection point for delivery to the POI within Universal. In the context of the arbitration, Qwest should be required to prove, with competent evidence, any claim that it incurs non-trivial costs in delivery traffic to Universal.

local calling area. Qwest claims that the FCC's regime does not apply to ISP-bound calls where the ISP is not geographically "local" to the originating caller. In other words, Qwest argues that so-called "VNXX"-routed ISP-bound traffic is not subject to compensation, and has crafted its specific contract language to achieve this result.³⁶ For the reasons described below, Qwest is wrong, and the Arbitrator should require Qwest to pay intercarrier compensation on all traffic the parties exchange.

A. The FCC's Intercarrier Compensation Regime.

Beginning shortly after the passage of the 1996 Act, there was controversy surrounding how and whether Section 251(b)(5)'s reciprocal compensation obligation applied to ISP-bound calls. Very briefly, the FCC's original rules from 1996 said that reciprocal compensation only applied to "local" traffic, which the FCC conceived as traffic that one LEC hands off directly to another, as opposed to long distance traffic, where an originating LEC hands calls off to an intermediary carrier – an interexchange carrier – which then hands the calls off to a terminating LEC for completion.³⁷ In an order issued in early 1999, the FCC ruled that the interstate character of ISP-bound traffic meant that it was not properly classified as "local" for purposes of the FCC's reciprocal compensation rules.³⁸ The courts, however, rejected this reasoning, because the FCC had

³⁶ Interconnection Agreement at § 7.3.1.1.3.1.

³⁷ *Local Competition Order*, *supra*, at ¶¶ 1033-35; *id.* at Appendix B, rule 47 C.F.R. § 51.701 (1996 version of reciprocal compensation rule). *Accord*, *Western Radio Services*, Order No. 04-600, ARB 537, 2004 Ore. PUC LEXIS 508 (2004) at *25-26 ("The FCC has made clear that the deciding factor in determining whether the call is local or non-local for purposes of compensation is whether or not an interexchange carrier has a role in handling the call").

³⁸ *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, CC Docket Nos. 96-98, 99-68 (February 26, 1999) ("*ISP Declaratory Ruling*"). The FCC also ruled that the terms of particular interconnection agreements might nonetheless have the effect of treating ISP-bound calls as "local" anyway. *See id.* at ¶¶ 22-25.

not explained why the (generally uncontested) interstate nature of ISP-bound traffic had anything to do with what compensation regime should apply to two LECs that collaborate in getting calls from one LEC's end users to ISPs served by the other LEC.³⁹

The FCC tried again in 2001, in the *ISP Remand Order*. That order completely rethought the FCC's approach to reciprocal compensation, not merely for ISP-bound calls, but for all calls. Specifically, the FCC expressly and completely repudiated the notion that the "local" status of a call has any bearing on whether the call is entitled to reciprocal compensation under Section 251(b)(5). It therefore amended its reciprocal compensation rules to remove all references to "local" traffic. *ISP Remand Order* at ¶¶ 45-46. *Id.* at Appendix B (showing new rules, with the term "local" conspicuous by its absence). That said, the FCC still did not believe that Section 251(b)(5) applied to *all* "telecommunications." Instead, it concluded that two classes of traffic identified in another section of the law – Section 251(g) – were properly viewed as excluded from Section 251(b)(5). These two supposedly excluded categories were "information access" and "exchange access."

In its ruling, the FCC did not set up any special compensation rule for "exchange access," which makes sense because the pre-existing access charge regime already ensured that exchange access charges would be payable in connection with toll calls. The FCC, however, re-affirmed its interstate jurisdictional authority over ISP-bound traffic as a form of "information access," and set up a special intercarrier compensation regime applicable to it. Under that regime, ISP-bound calls and non-toll calls (that is, traffic that

³⁹ *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

isn't "exchange access") are to be treated the same, with the specific rate – reciprocal compensation or FCC-set – chosen by the ILEC.⁴⁰

An important feature of the FCC's new regime is that ILECs *may not discriminate* against ISP-bound traffic. In this regard, note that the genesis of the controversy over ISP-bound calls was that ILECs were being called on to pay large sums to CLECs for such traffic. *ISP Remand Order* at ¶ 89 & n.175. While ILECs of course argued that ISP-bound traffic should not be compensable at all, as a fallback position they also argued that if ISP-bound traffic is compensable, payment should be at some rate that was *lower than* the rate applicable to "normal" Section 251(b)(5) traffic. The FCC, however, flatly rejected those arguments. Just as the FCC had found that requiring the payment of full reciprocal compensation rates for ISP-bound traffic had led to uneconomic distortions, the FCC also found that discriminating *against* ISP-bound traffic by subjecting it to a lower compensation rate would be inappropriate:

It would be unwise as a policy matter, *and patently unfair*, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. Because we are concerned about the superior bargaining power of incumbent LECs, *we will not allow them to "pick and choose" intercarrier compensation regimes, depending on the nature of the traffic exchanged* with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same

⁴⁰ Under the FCC's rule, the ILEC can choose whether the rate that applies is a state-determined "reciprocal compensation" rate or the FCC's own low rate (now \$0.0007 per minute), but *the same rate applies to all non-toll traffic*. To deal with what it saw as an immediate problem of "arbitrage," the FCC initially ruled that the rate of growth in CLEC bills for ISP-bound traffic would be limited to a 10% annual traffic growth cap, and that no compensation for ISP-bound traffic would be due to CLECs who were not serving ISPs in a particular market as of the first quarter of 2001. These restrictions were removed as of October 2004 in the *Core Forbearance Order*. As a result, it is simply unlawful discrimination to establish a regime in which ISP-bound and non-ISP-bound traffic are compensated at different rates.

rate. Thus, if the applicable rate cap is \$.0010/mou, the ILEC must offer to exchange section 251(b)(5) traffic at that same rate. ... For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This “mirroring” rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

This is the correct policy result because *we see no reason to impose different rates for ISP-bound and voice traffic*. The record developed in response to the *Intercarrier Compensation NPRM* and the *Public Notice* fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP. Assuming the two calls have otherwise identical characteristics (*e.g.*, duration and time of day), a LEC generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP. *We therefore are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic.*

ISP Remand Order at ¶¶ 89-90 (footnotes omitted, emphasis added). Given this clear FCC ban on establishing a different rate for ISP-bound traffic than for “normal” traffic, any Qwest suggestion that any ISP-bound traffic should be subject to a different compensation regime than “normal” Section 251(b)(5) traffic is wrong.

The 2001 *ISP Remand Order* fared a bit better in the courts than had its predecessor order. The D.C. Circuit did hold, without any hesitation, that the FCC’s basic legal analysis was flatly wrong. That is nothing in Section 251(b)(5) or Section 251(g) remotely supported the conclusion that “information access” traffic – calls to ISPs – were somehow properly carved out from the reciprocal compensation obligation of Section 251(b)(5).⁴¹ But the court concluded that even though the FCC’s specific legal reasoning was “precluded,” the actual compensation regime the FCC had established – treating both ISP-bound and non-ISP-bound traffic the same – could remain in effect

⁴¹ *WorldCom v. FCC, supra*, at 433-34.

while the FCC tried yet again to develop a coherent legal analysis of this matter. So, this arbitration is governed by the specifics of the FCC regime adopted in the *ISP Remand Order*, conditioned, however, by the fact that the specific *reasoning* the FCC used to create that regime is legally invalid and, therefore, may not be used to interpret or justify that regime.⁴²

B. The Regime of the *ISP Remand Order* Applies to All Locally Dialed Traffic, Including ISP-Bound VNXX Traffic.

The essence of Qwest's argument, as Universal understands it, is that the FCC's compensation regime only applies to "local" ISP-bound traffic, *i.e.*, traffic where the ISP is physically located in the originating customer's local calling area. This is wrong. First, the text and context of the *ISP Remand Order* provide no support for such a limitation, as at least two courts have expressly ruled. Second, both contemporaneous and subsequent statements by the FCC in other proceedings show that no such limitation was intended. Third, the FCC was fully and completely apprised of the existence of VNXX-routed calls to ISPs – including by Qwest itself – prior to the issuance of the *ISP Remand Order*, confirming that if the FCC had wanted to carve out non-"local" ISP-bound traffic from its regime, it would have done so openly and expressly. So, any reliance on tortured exegesis of the FCC's few stray references to "local" traffic is unavailing. Fourth, giving force to the court's ruling in *WorldCom v. FCC* – which flatly rejected the FCC's rationale in the *ISP Remand Order* – requires that VNXX-routed ISP-bound traffic (and, indeed, all non-toll traffic) be subject to reciprocal compensation under Section 251(b)(5).

