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Carla M. Butler
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May 11, 2005

Frances Nichols
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: IC-8 & IC-9

Dear Ms. Nichols:

Enclosed please find an original and five (5) copies of Qwest's Additional Legal Brief Regarding Possible Impact of Universal Federal Court Decision on These Dockets, along with a certificate of service.

If you have any questions, please don't hesitate to give me a call.

Sincerely,



Carla M. Butler

CMB:

Enclosure

cc: Service List

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 8/IC 9

WANTEL, INC., doing business as
ComSpanUSA et al.

Complainants,

v.

QWEST CORPORATION,

Respondent.

PAC-WEST TELECOMM, INC.,

Plaintiff,

v.

QWEST CORPORATION (FKA U S WEST
COMMUNICATIONS, INC.),

Defendant.

**QWEST'S ADDITIONAL LEGAL
BRIEF REGARDING POSSIBLE
IMPACT OF UNIVERSAL FEDERAL
COURT DECISION ON THESE
DOCKETS**

Pursuant to Administrative Law Judge Sam Petrillo's request at the April 27, 2005 prehearing conference, defendant Qwest Corporation ("Qwest") respectfully submits its additional legal brief regarding the possible impact of the *Universal* federal court decision on these dockets.

ARGUMENT

I. UNIVERSAL'S IMPACT ON THE ISP AND VNXX TRAFFIC ISSUES

The first issue on which the ALJ wanted the parties to comment was with respect to any possible impact of the recent *Universal* federal court decision ("*Universal*" or "*Universal* decision") on the ISP traffic and VNXX traffic issues in these docket.¹ Specifically, as Qwest understands it, the ALJ wants the parties to comment on whether the *Universal* decision has any impact on the issue whether, if the relative use factor ("RUF") applies to the DTT facilities here, the facilities used for ISP traffic and/or VNXX traffic should be excluded from the RUF.

¹ The *Universal* decision refers to the Opinion and Order issued by the Honorable Ann Aiken of the United States District Court for the District of Oregon in *Qwest Corporation v. Universal Telecom, Inc.*, Case No. 6:04-cv-6047-AA, on December 15, 2004.

For the reasons set forth below, Qwest submits that the *Universal* decision does *not* have any material impact on the ISP traffic issue. This is primarily so because unlike the parties in *Universal*, Qwest and Pac-West actually entered into a “change of law” amendment in their interconnection agreements (“ICAs”) to reflect the change of law arising from the FCC’s *ISP Remand Order*.² However, even if *Universal* has any impact on the ISP traffic issue here, the decision actually supports Qwest’s position because unlike in *Universal*, Pac-West and Qwest entered into a change of law amendment to their ICA. Further, with respect to the VNXX traffic issue, the *Universal* decision strongly supports Qwest’s position that any facilities used to provide VNXX traffic should be *excluded* from any RUF calculation (assuming the RUF even applies to the DTT facilities at issue). This is so because the *Universal* decision confirmed the Commission’s previous decision in Order No. 04-504 in docket UM 1058 that VNXX traffic is, *by definition*, not “local” traffic, and the RUF here only applies to local traffic.

A. *Universal’s impact on the ISP traffic issue*

As stated, the *Universal* decision does not have any material impact on the ISP traffic issue here. First, as the Commission knows, the *Universal* decision is not entirely on point because the issue there had to do with *reciprocal compensation* for ISP traffic. In contrast, the issue with Pac-West has to do with the *relative use factor* for *DTT facilities* (and whether, *if* the RUF applies to these facilities, any facilities used for ISP traffic should be excluded from RUF calculations because the RUF applies only to local traffic).

Second, to the extent *Universal* does have any impact on the ISP traffic issue here (such as, for example, what traffic should be considered “local” and what traffic is not local),

² The issues in this additional legal brief appear to apply and be limited only to Pac-West’s complaint (docket No. IC 9), and not to Wantel’s complaint (docket IC 8), because only Pac-West makes the argument that it is entitled to any relative use factor calculations for the DTT facilities at issue. In addition, the vast majority, if not all, of the Pac-West traffic on the DTT facilities appears to be both ISP traffic and VNXX traffic. However, to the extent that Wantel makes any similar arguments, Qwest’s brief would apply to Wantel as well.

