BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of **Qwest Corporation** for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc.	**ARB 671**

REPLY TO QWEST CORPORATION'S RESPONSE TO UNIVERSAL TELECOM'S REQUEST FOR RECONSIDERATION

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Pursuant to O.A.R. 860-013-0050 Universal Telecom, Inc. ("Universal") hereby files its Reply to Qwest Corporation's ("Qwest") Response to Universal's Request for Reconsideration (hereinafter "Qwest Response") in Commission Docket No. ARB 671. Universal incorporates and adopts by reference herein all arguments it has placed before the Commission during the course of this proceeding, including but not limited to those arguments actively decided by the Commission and those arguments not addressed by the Commission. The instant pleading shall address the claims and defenses advanced by Qwest in the Qwest Response filed on May 22, 2006.

I. INTRODUCTION AND SUMMARY.

Qwest offers a multitude of arguments and unsupported assertions in its Response in an attempt to distract this Commission's attention from an undeniable truth facing Qwest and this Commission: the Federal District Court of Oregon (the "Federal District Court") has already ruled that *as a matter of federal law* Qwest's facilities charges are prohibited by FCC regulations.

This Commission acknowledges that it and the Arbitrator[1] are bound by the decisions of the Federal District Court in *Qwest Corp. v. Universal Telecom, Inc.*[2] The Federal District Court is, of course, the arbiter of the meaning and construction of federal law, and its interpretations of federal regulations are binding on this Commission. Moreover, this Commission is required by federal statute, 47 U.S.C. § 252(c)(1), to ensure that its arbitration decision meets the requirements of Section 251, 47 U.S.C. § 251, and FCC regulations implementing that statute.

The Federal District Court has already construed federal regulations, in the form of the FCC's *ISP Remand Order* and FCC Rules 51.703(b) and 51.709(b), to conclude that telecommunications carriers may not charge for facilities used to carry ISP-bound traffic to other telecommunications carriers. In fact the Federal District Court ruled that *as a matter of federal law* the FCC rules prohibiting carriers from imposing charges on their own originating traffic or facilities "remain in effect" with respect to ISP-bound traffic.

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1 *See* Order No. 06-190 at fn. 6.

2 2004 U.S. Dist. LEXIS 28340 (D. Or. 2004). Slip opinion reported at 2004 WL 2958421 (D. Or. 2004) (hereinafter "*Qwest v. Universal*"). A copy of the Westlaw slip opinion is attached hereto as Attachment 1 for the Commission's use.

Having already acknowledged that it must follow the Federal District Court's interpretation and construction of federal law, the Commission must heed the Federal District Court's ruling with respect to the application of FCC Rules 51.703(b) and 51.709(b) to ISP-bound traffic. In so doing the Commission must reconsider and reverse its decision in Order No. 06-190 approving Qwest's proposed recurring and non-recurring charges for facilities used to carry such traffic to Universal's network. The Commission must instead rule that such charges are unlawful as a matter of federal law and should not be included in the parties' agreement.

Qwest also argues that Universal has been given ample due process regarding the Commission's decision to outlaw VNXX in Oregon. But none of Qwest's wordsmithing can change the fact that the parties agreed to limit the issues in this case and the Arbitrator accepted that limitation. Viewed in this light, Qwest's recollection of mentioning the propriety of VNXX in its briefs is little more than post hoc bootstrapping, and the scant discussion Qwest cites falls far short of federal common law requirements for due process under 47 U.S.C. § 252(b)(4)(A). The Commission must therefore reconsider its decision to ban the exchange of VNXX between Universal and Qwest.

Finally, Qwest's attempt to overcome Universal's 47 U.S.C. § 253(a) claims is unavailing, for the twin reasons that "information access" is a subset of protected "telecommunications" under the statute, and the caselaw that Qwest cites simply does not address 47 U.S.C. § 253(a). Section 253(a) proscribes the Commission's authority to ban a telecommunications service. Since ISP-bound VNXX service is clearly telecommunications, the Commission may not ban it under Section 253(a).

ARGUMENT

II. QWEST'S PROPOSED FACILITIES CHARGES, OR "RUF" PROVISIONS, CONFLICT WITH THE PROHIBITION UNDER FCC RULES AND THE FEDERAL DISTRICT COURT OF OREGON'S DECISION INTERPRETING THOSE RULES.

A. The Application of FCC Rules 51.703(b) and 51.709(b) to Traffic That Originates on Qwest's Network.

Qwest's primary response to Universal's arguments is that the FCC Rules cited by Universal do not apply to the traffic that Qwest sends to Universal's network–telecommunications traffic that is delivered to the Internet (so-called ISP-bound traffic). *See, e.g.*, Qwest Response at 4-8. In this regard Qwest presents a simplistic reading of current FCC rules and concludes that the FCC intentionally excluded ISP-bound traffic from the scope of its rules–47 C.F.R. §§ 51.703(b) and 51.709(b)–which specifically prohibit carriers like Qwest from imposing charges on their own originating traffic and the facilities used to carry that traffic. Qwest Response at 4-8.

In particular, Qwest points to the definition of telecommunications in FCC Rule 51.701 and argues that FCC Rules prohibiting origination charges (47 CFR §§ 51.703(b) and 71.709(b)) apply only to telecommunications traffic and that ISP bound traffic is not telecommunications traffic. *Id.* at 5. Qwest also argues that this simplistic reading of the FCC's rules is supported by two federal court decisions in Colorado. *Id.* at 7-8.

Although the two federal court cases from Colorado are interesting, they do not bind the Commission in any way. In contrast, this Commission ***is bound*** by the decisions of the Federal District Court, the arbiter of the meaning of federal law in Oregon, a point which the Commission does not contest.[3] And it is uncontested that the Federal District

[3] *See* Order No. 06-190 at n. 6.

Court has already addressed the specific question of whether ISP-bound traffic is excluded from the scope of FCC Rule 51.703(b) and 51.709. In *Qwest v. Universal* the Federal District Court addressed and rejected the same definitional arguments raised by Qwest in this proceeding.

The Federal District Court found that the *ISP Remand Order* only changed rules governing the compensation for the "termination" of ISP-bound traffic, but did nothing to change the rules governing the "origination" of such traffic.[4] The Federal District Court, relying on footnote 149 of the *ISP Remand Order*, ruled that the FCC did not intend to exclude ISP-bound traffic from the scope of Rules 51.703(b) and 51.709(b) which prohibit charges on originating traffic or facilities.[5]

To assist the Commission Universal has attached a copy of the opinion of Judge Aiken in *Qwest v. Universal* to this pleading. (*See* Attachment 1). As a cursory reading of pages 4 and 5 of Judge Aiken's opinion reveal, the Federal District Court considered the identical arguments that Qwest raises here. For example, on page 4 of the slip opinion the Federal District Court explains that Qwest argued that ISP-bound traffic is not subject to the prohibition of FCC rules 51.703(b) and 51.709(b). The Court summarized Qwest's arguments in this way:

> Qwest argues that ***§ 51.703(b) and § 51.709(b) apply only to telecommunications traffic*** and that ***ISP bound traffic is not telecommunications traffic***. Therefore, because all of the traffic exchanged between the parties is ISP bound traffic, the ***restrictions of § 51.703(b), § 51.709(b), and TSR Wireless do not apply to facility charges***

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[4] The distinction between origination and termination where two LECs are involved in exchanging traffic is particularly important to recall: origination is the delivery of traffic from the calling party to a "point of interconnection" ("POI") with another LEC; termination constitutes the receipt of that same call at the POI and delivery of the call to the called party.

[5] *Qwest v. Universal*, slip op. at 5.

> ***imposed on Universal by Qwest.*** To support its argument, Qwest cites *In re Implementation of Local Competition Provisions in Telecomms. Act of 1996,* 16 F.C.C.R. 9151, 9170 *remanded sub. nom. Worldcom, Inc. v. F.C.C.,* 288 F.3d 429 (D .C. Cir.2002) (hereinafter *"ISP Remand Order"*), for the proposition that ISP traffic is not telecommunications traffic but is information access.

Qwest v. Universal, slip op. at 4-5 (emphasis added).

That is, of course, the ***identical*** argument that Qwest presents on pages 4 through 6 of its Response. On pages 5 and 6 Qwest asserts that: "Specifically, in its *ISP Remand Order*, the FCC found that 'ISP-bound traffic falls under the rubric of information access.'" Qwest Response at 5. From this point Qwest then argues: "Thus, Rule 703(b) does not apply ...", *id.* at 5-6; and Qwest continues: "Thus, Rule 709(b), like Rule 703(b), does not govern the arrangements between Qwest and Universal because, by its terms, it applies only to telecommunications traffic."[6]

Unfortunately for Qwest the Federal District Court has already rejected this argument and has ruled that as a matter of law footnote 149 of the *ISP Remand Order* preserves the application of FCC Rules 51.703(b) and 51.709(b), which prohibit LECs from imposing origination charges on all traffic originating on their network, including ISP-bound traffic. Specifically, the Federal District Court ruled that the *ISP Remand Order* did ***not*** remove ISP-bound traffic from the application of the FCC rules prohibiting origination charges.[7] The Federal District Court's ruling was predicated on the FCC's statement in footnote 149 of the *ISP Remand Order*, by which the FCC expressly stated that the *ISP Remand Order* did not alter existing obligations, including the obligation to

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6 *Id.* at 6.

7 *Qwest v. Universal*, slip op at 6.

deliver originating traffic to a point of interconnection without charge.[8] Upon these findings the Federal District Court concluded that: "the restrictions of § 51.703(b) and § 51.709(b) ***remains in full effect.***"[9]

As the Federal District Court explained:

> In *ISP Remand Order,* the FCC did rule that ISP bound traffic was not telecommunication traffic for the purpose of determining the scope of reciprocal compensation requirements under 47 U.S.C. § 251(b)(5). *ISP Remand Order.* 16 F .C.C.R. at 9163.
>
> ***However, Qwest is mistaken in its broad application of ISP Remand Order.*** In *ISP Remand Order,* the FCC explicitly stated that its ruling "does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law provisions." *Id.* at 9189. The FCC further stated that the interim compensation regime established in *ISP Remand Order* "affects only intercarrier compensation (i.e. the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing intercarrier agreements, such as obligations to transport traffic to points of interconnection." *Id.* at n. 149.
>
> ***Therefore, the restrictions of § 51.703(b) and § 51.709(b) remain in full effect.***

Qwest v. Universal, slip op. at 5 (emphasis added).

Based upon its construction of the *ISP Remand Order* the Federal District Court concluded that the FCC rules do apply to ISP-bound traffic and rejected Qwest's attempts to charge Universal for facilities used to carry such traffic to Universal's network:

> 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.

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8 *Id.*

9 *Id.* (emphasis added).

Qwest v. Universal, slip op. at 5-6 (emphasis added).