⁴² Universal discusses below the specific implications of the court's evisceration of the FCC's *rationale*, while leaving the specific *regime* in place.

1. Carving Out Non-“Local” ISP-Bound Traffic Is Not Consistent With The *ISP Remand Order*.

There can be no real question that the FCC intended the *ISP Remand Order* to apply to all ISP-bound traffic, including VNXX-routed traffic. First, the FCC itself described its task as establishing “the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).” *ISP Remand Order* at ¶ 1. This statement is not qualified in any way. It does not refer to “local traffic delivered to ISPs.” It does not refer to “traffic delivered to ISPs within an ILEC local calling area.” It refers without limitation to any and all “telecommunications traffic delivered to” ISPs. If the FCC meant to limit its new regime to what Qwest would call “local” ISP-bound traffic, it surely would have said so.

Indeed, in a companion order to the *ISP Remand Order*, issued the same day, the FCC used similarly expansive language. In its *Inter-carrier Compensation NPRM*, the FCC described the *ISP Remand Order* as follows:

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

Inter-carrier Compensation NPRM at ¶ 3 (footnote citing *ISP Remand Order* omitted).

The FCC did not in any way indicate that the scope of the *ISP Remand Order* was limited to “local” ISP-bound traffic. To the contrary, it characterized the *ISP Remand Order* as addressing “intercarrier compensation for traffic that is specifically bound for” ISPs – with no concern or qualification about where those ISPs might be located. Indeed, a fair reading of this language is that the FCC thought it had, at least for the time being, put

disputes about compensation for ISP-bound traffic to bed. This would make no sense if the FCC had intended the *ISP Remand Order's* compensation regime not to apply to the “routine” practice of CLECs serving ISPs by means of VNXX arrangements.⁴³

Moreover, the *Intercarrier Compensation NPRM* eliminates any doubt – if reasonable doubt there was – that the FCC was aware of the existence of VNXX arrangements. One of the specific issues as to which the FCC seeks comment is the appropriate intercarrier compensation regime applicable to VNXX traffic. *See id.* at ¶ 115 (noting ILEC claims that VNXX arrangements are “inappropriate” and seeking comment). Given that the FCC was specifically aware of both VNXX arrangements and the controversy surrounding them, it defies reason and logic to think that the FCC would characterize the compensation regime of the *ISP Remand Order* as applying to all “delivery of dial-up traffic to ISPs,” as it did in ¶ 3 of the *Intercarrier Compensation NPRM*, if it really had meant to *exclude* VNXX-routed ISP-bound traffic from that regime.⁴⁴

It is no surprise that Qwest is not the only ILEC seeking to exclude VNXX-routed ISP-bound traffic from its compensation obligations, so it should be no surprise that other decisionmakers have addressed the claims that Qwest made below, and that the *Ruling*

⁴³ Comments of SBC Communications Inc., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68 (filed July 21, 2000) at 43 (characterizing the physical arrangements used for VNXX-routing as “routine;” *see infra*).

⁴⁴ In this regard, Qwest’s entire position – effectively adopted in the *Ruling* below – depends on the notion that VNXX arrangements in general, and for ISP-bound traffic in particular, were somehow unknown or rare at the time of the *ISP Remand Order*, thereby supporting an inference that a general reference to “ISP-bound traffic” would *exclude* such arrangements. In fact, the materials cited in Section III. B.3 of this Brief, *infra*, as well as the portions of the *Intercarrier Compensation NPRM* cited just above, show that the FCC, and the industry in general, were fully cognizant of VNXX arrangements at that time. It follows that general references to “ISP-bound traffic” would normally be construed to *include* VNXX-routed traffic, unless some specific effort is made to carve it out.

below accepted. The essence of those claims is that, in a few places in the *ISP Remand Order*, in describing the background of the matter at hand, the FCC makes reference to a “typical” situations in which an ISP’s equipment might be located in the originating caller’s local calling area. These references, in *dicta*, are then bootstrapped into a supposed definitional limitation on the entire scope of the *ISP Remand Order’s* analysis. As suggested above, this amounts to refusing to see the forest by focusing on one particular tree.

Universal submits that the most cogent refutation of the claim that these passing references to “local” ISP-bound traffic is contained in the recent opinion of the federal district court in Connecticut, dealing with essentially identical claims by the Southern New England Telephone Company.⁴⁵ We quote that opinion at length below.

That court had already ruled, in an earlier phase of litigation, that the “*ISP Remand Order* covers *all* ISP-bound traffic, without exception.” *See Global NAPS, Inc.*, 327 F. Supp. 2d at 300 (“The FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area.”) 359 F. Supp. 2d at 230. SBC (the owner of Southern New England Telephone) objected strongly to this conclusion, and asked the court to reexamine it.⁴⁶ Specifically, as the court notes, SBC made three arguments:

In support of its contention that the FCC only intended the *ISP Remand Order* to cover “local” ISP-bound traffic, SBC makes three arguments. First, SBC argues that there is language in the FCC’s order and the D.C. Circuit’s decision reviewing that order that refers to ISPs in the same “local calling area” as the ISP subscriber. Second, SBC argues that the

⁴⁵ *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229 (D. Conn. 2005).

⁴⁶ “SBC argues that the *ISP Remand Order* does not cover all ISP-bound traffic, but only covers ‘local’ ISP-bound traffic.” 359 F. Supp. 2d at 230.

context of the *ISP Remand Order* makes clear that the FCC was discussing only local ISP-bound traffic. Third, SBC argues that interpreting the order as applying to all ISP-bound traffic will have unintended consequences, including the creation of new arbitrage opportunities.

359 F. Supp. 2d at 230 (footnote omitted). The court rejected these arguments:

I start by noting that, in the *ISP Remand Order*, the FCC did not use the term "local ISP-bound" traffic and did not impose any explicit restriction on the term "ISP-bound traffic." Moreover, as I explained in the Decision, the FCC expressly disavowed the use of the term "local," making it difficult to believe the Commission nevertheless intended that term to be implicitly read back into its ruling. *ISP Remand Order* at 34. ("We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meaning and, significantly, is not a term used in section 251(b)(5) or section 251(g)."). 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 it proceeded to set the intercarrier compensation rates for such traffic.

Bearing in mind that SBC bears a heavy burden in attempting to argue against the plain language of the FCC's order, I now turn to its arguments.

First, SBC argues that in a number of places the language of the *ISP Remand Order* makes clear that the FCC was discussing local ISP-bound traffic. SBC points to the FCC's statement that "the 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*," *id.* P13 (emphasis supplied), and to the D.C. Circuit's statement that the FCC held that it could "'carve out' from § 251(b)(5) calls made to internet service providers ('ISPs') located *within the caller's local calling area*," *WorldCom v. FCC*, 351 U.S. App. D.C. 176, 288 F.3d 429, 430 (D.C. Cir. 2002) (emphasis supplied).

I agree that these statements indicate the FCC began by addressing the question whether ISP-bound traffic that would typically be subject to reciprocal compensation – which at the time would have consisted of "local" ISP-bound traffic – was nevertheless exempt. In other words, because at the time only "local" traffic was subject to reciprocal compensation, the question before the FCC was whether "local" ISP-bound traffic was exempt from reciprocal compensation. Other forms of ISP-bound traffic were already exempt because they were not "local."