Universal actually supports Qwest's position here. This is so because although the court in *Universal* stated that the FCC's *ISP Remand Order* was not a "change of law" that "automatically" amended the parties' ICA, it ruled that since Qwest and Universal had *not* entered into a change of law amendment to reflect the FCC *ISP Remand Order*, the Qwest/Universal ICA had not been amended. Here, however, Qwest and Pac-West actually entered into a change of law amendment of their ICA in 2002 and 2003 that reflected a recognition that the FCC's *ISP Remand Order* did not consider ISP traffic to be local telecommunications traffic. That is, Qwest and Pac-West amended their ICA to reflect that "[t]he FCC issued an Order on Remand and Report and Order in CC Docket 99-68 (Intercarrier Compensation for ISP-Bound Traffic) [the *ISP Remand Order*], "the Parties wish to *amend* the Agreement to *reflect the aforementioned Order* under the terms and conditions contained herein," and "the Parties wish to amend the Agreement to add a Change of Law provision." (See the parties' ICA amendment, No. 4, approved on April 4, 2003 in Order No. 03-204 in docket ARB 198 (emphasis added).)

Thus, Qwest and Pac-West recognized that the FCC's *ISP Remand Order* did not consider ISP traffic to be local telecommunications traffic, that the FCC had phased in a transitional compensation scheme for such traffic, and that the parties would implement the new FCC rates for ISP traffic. Therefore, although the issue with Pac-West does not deal with reciprocal compensation for ISP traffic (unlike in *Universal*), here there was indeed an ICA change of law amendment that reflected the FCC's *ISP Remand Order*, which clearly did not consider ISP traffic to be local telecommunications traffic. Accordingly, although the *Universal* decision here is not entirely on point, it is instructive and helpful to Qwest's position because, unlike in *Universal*, Qwest and Pac-West *did* amend their ICA to reflect the *ISP Remand Order* change of law.

B. *Universal's impact on the VNXX traffic issue*

In addition, the *Universal* decision regarding the VNXX issue actually strengthens Qwest's position that even if the RUF were to apply to any MRCs or NRCs for the DTT facilities at issue, any facilities used to engage in VNXX traffic should be excluded from such calculations. This is so because the *Universal* court confirmed this Commission's previous decision in Order No. 04-504 that VNXX traffic is, by definition, *not* "local traffic." Thus, because the ICAs at issue here provide that the RUF applies *only* to local traffic, VNXX traffic and the facilities that carry such traffic should be excluded from any RUF that may be deemed to apply.

In *Universal*, the court expressly agreed with Qwest that no reciprocal compensation was due for VNXX traffic because *VNXX traffic is not local traffic*. Here, although the issue between Qwest and Pac-West is not reciprocal compensation, but rather, whether the RUF applies to DTT facilities, the same analysis in *Universal* is on point. Since VNXX traffic is not local traffic, by definition, and since the RUF applies only to local traffic (see e.g., ICA, §§ V.A., V.B., V.C., and V.D.), any facilities that Pac-West has used to engage in VNXX traffic should be excluded from any RUF calculation (to the extent that the RUF even applies here, which Qwest denies).

Specifically, the court in *Universal* recognized that the definition of "local traffic" in the ICA there (essentially the same ICA here) was the definition which was listed in Qwest's Oregon tariff at the time the ICA became effective. The court then concluded: "VNXX traffic *does not meet the definition of local traffic* because it does not originate and terminate in the same LCAs [local calling areas] and EASs [Extended Area Service areas]." Opinion and Order, p. 24. (Emphasis added.) The court further rejected *Universal's* argument that the Commission's *MFS* decision in 1996 applied to VNXX traffic. *Id.*, pp. 25-26. Finally, the court in *Universal* ruled that

the Commission's recent decision in docket UM 1058 (Order No. 04-504) "len[t] further support to [its] conclusion" that VNXX traffic is not local traffic. *Id.*, p. 26, fn. 4.³

Accordingly, to the extent that Pac-West uses any of the facilities at issue to engage in VNXX traffic, the RUF does not apply to such facilities.⁴ The *Universal* decision further strengthens Qwest's argument on this issue.

II. IMPACT ON THE CHANGE OF LAW PROVISION HERE

The second issue on which the ALJ requested comments is the extent to which the *Universal* decision's "change of law" discussion has any impact on the parties' contractual obligations here. For the reasons set forth above, the *Universal* change of law discussion really has no material impact here. This is so because, as stated, the *Universal* change of law discussion dealt with *reciprocal compensation* for ISP traffic, whereas there are no reciprocal compensation issues here.

