

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

IC 9

In the Matter of )  
PAC-WEST TELECOMM, INC., vs. ) ORDER  
QWEST CORPORATION )  
Complaint for Enforcement of )  
Interconnection Agreement. )

**DISPOSITION: APPLICATION FOR RECONSIDERATION DENIED**

**Background.** On July 26, 2005, the Public Utility Commission of Oregon (Commission) entered Order No. 05-874 in response to a complaint filed by Pac-West Telecomm, Inc. (Pac-West), against Qwest Corporation (Qwest). Order No. 05-874 interprets and enforces various terms of the interconnection agreement (ICA) entered into by Pac-West and Qwest.

On September 26, 2005, Pac-West filed an application for rehearing or reconsideration of Order No. 05-874. Pac-West seeks reconsideration of the portion of the decision that concludes that the relative use factor (RUF) set forth in Article V, Section D.2.d., of the ICA does not apply to VNXX traffic transported over direct trunk transport (DTT) facilities. Pac-West requests that the order be modified to recognize that VNXX traffic bound for Internet service providers (ISPs) must be included in the RUF calculation used to determine each carrier's responsibility for the cost of the transport facilities used to interconnect their networks.

On October 11, 2005, Qwest filed a reply to Pac-West's application. Qwest contends that Order No. 05-874 correctly concludes that the RUF is inapplicable to DTT facilities used to exchange VNXX traffic.

**The Relative Use Factor.** Article V of the Pac-West/Qwest ICA governs reciprocal traffic exchange. Section D of Article V governs compensation for local traffic exchanged under the ICA. Subsection D.2.d. provides that compensation paid to the provider of DTT facilities shall be adjusted to reflect the provider's relative use of the facility during the busy hour. That percentage is referred to as the relative use factor, or RUF.

**Order No. 05-874.** In December 2004, the U.S. District Court for the District of Oregon issued a decision in *Qwest v. Universal Telecom (Universal)*.<sup>1</sup> Order No. 05-874 interprets the *Universal* decision to hold that the FCC's *ISP Remand Order*<sup>2</sup> does not apply to transport arrangements. We therefore held that the "ISP Amendment" executed by Qwest and Pac-West in 2003 to "reflect" the terms of the *ISP Remand Order* did not have any effect on the provisions in the Pac-West/Qwest ICA relating to transport, including the RUF.<sup>3</sup> Because the *ISP Remand Order* does not apply to transport obligations, we further held that the ICA must be interpreted based upon the law in effect at the time the ICA was executed in 2000.<sup>4</sup> At that time, the prevailing law in Oregon was that ISP-bound traffic was "local" traffic subject to the reciprocal compensation requirements of §251(b)(5) of the Telecommunications Act of 1996 (Act).<sup>5</sup>

As a result of these determinations, the Commission found that the RUF provision in the Pac-West/Qwest ICA applies to ISP-bound traffic. However, because the RUF applies only to local traffic under the ICA, and *Universal* holds that VNXX traffic is not local,<sup>6</sup> we concluded that the RUF does not apply to VNXX traffic.<sup>7</sup>

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<sup>1</sup>*Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Dec. 15, 2004) (*Universal*).

<sup>2</sup>*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2001, remanded *sub nom, WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en banc denied* D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). (*ISP Remand Order*.)

<sup>3</sup>As noted below, Pac-West and Qwest also executed a Change of Law Amendment to the ICA at the same time. *See* Order No. 05-874 at 27, ftn. 84.