What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*. In answering the question, the FCC: (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 was exempted because it is "information access," (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether "local" ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.

359 F. Supp. 2d at 231-32 (emphasis in original). Universal submits that the court's analysis is plainly and compellingly correct. The FCC *started* its analysis in the *ISP Remand Order* by noting that under its old rules, only "local" traffic was subject to compensation at all, so the question at the outset was whether "local" ISP-bound traffic was nonetheless exempt from compensation. But when the FCC got down to brass tacks, it *rejected* the notion that the "local" status of traffic has anything to do with whether that traffic is subject to compensation. It determined that *all* ISP-bound traffic was exempt from Section 251(b)(5) on the theory that *all* ISP-bound traffic falls into the excluded class of "information access." It then proceeded to set up a compensation mechanism applicable to all such traffic – whether "local" or not.

Other decisionmakers appreciate the soundness of this court's reasoning. For example, an ALJ in Washington State recently rejected Qwest's attempt to exclude compensation for VNXX-routed ISP-bound traffic in specific reliance on the reasoning of the *Southern New England Telephone* case. See *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket No. UT-053036, Order No. 03, *Recommended Decision to Grant Petition* (Aug. 23, 2005) at ¶¶ 31, 37. As stated there:

This Order adopts Pac-West's interpretation of the scope of "ISP-Bound" traffic described by the FCC in the *ISP Remand Order*. Specifically, ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. This interpretation is consistent with the Commission's

decision in the *Level 3 Arbitration*, as well as a recent decision of the U.S. District Court for the District of Connecticut.

Id. at ¶ 37 (footnote omitted).

The federal district court in Illinois concurs. In *AT&T Communications of Illinois v. Illinois Bell Telephone Co.*,⁴⁷ the court reversed an Illinois Commerce Commission arbitration decision that approved language similar to that proposed here by Qwest. The court first noted that the Act requires local telecommunications carriers to connect their networks so that customers of various carriers can call one another; however it does not require carriers to terminate, or complete, each other's calls free of charge. Rather, the Act envisions "reciprocal compensation" in which carriers pay each other a fee to terminate calls to their customers.⁴⁸ The court further held that ILECs, like Qwest, would not be permitted to "pick and choose" intercarrier compensation rates once they elected to be bound by the ISP rate regime.⁴⁹ The court held that the *ISP Remand Order* "explicitly states that ILECs must charge the same rate for ISP-bound traffic, which is excluded from 251(b)(5), as it does for traffic that is subject to that section."⁵⁰

In light of these rulings, Universal submits that it is plainly contrary to federal law to establish an intercarrier compensation regime that purports to exclude VNXX-routed ISP-bound calls, as Qwest is attempting to do here. The only reasonable reading of the FCC's ruling is that *all* ISP-bound traffic is embraced by the FCC's regime.

⁴⁷ 2005 WL 820412, No. 04 C 1768 (N.D. Ill. Mar. 25, 2005).

⁴⁸ *Id.* (citing 47 U.S.C. § 251(b)(5) (stating that each ILEC has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications")).

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *ISP Remand Order* at ¶ 89).

2. **Other FCC Statements Confirm That The *ISP Remand Order* Applies To All ISP-Bound Traffic.**

As noted above, the FCC's statements in the *Intercarrier Compensation NPRM*, issued the same day as the *ISP Remand Order*, confirm that the FCC's compensation regime applies to all ISP-bound traffic, not just "local" ISP-bound traffic. Other FCC statements confirm this conclusion as well.

First, FCC Wireline Competition Bureau has rejected ILEC efforts to avoid compensation for ISP-bound traffic.. In the *Virginia Arbitration Order*, issued in 2002, Verizon's contract terms were summarized as follows:

Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("Virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denied Verizon the toll revenues that it would have received if it has transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.⁵¹

The FCC rejected Verizon's arguments against compensation for FX ISP-bound traffic:

We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. *We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points.* Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing technical issues that have no concrete, workable solutions at this time.⁵²

⁵¹ *Virginia Arbitration Order* at ¶ 286.

⁵² *Id.* at ¶ 301 (emphasis added).

Just as the FCC Wireline Competition Bureau rejected the ILEC's attempt to avoid paying for ISP-bound VNXX Traffic, so too should this Commission reject Qwest's attempt. In fact, under the FCC's holding in the *ISP Remand Order* mandating that only the FCC can establish intercarrier compensation rules for ISP-bound traffic, the only manner in which the Commission can address the underlying issue raised in this arbitration is to adopt Universal's proposal to apply a uniform rate of compensation for all ISP-bound traffic.

Universal's contract proposal is also in accordance with the *FCC Core Forbearance Order*, which addressed Core's petition requesting the FCC refrain from enforcing the *ISP Remand Order*. In summarizing its *ISP Remand Order*, the FCC stated that its Growth Cap rules "imposed a cap on total ISP-Bound minutes for which a LEC may receive this [intercarrier] compensation equal to *the total ISP-Bound minutes* for which the LEC was previously entitled compensation, plus a 10 percent growth factor,"⁵³ and that its New Market rules allowed two carriers to exchange traffic on a bill-and-keep basis if the two carriers were not exchanging traffic prior to adoption of the *ISP Remand Order* and the ILEC "has opted into the federal rate caps *for ISP-Bound traffic*."⁵⁴ These reference to "local ISP-Bound minutes" and "ISP-bound traffic," with no qualification or limitation to "local" ISP-bound traffic, confirm that the FCC understand its compensation regime to apply to all ISP-bound traffic, not just traffic where the ISP is located in the originating caller's local area.

3. The FCC Was Fully Aware Of VNXX-Routed ISP-Bound Traffic When It Issued The *ISP*

⁵³ *Core Forbearance Order* at ¶ 9.

⁵⁴ *Id.*

***Remand Order, Which Must Be Read In Light Of
That Awareness.***

Based on its positions elsewhere, as noted above, Universal believes that one of Qwest's arguments for excluding VNXX-routed ISP-bound traffic from intercarrier compensation will be the notion that the *ISP Remand Order* really only applies to "local" ISP-bound traffic. One of the reasons this conclusion is wrong is that, prior to issuing its ruling, the FCC was fully apprised not only of the existence of VNXX-routed ISP-bound traffic, but was in fact apprised that this was the "routine" practice. Given this, it would be irrational to conclude that the FCC was issuing an order that did not intend to encompass this traffic.

It is absolutely clear from the materials submitted prior to the *ISP Remand Order* that the FCC was fully aware of the CLEC practice of serving ISPs by allowing the ISPs to collocate their gear with a CLEC's LATA-wide switch, rather than requiring ISPs to maintain gear in a number of dispersed local calling areas throughout a LATA. Indeed, one reason the FCC was aware of this practice is that Qwest itself complained to the FCC about it.⁵⁵ At that time, as noted earlier, several ILECs, including Qwest, were arguing that the FCC should establish a compensation rate for ISP-bound traffic that is lower than "normal" Section 251(b)(5) rates. One aspect of that argument was to claim that CLECs delivering traffic to ISPs incurred lower costs than ILECs delivering "normal" traffic to "normal" customers. And one aspect of *that* argument was that CLECs save money by avoiding the cost of running loops to distant ISP locations, by allowing the ISPs to collate with the CLEC – in other words, by means of a VNXX arrangement.

⁵⁵ These filings were made by Qwest's predecessor entity, US West.

In the course of making this latter argument, Qwest's expert, Dr. William Taylor, stated as follows:

Unlike CLECs, ILECs must be prepared to provide local service to any or all such customers, regardless of their usage or location. In contrast, the incremental cost of an ISP-bound call does *not* reflect such a composite. ***ISPs can place their equipment in high-density, central business locations and frequently can collocate equipment in the CLEC's switch.*** Transport costs for such calls will be lower than for an average of all traffic terminating within the local exchange.