Thus, the Federal District Court has already specifically considered, and rejected, the very same arguments Qwest presents in its opposition filing. This Commission can not simply ignore the Federal District Court's decision, but must in fact heed the Court's rulings as to the meaning and scope of federal law.[10] Therefore, the Commission must reconsider its decision in Order No. 06-190 and rule that pursuant to the *Qwest* Court's ruling, the restrictions of FCC Rules 51.703(b) and 51.709(b) remain in full effect and apply to the traffic at issue in this case. That conclusion, in turn, would require the Commission to reverse its prior decision to affirm Qwest's proposed recurring and non-recurring charges on facilities used to carry Qwest's originating traffic.

Assuming the Commission intends to act in conformance to the Federal District Court's ruling, this result is also required by Section 252(c)(1), which requires the Commission to ensure that its arbitration decision is consistent with Section 251 and FCC regulations implementing that statute.[11]

Qwest makes much of the two federal court decisions in Colorado which adopted Qwest's narrow reading of the *ISP Remand Order* to exclude ISP-bound traffic from the scope of FCC rules which prohibit origination charges. These decisions might be of some consequence if two other conditions existed: (1) ARB 671 arose in the State of Colorado, and (2) there was no federal district court ruling in the State of Oregon governing the question before the Commission. Of course, though, neither condition

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[10] *See* Order No. 06-190 at fn. 6.

[11] FCC Rules 51.703(b) and 51.709(b) were implemented pursuant to Section 251 of the Act in the FCC's landmark "Local Competition" First Report and Order. *See In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 at ¶¶ 1042, 1062 (1996).

exists because this dispute did not arise in Colorado and there is a federal district court ruling in this jurisdiction which governs the specific question before the Commission. Therefore, there is little to take from Qwest's two preferred decisions, other than to note that there are other decisions which answer the question differently than the Federal District Court has answered the question.

But that is not to suggest that the Federal District Court is alone in this regard. Indeed, quite to the contrary, several appellate courts and a number of state commissions, including those in California, Washington, and Minnesota have all concluded that FCC Rules 51.703(b) and 51.709(b) do not exclude ISP-bound traffic, and therefore continue to prohibit carriers from imposing charges on originating traffic or facilities.

For example, in *In Re Pac-West Telecomm, Inc.*, the California PUC recently determined that the FCC's rules prohibit SureWest from charging Pac-West for the cost of interconnection facilities on SureWest's side of the POI even though the majority of the traffic associated with the interconnection facilities was ISP-bound traffic.[12] Specifically, Pac-West agued that the *ISP Remand Order* did *not* exempt ISP-bound traffic from all FCC rules relating to reciprocal compensation.[13] The California Commission, agreeing with this contention, provided, in relevant part, that:

> We concur with Pac-West's interpretation of the FCC's rules. Even though the ISP Remand Order placed compensation-related caps on ISP-bound traffic, that order did not change Rules 51.703(b) and 51.709(b). Those rules prohibit ILECs from charging for delivery of ISP-bound calls to CLECs or charging CLECs for the facilities the ILECs use to deliver such traffic. Those rules continue to apply to all traffic, including calls to ISPs.

Id.

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12 2005 WL 1537248, *7-8 (Cal.P.U.C. June 16, 2005) (No. D. 05-06-028).

13 *Id.* at *8 (emphasis added).

Similarly, the Minnesota Commission determined this issue in an arbitration proceeding between AT&T and Qwest.[14] The Minnesota Commission found that ISP-bound traffic should be included in the formula used to allocate the costs of interconnection facilities.[15] Despite Qwest's arguments that it is possible to reconcile statutes and rules with the conclusion that parties may ignore ISP-bound traffic, the Minnesota Commission reasoned that the FCC's rules requiring parties to allocate facilities costs in proportion to usage does not make any exceptions for information access in general or ISP-bound traffic in particular.[16]

In addition, the Washington Commission also disagreed with Qwest's position that Internet traffic should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities.[17] Significantly, the Washington Commission determined that:

> Qwest argues further that because the FCC has exempted ISP-bound traffic from reciprocal compensation obligations, the ISP Remand Order also must be read to exclude this traffic from the relative use calculation to apportion costs of interconnection. The Commission does not accept this conclusion. Nothing in the text of the ISP Remand Order suggests that it applies to any functions other than transport and termination on the terminating side of the POI.
>
> Even if the Commission were to agree that Rule 709(b) is directed to 'telecommunications traffic,' this does not mean that the rule would exclude ISP-bound traffic from relative use. The rule apportions the cost of interconnection trunking based on the amount of traffic originated by the interconnecting carrier. Qwest essentially wants to apply the relative

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[14] *In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. 252 (b), Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement*, 2003 WL 22870903, * 19-20 (Minn. PUC 2003).

[15] *Id.* at *20 (finding persuasive that the Commissions in the states of New Mexico and Washington agreed with this position).

[16] *See id.*

[17] *In re Level 3 Communications, LLC*, Fourth Supplemental Order, 2003 WL 21537346, *4-7 (Wash.U.T.C. 2003).

> use rule in reverse that is, that the relative use calculation should charge Level 3 for calls originating with Qwest's customers and terminating on Level 3's network. Second, this reading simply would mean that Rule 709(b) is inapplicable to transmission facilities dedicated to ISP-bound traffic; it would provide no answer to the question of how the recurring costs of interconnection facilities should be apportioned, if at all.
>
> The Remand Order addressed what a terminating carrier might charge an originating carrier for transport and termination. It did not address the originating carrier's obligation to take traffic over its own network to a POI. *See* Remand Order, n. 149. Thus, the Remand Order does not affect Qwest's obligation under Rule 703(b) to transport this traffic to the POI.

Id. at *6-7.

But, in the end, what matters for this Commission's analysis is what the Federal District Court of Oregon has said about the application of these FCC rules. The Federal District Court's decision is clear on its face: FCC rules that prohibit charges on facilities used to carry originating traffic continue to apply even where the traffic is ISP-bound traffic. Because the Commission has acknowledged in Order No. 06-190 that "the Commission is bound by the holding in the *Qwest v. Universal*" it must reconsider its decision and rule that Qwest's facilities charges (both recurring and non-recurring) are unlawful.

B. *TSR Wireless* and Other Federal Authority Support the Federal District Court of Oregon's Interpretation of FCC Rules 51.703(b) and 51.709(b).

Qwest attempts to distinguish *TSR Wireless* and the rulings of other federal courts that have all reached the same conclusion with respect to the application of FCC Rules 51.703(b) and 51.709(b): Those rules evidence the FCC's intent to prohibit origination charges on ***all forms*** of traffic exchanged between two carriers. Qwest argues these cases are unique and not applicable here because they do not involve the exchange of ISP-bound traffic. Qwest Response at 8-10.

It is undoubtedly true that the numerous federal district court and FCC decisions previously cited by Universal involve different types of traffic. For example, the *TSR Wireless* case involved Qwest's attempt to impose charges on facilities used to carry traffic to a point of interconnection with paging companies.[18] And in the Fifth Circuit's *Southwestern Bell Telephone Co. v. PUC of Texas*[19] decision the rule was applied to prohibit then-SBC from imposing charges on traffic used to exchange general telecommunications traffic between two carriers.

However, in at least two other cases, the Fourth Circuit's *MCIMetro Access* and the FCC's *Worldcom* Arbitration decision, the rule prohibiting origination charges was applied and enforced when ISP-bound traffic was clearly being exchanged between the two parties. Each is discussed in turn.

Qwest's assertion on page 10 of its Opposition that the *MCIMetro Access* case is distinguishable because "the issue related to general telecommunications traffic being exchanged between an ILEC and a CLEC", Qwest Response at 10, is factually incorrect. Although the Fourth Circuit's opinion does not describe the types of traffic at issue, the underlying arbitration order from the North Carolina Utilities Commission clearly demonstrates that MCIMetro and BellSouth would be exchanging *ISP-bound traffic*. This is illustrated by the NCUC's discussion of disputed issue 47, which demonstrates that the parties would be exchanging ISP-bound traffic:

> **MATRIX ISSUE NO. 47:** Should reciprocal compensation payment be made for ***ISP-bound traffic***? . . . The Commission recognizes that the FCC has rendered an opinion that ***ISP-bound traffic*** is essentially non-local interstate traffic

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[18] *TSR Wireless, LLC v. US West Communications*, 15 FCC Rcd 11166, 11189 ¶ 1 (2000), aff'd sub. nom. *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[19] 348 F.3d 482 (5th Cir. 2003).

> The Commission continues to view the establishment of an interim inter-carrier compensation mechanism for ***ISP-bound traffic*** -- which is otherwise identical to that for non-ISP-bound traffic but which is subject to true-up once the FCC has decided upon a methodology and the Commission has implemented it --as a fair method to resolve this contentious issue. . .
> The Commission concludes that the Parties should establish an interim inter-carrier compensation mechanism for ***ISP-bound traffic*** which is identical to that for non-ISP-bound traffic but which is subject to true-up once the FCC has decided upon a methodology for ISP-bound traffic and the Commission has implemented it.

In the Matter of Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Recommended Arbitration Order, 2001 N.C. PUC LEXIS 398 (Apr. 3, 2001) (emphasis added).

Thus, the factual record in the arbitration between BellSouth and MCIMetro expressly refutes Qwest's claim: The parties there were contemplating the exchange of ISP-bound traffic. But this had no bearing on the Fourth Circuit's decision to apply the FCC rule prohibiting origination charges. The federal appeals court explained that FCC Rule 51.703(b) "unequivocal[ly] prohibit[s] LECs from levying charges for traffic originating on their own networks, and, ***by its own terms, admits of no exceptions***."[20]

In its 2002 WorldCom arbitration decision the FCC arbitrated the terms of an interconnection agreement between an ILEC (Verizon) and several CLECs. One of the contested issues was whether Verizon could assess charges upon traffic originating on its network and delivered to a single POI with a CLEC.[21] Critically important to the

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[20] *MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003).

[21] *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

Commission's analysis in the instant case, the traffic exchanged between the parties to that FCC proceeding *included* ISP-bound traffic.[22] The FCC summarized the dispute, in part, in this way: "AT&T asserts that Verizon has unilaterally refused to pay millions of dollars in reciprocal compensation for ***ISP-bound traffic*** that accrued during the period before the *ISP Intercarrier Compensation Order* established a new compensation regime. WorldCom adds that, according to the Virginia Commission, reciprocal compensation was the appropriate mechanism for ***ISP-bound traffic*** prior to the new regime."[23]

The FCC determined that traffic origination charges are not allowed under existing FCC rules and that under those rules, when an ILEC delivers originating traffic to the POI the ILEC is "required to bear financial responsibility for that traffic."[24] The FCC specifically cited and relied upon Rule 51.703(b).[25] The FCC did so with full knowledge there was ISP-bound traffic exchanged between the ILEC and CLECs, and despite the fact that it also ruled "that ISP-bound traffic is not subject to reciprocal compensation under Section 251(b)(5)."[26]

The FCC therefore reaffirmed that existing FCC rules preclude an ILEC from assessing charges on originating traffic—including ISP-bound traffic—while also concluding that ISP-bound traffic was not subject to the compensation regime under

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and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 at ¶ 36-71 (2002) (describing "Issues ... Single Point of Interconnection and Related Matters" as financial implications of establishing a "single point of interconnection" in a LATA, and parties' proposals defining their respective obligations to compensate each other for delivering traffic) (hereinafter "*WorldCom Arbitration Order*").

