

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

IC 8 & IC 9

In the Matter of	)	
	)	
WANTEL TELECOMMUNICATIONS,	)	
dba COMSPANUSA vs. QWEST	)	
CORPORATION	)	
	)	
Complaint for Enforcement of	)	
Interconnection Agreement.	(IC 8) )	ORDER
	)	
In the Matter of	)	
	)	
PAC-WEST TELECOMM, INC. vs.	)	
QWEST CORPORATION	)	
	)	
Complaint for Enforcement of	)	
Interconnection Agreement.	(IC 9) )	

DISPOSITION: INTERCONNECTION AGREEMENTS  
INTERPRETED AND ENFORCED AS SET  
FORTH HEREIN

**SUMMARY OF DECISION**

This order concludes as follows:

**Issue I** – The interconnection agreements under consideration permit Qwest to assess nonrecurring charges for the provision of direct trunk transport facilities. The applicable nonrecurring charges are those approved by the Commission in consolidated dockets UT 138 and UT 139, Phase III;

**Issue II** – The relative use factor included in Article V., Section D.2.d., of the interconnection agreements does not apply to nonrecurring charges for direct trunk transport facilities;

**Issue III** – The relative use factor included in Article V., Section D.2.d., of the interconnection agreements applies to the monthly recurring fixed and per-mile charges for direct trunk transport facilities. Whether a refund of these charges is required depends upon the type of traffic transported. See discussion of Issues IV and V.

**Issue IV** – The relative use factor included in Article V., Section D.2.d., of the interconnection agreements applies to ISP-bound traffic transported over direct trunk transport facilities;

**Issue V** – The relative use factor included in Article V., Section D.2.d., of the interconnection agreements does not apply to VNXX traffic transported over direct trunk transport facilities;

**Issue VI** – Article XXIV of the Wantel/Qwest interconnection agreement does not prohibit Qwest from back-billing Wantel for unpaid nonrecurring charges; and

**Issue VII** – Oregon Administrative Rule 860-021-0135 does not apply to the interconnection agreements under consideration.

### **INTRODUCTION AND BACKGROUND**

**Wantel Complaint.** On April 23, 2004, Wantel, Inc., dba ComSpanUSA (Wantel), filed a complaint with the Public Utility Commission of Oregon for enforcement of an interconnection agreement (ICA) between Wantel and Qwest Corporation (Qwest). Wantel is an Oregon corporation certified to provide telecommunications services in Oregon as a competitive local exchange telecommunications carrier (CLEC) pursuant to Commission Order No. 99-507, dated August 20, 1999. Qwest is a telecommunications utility providing services as an incumbent local exchange carrier (ILEC) in various locations within Oregon.

Wantel amended its complaint on two occasions. The second amended complaint was filed with the Commission on August 31, 2004.<sup>1</sup>

**Pac-West Complaint.** On July 20, 2004, Pac-West Telecomm, Inc. (Pac-West), filed a complaint with the Commission for enforcement of an interconnection agreement between Pac-West and Qwest. Pac-West is a California corporation certified as a CLEC pursuant to Commission Order No. 99-229, entered March 18, 1999.

Pac-West filed an amended complaint on August 24, 2004. Qwest answered the amended complaint on September 13, 2004, and filed an amended answer on October 18, 2004.

Pac-West filed a second amended complaint on November 10, 2004. The amendment clarifies that Qwest does not originate all of the traffic flowing over the direct trunk transport facilities in dispute. In addition, Pac-West seeks to expand the scope of

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<sup>1</sup> At the September 2, 2004, prehearing conference, Wantel stated that it might file a third amended complaint. The parties agreed that Qwest would not respond to the second amended complaint until Wantel decided whether it would further amend its complaint. Subsequently, the parties agreed to submit the issues for determination.

its complaint to address alleged harm suffered by Pac-West as a result of Qwest's failure to timely file certain interconnection agreements with other telecommunications carriers. Pac-West's second amended complaint is accepted only insofar as it clarifies the traffic flowing between Qwest and Pac-West. The request to expand the docket is denied.<sup>2</sup>