<sup>4</sup>Prior to the *ISP Remand Order*, FCC policy was that reciprocal compensation was due only for "local" traffic. *Universal* at 27; *WorldCom v. FCC*, 228 F.3d at 429, 430 (D.C. Cir. 2002). In that order, the FCC "abandoned the distinction between local and interstate traffic as the basis for determining whether reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic for purposes of §251(b)(5)." *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1128, 1131 (9<sup>th</sup> Cir. 2003). Since we interpret *Universal* to hold that the *ISP Remand Order* does not apply to transport obligations, the FCC's abandonment of the "local-interstate" distinction is irrelevant to the Pac-West/Qwest ICA. Instead, the law in effect at the time the ICA was executed in 2000 governs the agreement. As emphasized, the prevailing law in Oregon was that ISP-bound traffic was "local" traffic. *See also*, Order No. 05-874 at 3, ftn. 4, 28.

<sup>5</sup>*Universal* at 20; Order No. 05-874 at 28. *See also*, Order No. 00-722, docket ARB 238.

<sup>6</sup>The definition of "local/EAS" traffic in the Universal/Qwest ICA is the same as that in the Pac-West/Qwest ICA. With respect to that definition, the Court held:

Thus, for a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA [local calling area] or EAS [extended area service region] and terminated [sic] 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

**Pac-West Position.** Pac-West makes the following arguments in support of its application:

(a) Order No. 05-874 misconstrues the *Universal* decision. The Court's finding that the *ISP Remand Order* does not alter contractual obligations to transport traffic applies only to the existing Qwest/*Universal* agreement. The Pac-West/Qwest ICA differs from that agreement because Pac-West and Qwest executed the ISP Amendment<sup>8</sup> adopting the *ISP Remand Order*.

(b) The *ISP Remand Order* rejects the "local-interstate" distinction for purposes of determining whether traffic is subject to the reciprocal compensation requirements of §251(b)(5). Instead, the FCC found that §251(b)(5) applies to "all traffic not excluded by §251(g)." Thus, the provisions in the ICA limiting the RUF to the transport of "local" traffic are no longer valid, and the RUF must be construed to apply to "all traffic not excluded by §251(g)."

definition of local traffic [under the ICA] 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* at 24.

On September 22, 2005, the Court entered a supplemental opinion in *Universal*. Interpreting the foregoing statements, the Court stated that it:

. . . intended compensable traffic to include traffic that originates in one LCA or EAS area and 'terminates' in that same LCA or EAS area only for that traffic that *Universal* maintains a point of interconnection in the same LCA or EAS area in which the call originates. In other words, the 'termination point' is the location of the *Universal* modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision and the *ISP Remand Order*. [Citing Commission Order No. 99-218 docket ARB 91, entered March 17, 1999, and the *ISP Remand Order*]. *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Sept. 22, 2005) (*Universal Supp. Op.*).

Thus, the Court recognized that both the Commission's ARB 91 decision and the FCC's *ISP Remand Order* require reciprocal compensation for ISP-bound traffic only when ISP modems are located within the same local calling area as the calling party. The Court's holding is inconsistent with Pac-West's claim that the *ISP Remand Order* requires payment of reciprocal compensation for VNXX traffic.

<sup>7</sup>In its application, Pac-West also asserts that the definition of local traffic included in Qwest's tariff and adopted by the Court in *Universal* is inconsistent with an interpretation of local traffic made by the FCC in *Starpower Communications LLC v. Verizon South*, Memorandum Opinion and Order, EB-00-MD-19, FCC 03-278 (rel. Nov. 7, 2003). We find that *Universal* is controlling, and agree with Qwest that the *Starpower* decision is factually inapposite. See Qwest Response at 24-26.

<sup>8</sup>See Order No. 05-874 at 28-30, for discussion of the Pac-West/Qwest ISP Amendment.

(c) The *ISP Remand Order* was reviewed in *WorldCom v. FCC* by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit).<sup>9</sup> Pac-West claims that, because the D.C. Circuit concluded that ISP-bound traffic was “not excluded by §251(g)” it is properly categorized as “telecommunications” subject to the reciprocal compensation requirements of §251(b)(5). As such, the FCC’s reciprocal compensation rules – including §51.709(b) which mirrors the RUF – apply to ISP-bound traffic.