Letter from Melissa Newman, US West, to Magalie Roman Salas, Secretary, FCC, Attachment at 8 (Dec. 2, 1999) (emphasis added). The FCC was plainly aware of this specific aspect of this specific filing, because the FCC *cited to it, specifically*, in its ruling. *See ISP Remand Order* at ¶ 92 n.189. Tellingly, the FCC was citing this material in the course of stating that the distance between the CLEC's switch and the ISP's equipment was "irrelevant" to the compensation regime it was establishing.⁵⁶

Qwest, of course, was not the only party who brought these issues to the FCC's attention. The same footnote just cited (*ISP Remand Order* at ¶ 92, n. 189) also cites the submission of Mr. Fred Goldstein, on behalf of a CLEC, as describing "the CLEC reduction of loop costs through collocation." In particular, the FCC makes reference to SBC comments before the agency that (among other things) take note of Mr. Goldstein's observation. Those same SBC comments contain the following statement:

⁵⁶ Specifically, Ameritech and others had argued that the lower costs of serving ISPs – arising, in part, from CLECs allowing ISPs to locate all their equipment in a single, central location – justified a regime in which ISP-bound traffic was paid at a lower rate than "normal" Section 251(b)(5) traffic. The FCC rejected this claim and instead established a regime in which, at the ILEC's option, either FCC-mandated low rates (now \$0.0007 per minute) or state-established higher "Section 251(b)(5) rates" would apply uniformly to *both* "normal" traffic and ISP-bound traffic. The FCC found the length of the "loop" connection between the CLEC and the ISP to be "irrelevant" for compensation purposes, because loop costs are not part of the costs to be recovered by these charges in any event. *See ISP Remand Order* at ¶ 92.

[I]t has become *routine practice* for CLECs to assign NXX codes to switches that are nowhere near the calling area with which that NXX is associated. The CLECs then market themselves to their ISP customers on this basis, boasting that *the ISP's subscribers will be able to connect to the ISP through a local call.*

Comments of SBC Communications Inc., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68 (filed July 21, 2000) at 43 (emphasis added). In other words, the FCC was aware that VNXX-routing of ISP-bound traffic was “routine practice” for CLECs by July 2000. It is simply inconceivable that in the face of this evidence, when the FCC repeatedly refers to “ISP-bound traffic” in the *ISP Remand Order* it somehow intended not to deal with the “routine practices” of CLECs in handling such traffic.

Other filings with the FCC make equally clear that the FCC understood that a substantial portion of ISP-bound traffic was VNXX-routed, not inefficiently hauled back out to numerous ISP locations in numerous ILEC originating local calling areas. For example, Time Warner Telecom made the following observations in its August 2000 reply comments:

[T]he ILECs' tired argument that ISP collocation at CLEC switches lowers transport and termination costs is simply wrong. See, e.g., SBC Comments at 33. Collocation only lowers the fixed costs of connecting customers to the CLEC switch. These costs are not relevant to the incremental costs of transport and termination. See Wood Dec. at ¶ 48. It should be noted, of course, that the ILECs' refusal to allow ISPs to collocate at their switches, while not affecting transport and termination, has made ILECs far less efficient providers of service to ISPs. It would be bitterly ironic for the Commission to now incorrectly punish CLECs for being more efficient in this regard.

Reply Comments of Time Warner Telecom [in *ISP Remand Order* proceeding] at 23. Time Warner Telecom went on to specifically address the issue of VNXX-routed ISP-

bound traffic, praising VNXX arrangements (called “remote NXXs”) as a means of improving efficiency:

Indeed, several of the CLEC practices labeled as "scams" by the ILECs seem in fact to be simply more efficient means of providing service. For example, Verizon points to Brooks Fiber's use of remote NXXs in Maine as an impermissible waste of numbering resources, since Brooks Fiber obtained NXXs solely to provide ISP customers with local numbers in particular rate centers. Verizon Comments at 18-19. However, while Maine prohibited the use of remote NXXs, California has approved them.

Id. at 30 (footnote omitted).

Other materials cited by the FCC also prove that the agency was well aware that CLECs were serving ISPs, not by running loops from a central switch out to ISP equipment dispersed in numerous ILEC local calling areas, but, rather, by encouraging ISPs to efficiently locate all their equipment in a central location. For example, in the course of establishing the 3:1 presumption discussed above, the FCC considered and discussed a decision by the New York PSC regarding what that body called “convergent” traffic (essentially, lots of traffic inbound to a small number of customers). *See ISP Remand Order* at ¶ 79 n.150. That order, with which the FCC was clearly familiar, includes the following observation:

[One party] contends a CLEC can "serve" a wide geographic area by allowing its customers to collocate with it, even without constructing a fiber network traversing the area: "a CLEC may 'serve' a wide geographic area. . . by incurring the costs associated with **allowing its customers that need to receive calls from such an area to collocate at [its] switch**, by incurring the costs associated with deploying physical facilities to customer locations in different local calling areas throughout the LATA, or some combination of both."

New York Public Service Commission, Op. No. 99-10, Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, *Opinion and Order* (Aug. 26, 1999) at 41 (emphasis added, footnote omitted).⁵⁷

Universal submits that these materials conclusively prove that the FCC understood that “ISP-bound traffic” included and includes VNXX-routed traffic. The Arbitrator should expressly so rule in this matter, and direct the parties to establish an interconnection agreement that does not exclude such traffic from the FCC’s intercarrier compensation regime.

4. The Court’s Ruling In *WorldCom* Precludes The Exclusion Of VNXX-Routed ISP-Bound Traffic, And Any Other Non-Toll Traffic, From Reciprocal Compensation.

As noted above, the *ISP Remand Order* was reviewed by the D.C. Circuit in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The court did not vacate the *ISP Remand Order*, as it had vacated the FCC’s earlier effort to deal with this question. But at the end of the day, the court rejected the FCC’s central legal claim – and the only claim that would even arguably permit exclusion of VNXX-routed ISP-bound traffic.

In the *ISP Remand Order*, the FCC had ruled that ISP-bound traffic was a species of “information access” traffic, as that term is used in 47 U.S.C. § 251(g);⁵⁸ it ruled that “information access” traffic (and other traffic identified in § 251(g)) is “carved out” of

⁵⁷ This analysis highlights the underlying economic efficiency of ISP collocation/VNXX arrangements: The ISP can pay the costs of having numerous modem banks in numerous local calling areas, and the costs of getting loops out to those locations; or it can incur the costs of paying the CLEC for space to collocate. Because the latter costs are normally lower, it is a more efficient way to serve the ISPs than a dispersed architecture. For this reason, banning or discouraging VNXX arrangements for ISP customers is both anticompetitive and inefficient.

⁵⁸ *Id.* at ¶¶ 42-47.

the reciprocal compensation obligation of § 251(b)(5);⁵⁹ and it exercised its authority under 47 U.S.C. § 201 to establish its interim compensation regime, under which ISP-bound traffic and “normal” traffic are compensated at the same rates, either high or low at the ILEC’s option.⁶⁰

In *WorldCom*, the D.C. Circuit said that the second point above was flatly wrong – that it was “precluded” as a basis for establishing a compensation regime under Section 251(b)(5). *WorldCom*, 288 F.3d 430, 432. At the same time, however, the court let the FCC’s new compensation regime stand – not because it made sense to carve out ISP-bound traffic under §251(g) and then require compensation under §201 (which the FCC had done), but because there is “a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)).” *WorldCom*, 288 F.3d at 434. In other words, the D.C. Circuit allowed the FCC’s interim compensation regime to survive because that specific regime – identical compensation for ISP-bound and other traffic, but at lower rates – could probably be justified under §§ 251(b)(5) and 252(d)(B)(i).