**The Interconnection Agreements.** Both Wantel and Pac-West (hereafter, jointly, "the CLECs") opted into an interconnection agreement previously executed by Qwest and MFS Intelenet Oregon.<sup>3</sup> As a result, the Wantel/Qwest and the Pac-West/Qwest interconnection agreements (hereafter, jointly, the "ICAs") are substantially the same.<sup>4</sup> The ICAs provide for the purchase of resold services, unbundled network elements (UNEs), and certain UNE combinations. Significantly, for purposes of this case, the ICAs also provide for the purchase of Direct Trunk Transport (DTT) facilities as a means of interconnecting Qwest's network with the CLEC networks and for the mutual exchange of traffic between those networks.<sup>5</sup> The complaints involve billing disputes over the calculation of recurring and nonrecurring charges relating to Qwest's provision of DTT facilities.

**Disputed Issues.**

**(a) Nonrecurring Charges.** In April, 2003, the Commission entered Order No. 03-209, concluding dockets UT 138 and UT 139 (UT 138/139), a generic investigation to determine the nonrecurring charges (also, "NRCs") that should be paid by competitive local exchange providers (CLECs) for the purchase of facilities and services from incumbent local exchange carriers (ILECs) pursuant to the Telecommunications Act of 1996 (Act). During the six years that the UT 138/139 investigation was underway, the CLECs paid interim NRCs to Qwest on a "subject-to-refund" basis. As part of Order No. 03-209, Qwest was required to calculate any NRC refunds owed to CLECs.

In the process of calculating the NRC refunds, Qwest discovered that it failed to charge numerous CLECs, including Wantel and Pac-West, for NRCs applicable to DTT facilities. Qwest decided that the ICAs did not prohibit billing adjustments, and proceeded to charge the CLECs for the previously unbilled NRCs. The billing

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<sup>2</sup> This decision does not prevent Pac-West from filing a separate complaint addressing those matters.

<sup>3</sup> Section 252(i) of the Telecommunications Act of 1996 allows a CLEC to opt in, or adopt, the terms of an interconnection agreement previously entered into by an ILEC and another CLEC.

<sup>4</sup> The Wantel/Qwest ICA was adopted by the parties in November, 1999, and acknowledged by the Commission on December 3, 1999. The Pac-West/Qwest ICA was adopted by the parties in January, 2000, and acknowledged by the Commission on February 8, 2000. Both ICAs have been amended several times.

<sup>5</sup> Transport arrangements are set forth in Article V, Section D.2.d., of both ICAs, attached as Attachment 1, pp. 9-12, of this order. Direct Trunk Transport facilities are a subcategory of Local Interconnection Service Trunks (LIS Trunks). Qwest Reply Br. at 6, fn. 10, Pac-West Exhibit 1, *Pac-West/Qwest Interconnection Agreement*, Section V.J.1. at p. 15.

adjustments were made on or about July, 2003, and were limited to a three-year period consistent with Qwest's interpretation of Oregon Administrative Rule (OAR) 860-021-0135(1).

The CLECs challenge the NRCs billed by Qwest. Pac-West contends that the ICAs do not specify any nonrecurring charges for DTT facilities.<sup>6</sup> To the extent the Commission concludes that NRCs apply to DTT, both Wantel and Pac-West argue that those charges are subject to the “relative use factor” (also, the “RUF”) specified in Article V., Section D.2.d., of each ICA.

**(b) ISP-Bound Traffic.** The parties dispute whether traffic transported to Internet Service Providers (ISP-bound traffic) should be included in the calculation of the RUF. Qwest has excluded ISP-bound traffic from the RUF for purposes of calculating monthly recurring DTT charges and the back-billed DTT NRCs. The CLECs claim that Qwest has overbilled them by failing to apply the RUF to recurring charges and nonrecurring charges for DTT facilities.

**(c) VNXX Traffic.** The parties dispute whether VNXX traffic should be excluded from the RUF for purposes of determining compensation for DTT facilities.