(d) The *ISP Remand Order* encompasses all ISP-bound traffic, including VNXX ISP-bound traffic. Thus, the RUF applies to VNXX traffic.

**Standard for Reconsideration.** OAR 860-014-0095(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:

- (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
- (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
- (c) An error of law or fact in the order which is essential to the decision; or
- (d) Good cause for further examination of a matter essential to the decision.

**Commission Decision.** Upon review, the Commission is unpersuaded by the arguments advanced by Pac-West in support of its application. We conclude that Order No. 05-874 correctly interprets the law applicable to the Pac-West/Qwest ICA and does not require revision. In addition, we find a number of flaws in the reasoning underlying Pac-West’s application:

(a) To begin with, we note that Pac-West’s argument is premised upon its claim that the *ISP Remand Order* encompasses transport obligations under the ICA. This argument is a complete reversal from the position articulated by Pac-West in the proceeding below. Pac-West makes no effort to explain its change in position or to explain the presumed shortcoming in its prior analysis.<sup>10</sup>

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<sup>9</sup>*WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>10</sup>In the proceeding below, Pac-West devoted an entire page of its reply brief to support its claim that the *ISP Remand Order* addressed only the *termination* of ISP-bound traffic and did not encompass *transport* arrangements. Among other things, Pac-West stated: “In its recent order granting in part the forbearance petition filed by Core Communications [footnote omitted], the FCC clarified that the *ISP Remand Order* was designed to modify *reciprocal compensation for ISP-bound traffic only, not to disturb any other aspect*

(b) Even if we assume, for the sake of argument, that *Universal* is inapplicable and the *ISP Remand Order* encompasses transport obligations under the ICA, it still does not produce the outcome Pac-West desires. At the time Pac-West and Qwest executed the ISP Amendment to their ICA incorporating the *ISP Remand Order*, they also executed a new Change of Law Amendment. The Change of Law Amendment provides that the “Existing Rules” govern the ICA. The “Existing Rules” include the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof.”<sup>11</sup>

In 2003, when the new Change of Law Amendment was executed, the “Existing Rules” included two decisions interpreting the effect of the *ISP Remand Order* on ISP-bound traffic and the RUF. Specifically, the Commission had entered Order No. 01-809 in *Level 3 Communications*,<sup>12</sup> holding that the FCC’s *ISP Remand Order* excluded ISP-bound traffic for purposes of calculating the relative use of transport facilities. At the time the Change of Law Amendment was executed, Order No. 01-809 had also been sustained on appeal in *Level 3 Communications v. PUC* by the U.S. District Court for the District of Oregon.<sup>13</sup>

In *Universal*, the Court found that the *Level 3 Communications v. PUC* decision was inapplicable because it involved an arbitration agreement established after the issuance of the *ISP Remand Order*. The Court also emphasized that the *ISP Remand Order* “does not alter carriers’ other obligations under [FCC] Part 51 rules,”<sup>14</sup> including obligations to transport traffic.

As explained above, Order No. 05-874 interprets the *Universal* decision to hold that the *ISP Remand Order* does not apply to transport obligations. Accordingly, we held that the *ISP Remand Order* did not change the law with respect to transport obligations in the Pac-West/Qwest ICA, leaving the existing contract provisions in effect. If, however, we accept Pac-West’s new-found theory and assume (a) that *Universal* is inapplicable and (b) that the *ISP Remand Order* encompasses transport obligations, then the two *Level 3 Communications* decisions noted above comprise the “Existing Rules”

<sup>11</sup>Order No. 05-874 at 31.

<sup>12</sup>*Re Petition of Level 3 Communications for Arbitration with Qwest Corporation*, docket ARB 332, Order No. 01-809, entered September 13, 2001. See also, Order No. 05-874 at 25.

<sup>13</sup>*Level 3 Communications LLC v. Public Utility Commission of Oregon*, et al., CV 01-1818-PA, mimeo at 6-7 (D. OR, November 25, 2002). See also, Order No. 05-874 at 26.

