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May 11, 2005

VIA E-FILING AND REGULAR MAIL

Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Pac-West Telecomm, Inc., v. Qwest Corporation; Docket IC-9

Dear Madame:

Enclosed for filing is "**PAC-WEST TELECOMM, INC.'S BRIEF REGARDING THE IMPACT OF FEDERAL DISTRICT COURT DECISION IN *QWEST CORPORATION v. UNIVERSAL TELECOM, INC.***".

Thank you for your assistance.

Very truly yours,

Davis Wright Tremaine LLP


Mark P. Trinchero

MPT:fmw

Enclosures

cc: Service List

**BEFORE THE
PUBLIC UTILITY COMMISSION
OF OREGON**

PAC-WEST TELECOMM, INC.,

Plaintiff,

v.

**QWEST CORPORATION (fka US WEST
COMMUNICATIONS, INC.),**

Defendant.

Docket No. IC 9

**PAC-WEST TELECOMM, INC.'S
BRIEF REGARDING THE IMPACT OF
FEDERAL DISTRICT COURT DECISION IN
*QWEST CORPORATION v. UNIVERSAL TELECOM, INC.***

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Dated: May 11, 2005

INTRODUCTION AND SUMMARY

Pursuant to the procedural schedule established during the April 27, 2005 telephone status conference in this proceeding, Pac-West Telecomm, Inc. ("Pac-West") respectfully submits this brief regarding the impact of the December 15, 2004 Opinion and Order issued by the United States District Court for the District Court of Oregon in *Qwest v. Universal*¹ on the legal issues presented in this complaint proceeding. In considering the legal questions below, it is important to note that Universal Telecom, Inc. and Pac-West do not have identical interconnection agreements with Qwest Corporation ("Qwest"). While Universal Telecom, Inc. and Pac-West opted into the same base interconnection agreement ("MFS Agreement"), Pac-West and Qwest subsequently amended their agreement (the "Pac-West ICA") to incorporate terms and conditions to include "ISP-bound traffic" as a result of the FCC's *ISP Remand Order*² (the "ISP Amendment"). Universal Telecom, Inc. and Qwest did not similarly amend their interconnection agreement. In addition, there are physical differences with respect to traffic volumes and patterns, and the underlying networks of Pac-West and Universal.

The specific legal questions raised³ and Pac-West's summary responses are set forth as follows:

1. What is the impact of *Qwest v. Universal* on the question of whether ISP-bound traffic should be included in the calculation of the Relative Use Factor ("RUF") for determining monthly recurring charges ("MRCs") for Direct Trunk Transport ("DTT") facilities?

PAC-WEST RESPONSE: *Qwest v. Universal* holds that ISP-bound traffic is

¹ *Qwest Corporation v. Universal Telecom, Inc, dba US POPS, fka Universal Telecommunications, Inc.*, mimeo Opinion and Order issued December 15, 2004 (OR Fed. Dist. Ct. CV-04-6047-AA) (hereinafter "*Qwest v. Universal*").

² Order and Report and Order, *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96098 and 99-68, FCC 01-131, 2011 (rel. April 27, 2001) *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)(*"ISP Remand Order"*).

³ During the April 27, 2005 telephone status conference in this proceeding, the ALJ noted that there may be a need to brief change of law issues. Pac-West submits that the change of law discussion in *Qwest v. Universal* relates to the issue of whether Qwest is obligated to pay Universal Telecom, Inc. reciprocal compensation for terminating ISP-bound traffic. Reciprocal compensation payments are not at issue in this proceeding. In addition, Pac-West and Qwest have an ISP Amendment to their ICA; whereas, Qwest and Universal Telecom, Inc. did not which triggered the court's change of law analysis.

not excluded from the RUF calculation in the MFS agreement. This holding is binding on the Commission in this proceeding. Further buttressing this finding is the fact that Pac-West and Qwest have amended the agreement to specifically cover “ISP-bound traffic” and the ISP Amendment does not exclude ISP-bound traffic from the RUF, nor does it amend the underlying RUF provisions in any way.

2. What is the impact of *Qwest v. Universal* on the question of whether ISP-bound traffic should be included in the calculation of the RUF for determining DTT facility non-recurring charges (“NRCs”)?