**(d) Other Issues.** This order also addresses a number of ancillary issues raised by the complaints.

**Procedural History.** Prehearing conferences regarding the Wantel complaint were held on May 12, June 1, and July 1, 2004. After Pac-West filed its complaint, the dockets were consolidated for review. Joint prehearing conferences were thereafter held on September 2, and November 18, 2004.<sup>7</sup> At the November conference, the parties agreed to a procedural schedule contemplating the filing of cross-motions for summary judgment.

By letter dated October 10, 2004, the parties indicated that they had agreed to modify the schedule and requested that the Administrative Law Judge (ALJ) rule on several legal issues. In accordance with the agreed-upon schedule, the parties filed simultaneous briefs on November 2, and November 24, 2004.

On December 15, 2004, the United States District Court for the District of Oregon issued its opinion and order in *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (*Universal*). On December 23, 2004, the ALJ requested that the parties evaluate the impact of the *Universal* decision on the disputed issues. The parties did not respond until April, 2005, preferring to await disposition of motions for reconsideration filed with the Court.

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<sup>6</sup> Wantel's First Amended Complaint, para. 10, alleged that Qwest was not entitled to bill DTT NRCs under the ICA. Wantel's Second Amended Complaint does not include that claim.

<sup>7</sup> Standard Protective Order No. 04-508 was entered September 9, 2004.

On April 27, 2005, a telephone conference was held to discuss issues relating to the *Universal* decision. Supplemental briefs relating to those issues were filed by the parties on May 11, 2005.

**Standard of Review.** In *Universal*, the Court articulated the legal principles governing the interpretation of interconnection agreements:

‘[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 Telecom, Inc., 325 F.3d 1114, 1128 (9<sup>th</sup> Cir. 2003) (quoting Southwestern Bell v. Pub. Util. Comm’n, 208 F.3d 475, 485 (5<sup>th</sup> 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).

## **ISSUES**

### **Issue I – Is Qwest Entitled Under the ICAs to Assess NonRecurring Charges for Direct Trunk Transport Facilities? If So, What Rates Apply?**

**Party Positions.** Pac-West contends that its ICA does not allow Qwest to charge NRCs for DTT facilities.<sup>8</sup> It claims that Qwest is asking the Commission to rewrite the ICA by inserting language from another part of the agreement and by adopting rates that do not apply to DTT.

Qwest maintains that the parties clearly intended that NRCs apply to DTT facilities. It states that the applicable rates are those established by the Commission as a

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<sup>8</sup> As noted above, Wantel does not advance this argument.

result of its recently concluded generic investigation of nonrecurring costs and prices in consolidated dockets UT 138/139, Phase III.

**Issue 1 – Decision.** 1. The compensation arrangement applicable to DTT facilities is set forth in Article V., Section D.2.d., of the ICAs. It provides:

If the Parties elect to establish two-way direct trunks, the compensation for such jointly used ‘shared’ facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider’s use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider’s relative use (i.e., originating minutes of use) of the facility in the busy hour.

The Pac-West/Qwest ICA was adopted by the Commission in February, 2000. Appendix A of the ICA specified the prices and discounts applicable to services and facilities provided under the agreement.<sup>9</sup> For DTT, Appendix A specified “Agreed Price Fixed” rates and “Agreed Price Per Mile” rates, but did not list any NRCs for DTT facilities.

Appendix A of the ICA was superseded by Revised Appendix A in November, 2000.<sup>10</sup> Revised Appendix A continues to specify “fixed” and “per-mile” rates for DTT but, unlike the original Appendix, also contains a “Nonrecurring Charge” column for DTT and other rate elements.<sup>11</sup> Instead of specifying actual NRC rates, however, the parties inserted “Note 1” under the NRC column for each category of DTT service.<sup>12</sup>

The fact that the parties modified original Appendix A to add a separate NRC column for DTT in Revised Appendix A indicates that they contemplated NRCs would apply to the provision of DTT facilities. When contracting parties make a change to an existing term of an agreement, it is reasonable to assume that the action was taken for a specific purpose. Had the parties intended that no NRCs would apply, they would

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<sup>9</sup> Pac-West Exhibit No. 1, p. 95-101.