22 *See id.* at ¶¶ 244-268 (resolving issues concerning compensation for ISP-bound traffic).

23 *Id.* at ¶ 247.

24 *WorldCom Arbitration Order* at ¶ 52 (citing 47 U.S.C. § 51.703(b)).

25 *Id.* at ¶ 52, n. 119 (citing 51.703(b)).

26 *Id.* at ¶¶ 245, 246 (cited by Qwest in n. 78 of Qwest Opposition Brief). Obviously, the D.C. Circuit's decision *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) rejects the FCC's conclusion that ISP-bound traffic is outside Section 251(b)(5).

251(b)(5) (instead subject to the FCC's interim compensation regime). Qwest's argument is flat wrong: If ISP-bound traffic is specifically excluded from the traffic addressed in FCC Rules 51.703(b) and 51.709(b) then the FCC would not have relied on those rules to conclude that Verizon's proposed origination charges were unlawful.

Thus, Qwest's assertions that other federal cases did not involve ISP-bound traffic are demonstrably false. In both the FCC's *WorldCom* Arbitration Order and the North Carolina Utilities Commission proceeding which led to the Fourth Circuit's decision in *BellSouth v. MCIMetro Access* ISP-bound traffic was at issue. And in both cases the FCC and the Fourth Circuit both found that the FCC rules prohibiting origination charges applied to such traffic.

C. The Federal District Court of Oregon's Ruling Prohibiting Qwest's Charges on Traffic Used to Carry Originating Traffic Rests Upon the Court's Interpretation of Federal Law, Not Merely Than Only the Existing Agreement.

Qwest attempts to discount the significance of the Federal District Court of Oregon's findings of fact and rulings of law. First, Qwest asserts that Judge Aiken's discussion of the facts surrounding the previous dispute were not factual findings because they were set forth in a section of the opinion entitled "Background." Qwest Response at 11, n. 13. But despite this vague allusion to Judge Aiken's drafting style Qwest does not contest that the Federal District Court stated in the opinion that: "Universal provides services to internet service providers ("ISPs") by offering local telephone numbers which the ISPs' customers may call using their computers...Qwest and Universal have interconnected their networks to allow this exchange of ***telecommunications*** traffic." *Qwest v. Universal*, slip op. at 1 (emphasis added).

Although Qwest suggests that Judge Aiken's findings should be questioned by

this Commission, it offers no proof, evidence or statement that contradicts the Judge's finding. Is the federal judge wrong? Are there errors in her statement? Is this statement somehow false or misleading? Qwest would have this Commission believe so–but it can not, and indeed does not, point to any finding of the Federal District Court's which is incorrect.

Qwest also suggests that the Federal District Court's ruling is not binding on the Commission here because it only constituted the interpretation of the prior Qwest-Universal interconnection agreement. Qwest Response at 11-15. Specifically, Qwest states that Judge Aiken's opinion "merely held that *the existing agreement* did not allow ISP traffic to be removed from the RUF." *Id.* at 13 (emphasis in original). And, Qwest also asserts that: "[t]he only thing that Judge Aiken did was to conclude that these rulings did not apply to the *interconnection agreement at issue*." *Id.* at 14 (emphasis in original). In support of these false claims Qwest quotes from portions of the opinion where Judge Aiken addressed the agreement's application to the question of whether Qwest could charge Universal for facilities used to carry originating traffic.

But Qwest conveniently ignores those portions of the opinion where Judge Aiken interprets federal law, including the *ISP Remand Order* and FCC Rules 51.703(b) and 51.709(b), and applies that law to the parties' dispute. Those sections, found on pages 4 & 5 of the attached slip opinion (and highlighted in yellow), clearly show that Judge Aiken based her analysis on governing federal law, rather than the parties' agreement. Moreover, Qwest assiduously avoids the concluding paragraphs of Judge Aiken's opinion, where she states that: "[t]here is no genuine issue of material fact as to whether Qwest may charge Universal for interconnection facilities used solely to transport traffic

for termination on Universal's network. The agreement ***and FCC regulations clearly prohibit such charges***." *Qwest v. Universal*, slip op. at 12 (emphasis added).

As the above quoted-sentence of the opinion unequivocally demonstrates, Judge Aiken's conclusions rest upon ***both*** an interpretation of the agreement ***and FCC regulations***–which "clearly prohibit" Qwest's proposed origination charges. And her analysis of the scope and application of those rules, as set forth on pages 4 and 5 of the attached slip opinion, show that Judge Aiken has concluded that as a matter of federal law FCC Rules 51.703(b) and 51.709(b) continue to apply to ISP-bound traffic.

III. QWEST'S DUE PROCESS ARGUMENTS IGNORE CLEAR AND CONTROLLING FEDERAL COMMON LAW AND SHOULD BE REJECTED.

In defense of the Arbitrator's Decision concerning the illegality of VNXX, Qwest argues that because two sentences in its draft ICA, and Opening and Reply Briefs mentioned VNXX, its actions "clearly raised the question whether the exchange of VNXX traffic is proper in Oregon, and in particular, whether the exchange of such traffic is appropriate between Qwest and Universal." Qwest Response at 20. Before moving to a refutation of Qwest's arguments, it is worth refreshing our recollection of how ARB 671 came to be, and how the enumerated issues before the Commission came to be identified in this docket.

In July 2004 Qwest filed a Petition for Arbitration against Universal, which was docketed as ARB 589.[27] Universal objected to Qwest's petition on the grounds that only a CLEC can initiate interconnection negotiations and arbitration under 47 U.S.C. 252(a).

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[27] *Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.*, ARB 589 (filed July 15, 2004).

The Commission agreed with Universal, but ultimately found that the parties' current interconnection agreement provided that either party could initiate negotiations and a subsequent arbitration.[28] Universal appealed the Commission's decision to the United States District Court for the District of Oregon.[29] After denying Universal's Motion to Stay ARB 671, and the Commission and Qwest's Motions to Dismiss Universal's appeal, the District Court elicited from the parties an informal agreement to stay the court proceedings pending final resolution of ARB 671. Universal and Qwest proceeded to negotiate a global settlement resolving, *inter alia*, the dismissal of Universal's appeal and the prosecution of ARB 671. The parties separately agreed to truncate ARB 671 by arbitrating only two basic issues: (i) Whether ISP-bound traffic should be excluded from the Relative Use Factor calculation, and (ii) Whether so-called VNXX traffic qualified for reciprocal compensation. These are the issues identified in the parties' briefs and as a result of Qwest discovery both parties agreed should be in the record of ARB 671. As Universal pointed out in its Petition for Reconsideration, neither party identified as an open issue the *lawfulness* of VNXX as a means by which Universal might support its Managed Modem Service. Universal Petition for Reconsideration at 17-18.

This history demonstrates that the parties' intention was to limit the open issues before the Commission to those enumerated above. At any time during ARB 589, the appeal of ARB 589, ARB 671, or the initial appeal of ARB 671 Qwest—which argued that ARB 589 and ARB 671 were one continuous proceeding—could have raised the lawfulness of VNXX traffic as a defense to certain of Universal's arguments and claims.

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[28] *In the Matter of Qwest Corporation, Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecommunications, Inc.*, ARB 589, Oregon PUC Order No. 05-206 (2005).

[29] *Universal Telecom, Inc. v. The Oregon Public Utility Commission, et al*, No. 6:05-CV-6200-TC (D. Ore.) (2005).

Qwest did not do so. Further, Qwest conveniently ignores—as Universal pointed out previously—that Qwest stipulated to certain, limited issues in ARB 671 with Universal and that the Arbitrator *accepted* those stipulations.[30] This is not to say that the Commission could not investigate the propriety of VNXX as provided by Universal. But such investigation would have to occur in a separate docket, with adequate notice and opportunity to respond. The Commission cannot address the legality of VNXX as provided by Universal in ARB 671, because the parties expressly limited the issues before the Commission.

Now, to Qwest's specific arguments. Qwest essentially relies on general principles of due process to argue that Universal has had the opportunity to address the lawfulness of VNXX in Oregon in ARB 671. While basic due process is certainly relevant here, there exists a consistent body of federal common law on what issues a state commission may consider in an arbitration. Qwest completely fails to acknowledge these decisions, which are directly on point and are controlling versus general state common law on due process (which concept Universal raised below merely to show what type of procedure the Commission had denied Universal).

It is settled law that a "state commission must limit its consideration of the agreement to the matters specifically presented in the petition for arbitration and in the response." *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59, 62 (2006) (citing 47 U.S.C. § 252(b)(4)(A)). Further, § 252(b)(4)(A) indicates a state commission "cannot independently raise an issue not raised by one of the parties." *US WEST Communs., Inc. v. Minnesota PUC*, 55 F. Supp. 2d 968, 976-77 (1999). "Issues that directly relate to

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[30] Letter from Alex M. Duarte, Corporate Counsel, Qwest Corporation, to Hon. Allan Arlow, ALJ, Or. PUC (entered Nov. 14, 2005).

those raised in the petition *and that both parties addressed* may also be considered by" the agency. *Global NAPS, Inc. v. Verizon New Eng., Inc.*, 2005 U.S. Dist. LEXIS 20559, *3 (2005) (citations omitted, emphasis added). *See also, US West Communs. v. Boyle*, 1999 U.S. Dist. LEXIS 22331 *17 (1999) ("The parties determine what issues will be resolved through arbitration, so actions of the parties can alter the scope of matters under consideration.") (emphases added). In sum, § 252(b)(4)(A) limits a state commission to arbitration of only those issues specifically presented *in the petition or response*, and it shall not independently raise an issue not raised in the petition or response. If the state commission wishes to consider issues that directly relate to those raised in a petition, *both parties* must have addressed such additional issues.