PAC-WEST RESPONSE: The court’s ruling regarding DTT NRCs is inapposite to the present complaint proceeding. In *Qwest v. Universal*, the court held that Universal Telecom, Inc. had failed to meet its burden of proof because it had failed to address Qwest’s claims regarding DTT NRCs. In this proceeding, on the other hand, Pac-West has presented significant briefing regarding why ISP-bound traffic is not excluded from the calculation of the RUF for determining DTT NRCs. Furthermore, the court’s rationale with respect to DTT MRCs is equally applicable to DTT NRCs.

3. What is the impact of *Qwest v. Universal* on the question of whether VNXX traffic should be included in the calculation of the RUF for determining DTT MRCs and NRCs?

PAC-WEST RESPONSE: The court’s ruling is inapposite. The court addressed only the question of whether Qwest is required to pay reciprocal compensation on VNXX traffic under the interconnection agreement between Qwest and Universal Telecom, Inc. The court did not address the issue of whether VNXX traffic should be excluded in the calculation of the RUF for determining DTT MRCs and NRCs. In addition, the interconnection agreement between Qwest and Universal Telecom, Inc. was never amended to reflect the *ISP Remand Order*. The Pac-West ICA at issue in this proceeding, on the other hand, contains an amendment (the ISP Amendment) reflecting the *ISP Remand Order* that, by its terms, addresses all ISP-bound traffic compensation issues. There is no carve-out for alleged VNXX traffic in the ISP Amendment. Accordingly if the court’s VNXX findings are relevant in this proceeding they are only relevant with respect to non-ISP bound VNXX traffic.

ARGUMENT

I. The Holding in *Qwest v. Universal* Regarding DTT MRCs is Binding in this Proceeding.

In *Qwest v. Universal*, the court rejected Qwest’s claim that Universal Telecom, Inc. was obligated under its interconnection agreement to pay Qwest DTT MRCs.⁴ Similar to its arguments in the instant proceeding, Qwest had argued to the court in *Qwest v. Universal* that DTT MRCs should not be reduced to reflect ISP-bound traffic.⁵ Qwest based its argument on

⁴ *Qwest v. Universal*, mimeo at 13.

⁵ *Id.*, mimeo at 10.

the *ISP Remand Order*, claiming that ISP-bound traffic is not “telecommunications traffic” as that term is used in 47 CFR §§ 51.703(b) and 51.709(b).⁶ The court disagreed, concluding that Qwest’s reading of the *ISP Remand Order* was too broad. The court found that “the restrictions of § 51.703(b) and § 51.709(b) remain in full effect.”⁷ Because all of the traffic in question originated on Qwest’s network and terminated to Universal Telecom, Inc.’s network, the court held that Qwest could not charge Universal Telecom, Inc. for DTT.⁸

This same analysis applies equally in the instant case. The RUF provides for the same sharing of DTT costs that is expressed by rule in 47 C.F.R. § 51.709(b). In fact, the RUF provisions in the Universal Telecom, Inc. interconnection agreement and the Pac-West ICA are identical.⁹ As explained in Pac-West’s prior briefing in this case, the RUF language makes no exception for ISP-bound traffic. Nor does the ISP Amendment, or 47 C.F.R. § 51.709(b). The court’s holding in *Qwest v. Universal* is binding in this case.

It is also important to note that the court distinguished this Commission’s findings in the arbitration between Qwest Level 3 Communications, and a similar ruling of the Colorado Public Utilities Commission.¹⁰ The court stated:

I find these cases inapplicable. Both cases involved the arbitration of proposed interconnection agreements that were established after the issuance of ISP Remand Order. . . . Unlike the present case, neither involved disputes about preexisting contracts. . . . 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 . . .” . . . Furthermore, ISP Remand Order “does not alter carriers’ other obligations under [FCC] Part 51 rules . . .” . . . Therefore, the cases are distinguishable.¹¹

⁶ As the court explained, Sections 51.703(b) and 51.709(b) of the Federal Communications Commission’s (“FCC”) rules read together provide that “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.”. (*Id.* mimeo at 9-10.)

⁷ *Id.* mimeo at 11.

⁸ *Id.* mimeo at 13.