<sup>10</sup> Revised Appendix A is attached to this Order as Attachment 2, and is incorporated herein by reference. The parties did not indicate whether any DTT facilities were provisioned under the ICA prior to the time Revised Appendix A took effect.

<sup>11</sup> Similar “Nonrecurring Charge” columns were added for Tandem Transmission and Direct Link Transport. The parties also inserted “Note 1” under the NRC columns for these facilities.

<sup>12</sup> DTT service is provided over DSO, DS1, or DS3 trunk facilities. It is priced differently depending upon the capacity and length of the trunk facility.

simply have left Appendix A unchanged. It is illogical to conclude that the parties added the reference to NRCs for no reason.<sup>13</sup>

2. Ascertaining the NRC rates that the parties intended to apply to DTT facilities is more complicated. The “Note 1” reference listed under the NRC column in Revised Appendix A for DTT (and the two other elements) is puzzling because there is nothing in the Appendix explaining what “Note 1” means.

In their comments, both Qwest and Pac-West suggest that “Note 1” of Revised Appendix A may have been intended to refer to the “Note” entry shown at the top of the first page of the Appendix. The parties do not agree, however, concerning the text encompassed by the “Note” or the meaning that should be ascribed to it.

Revised Appendix A is a price list showing the interconnection facilities and unbundled elements available under the ICA, together with the rates applicable to those items. Under the title of the Appendix and immediately preceding the price list, are seven sentences that, when interpreted in context, disclose the NRCs that the parties intended would apply to DTT facilities and the two other facilities identified by “Note 1.”

The first sentence under the heading in Revised Appendix A states that, “except as footnoted,” the rate revision is pursuant to Commission Order No. 97-239. That order was entered in docket UM 844 and specified revisions to recurring “building block”<sup>14</sup> rates adopted previously by the Commission in Order No. 96-283 in docket UM 351.<sup>15</sup> The footnotes referenced in the first sentence begin on page 2 of Revised Appendix A, and are not relevant to the issues in dispute.<sup>16</sup>

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<sup>13</sup> DTT, Tandem Transmission, and Direct Link Transport are the only facilities specified in original Appendix A for which an NRC column was added. Revised Appendix A does include new services not included in original Appendix A for which both recurring and nonrecurring charges are specified.

<sup>14</sup> The Commission began its investigation into the unbundling of telecommunications services in docket UM 351, approximately five years before passage of the Telecommunications Act of 1996 (Act). As applied by the Commission, “building blocks” were the approximate equivalent of “unbundled network elements” -- or UNEs -- as defined in the Act. In 2000, the Commission concluded that the Oregon building block terminology established in docket UM 351 should be changed to correspond to the UNE terminology used in the Act. The reconciliation was accomplished in Order No. 01-1106, entered December 26, 2001, in consolidated dockets UT 138 and UT 139, Phase II.

<sup>15</sup> The building block rates adopted in Order No. 96-283 were modified in Order No. 97-239 to take into account new cost estimates approved in docket UM 773 (Order No. 96-284), and also to implement a revised mark-up authorized by the Commission.

<sup>16</sup> Pac-West’s original complaint suggested that “Note 1” might refer to the first of a series of footnotes beginning on page 2 of Revised Appendix A. However, it is apparent from the form and numbering sequence used in those footnotes that they refer to other rate elements in the Appendix. Both Pac-West and Qwest now appear to have reached the same conclusion. Pac-West Op. Br. at 5; Qwest Op. Br. at 9.

Taken together, the second and third sentences acknowledge that Revised Appendix A does not encompass all of the unbundled building block elements approved by the Commission and available from Qwest. In addition, the parties recognize that, while Revised Appendix A includes the unbundled elements that would *most likely* be used by the parties, there remains the possibility that other elements might be used during the term of the agreement. To the extent other elements are required, they “are available pursuant to Appendix C.” The reference to “Appendix C” is to Order No. 96-188, Appendix C, wherein the Commission established its initial list of building blocks and recurring building block rates. Appendix C was subsequently revised in Order No. 96-283, to comply with regulations promulgated by the Federal Communications Commission (FCC) pursuant to the 1996 Act. Revised Appendix C of Order No. 96-283 changed the rates of several building blocks and added new building blocks to the list originally established in Order No. 96-188.