Qwest's Petition for Arbitration, filed in July 2005, did not identify any issues in dispute.[31] Qwest's Petition had as Exhibit A an Interconnection Agreement that, in 304 pages plus approximately two hundred more pages in associated exhibits and appendices, mentioned VNXX in exactly two RUF sub-provisions (7.3.1.1.3.1 and 7.3.2.2.1, attached as Attachment 2). These provisions purport to remove VNXX traffic from the RUF factor. Neither RUF sub-provision expressly or impliedly places before the Commission the lawfulness of VNXX in Oregon. In fact, neither RUF sub-provision mentions Oregon law at all. Yet, Qwest postulates that a single sentence that appears in both RUF sub-provisions—a sentence that does not use the terms "unlawful" or "inappropriate" or "improper" or "illegal," and that does not say that Qwest will not agree to exchange VNXX traffic[32]—suffices to "clearly raise[] the question whether the exchange of VNXX

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31 *See* Qwest Corporation's Petition for Arbitration, ARB 671 (first docket entry) (filed July 14, 2005).

traffic is proper in Oregon, and in particular, whether the exchange of such traffic is appropriate between Qwest and Universal." Qwest Response at 20. Qwest's claim is simply not believable or supported by federal common law.

The most reasonable interpretation of the RUF sub-provisions is that Qwest was reserving its rights, via contract language, to excise VNXX traffic from the RUF calculation. Why did Universal remove the referenced language in its response? Simply to avoid having VNXX traffic excised from the RUF. Neither Qwest's original language nor Universal's removal of it put into play the underlying legality of VNXX traffic under Oregon law.[33]

Qwest also argues that because its Brief and Reply Brief mentioned that VNXX is inconsistent with Oregon law, these statements suffice to make VNXX legality an issue in the case. Qwest Response at 20-21. As noted above, in the circumstance where a state commission desires to examine an issue related to a § 252(b)(4)(A) issue, *both parties*

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[32] Qwest's assertion in the ICA that it has never agreed to exchange VNXX traffic with Universal is false. Qwest has agreed to do so with Universal under the parties' existing contract as a result of certain settlements between the parties (although, admittedly, Qwest has refused to pay reciprocal compensation on such traffic—*see* http://edocs.puc.state.or.us/efdocs/HAQ/arb157haq121942.pdf and Attachment 3), and has even notified the Commission *in this docket* that it would not "'disconnect' or otherwise interfere with [VNXX] service to Universal while the Commission and its Staff review the conforming interconnection agreement and the request for reconsideration is pending." Qwest Response at n. 27 (citing Qwest's May 12, 2006 letter, p. 2).

[33] Two other documents appended to Qwest's Petition for Arbitration bear out Universal's position. First, Qwest's Agreement Exhibit H, entitled "Calculation of the Relative Use Factor (RUF)," specifically references "All ISP-bound and FX MOU that CLEC sends to Qwest" (Qwest's responsibility) and "All VNXX MOU that transits Qwest network and is terminated to CLEC" (Universal's responsibility). *See* Attachment 4. The only reasonable inference to draw from this text is that Qwest anticipated exchanging VNXX traffic with Universal, but wished not to include it in the RUF. Second, Qwest's Agreement Exhibit J, entitled "Election of Reciprocal Compensation Option," discusses treatment of ISP-bound traffic, but fails to mention VNXX traffic. Reasonably, if Qwest feared it might be required to pay reciprocal compensation on VNXX traffic, in this election form it might have noted that it would not given the "unlawful" nature of such traffic. *See* Attachment 4.

must have addressed such related issue.[34] The fact that Qwest purportedly raised the issue in its briefs is not sufficient under federal common law to raise the legality of VNXX traffic to a justiciable issue in this case. Universal would have had to respond in kind and it did not. Universal limited its VNXX comments to the RUF. Why did Universal not argue the lawfulness of VNXX, the Commission might ask? First, Universal never considered the lawfulness of VNXX to be before the Commission. Second, a "party to an arbitration may not argue the merits of an issue before the state commission, then later claim that the issue was not before the commission."[35] Qwest seeks to turn Universal's understanding that the legality of VNXX was never an issue and the preservation of its federal law rights (even if implicit) on their head. Qwest essentially argues that because Universal did not 'take the bait' on Qwest's points Universal forfeited its "opportunity to take a position on those points." Qwest Response at 21. Qwest's argument is defeated by clear federal common law that provides that a single party alone may not raise a subsequent issue in a § 252 arbitration.[36]

Thus, Qwest's reliance on the recent Global NAPs' case for the proposition that a state commission can ban VNXX services in its state without due process is misplaced.

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[34] *Global NAPS, Inc. v. Verizon New Eng., Inc.*, 2005 U.S. Dist. LEXIS 20559, *3 (2005) (citations omitted); s*ee also US West Communs. v. Boyle*, 1999 U.S. Dist. LEXIS 22331 *17 (1999).

[35] *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1999 U.S. Dist. LEXIS 11418, *43-44 (1999).

[36] Qwest's argument here is reminiscent of its arguments in ARB 589 that because Universal refused to respond to Qwest's attempts as an ILEC to initiate negotiations under 47 U.S.C. § 252(a)(1)—a decision the Commission ultimately upheld—that Universal should forfeit its "technical" federal law rights. *See* Qwest Corporation's Response to Universal Telecom, Inc.'s Motion to Dismiss, with Prejudice at n. 4, ARB 589 (Aug. 27, 2004). The Commission ruled, of course, that only in circumstances where both the ILEC and CLEC agree may the ILEC initiate negotiations under § 252(a)(1). *In the Matter of Qwest Corporation, Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecommunications, Inc.*, ARB 589, Order No. 05-088 (2005).

Qwest Response at 23, 24. The Global NAPs court determined that the Vermont Public Service Board ("PSB") extended the appropriate due process to Global NAPs, which had enumerated as a specific § 252(b)(4)(A) issue the banning of VNXX service ("Global, however, squarely raised the issue of its right to use VNXX in its petition for arbitration." *Global NAPs* at 298.) In ARB 671, by contrast, the issue of VNXX's lawfulness in Oregon was not "squarely raised" by anyone.

Similarly, Qwest's reliance on the recent decision of an administrative law judge of the Arizona Corporation Commission ("ACC") is unavailing. There, as before the Vermont PSB, the parties specifically enumerated the lawfulness of VNXX as a § 252(b)(4)(A) issue before the ACC.[37] Both parties submitted extensive arguments on VNXX, including its lawfulness.[38] Neither party argued to the ALJ that the issue was not properly before her. The ACC's decision on VNXX was predicated on the fact that lawfulness of VNXX was an open issue both parties sought to resolve, and that both parties briefed. That is a far cry from the Commission's unilateral action here.

For all these reasons, the Commission must reconsider its decision to consider the lawfulness of VNXX in ARB 671.

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[37] Recommended Opinion and Order, *In the Matter of the Petition of Level 3 Communications LLC for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket Nos. T-03654A-05-0350 and T-01015B-05-0350 at 4.

[38] *Id.* at 4-25.

IV. QWEST'S ARGUMENT ON THE INTERSTATE CHARACTER OF VNXX SERVICE FAILS TO ADDRESS UNIVERSAL'S SECTION 253(a) CLAIM.

In its Petition for Reconsideration Universal argued that the Commission overstepped its legal authority in banning VNXX as provided by Universal, in that the FCC's limited delegation of authority over certain use of NXX codes does not mean the Commission may proscribe the provision of an interstate or telecommunications service. (Universal will not repeat, but certainly incorporates, those arguments here.) Qwest's response is to cite to decisions which did not consider 47 U.S.C. 253(a). Qwest Response at 22-25. To borrow from and paraphrase Qwest, nothing in the decisions upon which Qwest's relies "even remotely relates to an issue in this case." For example, even a cursory reading of *Global NAPs* reveals that the CLEC neither raised nor did the Vermont PSB consider whether the agency had overstepped its authority in light of § 253(a), which is the legal claim Universal advanced in its Petition for Reconsideration. The § 253(a) issue simply wasn't raised in *Global NAPs*. Rather, the *Global NAPs* court considered and rejected Global NAPs' argument that the Vermont PSB was barred from banning VNXX because the FCC assumed full jurisdiction over ISP-bound traffic pursuant to the *ISP Remand Order* and 47 U.S.C. § 201.[39] Universal did not make this argument in its Petition for Reconsideration. Consequently, the *Global NAPs* decision does not inhibit Universal's position at all, because Universal raised a different legal theory than the ones discussed in *Global NAPs*.

Similarly, in the ACC case upon which Qwest relies, although Qwest and Level 3 raised many arguments pertaining to the propriety of VNXX, neither raised any § 253(a)

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[39] *Global NAPs* at 299-300.

issue. That decision simply cannot stand for the proposition that a state commission can trump 47 U.S.C. § 253(a) in the context of banning VNXX for the simple reason that the case did not consider that issue.

Thus, Qwest's defense of the Commission's decision banning VNXX from a § 253(a) perspective is reduced to a single footnote, arguing that service to ISPs is not "telecommunications service" within the meaning of § 253(a). Qwest Response at note 26. Universal discussed below the Ninth Circuit's ruling that no one can rely on the legal rationale espoused by the FCC that ISP-bound traffic is not "telecommunications" for purposes of reciprocal compensation.[40] And Universal argues above that Qwest's arguments about considering ISP-bound traffic to be non-telecommunications for purposes of the RUF are at odds with the Federal District Court and other federal decisions. *See* Section II, *supra*. It would be odd, indeed, if the Ninth Circuit did not permit state commission to characterize ISP-bound traffic as non-telecommunications for purposes of reciprocal compensation, but did so for purposes of RUF or § 253(a). In this case, moreover, the unrefuted evidence, in the form of Qwest data responses, proves that the service by which Qwest transports ISP-bound traffic is telecommunications.[41] The Ninth Circuit has characterized such traffic as telecommunications[42]. The Federal

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[40] Universal Telecom, Inc.'s Request for Reconsideration (filed May 5, 2006) at 16, n.29; Comments of Universal Telecom, Inc. to the Arbitrator's Decision (filed Feb. 13, 2006) at 21-22, generally citing *Pacific Bell v. PacWest Telecomm., Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003).

[41] *See* Qwest Responses to Universal Data Requests Nos. UTI 01-3, and UTI 01-27. Qwest has never briefed this point. If the moving party (Universal) shows the absence of a genuine issue material fact, the nonmoving party (Qwest) must go beyond the pleadings and identify facts which show a genuine issue for trial. *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317, 323 (1986). Here, by failing to respond to Universal's claims, Qwest did not meet its burden under *Celotex*. Therefore, the Commission must accept Universal's characterization of the evidence at issue.

[42] *Pacific Bell*, 325 F.3d at 1119, 1131, and n.15.

District Court in Eugene has characterized such traffic as telecommunications. *Qwest* at 1, 2, 4-6 and 9. Qwest ignores all this. Ultimately, the genealogy of the term "information access"—as used by the FCC in the *ISP Remand Order*—shows, too, that the traffic is telecommunications.