<sup>14</sup>*Universal* at 12.

governing the ICA.<sup>15</sup> Those decisions interpret the *ISP Remand Order* to hold that ISP-bound traffic is excluded from the relative use calculation of transport facilities.<sup>16</sup>

Thus, Pac-West's latest theory yields essentially the same result as that obtained from Order No. 05-874.<sup>17</sup> Because of the operation of the 2003 Change of Law Amendment, *all* ISP-bound traffic – including any VNXX ISP-bound traffic – is excluded for purposes of calculating the relative use of direct trunk transport facilities.

(c) Pac-West's argument focuses on the fact that the *ISP Remand Order* rejects the “local v. interstate” distinction<sup>18</sup> for purposes of determining the traffic subject to §251(b)(5). It goes on to claim that, because ISP-bound traffic was “not excluded by §251(g)” it is properly categorized as “telecommunications.” In advancing this claim, Pac-West ignores important elements of the *ISP Remand Order* and the *WorldCom* decision that undermine its argument. Specifically, it fails to point out that:

- Section 251(b)(5) of the Act and the FCC’s Part 51 reciprocal compensation rules, including §51.709(b), apply only to “telecommunications” traffic.
- The *ISP Remand Order* concludes that ISP-bound traffic is not “telecommunications traffic” but rather “information access traffic.”<sup>19</sup>
- The conclusion that ISP-bound traffic is information access is clearly embodied in the FCC Rules adopted in the *ISP Remand Order*.<sup>20</sup>

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<sup>15</sup>In Order No. 05-874, we expressed reservations regarding whether the *Level 3* decisions should comprise the “Existing Rules” under which the Pac-West/Qwest ICA should be interpreted. In particular, we observed that an important rationale underlying our decision in Order No. 01-809 to exclude ISP-bound traffic from the RUF was inconsistent with the D.C. Circuit’s decision in *WorldCom*. Upon review, we find that those decisions do not conflict. While the D.C. Circuit held that the FCC did not have authority under §251(g) to remove ISP-bound traffic from the scope of §251(b)(5), it did not reverse the FCC’s determination that that ISP-bound traffic is information access rather than telecommunications. Nor did the Court find that the FCC could not exercise preemptive authority over ISP-bound traffic. Although our comments were not made in response to arguments raised by the parties, and were therefore essentially *dicta*, we take this opportunity to clarify our position regarding the matter.

<sup>16</sup>Order No. 01-809, Appendix A, at 13-14; Order No. 05-874 at 25. *See also, Universal* at 12.

<sup>17</sup>In fact, Order No. 05-874 is less restrictive than the result produced by Pac-West’s new theory. The Order applies the RUF to all ISP-bound traffic except for VNXX ISP-bound traffic. Under Pac-West’s new theory, the 2003 the Change of Law Amendment operates to exclude *all* ISP-bound traffic from the RUF.

<sup>18</sup>As noted in Order No. 05-874, there is some uncertainty regarding the future application of the local-interstate distinction. Order No. 05-874 at 30; *see also*, Administrative Law Judge Ruling, docket IC 12, dated August 16, 2005, at 10, ftn. 38.

<sup>19</sup>*See, e.g., ISP Remand Order* at paras. 1, 30, 39, 42.