Order No. 96-283 also mandated that NRCs for provisioning building blocks should be addressed in compliance filings made by Qwest and Verizon.<sup>17</sup> On December 16, 1996, Qwest made its compliance filing as required by Order No. 96-283. The compliance filing was designated Advice No. 1661. Pursuant to Order No. 97-037, Advice No. 1661 was superceded in its entirety by Supplemental Advice No. 1661. On April 24, 1997, the Commission entered Order No. 97-153, opening a generic investigation of NRC costs and prices and authorizing the NRC rates in Supplemental Advice No. 1661 to take effect subject to refund. As noted above, the generic NRC investigation was designated docket UT 138/139.

The fourth sentence in Revised Appendix A indicates that, in the event of a conflict regarding pricing, the rates specified in “Order No. 96-283, as amended,”<sup>18</sup> shall prevail” over anything to the contrary in Revised Appendix A. As discussed below, this sentence is critical to ascertaining the NRCs that the parties contemplated would apply to the provision of DTT facilities.

The fifth and sixth sentences in Revised Appendix A follow the “Note” entry discussed above. The fifth sentence indicates that in some cases the unbundled elements described in the ICA “are changed from the building block vernacular” used by the Commission in docket UM 351 (*i.e.*, in Order Nos. 96-188 and 96-283). For example, the term “Direct Trunk Transport” used in the ICAs is not a building block term used by the Commission.<sup>19</sup>

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<sup>17</sup> Order No. 96-283 at 13. At the time Order No. 96-283 was issued, Qwest was known as U. S. WEST Communications, Inc., and Verizon was known as GTE Northwest Incorporated.

<sup>18</sup> The term “as amended” is underscored in Revised Appendix A.

<sup>19</sup> In fact, as discussed below, the “fixed” and “per-mile” DTT rates listed in Revised Appendix A are actually based upon the “Interoffice Transport” building block rates adopted by the Commission in Order No. 97-239 for the “Transport Termination Dedicated” and “Transport Facilities Dedicated” building blocks. The building block rates in Order No. 97-239 revised the building block rates previously approved in Order No. 96-238, which mirrored the Interoffice Transport rates proposed by Qwest in Supplemental Advice 1661.

The sixth sentence in Revised Appendix A also appears to be part of the “Note” entry and, as in Sentence No. 1, confirms that the rate revisions in Revised Appendix A are based on Order No. 97-239 entered in docket UM 844. As noted, the building block rate changes approved in Order No. 97-239 revised the building block rates approved in Order No. 96-283 in docket UM 351. Both of those orders affected only *recurring* building block rates. As also noted, the Commission determined in Order No. 97-153 that the *nonrecurring* rates filed by Qwest in Supplemental Advice 1661 in compliance with Order No. 96-283 would be considered in docket UT 138/139, the generic NRC investigation.

Because the seventh sentence in Revised Appendix A is separated by a space from the fifth and sixth sentences, it is unclear whether the parties intended it to be part of the “Note” entry. The sentence basically states that, if Pac-West seeks a rate or rate element referred to in the ICA but not contained in Revised Appendix A, Qwest will provide the applicable rate upon request. Like Sentence No. 2, it is an acknowledgement by the parties that Revised Appendix A may not include all of the rates or rate elements applicable to the interconnection agreement.

As mentioned above, the parties inserted “Note 1” under the DTT NRC column as well as under the NRC column for the Tandem Switched Transport and Direct Link Transport elements. Pac-West argues that “Note 1” refers only to the fifth and sixth sentences discussed above; i.e., the two sentences immediately following the “Note” entry. It contends that those sentences do not shed any light upon the rates applicable to DTT NRCs. Qwest, on the other hand, argues that “Note 1” should also include the fourth sentence.