⁹ As noted above, both Universal Telecom, Inc. and Pac-West adopted the MFS Agreement.

¹⁰ *Level 3 Communications*, 300 F. Supp. 2d at 1071-72; *OPUC Level 3 Arbitration*, 2001 Ore. PUC LEXIS, *1; *Level 3 Communications v. Colorado Pub. Util.*, 300 F. Supp. 2d 1069 (D. Colo. 2003).

¹¹ *Qwest v. Universal*, mimeo at 12.

The same is true in this interconnection agreement enforcement proceeding, where the Commission is called upon to interpret the parties' rights under an existing interconnection agreement. As in *Qwest v. Universal*, the Pac-West ICA at issue in this docket was entered into prior to issuance of the *ISP Remand Order*, and there was no provision in the Pac-West ICA excluding ISP-bound traffic from the RUF. The Commission must interpret the language in the contract. As explicated recognized by the court in *Qwest v. Universal*, standard principles of contract interpretation require the court (and this Commission) to look no further than the four-corners of the contract to interpret its meaning.¹² There is no exclusion for ISP-bound traffic in the MFS Agreement, a fact confirmed by the holding in *Qwest v. Universal*, and bolstered by the very language of the ISP Amendment, which also does not exclude ISP-bound traffic from the RUF.

In summary, the Commission must apply the court's ruling regarding DTT MRCs in this case.

II. The *Qwest v. Universal* Court's Ruling Regarding DTT NRCs is Inapposite to the Present Complaint Proceeding.

In *Qwest v. Universal*, the court held that Universal Telecom, Inc. had failed to meet its burden of proof because it had failed to address Qwest's claims regarding DTT NRCs. In this proceeding, on the other hand, Pac-West has presented significant briefing regarding the issue of why ISP-bound traffic is included in the calculation of the RUF for determining DTT NRCs. Accordingly, *Qwest v. Universal* is inapposite.

While the court's procedurally-based ruling regarding DTT NRCs is not relevant to this proceeding, the rationale the court utilized in ruling that ISP-bound traffic is included in the RUF when calculating DTT MRCs is equally applicable to DTT NRCs. As the court noted, "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." *Id.* mimeo at 9-10. It stands to reason that if charges designed to recover the

¹² *Id.* mimeo at 7.

costs of DTT facilities are covered by the RUF, then it is irrelevant whether those charges are incurred on a one-time basis to install the trunks or on a monthly basis. The principle embodied in the RUF language in the Pac-West ICA, which in turn reflects the FCC's rules, stands for the unconditioned proposition that each carrier pays for the cost of the *facility* used to connect calls originated by its customers. By definition, DTT non-recurring installation costs are "costs for the facility", and cannot be charged to the terminating carrier.

III. *Qwest v. Universal* has no Bearing on the Question of Whether VNXX Traffic Should be Included in Calculating the RUF Under the Pac-West ICA.

Qwest v. Universal is inapposite to the VNXX-related issues that Qwest has raised in this proceeding. In *Qwest v. Universal*, the court addressed only the question of whether Qwest is required to pay reciprocal compensation on VNXX traffic under the interconnection agreement between Qwest and Universal Telecom, Inc. The court did not address the issue of whether VNXX traffic should be included in the calculation of the RUF for determining DTT MRCs and NRCs¹³.

In addition, the interconnection agreement between Qwest and Universal Telecom, Inc. was never amended to reflect the *ISP Remand Order*.¹⁴ The Pac-West ICA at issue in this proceeding, on the other hand, contains an ISP Amendment that by its terms governs *all* ISP-bound traffic compensation issues under the *ISP Remand Order*. There is no carve-out for alleged VNXX traffic in the ISP Amendment. The court's decision in this regard is simply inapplicable to the present dispute.

It is important to note, that were the Commission to determine that the *Qwest v. Universal* holding regarding reciprocal compensation on VNXX traffic under the interconnection agreement between Qwest and Universal Telecom, Inc. is somehow relevant to the calculation of the RUF under the Pac-West ICA at issue in this case, the Commission can only apply the ruling

¹³ Apparently Qwest did not raise this issue with respect to Universal and it is curious that it seeks to do so with Pac-West.