The FCC has used the term "information access" as it appears in § 251(g) of the Act to describe ISP-bound traffic.[43] The FCC further explained that "information access" is a legacy term carried over from the Modified Final Judgment.[44] Judge Greene, in the MFJ, used the following definitions which are critical to understanding the FCC's use of the term "information access" and that term's import as it is variously used in RUF and reciprocal compensation discussions, and in Universal's § 253(a) claim:

> I. "Information access" means the provision of specialized exchange ***telecommunications services*** by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of ***telecommunications traffic*** to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.
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> * * *
>
> O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.
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> P. "Telecommunications service" means the offering for hire of

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43 *See, e.g., ISP Remand Order* at ¶ 30.

44 *Id.* at ¶ 39, citing *United States v. AT&T,* 552 F. Supp. 131 at 229.

> telecommunications facilities, or of telecommunications by means of such facilities.

United States v. AT&T, 552 F. Supp. at 229 (emphases added).

In 1996 Congress enacted the Telecommunications Act, and in so doing added definitions for "telecommunications," "telecommunications carrier" and "telecommunications service" to section 3 of the Communications Act of 1934. Pub. L. No. 104-104, 110 Stat. 56, 58 (1996). The final language adopted for the definition of "telecommunications" by Congress dropped the following phrase from the MFJ definition of "telecommunications:"

> by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

See H.R. REP. NO. 458, 104th Cong., 2d Sess., *published at* 142 Cong. Rec. H1107, 1108 (Daily ed. Jan. 31, 1996). Thus, Congress de-limited the concept "telecommunications" as conceived by Judge Greene, by eliminating reference to any medium of transmission within the definition. Congress moved to the definition of "telecommunications services" the concept that type of facilities used to provide telecommunications is irrelevant. 47 U.S.C. § 153(46). At core, therefore, the definition of "information access" that the FCC has used to describe ISP-bound traffic includes and parallels the indispensable concept of "telecommunications" as contained in the MFJ, the Act and the FCC's rules. As the FCC has stated,

> we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications

> service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.

Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11,501, 11,511 § 21 (1998).

Thus, "information access" as used by the FCC is a form or subset of "telecommunications" as used by Judge Greene, and as carried forward by Congress in the Act, and the FCC in its rules. The terms are not mutually exclusive. Under the plain definition of the Act, a service contains "telecommunications" so long as the "transmission" does not produce a change "in the form or content of the information as sent and received." 47 U.S.C. § 153(43). This is precisely the point of the discovery the parties jointly moved into the record of this case. Qwest serves as a passive transmitter of ISP-bound traffic, between or among points of its end users' choosing, without change in the form content of the information as sent and received.[45]

The FCC's attempts to distinguish the subset of telecommunications that is ISP-bound traffic from other types of telecommunications for purposes of reciprocal compensation have met with court disapproval.[46] Nonetheless, the Commission has ruled in ARB 671 that it may distinguish the subset of ISP-bound traffic from other forms of

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[45] *See* Qwest Response to Data Request No. UTI 01-12 (acknowledging that "there is no protocol conversion that Qwest undertakes to deliver a call to a Universal POI in Oregon"); *see also* Qwest Response to Data Request No. UTI 01-5 (stating that "with traffic to an ISP the call [is]... translated into TDM by the modem and delivered in TDM format to the POI").

[46] *Pacific Bell*, 325 F.3d at 1131; *WorldCom*, 288 F.3d at 430.

telecommunications for purposes of the RUF.[47] Universal respectfully disagrees, as most recently articulated in Section II, *supra*. Qwest would go a step further, and would have the Commission believe that it may distinguish this form of telecommunications under its limited delegated authority to manage NXX codes. Qwest argues that this form of telecommunications is not subject to 47 U.S.C. § 253(a). Qwest Response at n. 26. Qwest is wrong. "Information access" is a subset of the "telecommunications" referenced in § 253(a) and no state authority may prohibit or have the effect of prohibiting the ability of Universal to provide "information access" in the form of VNXX service. That other CLECs have not raised § 253(a) as a defense to constraints on VNXX is of no moment here.

For all these reasons the Commission must reconsider its decision to bar Universal from providing VNXX service.

V. QWEST'S COMMENTS ON UNIVERSAL'S STAY REQUEST.

Qwest argues at length that the Commission erred in granting Universal's Request for Stay, however, this issue is moot. Qwest Response at 25-29. In fact, the Commission properly resolved this issue when it determined that Universal met its burden to obtain a stay of Order No. 06-190 by showing that: 1) Universal would suffer irreparable injury because it would be forced to cease operation; and, 2) that no substantial public harm would result from granting the stay. Moreover, Qwest's argument are completely irrelevant to this proceeding and moot. Consequently, Universal does not comment on or admit to the feasibility of Qwest's proposed alternative network arrangements or its

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47 *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rules, Terms, Conditions and Related Arrangements with Universal Telecommunications, Inc.*, Order No. 06-190 at 8-9(2006).

contentions that Universal's Request for Stay was without merit because Universal could have simply changed the location of its ISP modems to comply with the Commission's order. These arguments have absolutely no bearing on the principal issue of whether the Commission should reconsider its prior decision in Order No. 06-190.

Further, to the extent the Commission determines not to reconsider its substantive rulings from Order No. 06-190, Universal respectfully requests that the Commission extend the Stay issued in Order No. 06-229 through such time as Universal exhausts its federal law remedies under 47 U.S.C. § 252(e)(6). The Commission has already found that Universal has met its burdens under ORS 183.482(3)(a)(A) and (B). Order No. 06-229 at 1, 2. Those burdens will not disappear, and indeed will be exacerbated, should the Commission enter a final order that, for example, bans the exchange of VNXX traffic. By contrast, extending the Stay merely continues the status quo as between Universal and Qwest while allowing Universal to pursue its legal and procedural claims before the federal district court in Oregon. On balance, this would appear to serve the administration of justice and the public interest for all the same reasons articulated in Universal's original Request for Stay.

VI. CONCLUSION.

For the reasons stated herein, Universal requests that the Commission reject the arguments raised by Qwest in its Response and instead reconsider its determinations in Order No. 06-190 as requested in Universal's request for reconsideration. In addition, Universal respectfully requests that, to the extent the Commission does not reconsider its rulings in Order No. 06-190, the Commission extend the Stay adopted in Order No. 06-229 until such time as Universal exhausts its federal law remedies under 47 U.S.C. § 252(e)(6).

Respectfully submitted,

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June 6, 2006

CERTIFICATE OF SERVICE

I, Gina Lee, hereby certify that on 6th day of June 2006, I caused copies of forgoing Reply to Qwest Corporation's Response to Universal Telecom's Request for Reconsideration to be sent by electronically to the following parties:

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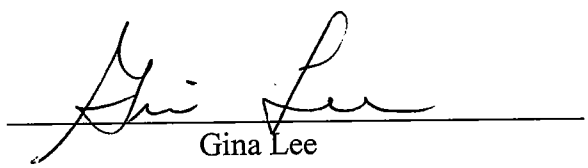

Gina Lee

ATTACHMENT 1

Qwest v. Universal, Slip Opinion,
2004 WL 2958421 (D. Or. 2004)

Slip Copy, 2004 WL 2958421
Briefs and Other Related Documents
Only the Westlaw citation is currently available.

United States District Court,D. Oregon.
QWEST CORPORATION, a Colorado corporation, Plaintiff,
v.
UNIVERSAL TELECOM, INC., dba U.S. Pops, fka Universal Telecommunications, Inc., an Oregon corporation Defendant.
No. Civ.04-6047-AA.

Dec. 15, 2004.

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OPINION AND ORDER

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

BACKGROUND

Qwest is an incumbent local exchange carrier ("ILEC") which provides local telephone services in Oregon. Universal is a competitive local exchange carrier ("CLEC") which provides telecommunication services in Oregon. A local exchange carrier ("LEC") is a provider of telephone services. An ILEC is a provider of telephone services which was in operation before the telephone industry was deregulated; while a CLEC is a new competitor who began providing telephone services after the industry was deregulated. Universal provides services to internet service providers ("ISPs") by offering local telephone numbers which the ISPs' customers may call using their computers. Universal receives these calls from ISPs' customers, who are seeking to access the internet, converts the calls to internet protocol, and delivers the internet protocol to different internet locations, as instructed by the customer's computer. Qwest is involved in this process because the calls from the ISPs' customer's computer must pass over Qwest's network to reach Universal's local telephone number. Qwest and Universal have interconnected their networks to allow this exchange of telecommunications traffic.

In 1999, Qwest and Universal entered into an interconnection agreement which set forth how the parties would connect their networks, exchange traffic, finance jointly used facilities, and compensate each other for delivering traffic received from the other

party. The agreement between Qwest and Universal was not negotiated. Instead, pursuant to federal law, Universal adopted a previous agreement ("MFS agreement") that Qwest had entered into with Metropolitan Fiber Systems. Thus the MFS agreement became the interconnection agreement between Universal and Qwest (hereafter "the agreement"). Under the agreement, the parties have interconnected their networks through a single point of interconnection ("POI") in each of the two Oregon Local Access and Transportation Areas ("LATA").

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

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

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

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

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

SUMMARY JUDGMENT STANDARD

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

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

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

APPLICABLE PRINCIPLES OF CONTRACT LAW

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

CHOICE OF LAW

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

DISCUSSION

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

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

"A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). An originating LEC may not impose charges on a terminating LEC for facilities, located on the originating LEC's side of the POI, used solely to transmit telecommunications traffic from the originating LEC's network to the terminating LEC's network. *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCCR 11166, 11189 ¶ 40 (2000), *aff'd sub. nom. Qwest Corp. v. F.C.C.*, 252 F.3d 462 (D.C.Cir.2001) (hereinafter "*TSR Wireless* "). When read together § 51.703(b) and *TSR Wireless* generally prohibit charges imposed on a CLEC for the cost of transmitting traffic that originates on the ILEC's network or for facilities used to deliver such traffic to the CLEC.

However, § 51.709(b) is an exception to this general prohibition. "The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by the interconnecting carrier to send traffic that will terminate on the providing carrier's network." 47 C.F.R. § 51.709(b). FN1 Thus, a ILEC may recover the cost of the interconnection facilities from a CLEC but only in proportion to the amount of traffic that originates on the CLEC's network and terminates on the ILEC's network. Overall, though, the FCC "reads § 51.703(b) as entirely congruent with § 51.709(b) confirming the ban on charges, whether labeled as for traffic or for facilities, for LEC-originated calls." *Qwest Corp. v. F.C.C.*, 252 F.3d at 468 (discussing charges imposed on a CLEC for facilities used to send only one-way traffic from the ILEC to the CLEC).

FN1. The applicable relative use provision of the agreement essentially tracks the requirements of 47 C.F.R. § 51.709(b). See Qwest Compl., Ex. 1 at 18.