The fact that the parties inserted “Note 1” under the NRC column, but did not identify or explain what “Note 1” meant, indicates that an error of omission was made in drafting Revised Appendix A.<sup>20</sup> In the final analysis, however, the precise meaning of “Note 1” is not necessary to ascertain the NRCs applicable to DTT and the other two network elements. Absent any indication in the ICA to the contrary, it is reasonable to conclude that the parties intended that *all seven* of the sentences discussed above would apply to Revised Appendix A in its entirety. In other words, the parties intended that those sentences would provide the overall framework or context for interpreting all of the rates and rate elements set forth in Revised Appendix A.<sup>21</sup>

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<sup>20</sup> It appears that the parties attempted, without success, to adopt the same type of notation structure used in the original Appendix A. In the original Appendix A, the parties utilized a notation structure that specified “Notes 1-6,” together with an explanatory description for each. “Note 1,” for example, described the elements of the local tandem call termination rates and how those rates should be adjusted in the event transmission mileage exceeded 10 miles.

<sup>21</sup> Thus, the dispute over whether any of the sentences preceding or following the “Note” entry are included in “Note 1” is unimportant, because the requirements of those sentences apply to all matters encompassed by Revised Appendix A.

Sentence four of Revised Appendix A provides the answer to the puzzle concerning the DTT NRC rates that the parties intended to include in the ICA. As noted above, that sentence states that the prices approved by the Commission in “Order No. 96-283, as amended shall prevail” in case of a “conflict in pricing between this Appendix A and Order No. 96-238, as amended.” The most reasonable interpretation of this requirement is that any pricing questions or uncertainties arising from Revised Appendix A should be resolved by relying on the rates approved by the Commission in accordance with Order No. 96-238. In this situation -- where Pac-West argues that the nonrecurring charge intended by “Note 1” effectively means “zero” and Qwest contends that “Note 1” means the nonrecurring rates derived from Order No. 96-283 should apply - the language of Revised Appendix A supports the position taken by Qwest.

3. This interpretation of the Pac-West/Qwest ICA is consistent with the new Change of Law provision executed by the parties in 2003. That provision states, in part:

*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. This Section shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement. (Emphasis added.)*

The DTT NRCs that Qwest billed to Pac-West reflect the final rates approved by the Commission *as a result of the generic NRC investigation* initiated to examine Supplemental Advice No. 1661, filed by Qwest in compliance with Order No. 96-238.<sup>22</sup> Thus, Qwest has done precisely what the Change of Law provision and Revised Appendix A require. That is, it has corrected the rates in the interconnection agreement to correspond to the outcome of the Commission’s generic NRC proceeding, and has implemented rates in accordance with Order No. 96-238, as amended.

4. Pac-West argues that, “if the parties had intended to include DTT NRCs in the ICA they could have inserted the Commission-authorized interim rates from Supplemental Advice 1661 directly into Revised Appendix A.”<sup>23</sup> Obviously, the parties could have listed the subject-to-refund NRC rates authorized in Order No. 97-153 under

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<sup>22</sup> As noted, Order No. 97-153 authorized Qwest to impose the NRCs in Supplemental Advice No. 1661 on a subject-to-refund basis. Those interim NRCs remained in place for over six years, until June, 2003, when permanent NRCs were approved by the Commission in consolidated dockets UT 138/139, Phase III.

<sup>23</sup> Pac-West Reply Br. at 6.

the NRC columns in Revised Appendix A for DTT, Tandem Switched Transport, and Direct Link Transport. The fact that they failed to do so is not dispositive, however. As indicated above, the parties made an error of omission when they failed to include an explanation for the “Note 1” entry listed under the NRC column for DTT and the other two UNEs. Fortunately, they had the foresight to anticipate the possibility that conflicts would arise regarding pricing issues, and specified that such conflicts should be resolved by using the prices adopted by the Commission as a result of Order No. 96-238, as amended.

5. Pac-West argues that Attachment 1 to Amendment No. 1 of the ICA, executed by the parties in September, 2000, supports its claim that the agreement does not incorporate NRCs for DTT facilities.<sup>24</sup> Sections 1.3 and 1.4 of Attachment 1 apply the DTT rates in Appendix A to certain trunk facilities. Pac-West points out that these sections refer to monthly recurring fixed and per-mile DTT rates, but make no mention of DTT NRCs.