The *ISP Remand Order* must be read in light of the D.C. Circuit’s ruling in *WorldCom*. In that ruling, with surgical precision, the court excised the key erroneous element of the FCC’s thinking – that “information access” traffic isn’t covered by 47 U.S.C. § 251(b)(5). By cutting out *only that element* of the FCC’s analysis, while leaving the rest intact, the court eliminated any logical basis, going forward, for excluding *any* “information access” traffic from reciprocal compensation under § 251(b)(5). It allowed the FCC’s compensation regime to remain intact, not on the theory

⁵⁹ *Id.* at ¶¶ 34-41.

⁶⁰ *Id.* at ¶¶ 52-65 (exercise of § 201 authority); ¶¶ 77-94 (establishing new regime).

that it is legally proper to exclude “information access” from reciprocal compensation – again, the court *expressly rejected that theory* – but, rather, on the theory that the FCC could properly establish a non-discriminatory, low interim rate applicable to all such traffic.⁶¹

This means that, going forward, new interconnection agreements must simultaneously reflect the FCC’s regime from the *ISP Remand Order*, while at the same time avoiding the erroneous legal rationale that the *WorldCom* court found to be “precluded.” In practical terms, this means that *all* locally-dialed traffic that one LEC directly hands off to another LEC counts as “telecommunications” subject to intercarrier compensation under the FCC’s regime.⁶² The Arbitrator should direct the parties to draft and submit contract terms that embodies this result.⁶³

⁶¹ It bears emphasis that the *WorldCom* court, in striking down the FCC’s conclusion that traffic of the types identified in Section 251(g) were “carved out” of Section 251(b)(5), said that it was required by principles of administrative law to *uphold* any “reasonable” FCC interpretation of the statute, *i.e.*, any interpretation that was not “precluded by the language of the statute, read with the ordinary tools of statutory construction.” 288 F.3d at 432. Therefore, when the court said that treating “information access” as being “carved out” from Section 251(b)(5) *was* “precluded,” it was saying that there is no reasonable way to interpret Section 251(b)(5) to reach the FCC’s result. It follows that it would be *unreasonable* for any subsequent decisionmaker to rule that “information access” – that is, ISP-bound traffic and VoIP traffic – is *not* subject to reciprocal compensation under Section 251(b)(5). What the *WorldCom* court let stand was the particular reciprocal compensation *regime* that the FCC established in the *ISP Remand Order* – including the \$0.0007 rate that Universal seeks to implement here.

⁶² Universal is not contending that 1+ toll traffic, or, indeed, any traffic as to which the end user is assessed a toll charge, should be subject to reciprocal compensation. If the end user is charged a toll in connection with a call, then the call meets the statutory definition of “telephone toll service” set out in 47 U.S.C. § 153(48). When a LEC’s facilities are used to originate or terminate such “telephone toll service,” the LEC is providing “exchange access,” *see* 47 U.S.C. § 153(16), and access charges, rather than reciprocal compensation, properly apply. Imposing reciprocal compensation charges in addition to applicable access charges would simply be double-counting. At the same time, however, it is clear that access charges do not properly apply to traffic as to which there is no separate toll charge to the end user. The existence of a separate charge to the end user is an express, unambiguous aspect of the definition of “telephone toll service” under Section 153(48) of the Act. At the same time, Section 153(16) of the Act is equally explicit that “exchange access” – the service for which access charges are properly assessed – only applies to “telephone toll service” traffic. The inevitable result of applying these

C. It Would Be Inefficient To Treat VNXX-ISP-Bound Traffic Differently Than “Local” ISP-Bound Traffic

The economic effect of treating VNXX-routed ISP-bound traffic differently from “local” ISP-bound traffic is to give Universal the incentive to re-arrange its network so that it delivers traffic to its ISP customers in the local calling areas where the calls originate and where, in fact, many of Universal’s ISP customers have facilities. This would, in other words, force Universal to mimic Qwest’s historical network architecture by building out facilities to all or most of Qwest’s legacy local calling areas, even though such facilities are not needed, as a technical matter, to serve Universal’s customers.

This needlessly introduces inefficiency that will raise ISPs’ costs (and rates) to provide dial-up Internet access to end user customers. VNXX arrangements, by contrast, impose no greater obligation on Qwest – i.e., Qwest must carry traffic to the same point of interconnection with Universal regardless of where the traffic is routed after it reaches the point of interconnection. As a result, Qwest’s position regarding VNXX arrangements will limit the availability of affordable Internet access for end user customers and reduce Internet usage.

plain and unambiguous statutory provisions is that access charges only apply to “real” toll traffic – that is, traffic on which a toll is assessed.

⁶³ Indeed, from this perspective, the only reason that this Commission has jurisdiction to decide this issue at all is the *WorldCom* court’s rejection of the FCC’s “Section 251(g)/information access carve out” theory. The FCC said that compensation for ISP-bound traffic is subject to federal authority under Section 201 of the Act and that states had no further authority to deal with the issue in proceedings under Section 251/252. *ISP Remand Order* at ¶ 82; *accord, Investigation into the Use of Virtual NPA/NXX Calling Patterns*, Order No. 03-329; UM 1058, 2003 Ore. PUC LEXIS 213 (2003) at [*21-23] (Commission pre-empted from applying state-level policies regarding VNXX to ISP-bound traffic). The question of compensation for ISP-bound traffic, including VNXX routed traffic only comes before this Commission if full force and effect is given to the ruling of the *Worldcom* court that “information access” is *not* excluded from the scope of Section 251(b)(5). But if information access is not excluded, then it is *included* and the FCC’s repudiation of the notion of “local” traffic means that VNXX-routed calls are compensable.

Significantly, VNXX arrangements do not generate additional costs of Qwest beyond those associated with interconnection for any other ISP-bound traffic. All traffic generated by Qwest end users to Universal's customers is exchanged between the Qwest and Universal networks at a POI within a LATA.⁶⁴ Qwest has the obligation to bring its traffic to the POI, regardless of where it originated within the LATA.⁶⁵ From that point, Universal is responsible for all the transport associated with delivering the call to the called party.⁶⁶ Thus, Qwest's transport cost is solely determined by the location of the POI at which Qwest hands off the traffic to Universal, and not by whether the ISP server is located within Qwest's local calling area. Importantly, Universal is not seeking any additional compensation from Qwest for transport and termination when the ISP's server is not located in the calling party's local calling area. Thus, to the extent that Qwest has complaints about transport costs, that is an issue related to the single POI per LATA rule,⁶⁷ not the intercarrier compensation for the ISP-bound VNXX traffic.

VNXX arrangements create economies of scale and scope for ISPs. This, in turn, reduces the cost of, and promotes competition for, dial-up Internet access. First, VNXX arrangements allow ISPs to serve an entire LATA from a single server (or even multiple LATAs or multiple states), reducing the costs of serving larger geographic areas by allowing those areas to share economies of scale and scope. Second, VNXX arrangements enable Universal to consolidate switching in a manner that allows Universal to take advantage of the decreased cost of processing calls. This is vastly

⁶⁴ SMF ¶¶ 12-13.

⁶⁵ See SMF ¶ 13.

⁶⁶ SMF ¶ 15.

⁶⁷ An ILEC's responsibility to allow a LEC to establish a single POI per LATA is not a disputed issue in this case.

different from Qwest's network, which has multiple switches in small rate centers because it was largely constructed in a monopoly environment that guaranteed return on investment.⁶⁸

Further, no matter how a court or agency classifies the traffic exchanged between Universal and Qwest, Universal is continuing to incur transport and termination costs. Universal accepts *all* traffic, no matter its location of origin, and treats it and terminates it the same. If the Commission does not require Qwest to pay Universal for these costs, Universal may need to exercise its remedies against the Commission, including a claim for a violation of Universal's rights under the Fifth Amendment Takings Clause⁶⁹ and the takings clause included in Article I, Section 18 of the Oregon Constitution.⁷⁰

⁶⁸ See discussion in Section III.B.3, *supra*, regarding the efficiencies of VNXX arrangements for ISPs.