Qwest argues that § 51.703(b) and § 51.709(b) apply only to telecommunications traffic and that ISP bound traffic is not telecommunications traffic. Therefore, because all of the traffic exchanged between the parties is ISP bound traffic, the restrictions of § 51.703(b) , § 51.709(b) , and *TSR Wireless* do not apply to facility charges imposed on Universal by Qwest. To support its argument, Qwest cites *In re Implementation of Local Competition Provisions in Telecomms. Act of 1996*, 16 F.C.C.R. 9151, 9170 *remanded sub. nom. Worldcom, Inc. v. F.C.C.*, 288 F.3d 429 (D.C. Cir.2002) (hereinafter *"ISP Remand Order"*), for the proposition that ISP traffic is not telecommunications traffic but is

information access. In *ISP Remand Order*, the FCC did rule that ISP bound traffic was not telecommunication traffic for the purpose of determining the scope of reciprocal compensation requirements under 47 U.S.C. § 251(b)(5). *ISP Remand Order*, 16 F .C.C.R. at 9163.

However, Qwest is mistaken in its broad application of *ISP Remand Order*. In *ISP Remand Order*, the FCC explicitly stated that its ruling "does not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change-of-law provisions." *Id.* at 9189. The FCC further stated that the interim compensation regime established in *ISP Remand Order* "affects only intercarrier compensation (i.e. the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing intercarrier agreements, such as obligations to transport traffic to points of interconnection." *Id.* at n. 149. Therefore, the restrictions of § 51.703(b) and § 51.709(b) remain in full effect.

Qwest asserts that its interpretation of *ISP Remand Order* is correct and cites *Level 3 Communications v. Colorado Pub. Util.*, 300 F. Supp 2d 1069 (D.Colo.2003), and the *OPUC Level 3 Decision* FN2 for further support. In *Level 3 Communications*, the Colorado District Court held that *ISP Remand Order* excluded ISP bound traffic from the definition of telecommunications traffic; instead designating it as information access. 300 F.Supp.2d at 1076. Based on this premise, the court went on to hold that ISP bound traffic was not subject to the restrictions of § 51.703(b) and § 51.709(b). *Id.* at 1076-1078. In the *OPUC Level 3 Decision*, the Oregon Public Utility Commission ("OPUC") affirmed an arbitrator's decision that ISP bound traffic should not be considered when determining the cost to be born by the CLEC for interconnection facilities located on the ILEC's side of the POI.2001 Ore. PUC LEXIS, *5. The OPUC relied on *ISP Remand Order* in affirming the arbitrator's decision. *Id.* at *6-7.

> FN2. *In re the Petition of Level 3 Communications, LLC for arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corp. Regarding Rates, Terms, and Conditions for Interconnection.*, Arbitrator's Decision, 2001 Ore. PUC LEXIS 458 (Sept. 13, 2001) (hereafter *"OPUC Level 3 Decision"*).

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

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

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

Qwest alleges that the agreement requires Universal to pay nonrecurring charges for the installation of the interconnection facilities and that Universal has failed to pay a portion of these charges. Qwest further claims that in June 2003 the OPUC approved the nonrecurring charges, as they complied with OPUC Order 03-209. Mason Aff. in Supp. of Qwest's Mot. for Summary Judgment, ¶ 12. Universal failed to address these claims either through its written briefs or at oral argument. If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 323. Here, by failing to respond to Qwest's claims, Universal did not meet its burden under *Celotex*. Therefore, the court credits the testimony of Don Mason and finds that the nonrecurring charges were proper and approved by the OPUC.

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

A local exchange carrier has:

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

47 U.S.C. § 251©) (3).

The parties agreement:

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

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

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

agreement. Qwest states:

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

Qwest's Reply Memo at 31-32 (internal quotations omitted) (emphasis in original). However, Qwest quotes only a portion of the agreement and ignores the proceeding sentence. Further, Qwest conveniently omits the word "also" which begins the quoted sentence. The omitted "also" refers to the proceeding sentence which provides that the agreement "sets forth the terms, conditions and prices under which [Qwest] agrees to provide ... certain Unbundled Network Elements ... to Universal ... *for Universal's own use* or for resale to others." Qwest Compl., Ex. 1 at 8 (emphasis added).

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

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

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

"The Parties agree that call termination rates as described in Appendix A will apply reciprocally for the termination of local/EAS traffic per minute of use." Qwest Compl., Ex. 1 at 17. Appendix A, by reference to rates established by the OPUC, set the reciprocal compensation rate at $0.00133 for local call termination. Qwest Compl., Ex. 1 at 86; Universal Statement Material Fact ¶ 38. To summarize, the agreement requires Qwest to pay Universal at a rate of $0.00133 per minute for terminating local calls that originated on Qwest's network.

A. *Change of Law*

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

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

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

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

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

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

Qwest Compl., Ex. 1 at 85. Thus, three conditions must be met for the change of law provision to apply. First, the FCC or OPUC must issue a decision that changes or modifies the rules and regulations governing the implementation of the Act. Second, the changes or modifications must alter the state

of the law upon which the agreement was negotiated. Third, it must reasonably appear that the parties would have negotiated and agreed to different terms had the changed law been in effect when the agreement was executed.

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

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

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

B. *VNXX Traffic*

Qwest further argues that the agreement does not require it to pay reciprocal compensation on VNXX traffic. I agree, VNXX traffic involves a call that is originated in one local calling area ("LCA") and is terminated in a different LCA without incurring the toll charges which would normally apply. The essence of VNXX traffic is that a LEC who does not have a physical presence in a particular calling area may appear to be local. The LEC gains this local appearance by holding a block of local numbers which the end user, who is located in that LCA, may call. Upon making what appears to be the local call, the call is relayed over the lines of the local LEC, passed off to the distant LEC and terminated by that distant LEC. For example, an ISP located in Portland, Oregon would request a local Bend, Oregon telephone number held by the CLEC. A person in Bend would call that number to connect to the internet. The call would be relayed by the ILEC serving the Bend area, handed off to the CLEC at the POI in Portland and terminated by delivery to the ISP in Portland. Thus the person making the call would be billed at the local rate for a call that was really long distance.

In the instant case, VNXX traffic is generated when an end user, who is not

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

The agreement requires the payment of reciprocal compensation "for the termination of local/EAS FN3 traffic per minute of use." Qwest Compl., Ex. 1 at 17. Traffic exchanged within each of the two Oregon LATAs is classified as " 'local' (local includes EAS), or 'toll' which shall be the same as the characterization established by the effective tariffs of the incumbent local exchange carrier as of the date of this agreement." Qwest Compl., Ex. 1 at 13. Thus, the agreement adopted the definition of "local" that was listed in Qwest's Oregon tariff at the time the agreement became effective.

> FN3. Extended Area Service ("EAS") is essentially a large LCA, which is used to allow local calling within a metropolitan area. *See* Qwest's Mem. in Res. to Universal's Mot. of Summ. J. at 7-8.

Qwest's Oregon tariff defines "local service" as "[t]elephone service furnished between customer's premises located within the same local service area." Mason Aff. in Supp. of Qwest's Motion for Summary Judgment, Ex. B. The tariff further defines "local service area" as "[t]he area within which telephone service is furnished under a specific schedule of rates. This area may include one or more exchanges without the application of toll charges." *Id.* A "local service area" is the equivalent of a LCA. Mason Aff. ¶ 4. Finally, "premises" is defined as "[a] tract of land" or buildings on such land. Mason Aff., Ex. B.

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

Thus, for a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA or EAS and terminated at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in

a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the ISP. VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal compensation.

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

In the *MFS Decision*, MFS entered into an interconnection agreement with Qwest. *See Id.* at *1. Under the agreement MFS was to terminate traffic originated on Qwest's network using switch facilities. *See Id.* at *7. MFS argued that it should be paid reciprocal compensation at a higher rate usually reserved for traffic terminated on tandem facilities. *Id.* at *7-8. MFS asserted that it should be paid at the tandem rate because it's switch facilities terminated traffic from a wider geographic area than is normal for switch facilities. *Id.* at *7-8. The OPUC merely held that MFS should be compensated at the lower end office rate, normal for traffic terminated on switch facilities. *Id.* at *9. The OPUC decided what rate should apply to traffic subject to reciprocal compensation, not, as Universal argues, what traffic was subject to reciprocal compensation. *See Id.* at *6. The OPUC apparently assumed that all traffic terminated by MFS was subject to reciprocal compensation, as the issue of VNXX traffic was never raised. Thus, the *MFS Decision* is inapplicable to the question of whether VNXX traffic is subject to reciprocal compensation and has no preclusive effect. FN4

FN4. Lending further support to this conclusion is the recent OPUC decision *In re the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, 2004 Ore. PUC LEXIS 425 (Sept. 7, 2004) (hereafter referred to as the *VNXX General Docket Decision.* In the *VNXX General Docket Decision* the OPUC declined to issue any formal ruling as to whether VNXX traffic violated current telecommunications regulations. *Id.* at *11. The OPUC declined to issue any such ruling because the recent Ninth Circuit case *Pacific Bell v. **Pac-West***, 325 F.3d 1114, held that state commissions lacked authority to conduct general docket investigations. *Id.* at *5. However, prior to the ***Pac-West*** decision, the OPUC conducted a general docket investigation to decide whether VNXX traffic violated the requirement that all LECs abide by OPUC designated exchange boundaries. *Id.* at *8-9.

> The OPUC conducted this investigation as if the issue of VNXX traffic was entirely new and no mention was made of the *MFS Decision. See Id.* at *8-11. If the OPUC had held in the *MFS Decision* that VNXX traffic was local traffic and a legitimate practice, as Universal alleges, one would expect the *MFS Decision* to have been cited in the *VNXX General Docket Decision.* In fact if the *MFS Decision* stood for the proposition that Universal alleges, the *VNXX General Docket Decision* would be unnecessary as the issues it addressed would have been previously decided.

C. *Transit Traffic*

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

In section V.B. of the agreement transit traffic and local/EAS traffic are defined. *See* Qwest Compl., Ex. 1 at 15. "Transit traffic is any traffic other than switched access, that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Carrier's network." *Id.* As described above, local/EAS traffic is "[t]elephone service furnished between customer's premises located within the same local service area." Mason Aff., Ex. B.

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

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

CONCLUSION

There is no genuine issue of material fact as to whether Qwest may charge Universal for interconnection facilities used solely to transport traffic for termination on Universal's network. The agreement and FCC regulations clearly prohibit such charges. There is also no genuine issue of material fact as to whether Universal is required to pay the nonrecurring installation

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

IT IS SO ORDERED.

D.Or.,2004.
Qwest Corp. v. Universal Telecom, Inc.
Slip Copy, 2004 WL 2958421

Briefs and Other Related Documents (Back to top)

- 6:0406047 (Docket) (Feb. 05, 2004)
- 6:04CV06047 (Docket) (Feb. 05, 2004)

END OF DOCUMENT

ATTACHMENT 2

Sections 7.3.1.1.3.1 and 7.3.2.2.1 from Qwest's Proposed ICA

and meets the applicable technical parameters.