<sup>20</sup>Section 51.701(b) of the FCC rules defines “telecommunications traffic.” Subsection (b)(1) of that rule makes specific reference to paragraphs 34, 36, 39 and 42-43 of the *ISP Remand Order*. Paragraphs 39 and

- Although *WorldCom* rejected the FCC's conclusion that §251(g) "carves out" ISP-bound traffic from the scope of §251(b)(5), the D.C. Circuit did not reject the FCC's determination that ISP-bound traffic constitutes "information access" rather than "telecommunications traffic." In fact, the Court specifically declined to vacate the FCC's revised rules or define the "scope of telecommunications" subject to §251(b)(5).<sup>21</sup>

In *Universal*, the Court acknowledged a decision by the U.S. District Court for the District of Colorado, holding that "the *ISP Remand Order* excluded ISP-bound traffic from the definition of telecommunications traffic; instead designating it as information access."<sup>22</sup> Consistent with its analysis of the *Level 3 Communications v. PUC* decision, the *Universal* Court declined to exclude ISP-bound traffic from the definition of "telecommunications," noting that the Qwest/*Universal* ICA predicated the *ISP Remand Order*, and reiterating that the *ISP Remand Order* "does not alter carriers' other obligations under [FCC] Part 51 rules."<sup>23</sup>

As we have emphasized, Order No. 05-874 did not address whether ISP-bound traffic is telecommunications because we construed *Universal* to hold that the *ISP Remand Order* does not apply to transport arrangements. If, however, we accept Pac-West's claim that *Universal* is inapposite and that the *ISP Remand Order* encompasses transport obligations, then there is no logical reason for us to reach a result different from the Colorado Federal District Court decision. Since the ISP Amendment requires the Pac-West/Qwest ICA to "reflect" the terms of the *ISP Remand Order*, and since that order [and the FCC's revised Part 51 rules] specify that ISP-bound traffic is *not telecommunications*, there is no basis for Pac-West's claim that ISP-bound traffic is subject to the reciprocal compensation requirements of §251(b)(5).

(d) As a result of the foregoing discussion, it is unnecessary for us to resolve Pac-West's claim that ISP-bound traffic, as used in the *ISP Remand Order*, includes VNXX traffic. Nevertheless, we make the following observations:

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42 clearly articulate that ISP-bound traffic is information access rather than telecommunications traffic. As noted, the D.C. Circuit did not vacate the FCC rules, leaving the agency's determination intact.

<sup>21</sup>The D.C. Circuit stated: ". . . we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act, 47 U.S.C. §§153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the 'telecommunications' covered by §251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to §251(b)(5); see §252(d)(B)(i) (referring to bill-and-keep). Indeed, these are only samples of the issues we do not decide, which are in fact all issues other than whether §251(g) provided the authority claimed by the Commission for not applying §251(b)(5)." *WorldCom* at 434.

<sup>22</sup>*Universal* at 11-12, citing *Level 3 Communications v. Colorado Pub. Util.*, 300 F. Supp. 2d 1069 (D. Colo. 2003).

<sup>23</sup>*Id.*

(1) There is nothing in the *ISP Remand Order* or the judicial decisions interpreting the FCC's order to substantiate Pac-West's assertion that the FCC's definition of ISP-bound traffic includes VNXX traffic. Indeed, there is no mention whatsoever of VNXX-type arrangements in those decisions.<sup>24</sup>

(2) The *ISP Remand Order* specifically preempts States from regulating ISP-bound traffic.<sup>25</sup> At the same time, however, the FCC issued a *Notice of Proposed Rulemaking* in its Intercarrier Compensation proceeding, wherein it acknowledges that States may reject VNXX arrangements as a misuse of numbering resources.<sup>26</sup> If VNXX is included in the definition of ISP-bound traffic and therefore preempted from State regulation, there is no rational reason why the FCC would have made a contemporaneous statement recognizing that States may reject VNXX arrangements as misuse of numbering resources.<sup>27</sup> The only logical conclusion is that the FCC did not contemplate that VNXX traffic would be encompassed by its *ISP Remand Order*.<sup>28</sup>

(3) In Order No. 04-504, entered in docket UM 1058, we recognized that VNXX service bears a resemblance to Foreign Exchange, or FX, service. In Order No. 83-869, entered in 1983, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers. The Commission also terminated all FX arrangements for business customers and required that they be converted to Feature Group A access service. Consistent with these determinations, Qwest's tariffs define local traffic in a manner that is explicitly tied to the physical location of the customer, a fact emphasized by the Court in *Universal*.