⁶⁹ U.S. Const. amend. V. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-31 (1978) (explaining factors for determining whether a taking without just compensation has occurred).

⁷⁰ Or. Const. art. I, § 18. See, e.g., *Coast Range Conifers, LLC v. State of Oregon*, 339 Ore. 136, 146-50 (2005) (explaining different tests that Supreme Court of Oregon has used to evaluate takings claims).

V. Conclusion

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

Respectfully submitted,

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October 21, 2005

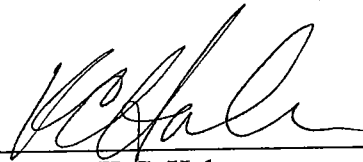
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I, K.C. Halm, hereby certify that on 21st day of October, I caused copies of forgoing Initial Brief of Universal Telecom Inc. to be sent by electronically to the following parties:

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**BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION**

In the Matter of the Petition of

Qwest Corporation

for Arbitration of Interconnection Rates,
Terms, Conditions, and Related Arrangements
with Universal Telecom, Inc.

ARB 671

**PRE-FILED TESTIMONY OF
STEPHEN C. RODERICK
ON BEHALF OF
UNIVERSAL TELECOM, INC.**

UNIVERSAL TELECOM, INC.

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October 21, 2005

1 **I. INTRODUCTION**

2 **Q. Please state your name and business address.**

3 A. My name is Steve Roderick and my business address is 1600 SW Western Boulevard,
4 Suite 290, Corvallis, Oregon 97333.

5
6 **Q. What is your position at the above address?**

7 A. I am the Chief Executive Officer of Universal.
8

9 **Q. Please summarize your background and experience.**

10 A. I am one of the co-founders and initial investors for Universal Telecom. I have been one
11 of the initiators of three successful start-ups in the Data and Telecom sectors - launching
12 ProAxis Communications in 1995, The GoHome Networks in 1998, and Universal
13 Telecom in 1998.
14

15 **Q. What is the purpose of your testimony?**

16
17 A. The purpose of my testimony is to explain the basis for Universal's positions regarding
18 the apportionment of the costs of interconnection facilities and the requirement to pay
19 reciprocal compensation for the transport and termination of all traffic.
20

21 **Q. Please describe Universal's "managed modem" service.**

22 A. Managed modem service provides Internet Service Providers ("ISPs") a service that
23 allows the ISP to offer Oregon residents local "dial-up" access to the Internet. It does not
24 provide services generally offered by ISPs, such as email, web hosting, information

1 retrieval and storage, or instant messaging. Under Universal's "managed modem
2 service," end user customers' computer modems initiate local telephone calls that travel
3 over Qwest's network to Universal, where Universal converts the calls into Internet
4 Protocol and delivers them—as instructed by the customers' computer—to different
5 Internet locations, features, and capabilities (email servers; ecommerce sites such as
6 Amazon.com or eBay; or online services such as Yahoo or America Online *etc.*). The
7 local telephone numbers called by customers are assigned to Universal by virtue of its
8 status as a CLEC, and Universal in turn uses those local numbers to support its ISP
9 customers' local access needs.

10
11 **Q. How does this service vary from typical ISP service?**

12 A. As I mentioned above, although ISPs' various services can include email, web hosting,
13 information retrieval and storage, instant messaging, *etc.*, Universal does not provide
14 these services to its ISPs' end user customers. Rather, Universal only provides local
15 "dial-up" access to the Internet for its ISPs' end user customers. Further, in a typical
16 dial-up arrangement, a customer's computer modem uses a normal telephone line to dial
17 a normal telephone call to a local telephone number that has been assigned to an ISP.
18 However, with Universal's service, Universal's customers' computer modems initiate
19 local telephone calls that travel over Qwest's network to Universal, where Universal
20 converts the calls into Internet Protocol and delivers them to different Internet locations.

21
22
23
24
25

1 **II. Issue 1 - Each Party Bears Full Responsibility for Facilities Used to Carry That**
2 **Party's Own Originating Traffic to the Other Party**
3

4 **Q. Please explain, as you understand it, exactly what the issue or dispute is here?**

5 A. The key dispute here is whether Qwest should be allowed to force Universal to pay
6 Qwest for Qwest to deliver its own subscribers' traffic to Universal. Qwest has proposed
7 contract language that would require Universal to pay Qwest for something that Qwest is
8 obliged to do itself: deliver calls that Qwest's own subscribers place to Universal's
9 subscribers.

10

11 **Q. You state that Qwest is obliged to deliver its own subscribers calls to Universal.**
12 **What is the basis for that statement?**

13 A. Well, although I am not a lawyer, I understand that current regulations utilize a principle
14 known as the "calling party's network pays" to apportion cost responsibility for these
15 facilities. Because the vast majority of traffic at issue in this case starts, or "originates,"
16 on Qwest's network and ends, or "terminates," on Universal's network, Qwest is
17 responsible for the costs of getting that traffic to Universal.

18

19 **Q. Please explain.**

20 A. I will leave the detailed legal arguments on this issue to the lawyers, but the basic
21 premise goes back to the fact that the Telecommunications Act of 1996 introduced
22 competition in to the telecommunications market. Because there are now multiple
23 telecommunications companies providing services to end user customers, each of these
24 companies needs to be able to interconnect and exchange traffic with other

1 telecommunications companies. In this environment, it is often the case that the
2 subscriber of one telecommunications company calls the subscriber of a different
3 telecommunications company. When that happens the companies that serve these
4 subscribers must work together to coordinate the transmission of the call from the calling
5 party (what is known as origination), the handoff at the point between the two parties'
6 networks (known as the POI), and delivery of the call to the called party (known as
7 termination).

8
9 **Q. Then, under that that scenario, which party is responsible for the costs of delivering**
10 **the call?**

11 A. As I understand it, the FCC's detailed regulations concerning obligations surrounding
12 interconnection and compensation for exchange of traffic require the originating carrier,
13 the company with the subscriber that initiates the call, to pay for the cost of the call. I
14 will leave it to the attorneys to explain in the briefs how those rules work in this instance.

15
16 **Q. What is Universal's position on the issue of responsibility for the cost of facilities?**

17 A. Universal believes that each party is responsible for the cost of facilities on its side of the
18 POI. And, more specifically, that each party is responsible for the cost of facilities used
19 to carry telecommunications traffic that originates on that party's network.

20
21 **Q. Why shouldn't Universal be obligated to pay for those facilities?**

22 A. As I understand it, to promote competition, the FCC's rules state that a competitive local
23 exchange carrier ("CLEC"), like Universal, is entitled to interconnect with any incumbent

1 local exchange carrier (“ILEC”), like Qwest, at a single point of interconnection (“POI”)
2 within a LATA.

3
4 **Q. Is that how Universal interconnects with Qwest today?**

5 A. Yes. Universal and Qwest currently interconnect and exchange traffic between their
6 respective subscribers at a single point in each of Oregon’s two LATAs.

7
8 **Q. Is that how Universal expects to interconnect with Qwest under a new
9 interconnection agreement?**

10 A. Yes. Universal intends to continue to do so under any new agreement with Qwest.

11
12 **Q. Is this situation unique to Universal, or does it otherwise represent a special
13 arrangement for Universal that other CLECs do not have?**

14 A. No, I don’t think so. Although I do not have specific information as to how other CLECs
15 interconnect with Qwest in Oregon, it is my general understanding that many CLECs
16 avail themselves of the right to interconnect at a single POI within a LATA. It is my
17 understanding, although I am not a lawyer, that this is a federal legal right that all CLECs
18 have.