7.2.2.11 Mileage Measurement. Where required, the mileage measurement for LIS rate elements is determined in the same manner as the mileage measurement for V&H methodology as outlined in NECA Tariff No. 4.

7.3 Reciprocal Compensation

7.3.1 Interconnection Facility Options

The Reciprocal Compensation provisions of this Agreement shall apply to the exchange of Exchange Service (EAS/Local) traffic between CLEC's network and Qwest's network. Where either Party acts as an IntraLATA Toll provider, each Party shall bill the other the appropriate charges pursuant to its respective tariff or price lists. Where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective tariffs, price lists or contractual offerings for such third party terminations. Absent a separately negotiated agreement to the contrary, the Parties will directly exchange traffic between their respective networks without the use of third party transit providers.

7.3.1.1 Entrance Facilities

7.3.1.1.1 Recurring and nonrecurring rates for Entrance Facilities are specified in Exhibit A and will apply for those DS1 or DS3 facilities dedicated to use by LIS.

7.3.1.1.2 If CLEC chooses to use an existing facility purchased as private line transport service from the Qwest state or FCC access Tariffs, the rates from those Tariffs will apply.

7.3.1.1.2.1 Intentionally Left Blank.

7.3.1.1.3 If the Parties elect to establish LIS two-way trunks, for reciprocal exchange of Exchange Service (EAS/Local) traffic, the cost of the LIS two-way facilities shall be shared among the Parties by reducing the LIS two-way Entrance Facility (EF) rate element charges as follows:

7.3.1.1.3.1 The provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor (RUF) of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party for the use of the EF, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one (1) quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. If CLEC's End User Customers are assigned NPA-NXXs associated with a rate center different from the rate center where the End User Customers are physically located, traffic that does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the called and calling

NPA-NXXs involving those End User Customers, is referred to as "VNXX traffic." For purposes of determining the relative use factor, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. If either Party demonstrates with traffic data that actual minutes of use during the previous quarter justifies a new relative use factor, that Party will send a notice to the other Party. The new factor will be calculated based upon Exhibit H. Once the Parties finalize a new factor, bill reductions and payments will apply going forward from the date the original notice was sent. ISP-bound traffic or traffic delivered to Enhanced Service providers is interstate in nature. Qwest and CLEC shall not exchange VNXX traffic.

7.3.1.2 Collocation

7.3.1.2.1 See Section 8.

7.3.2 Direct Trunked Transport

7.3.2.1 Either Party may elect to purchase direct trunked transport from the other Party.

7.3.2.1.1 Direct trunked transport (DTT) is available between the Serving Wire Center of the POI and the terminating Party's Tandem Switch or End Office Switches. The applicable rates are described in Exhibit A. DTT facilities are provided as dedicated DS3, DS1 or DS0 facilities.

7.3.2.1.2 When DTT is provided to a local or Access Tandem Switch for Exchange Service (EAS/Local) traffic, or to an Access Tandem Switch for Exchange Access (IntraLATA Toll), or Jointly Provided Switched Access traffic, the applicable DTT rate elements apply between the Serving Wire Center and the Tandem Switch. Additional rate elements for delivery of traffic to the terminating End Office Switch are tandem switching and tandem transmission. These rates are described below.

7.3.2.1.3 Mileage shall be measured for DTT based on V&H coordinates between the Serving Wire Center and the local/Access Tandem Switch or End Office Switch.

7.3.2.1.4 Fixed Charges per DS0, DS1 or DS3 and per mile charges are defined for DTT in Exhibit A of this Agreement.

7.3.2.2 If the Parties elect to establish LIS two-way DTT trunks, for reciprocal exchange of Exchange Service (EAS/Local) traffic, the cost of the LIS two-way DTT facilities shall be shared among the Parties by reducing the LIS two-way DTT rate element charges as follows:

7.3.2.2.1 The provider of the LIS two-way DTT facility will initially share the cost of the LIS two-way DTT facility by assuming an initial relative use factor of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party for the use of the DTT facility, as described in Exhibit A, shall be reduced by this initial

relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one (1) quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor,–based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. If CLEC's End User Customers are assigned NPA-NXXs associated with a rate center other than the rate center where the End User Customers are physically located, traffic that does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the called and calling NPA-NXXs involving those End User Customers, is referred to as "VNXX traffic." For purposes of determining the relative use factor, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. If either Party demonstrates with traffic data that actual minutes of use during the previous quarter justifies a new relative use factor, that Party will send a notice to the other Party. The new factor will be calculated based upon Exhibit H. Once the Parties finalize a new factor, bill reductions and payments will apply going forward from the date the original notice was sent. ISP-bound traffic is interstate in nature. Qwest and CLEC shall not exchange VNXX traffic.

7.3.2.3 Multiplexing options (DS1/DS3 MUX or DS0/DS1 MUX) are available at rates described in Exhibit A.

7.3.3 Trunk Nonrecurring charges

7.3.3.1 Installation nonrecurring charges may be assessed by the provider for each LIS trunk ordered. Qwest rates are specified in Exhibit A.

7.3.3.2 Nonrecurring charges for rearrangement may be assessed by the provider for each LIS trunk rearrangement ordered, at one-half (1/2) the rates specified in Exhibit A.

7.3.4 Exchange Service (EAS/Local) Traffic

7.3.4.1 End Office Switch Call Termination

7.3.4.1.1 The per-minute-of-use call termination rates as described in Exhibit A of this Agreement will apply reciprocally for Exchange Service (EAS/Local) traffic terminated at a Qwest or CLEC End Office Switch.

7.3.4.1.2 For purposes of call termination, CLEC Switch(es) shall be treated as End Office Switch(es) unless CLEC's Switch(es) meet the definition of a Tandem Switch in this Agreement in the Definitions Section.

7.3.4.1.3 Intentionally Left Blank.

7.3.4.1.4 Neither Party shall be responsible to the other for call termination charges associated with third party traffic that transits such Party's network.

ATTACHMENT 3

Qwest-Universal Amendment to Existing ICA
Regarding Compensation for VNXX Traffic

Qwest Corporation/Universal Telecom

Amendment to the Interconnection Agreement between Qwest Corporation and Universal Telecom, Inc. for the State of Oregon

This Amendment to the Interconnection Agreement ("Amended Agreement" or "Agreement") is entered into effective this February ___, 2006, by and between Qwest Corporation, a Colorado Corporation ("Qwest") and Universal Telecom, Inc, an Oregon corporation, ("Universal"). Qwest and Universal are also collectively referred to hereafter at times as "the Parties."

RECITALS

WHEREAS, the Parties entered into an Interconnection Agreement for service in the state of Oregon, which was approved by the Oregon Public Utility Commission ("Commission") on September 22, 1999, as referenced in Docket No. ARB-157, Order No. 99-00547; and

WHEREAS, this Amended Agreement is executed coincident with, and as an integral part of the Parties' Confidential Settlement Agreement and Mutual Release, which addresses the financial resolution of past disputes between the Parties, as well as the resolution of two lawsuits (Case Nos. 04-cv-6047-AA and 6:05-cv-6200-TC in federal court for the District of Oregon) and Universal's challenge to the propriety of the arbitration of a new interconnection agreement between the Parties in Commission docket ARB 671; and

WHEREAS, the Parties wish to amend the Interconnection Agreement further under the terms and conditions contained herein.

AGREEMENT

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Amendment Terms

The Interconnection Agreement is hereby amended by adding terms, conditions and rates governing the Parties until a new interconnection agreement becomes effective as set forth in Attachment 1 and Appendix A to this Agreement, attached hereto and incorporated herein by this reference.

Effective Date

This Agreement shall be deemed effective upon approval by the Commission; however, the Parties agree to implement the provisions of this Agreement upon execution.

Further Amendments

Except as modified herein, the provisions of the Interconnection Agreement shall remain in full force and effect. The provisions of this Agreement, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from

the provisions of this Agreement may not be given without the written consent thereto by both Parties' authorized representative. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, will be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

Entire Agreement

The Agreement as amended (including the documents referred to herein) constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended and supersedes any prior understandings, agreements, or representations by or between the Parties, written or oral, to the extent they relate in any way to the subjects of the Agreement as amended.

IN WITNESS THEREOF, Qwest and Universal have caused this Agreement to be duly executed and delivered as of the date first set forth above.

Universal Telecom, Inc.	**Qwest Corporation**
Signature	Signature
Jeffry R. Martin Name Printed/Typed	L. T. Christensen Name Printed/Typed
President Title	Director – Interconnection Agreements Title
02/24/06 Date	2/24/06 Date

ATTACHMENT 1

1. TERMS AND CONDITIONS GOVERNING PARTIES UNTIL NEW INTERCONNECTION AGREEMENT BECOMES EFFECTIVE. The following terms shall govern the Parties until a new interconnection agreement is approved in ARB 671 and, to the extent these terms vary from the terms of the existing interconnection agreement, the following terms shall prevail:

1.1. For the months commencing on November 1, 2005 until a new interconnection agreement is approved, consistent with the Court's decision in Case No. 04-cv-6047-AA, reciprocal compensation shall be paid by the Parties based upon calculating reciprocal compensation for minutes originated and terminated within the same local calling (which shall include tandem traffic), with the termination point of ISP traffic to Universal being the modem banks located in the Universal POPs in Eugene and Portland (or other locations where Universal locates modems or modem banks prior to the approval of a new agreement). "Virtual NXX" or "VNXX" traffic (i.e., traffic that does not originate and terminate within the same local calling area) and "transit traffic" (traffic that originates on the network of a carrier other than Qwest, but which is carried on Qwest's network before being delivered to Universal) shall be excluded from the amount owed by Qwest to Universal for reciprocal compensation. Payments by the Parties for reciprocal compensation will be governed by the terms of the new interconnection agreement at such time as it is approved by the Commission.

1.2. Consistent with the Court's decision in Case No. 04-cv-6047-AA, commencing with the December 2005 invoice, Universal shall pay $2,342.15 per month for the two existing meet point circuits (which represents a combined amount that includes the payment for both existing meet point circuits—the Beaverton meet point circuit represents $719.70 of the total; the Coos Bay meet point circuit represents $1,622.45 of the total). If, prior to the approval of a new interconnection agreement, the Commission adjusts the rates for Unbundled Dedicated Interoffice Transport ("UDIT") unbundled network element ("UNE") rates, the charges for these circuits will be adjusted consistent with the method by which Qwest calculated the amount owing using UDIT rates. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. If new (or similar) services are ordered by Universal prior to the approval of a new interconnection agreement, UDIT rates shall apply to them. If either of the services are disconnected the amounts owed by Universal to Qwest for the meet point circuits will be reduced by the amount stated for each circuit above. Once a new interconnection agreement is approved, meet point services will be governed by that agreement. Appendix A to this Amendment sets forth the rates for UDIT that apply under this paragraph 1.2. These rates supplement the rates in Appendix A to the existing interconnection agreement.