Moreover, even to the extent that the *Universal* court's interpretation that the *ISP Remand Order* was not an "automatic" change of law (i.e., the *ISP Remand Order* "does not alter existing contractual obligations") has any impact here, the court nevertheless recognized that there was an exception "to the extent that the parties are entitled to invoke contractual change-of-law provisions." Opinion and Order, pp. 11, 17-18. Here, of course, Qwest and Pac-West did enter into a change of law amendment to their ICA which specifically adopted and reflected the FCC *ISP Remand Order*. Thus, the *Universal* court's expressed concern that the "state of the law upon which the [ICA] was negotiated" had not been changed since the ICA was negotiated (see Opinion

³ In that order, the Commission ruled that a CLEC engaging in VNXX traffic would be violating two of the standard conditions in their certificates of authority (pertaining to local exchange boundaries and EAS routes to distinguish between local and toll services, and limiting NXX codes to a single local exchange or rate center). Order No. 04-504, p. 5. See also ORS 759.005(2)(c); OAR 860-032-0001; Arbitrator's Decision in ARB 527, pp. 6-7.

⁴ Since most if not all of the VNXX traffic at issue is likely also ISP traffic, exclusion of ISP traffic from calculation of the relative use factor (as discussed in above) would likely exclude VNXX traffic as well. However, Qwest seeks additional confirmation that VNXX traffic should be excluded in the event that the Commission does not exclude ISP traffic from these calculations, or that Pac-West later shows that some VNXX traffic is voice traffic.

and Order, pp. 19-20) does not apply here precisely because Qwest and Pac-West specifically entered into an *ISP Remand Order* change of law ICA amendment.⁵

CONCLUSION

Accordingly, in addition to the points raised in its legal briefs on November 3, 2004 and November 24, 2004, Qwest respectfully submits the Commission should rule that even assuming that the RUF applies to either monthly recurring charges or nonrecurring charges for the DTT facilities at issue, any facilities that Pac-West uses or has used for ISP traffic, VNXX traffic and/or any other non-local traffic should be excluded from the calculation of any RUF that may otherwise apply. The recent *Universal* federal court decision strengthens Qwest's position on these issues.

DATED: May 11, 2005.

Respectfully submitted,



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⁵ Although Qwest will not belabor the point, it is difficult to understand how, apart from the question whether or not a change of law will “automatically” amend an ICA, the *Universal* court came to the conclusion that the state of the law regarding reciprocal compensation had not changed since the ICA there had been negotiated. This is especially so because (1) the *ISP Remand Order* rewrote the compensation scheme for ISP traffic, and (2) the FCC has ruled that ISP-bound traffic is “interstate access,” and “not telecommunications traffic.” See e.g., *ISP Remand Order*, ¶ 57; see also *id.* ¶¶ 52, 65. Thus, since ISP-bound traffic is not telecommunications traffic, it cannot be local traffic under the ICAs. The FCC has also repeatedly ruled that ISP-bound traffic is “interstate in nature,” and thus again it cannot be “local” traffic. Although the *ISP Remand Order* was remanded by the court in *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002), it was not vacated. Again, however, this is a moot point because in *Universal* the parties did not enter into an *ISP Remand Order* change of law amendment to their ICA, but here Qwest and Pac-West did.

Moreover, “this Commission has already determined that, in light of FCC rules, the term ‘telecommunications traffic’ does not include Internet traffic.” See *Arbitrator’s Decision* (April 19, 2004), p. 13, in docket ARB 527. (Emphasis added.) The Arbitrator in ARB 527 noted that “the *ISP Remand Order* clearly excluded Internet traffic from calculations of telecommunications traffic for purposes of reciprocal compensation,” and then quoted from Order No. 01-809 (the Level 3 ARB 332 decision) about the policy and economic reasons why “ISP-bound traffic is properly excluded, when *calculating relative use* by the originating carrier.” *Id.* (Emphasis added.) Thus, the Arbitrator ruled: “For the same reasons already articulated by this Commission, Internet traffic should be excluded from the *definition of telecommunications traffic.*” *Id.* The Commission then adopted the Arbitrator’s Decision in Order No. 04-262.

CERTIFICATE OF SERVICE

IC 8 / IC 9

I hereby certify that on the 11th day of May, 2005, I served the foregoing **QWEST'S ADDITIONAL LEGAL BRIEF REGARDING POSSIBLE IMPACT OF UNIVERSAL FEDERAL COURT DECISION ON THESE DOCKETS** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 11th day of May, 2005.

QWEST CORPORATION



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