19
20 **Q. Okay, so Qwest and Universal interconnect and exchange all traffic at a single POI
21 per LATA. Is there anything else you would like to tell us about the exchange of
22 traffic between the two parties?**

1 A. Yes. First, my expectation is that the interconnection and traffic exchange arrangements
2 that the parties employ today will continue under any new agreement. So, at least for the
3 foreseeable future, what happens today is a good proxy for what I expect may happen
4 tomorrow.

5 To that end, the basic facts regarding how Qwest and Universal interconnect and
6 exchange traffic were stated quite succinctly by Judge Ann Aiken of the federal district
7 court of Oregon in its recent opinion in *Qwest v. Universal*.

8
9 **Q. Can you explain?**

10 A. Judge Aiken's factual findings speak for themselves. Rather than try to restate them all
11 here I think it is more efficient and expeditious for the OPUC to review those findings
12 itself. In fact, as I understand it, Universal's lawyers have presented those factual
13 findings in the accompanying "Statement of Material Facts."

14
15 **Q. Lets go back to the question of cost responsibility for facilities used to carry**
16 **originating traffic to the single POI used by Qwest and Universal. What is the basis**
17 **for Universal's position that Qwest is responsible for the cost of facilities used to**
18 **carry its own originating traffic?**

19 A. Although that is a legal question, and I am not testifying on what the law says, it is my
20 understanding that FCC rules and other case precedent from multiple federal courts make
21 clear that a LEC can not charge another LEC for traffic that originates on the first LEC's
22 network. This, of course, was one of Judge Aiken's decisions in her recent opinion in
23 *Qwest v. Universal*.

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Q. Judge Aiken’s opinion was issued in December of 2004, are there significant facts or circumstances between Qwest and Universal on this issue that have changed since Judge Aiken issued her ruling finding that Qwest’s charges are unlawful?

A. No, there has been no significant change in facts or circumstances that I am aware of.

Q. To your knowledge, do the FCC’s rules or orders have any caveats to the rule for division of facilities’ costs where the Parties’ are exchanging Internet-Service Provider (ISP)-bound traffic?

A. As I understand the FCC’s rules and decisions, there is no exception in the rules that would state that a party does not have to pay the costs for facilities on its side of the POI where the parties are exchanging primarily ISP-bound traffic.

Q: Have you tried to estimate how much it actually costs Qwest to deliver traffic to Universal?

A: Yes. I have not tried to conduct any detailed cost study, but I did want to confirm what seems clear to anyone familiar with the high efficiency of fiber transport, which is that these costs are not very high. Based on the rates for interoffice transport contained in Qwest's SGAT, I made some rough but reasonable assumptions about utilization and distance and found that the average cost/minute to Qwest of getting traffic from their end offices to our POI is measured in *thousandths* of a penny per minute. While it would be possible to do a more detailed study to generate a more precise figure, it is clear that the costs to Qwest of performing this function are quite small under any reasonable set of

1 assumptions. For example, if someone were dialed into their ISP for 100 hours in a
2 month -- that's more than 3 hours per day, every day -- that would amount to a transport
3 cost to Qwest of only about \$0.31 per month. This level of usage would most likely
4 necessitate the purchase of an additional phone line at the customer's location, for which
5 Qwest would receive the full retail charges of this local service from their customer. I am
6 not trying to say that the \$0.31 per month would be Qwest's total cost of serving its
7 customer. But, clearly, the cost of transporting this traffic to the POI (based on Qwest's
8 own numbers) is not a significant factor. There is no reason to be concerned that Qwest is
9 not recovering this level of cost from its own end users, who are, after all, the ones
10 making these calls.

11
12 **III. Issue 2 - Each Party is Entitled to Collect Reciprocal Compensation on All Traffic**

13
14 **Q. Please explain the concept of reciprocal compensation and how it applies to the
15 arrangement between Universal and Qwest.**

16 **A.** The concept of reciprocal compensation is to compensate a LEC for terminating calls that
17 originate on another LEC's network. When competition was created in the
18 telecommunications industry by the Telecommunications Act of 1996 reciprocal
19 compensation was created to offset the "terminating LEC's" costs of switching. Before
20 competition the ILEC would be responsible for switching at the origination point and the
21 termination point. When two LECs are involved switching costs are incurred by both
22 companies, with the "terminating LEC" doing half of the switching function. The intent
23 of reciprocal compensation is to compensate the "terminating LEC" for its half of the cost

1 of switching a call. This maintains the basic principle of “calling party’s network pays.”
2 The concepts of “origination” and “termination” are best explained by Judge Aiken’s
3 opinion in a prior federal case relating to Universal and Qwest’s interconnection
4 agreement. Judge Aiken explained:

5 Telecommunications traffic that begins on one parties [sic] network but is
6 destined for the other parties [sic] network must pass through the POI.
7 This is known as “originating” the call. Calls originate when a particular
8 LEC’s customer calls a customer of a different LEC. Once the call passes
9 through the POI, the receiving party takes over responsibility for
10 delivering the call to its final destination. This is known as “terminating”
11 the call.

12 *Qwest Corp. v. Universal Telecom, Inc.*, Civil No. 04-6047-AA, 2004 U.S. Dist. LEXIS
13 28340 at *3 (D. Or. Dec. 15, 2004). Universal seeks charges from Qwest for terminating
14 traffic that originated on Qwest’s network – this payment is referred to as reciprocal
15 compensation.

16
17 **Q. What is Universal’s position on the payment of reciprocal compensation for the**
18 **exchange of traffic?**

19 A. Both Universal and Qwest are entitled to receive reciprocal compensation payments for
20 their costs of transport, switching and termination of all traffic from other LECs,
21 including ISP-bound traffic and Virtual NXX traffic (where the ISP and the originating
22 caller are located within different local calling areas).

23
24 **Q. How does that differ from Qwest’s position on the issue?**

25 A. Qwest believes it is required to pay reciprocal compensation to Universal only for ISP-
26 bound traffic where the ISP is physically located within the calling area of the originating
27 caller.

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Q. How are the VNXX calls routed in the network?

A. Actually, VNXX calls are routed in exactly the same way as non-VNXX local calls. There is nothing special about these calls.

Q. Please explain.

A. Assume that Universal has a single POI in a LATA located at a Qwest tandem in Portland. Assume further that Universal serves all ISPs who have customers in that LATA from a single switch that Universal uses to serve the entire LATA. Now assume that a customer of one of those ISPs, who takes telephone exchange service from Qwest, uses his or her computer's modem to connect to the ISP. In that case, Qwest's switch will receive the number as dialed by its customer, recognize it as a Universal number, and direct the call to a trunk group that connects to Universal's POI. Universal then accepts the traffic and routes it to its switch, switches the traffic and then routes it on to its ISP customer regardless of the location of that ISP customer. This is the same manner in which all local calls are routed.

Q. If this call handling is the same as all local calls then what is the dispute between Qwest and Universal?

A. If the Qwest customer making the call happens to be in the same Qwest retail originating local calling area as the ISP's equipment, then Qwest would say that the call is "local" and there is no dispute. On the other hand, if the ISP's equipment is in a different Qwest retail local calling area, Qwest says that the call is a VNXX call and is not local.

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Q. Does the location of the ISP impact the manner in which the parties' route or deliver the call, or the cost of getting the call to the POI?

A. No. Qwest's responsibilities, and costs, are absolutely identical regardless of the location of the ISP. In each case, a locally dialed call is routed to the POI for termination. All that Qwest does is determine that the dialed telephone number is a Universal number and ship the call off to Universal on an appropriate trunk group. And, what Universal does is the same in both cases: it recognizes the incoming traffic as bound for one of its customers, transports the traffic from the POI to Universal's switch, switches the traffic and then transports the traffic on to Universal's customer. The only difference is whether the ISP receiving the call is at the end of a short circuit (close to Universal's switch, and thus often not in the calling party's retail local calling area) or a longer circuit (away from Universal's switch, and thus, possibly, in the calling party's retail local calling area). Regardless of the distance, it is Universal's responsibility to complete the call. Universal's decision to design and build its network to maximize efficiency does not affect Qwest's costs. In other words, it is Universal and not Qwest that is providing the Universal ISP customer with the VNXX functionality. It makes no economic sense to make any distinction in Qwest's financial obligations depending on whether Universal uses a long or short circuit to connect its customers to its switch.