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<sup>24</sup> See e.g., Administrative Law Judge Ruling, docket IC 12, dated August 16, 2005 (holding that VNXX traffic is not encompassed by the definition of ISP-bound traffic in the *ISP Remand Order*). Although Pac-West asserts that some jurisdictions have reached a different conclusion, we remain unpersuaded by those decisions. In addition, Qwest asserts that "the vast majority" of other jurisdictions have concluded that VNXX traffic is not subject to reciprocal compensation. See, Qwest response at 25, ftn 20.

<sup>25</sup> *ISP Remand Order* at para. 82.

<sup>26</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket 01-92, FCC 01-132, rel. April 27, 2001, para. 115. The FCC noted that it has "delegated some of its authority to state public utility commissions . . . to reclaim NXX codes that are not used in accordance with Central Office Code Assignment Guidelines." It then cited a decision by the Maine Public Utility Commission directing the North American Numbering Plan Administrator to reclaim NXX codes improperly used by Brooks Fiber to provide unauthorized VNXX service.

<sup>27</sup> At least one federal district court has also recognized that states have the authority to reject VNXX arrangements. *Global NAPS, Inc. v. Verizon New England, Inc*, et al., 327 F. Supp. 2d 290, 300 (D. Vermont January 12, 2004).

<sup>28</sup> This also appears to be the result reached in the supplemental opinion entered in *Universal*. See, ftn. 6; *Universal Supp. Op.* at 2.

(4) In Order No. 04-504, the Commission also held that a competitive provider would violate conditions in its certificate of authority if it were to provide intrastate VNXX service.<sup>29</sup>

As we have stated, resolution of Pac-West's application for reconsideration does not require us to decide whether ISP-bound traffic encompasses VNXX traffic. We make these observations only to make clear that we have serious reservations concerning the validity of Pac-West's argument on this issue.

**Conclusion.** Based on the foregoing, the Commission finds no basis for Pac-West's claim that Order No. 05-874 incorrectly applies the law. We therefore conclude that the application for reconsideration should be denied.

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<sup>29</sup>Order No. 99-229, granting Pac-West's certificate of authority, imposes several conditions, including the following:

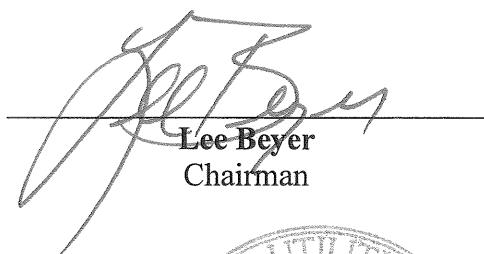
7. For purposes of distinguishing between local and toll calling, applicant [Pac-West] shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, [Pac-West] shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.
8. When applicant [Pac-West] is assigned one or more NXX codes, [Pac-West] shall limit each of its NXX codes to a single local exchange and shall establish a toll rate center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange.

Thus, Pac-West has a legal obligation to comply with specific requirements relating to local exchange boundaries and the assignment of telephone numbers. *See*, Order No. 04-504 at 5, Qwest Response at 26, ftn. 22.

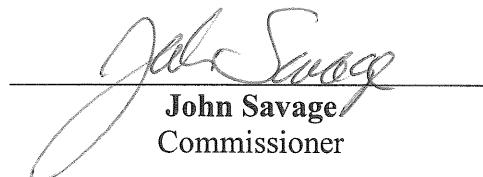
**ORDER**

IT IS ORDERED that the application for reconsideration filed by Pac-West Telecomm, Inc., on September 26, 2005, is denied.

Made, entered, and effective NOV 18 2005.



Lee Beyer  
Chairman



John Savage  
Commissioner



Ray Baum  
Commissioner



A party may appeal this order to a court pursuant to ORS 756.580.