1.3 Nonrecurring charges for direct trunked transport ("DTT"), entrance facilities ("EF"), and Multiplexing (as well as other interconnection facilities or UNEs) requested by Universal after the November 2005 invoice shall be billed by Qwest and paid for Universal at the rates established by the Commission for such facilities. Once a new interconnection agreement is approved, nonrecurring charges will be governed by the approved interconnection agreement.

1.4 Consistent with the Court's decision in Case No. 04-cv-6047-AA, Qwest shall not recover recurring charges for DTT, EF, and Multiplexing until a new interconnection agreement is approved, unless Universal begins to originate traffic, in which case the relative use factor in the existing interconnection agreement will allocate a portion of the financial responsibility for the DTT, EF, and Multiplexing facilities to

Universal. Once a new interconnection agreement is approved, financial responsibility for existing DTT, EF, and Multiplexing and any new DTT, EF, and Multiplexing shall be governed by the new interconnection agreement.

1.5. Universal shall have the right to relocate or establish new modems or modem banks under the existing and new interconnection agreements, so long as it provides notice of its intention to do so no less than thirty (30) days in advance of doing so. Part of that notice shall include the physical location of the modems by local calling area and the telephone numbers that will thereafter be associated with the relocated or new modems or modem banks. Irrespective of the other notice provisions contained in the Confidential Settlement Agreement and Mutual Release, in the event Universal decides to place modems or modem banks at locations other than the two existing POPs in Portland and Eugene, it shall provide notice of its intention to:

Nancy J. Batz
Qwest Corporation
421 SW Oak
Room 8S16
Portland, OR 97204
Fax: (503) 242-8558

1.6. In the event Universal relocates or establishes new modems or modem banks pursuant to paragraph 1.5, irrespective of other audit provisions in the existing interconnection or in the new interconnection agreement, Qwest shall have the right on an annual basis to audit to assure that the traffic that Universal states is associated with certain modems or modem banks is actually being terminated by those modems or modems banks. Universal shall cooperate with Qwest and shall provide reasonable information, which shall be maintained by Qwest on a confidential basis, to allow Qwest to perform such an audit. If the audit demonstrates less than a five percent (5%) discrepancy for traffic associated with relocated or new modems or modems banks, Qwest shall reimburse Universal's reasonable costs of complying with the audit. Universal shall have the responsibility to specifically identify those costs on an itemized basis. To the extent the variance exceeds five percent (5%), each party shall bear their own costs related to such an audit.

1.7. The Parties' agreement to amend the existing interconnection agreement to conform with the decisions of the Court in Case No. 04-cv-6047-AA should not be construed as either Parties' agreement that certain aspects of the Court's decisions are necessarily consistent with the language of the existing interconnection agreement or consistent with the requirements of the Act.

Appendix A
Oregon*

New			Recurring	Recurring, per Mile	Non-Recurring	Notes: Rec	Notes: NRC, per Mile	Notes: NRC
9.0	Unbundled Network Elements (UNEs)							
9.6	Unbundled Dedicated Interoffice Transport (UDIT)							
9.6.1	DS0 UDIT *(Recurring Fixed & per Mile)*							
	9.6.1.1	Over 0 to 8 Miles	$19.74	$0.09		E	E	
	9.6.1.2	Over 8 to 25 Miles	$19.74	$0.08		E	E	
	9.6.1.3	Over 25 to 50 Miles	$19.74	$0.11		E	E	
	9.6.1.4	Over 50 Miles	$19.74	$0.08		E	E	
	9.6.1.5	Manual			$172.66			F, 13
	9.6.1.6	Mechanized			$99.08			F
9.6.2	DS1 UDIT *(Recurring Fixed & per Mile)*							
	9.6.2.1	Over 0 to 8 Miles	$37.94	$0.49		E	E	
	9.6.2.2	Over 8 to 25 Miles	$37.94	$0.85		E	E	
	9.6.2.3	Over 25 to 50 Miles	$37.94	$1.16		E	E	
	9.6.2.4	Over 50 Miles	$34.94	$1.17		E	E	
	9.6.2.5	Manual			$190.69			F, 13
	9.6.2.6	Mechanized			$117.48			F
9.6.3	DS3 UDIT *(Recurring Fixed & per Mile)*							
	9.6.3.1	Over 0 to 8 Miles	$253.13	$9.95		E	E	
	9.6.3.2	Over 8 to 25 Miles	$253.13	$10.19		E	E	
	9.6.3.3	Over 25 to 50 Miles	$253.13	$14.27		E	E	
	9.6.3.4	Over 50 Miles	$253.13	$21.11		E	E	
	9.6.3.5	Manual			$193.66			F, 13
	9.6.3.6	Mechanized			$120.45			F
9.6.4	Intentionally Left Blank							
9.6.5	Intentionally Left Blank							
9.6.6	Intentionally Left Blank							
9.6.7	UDIT DS0 Channel Performance							
	9.6.7.1	DS0 Low Side Channelization	$14.50			12		
9.6.8	Intentionally Left Blank							
9.6.9	Intentionally Left Blank							
9.6.10	Intentionally Left Blank							
9.6.11	UDIT Rearrangement							
	9.6.11.1	DS0 Single Office			$171.64			12
	9.6.11.2	DS0 Dual Office			$215.90			12
	9.6.11.3	High Capacity, Single Office			$231.72			12
	9.6.11.4	High Capacity, Dual Office			$280.28			12
9.6.12	Private Line / Special Access to UDIT Conversion (as is)				$123.96			1

NOTES:

Unless otherwise indicated, all rates are pursuant to Oregon PUC Dockets listed below:

E: UT 138 Ph II Recurring (Order No. 02-184)

F: UT 138 Ph III Nonrecurring (Order No. 03-085)

[1] Rates not addressed in a Cost Docket (estimated TELRIC)

[12] Rates proposed in UM 1025

[13] Qwest is unable to bill Manual NRC rates at this time; the corresponding Mechanized NRC rate will be billed instead.

PUBLIC UTILITY COMMISSION OF OREGON
550 CAPITOL ST. NE, SUITE 215
SALEM, OR 97301-2551

CARRIER-TO-CARRIER AGREEMENT CHECKLIST

INSTRUCTIONS: Please complete all applicable parts of this form and submit it with related materials when filing a carrier-to-carrier agreement pursuant to 47 U.S.C. 252 and OAR 860-016-0000 et al. The Commission will utilize the information contained in this form to determine how to process the filing. **Unless you request otherwise in writing, the Commission will serve all documents related to the review of this agreement electronically to the e-mail addresses listed below.**

1. PARTIES

	Requesting Carrier	*Affected Carrier*
Name of Party:	Universal Telecommunications, Inc.	Qwest Corporation
Contact for Processing Questions:		
Name:	Jeff Martin	Carla Butler
Telephone:	(541) 752-9818	(503) 242-5420
E-mail:	martinj@uspops.com	carla.butler@qwest.com
Contact for Legal Questions (if different):		
Name:		
Telephone:		
E-mail:		
Other Persons wanting E-mail service of documents (if any):		
Name:		Don Mason / Steve Dea
E-mail:		don.mason@qwest.com / intagree@qwest.com

2. TYPE OF FILING

NOTE: Parties making multiple requests (such as seeking to adopt a previously approved agreement and Commission approval of new negotiated amendments to that agreement) should submit a separate checklist for each requested action.

☐ Adoption: Adopts existing carrier-to-carrier agreement filed with Commission.

- Docket ARB _____
- Parties to prior agreement _____ & _____
- Check one:
  - ☐ Adopts base agreement only; or
  - ☐ Adopts base agreement and subsequent amendments approved in Order No(s). _____

☐ New Agreement: Seeks approval of new negotiated agreement.

- Does filing replace an existing agreement between the parties?
  - ☐ NO
  - ☐ YES, Docket ARB _____
- If filing involves Qwest Communications, does it utilize the terms of an SGAT?
  - ☐ NO
  - ☐ YES, Revision _____

☒ Amendment: Amends an existing carrier-to-carrier agreement.

Docket ARB 157

☐ Other: Please explain.

ATTACHMENT 4

Exhibits H and J of Qwest's Proposed ICA

EXHIBIT H

Calculation of the Relative Use Factor (RUF)

Minutes that are Qwest's responsibility (A):

- All EAS/Local 251(b)(5) Minutes of Use (MOU) that Qwest sends to CLEC
- All Qwest Exchange Access MOU that Qwest sends to CLEC
- EAS/Local 251(b)(5) traffic that transits Qwest network and is terminated to CLEC, for which Qwest receives compensation from the originating Carrier for performing the local transiting function
- All IntraLATA transit MOU that Qwest sends to CLEC
- All ISP-bound and FX MOU that CLEC sends to Qwest

Minutes that are CLEC's responsibility (B):

- All EAS/Local 251(b)(5) MOU that CLEC sends to Qwest
- All Exchange Access MOU that CLEC sends to Qwest
- All EAS/Local 251(b)(5) traffic that CLEC sends to Qwest for termination on another Carrier's network
- All IntraLATA transit MOU that CLEC to Qwest
- All Jointly Provided Switched Access (unless joint NECA 4 billing percentages have been filed) that Qwest sends to CLEC and that CLEC sends to Qwest
- All ISP-bound and VNXX MOU that Qwest sends to CLEC
- All VNXX MOU that transits Qwest network and is terminated to CLEC

The mathematical equation for RUF is as follows:

Qwest (A) / (A+B)	**Rounded to nearest whole percentage**
CLEC (B) / (A+B)	**Rounded to nearest whole percentage**

Data used for the calculation will be the average of the most recent three (3) months' usage determined not to be an anomaly.

Exhibit J
Election of Reciprocal Compensation Option

Pursuant to the election in this Exhibit J of this Agreement, the Parties agree to exchange (§251(b)(5)) Traffic, per section 7.3.4.4 at:

CLEC must select either 1. OR 2.

1. The rates applicable to §251(b)(5) Traffic between Qwest and CLEC shall be the same as the rates established in ISP-bound traffic pursuant to Section 7.3.6.2.3. Such rate for ISP-bound traffic will apply to §251(b)(5) Traffic in lieu of End Office Call Termination rates, and Tandem Switched Transport rates.
Signature

2. Compensation rate for §251(b)(5) Traffic shall be as established by the Commission. The Parties shall cooperate in establishing a process by which §251(b)(5) Traffic and ISP-bound traffic will be identified in order to compensation one another at the appropriate rates and in an prompt manner (See §7.3.6).
Signature

When the FCC ordered rate for ISP-bound traffic is applied to (§251(b)(5)) Traffic, the FCC Ordered ISP rate is used in lieu of End Office call termination and Tandem Switched Transport rate elements.