Q. Is the routing of VNXX-calls different in any way from the routing of any other local call?

A. No, the routing process should not be any different.

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Q. Doesn't the FCC's guidance on reciprocal compensation settle the issue?

A. Yes, we believe that it does. In the *ISP Remand Order*, the FCC found that Internet traffic is interstate in nature and, though it "originates" at the computer of the end user in contact with the Internet, it does not "terminate" at the ISP's location, but instead continues on to the location on the Internet (such as a site on the World Wide Web) the customer seeks to retrieve information from, or send information to. In engineering terms, the FCC concluded that the ISP's location, instead of being a meaningful "end point" of the communication, is essentially an intermediate switching point between the customer and the web site.

ILECs like Qwest have two options under the FCC's ruling. First, an ILEC can choose to have all Internet traffic compensated at a very low rate. In return, the ILEC must be willing to receive only that same low per-minute compensation for normal telephone exchange traffic sent to it by the CLEC. Or, the ILEC may elect to have all locally-dialed traffic in both directions, including Internet traffic, subject to compensation at higher "reciprocal compensation" rates. From a business perspective, an ILEC concerned about paying out too much to CLECs for delivering ILEC-originated Internet traffic to ISPs will choose the first option; an ILEC that isn't so worried about that will choose the second option.

Qwest refuses to accept this simple and straightforward FCC regime. Instead, it draws a distinction between ISP-bound traffic and Virtual NXX traffic. It says that it will only pay compensation for ISP-bound traffic where the end user and the ISP's physical

1 location are in the same Qwest-defined local calling area. This makes no sense, though
2 — the logic of the FCC’s decision is based on the idea that the location of the ISP doesn’t
3 matter in assessing how to handle the traffic.

4
5 **Q. What type of arrangement does Qwest propose instead of the payment of reciprocal**
6 **compensation?**

7 A. Qwest proposes a bill and keep arrangement for calls where the ISP is located physically
8 outside of the Qwest local calling area of the party originating the calls.

9
10 **Q. Why does Universal object to such arrangement?**

11 A. Universal continues to incur costs each time it terminates Qwest’s traffic. This traffic
12 consists of calls initiated by Qwest subscribers to access the Internet. This provides an
13 enormous benefit to Qwest’s subscribers and Oregon residents generally. Under Qwest’s
14 bill and keep proposal, Universal would never be compensated for the costs that it incurs
15 to deliver traffic initiated by Qwest’s subscribers. Reciprocal compensation is intended to
16 compensate Universal for its switching costs when it completes the second half of a call.
17 Regardless of the location of Universal’s ISP customer or the location of the POI with
18 Qwest, Universal continues to incur the same switching costs to terminate traffic
19 originated by Qwest’s end users.

20 As a result, every minute of traffic that Qwest sends to Universal results in various costs
21 to Universal. These costs generally fall into two categories. First, there is the cost of
22 performing the switching functionality of directing calls placed by Qwest’s subscribers.
23 And second, there are also ancillary costs associated with operating the switch, such as

1 primary power sources, battery backups and generators, cooling equipment, and any
2 additions to the switching capacity of the switch itself. This is not an exclusive list, but
3 simply intended as an illustration of the different kinds of costs associated with switching
4 Qwest's telecommunications traffic.

5
6 **Q. Are there other problems with Qwest's proposal?**

7 A. Yes, Qwest's proposal would impose substantial additional costs on ISPs, which will then
8 be passed along to customers, which is contrary to the public interest. It would also give
9 Qwest yet another competitive advantage over CLECs. Even keeping aside the financial
10 ramifications of requiring a small CLEC like Universal to enter into a bill and keep
11 arrangement, as opposed to reciprocal compensation, Universal objects to Qwest's
12 position and alternative arrangement because the FCC's *ISP Remand Order* clearly states
13 that the parties' reciprocal compensation regime should apply to all traffic.

14
15 **Q. What is Qwest's basis for its position on reciprocal compensation?**

16 A. It is my understanding that Qwest has continued to rely mainly upon state public utility
17 commission decisions to support its argument without taking into account the FCC rules
18 and federal decisions interpreting these rules.

19
20 **Q. How does Universal refute this position?**

21 A. As I understand it, the FCC's rules and statements, as well as federal court decisions,
22 support Universal's position that each party is entitled to reciprocal compensation on all
23 traffic exchanged between the parties. This includes ISP-bound traffic, regardless of

1 whether the ISP that a Qwest customer is calling is located within the originating caller's
2 local calling area. The compensation regime outlined in the FCC's *ISP Remand Order*
3 continues to remain in effect, and clearly applies to all locally dialed traffic, including
4 ISP-bound VNXX traffic. There is nothing in the *ISP Remand Order* that suggests that
5 the FCC intended to exclude a certain type of ISP-bound traffic from its analysis.
6 Instead, it refers to any and all telecommunications traffic delivered to ISPs, which
7 encompasses the traffic exchanged between Qwest and Universal.

8
9 **IV. Conclusion**

10
11 **Q. How would you summarize your testimony?**

12 A. Even though Universal has not requested negotiations for a new interconnection
13 agreement, there are two critical issues that must be resolved before the parties can
14 negotiate a new mutually agreeable interconnection arrangement. First, Qwest disputes
15 clear federal law, which provides that each party is responsible for the cost of facilities on
16 its side of the POI. Second, Universal maintains that Qwest shall pay reciprocal
17 compensation on all telecommunications traffic as stated in the FCC's *ISP Remand*
18 *Order*. Federal law should be dispositive on these issues and should be accurately
19 reflected in any new interconnection agreement between the parties.

20
21 **Q. Does this complete your testimony?**

22 A. Yes.

**EXHIBIT 1: Pre-Filed Testimony of
Stephen C. Roderick**

Line #	Capacity	Minutes/Month	Comment
1	DS0 (one voice-grade channel)	43,200	24 hours/day x 60 minutes/hour x 30 days/month
2	DS1 (24 DS0s)	1,036,800	Line 1 x 24
3	DS3 (28 DS1s)	29,030,400	Line 2 x 28
4	Assumed Fill Factor	40%	See Note 1, below
5	Minutes/Month	11,612,160	Line 3 x Line 4
6	DS3 Costs		
7	Fixed/Month	\$ 253.13	Source: Oregon SGAT
8	Per Mile/Month		
8		0 to 8 \$ 9.95	Source: Oregon SGAT
10		8 to 25 \$ 10.19	Source: Oregon SGAT
11		25 to 50 \$ 14.27	Source: Oregon SGAT
12		over 50 \$ 21.11	Source: Oregon SGAT
13	Average \$/Mile/Month	\$ 13.88	See Note 2, below
14	Average Miles	25	See Note 2, below
15	Mileage Costs	\$ 347.00	Line 13 x Line 14
16	Cost/DS3/Month	\$ 600.13	Line 7 + Line 15
17	Cost/Minute	\$ 0.0000517	Line 16 ÷ Line 5
18	Cost of 100 hours on-line:	\$ 0.31	Line 17 x 60 minutes/hour x 100

Note 1: Transmission capacity will not be 100% filled because usage varies over the course of the day. The 40% figure is an estimate for purposes of this calculation. The ultimate cost per minute remains quite low even if much lower utilization is assumed.

Note 2: It would be theoretically possible to study the pattern of traffic from Qwest to Universal and develop a specific weighted average of the distance that an average minute of Universal-bound traffic is carried from the originating end office to the POI. Although some small number of end offices are relatively distant from the POI, they generate relatively little traffic compared to larger urban and suburban end offices. For purposes of this calculation, we simply took the average of the per-mile rates, and assumed an average transport of 25 miles.