¹⁴ Order and Report and Order, *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96098 and 99-68, FCC 01-131, 2011 (rel. April 27, 2011) *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*").

to non-ISP-bound traffic.¹⁵ Furthermore, given the definition of VNXX traffic used by the court in *Qwest v. Universal*, the non-ISP-bound traffic to which the ruling might be applied is likely very small. In *Qwest v. Universal*, the court found that: “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.”¹⁶ According to this definition, a VNXX call occurs only when the end-user originating a call is not in the same local calling area, or EAS, as the Pac-West network. Pac-West submits that this subset of traffic would be de minimus. To apply this definition to the subset of traffic at issue in this proceeding, Qwest would need to provide the location of its end-users, and Pac-West would need to provide the list of local calling areas in which it has facilities. Where the Qwest end-user and the Pac-West network are not in the same LCA, as shown by the NPA-NXX shown on the call record, then a VNXX call can be identified¹⁷ and treated appropriately.

CONCLUSION

The only binding ruling in *Qwest v. Universal* is the court’s holding that ISP-bound traffic is included in calculating the RUF for purposes of determining DTT MRCs. The court’s procedural ruling regarding DTT NRCs, on the other hand, is based exclusively on the fact that Universal Telecom, Inc. failed to address the issue. The DTT NRC holding was not based on the merits and is not binding in this proceeding. The rationale underlying the court’s decision regarding inclusion of ISP-bound traffic in the RUF for purposes of determining DTT MRCs, however, applies with equal vigor to the issue of calculating DTT NRCs, and this Commission should follow that reasoning in the instant case.

¹⁵ In docket UM 1058, the Commission recognized that the FCC has preempted states with respect to ISP bound traffic. *In the Matter of the Investigation Into the Use of Virtual NPA/NXX Calling Patterns*, Docket UM 1058, Order No. 03-329 at 7 (entered May 27, 2003).

¹⁶ *Qwest v. Universal*, mimeo at 21.

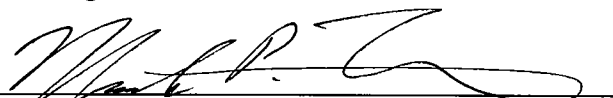
¹⁷ Pac-West reserves its rights to argue, assuming Pac-West did not have facilities in the same LCA as it had assigned an NPA-NXX, that such traffic is not VNXX but FX service. Regardless of the terminology the principle used to identify the traffic must apply to both carriers. If the Commission excludes traffic because Pac-West does not have facilities in the LCA where it has NPA-NXXs it should similarly exclude calls from Qwest where the originating end-user is not in the same LCA the NPA-NXX assigned to it.

The court's ruling regarding reciprocal compensation for VNXX traffic is in inapposite. The court ruled only on the limited issue of reciprocal compensation and did not address whether VNXX traffic should be excluded from the RUF for purposes of determining DTT rates. The court's decision in this regard is also distinguishable because the interconnection agreement between Qwest and Universal Telecom, Inc. was never amended to reflect the *ISP Remand Order*. The Pac-West ICA at issue in the instant case, on the other hand, includes an ISP Amendment designed to implement the parties' understanding of the impact of the *ISP Remand Order* on the Pac-West ICA.

Finally, given federal preemption of ISP-bound traffic and the definition of VNXX utilized by the *Qwest v. Universal* court, the subset of traffic to which the *Qwest v. Universal* decision could be applied would likely be extremely small.

Respectfully submitted this 11th day of May, 2005.

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By 

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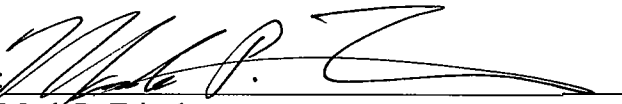
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **“PAC-WEST TELECOMM, INC.’S BRIEF REGARDING THE IMPACT OF FEDERAL DISTRICT COURT DECISION IN *QWEST CORPORATION* v. *UNIVERSAL TELECOM, INC.*”** upon the parties named on the attachment.

I further certify that said copies were placed in sealed envelopes addressed to said party’s/attorneys’ last known addresses as shown and deposited in the United States Mail at Portland, Oregon, and that the postage thereon was prepaid.

DATED this 11th day of May, 2005.

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By: 
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