The reason that Attachment 1 to Amendment No. 1 does not mention NRCs for DTT facilities is because that Attachment was executed by the parties in September, 2000, *before* Revised Appendix A was filed.<sup>25</sup> As noted above, Revised Appendix A modified original Appendix A to include NRCs for DTT and other facilities.

6. PacWest also alleges that Qwest is asking the Commission to apply the “wrong” NRC rates to the ICAs. It asserts that: (a) the NRC rates in Supplemental Advice No. 1661 implemented by Qwest subject to refund, and (b) the final NRC rates filed by Qwest in compliance with Order No. 03-209 in docket UM 138/139, pertain only to Unbundled Dedicated Interoffice Transport (UDIT), and not to Direct Trunk Transport (DTT).<sup>26</sup> Pac-West emphasizes that DTT is an *interconnection facility* (trunk) between Qwest’s network and Pac-West’s network required by §252(c)(2) of the Act, whereas UDIT is an *unbundled network element* providing dedicated transport between Qwest switches required under §251(c)(3).

Qwest denies that it has billed Pac-West the wrong NRC rate for DTT facilities. It further asserts that both Supplemental Advice No. 1661 and the final NRCs filed in compliance with Order No. 03-209 in docket UT 138/139, Phase III, specify separate NRC rates for UDIT and DTT.

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<sup>24</sup> Pac-West Op. Br. at 6.

<sup>25</sup> Pac-West Amended Complaint at 3. Revised Appendix A was filed in November, 2000.

<sup>26</sup> *Id.*; Pac-West Reply Br. at 7-8.

In order to resolve this somewhat complex issue, it is necessary to discuss how the recurring and nonrecurring rates for dedicated transport have developed over time.<sup>27</sup>

**6(a). Recurring Dedicated Transport Rates.** The recurring Interoffice Transport building block rates filed by Qwest in Supplemental Advice No. 1661 were adopted by the Commission in Order No. 96-238, and were later revised in Order No. 97-239 in docket UM 844. The recurring fixed and per-mile DTT rates in Revised Appendix A mirror the monthly Interoffice Transport building block rates approved in Order No. 97-239.<sup>28</sup> Specifically, the parties adopted the monthly “Transport Termination Dedicated” building block rates for the “fixed” DTT charge, and the monthly “Transport Facilities Dedicated” building block rate for the per-mile DTT charge.<sup>29</sup>

In Order No. 01-1106, entered in docket UM 138/139, Phase II, the Commission reconciled its list of “building blocks” with the list of “unbundled network elements” adopted by the FCC in 47 C.F.R. §51.319. The Interoffice Transport building blocks were reclassified as “Interoffice Transport Facilities UNEs.” The Interoffice Transport Facilities UNEs were then separated into three categories: (1) Dedicated Interoffice Transport; (2) Dark Fiber Transport; and (3) Shared Transport per minute. The Dedicated Interoffice Transport category was further separated into four subcategories: (1) ILEC to ILEC Dedicated Transport; (2) ILEC to CLEC Dedicated Transport; (3) Multiplexing; and (4) Digital Cross Connect System.

Order No. 01-1106 also specified the recurring monthly rates for the new UNEs. For the ILEC to ILEC Dedicated Transport UNE, the “fixed” and per-mile rates for DS1 and DS3 transport facilities mirror the Interoffice Transport recurring building block rates for “Transport Termination Dedicated” and “Transport Facilities Dedicated” adopted in Order No. 97-239. In other words, the monthly “fixed” and per-mile rates adopted by the Commission for ILEC to ILEC Dedicated Transport are the same as the monthly recurring DTT rates adopted by the parties in Revised Appendix A.

The reason for this is simple. At the time Revised Appendix A was executed, the Interoffice Transport recurring building block rates were the only Commission-approved building block rates for dedicated transport. It was not until Order No. 01-1106 that dedicated transport was separated into ILEC to ILEC Dedicated

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<sup>27</sup> Both Pac-West and Qwest appear to agree that UDIT trunks provide interoffice transport between Qwest central offices, whereas DTT trunks connect a Qwest central office with a CLEC’s point of interconnection. They also agree that the Pac-West/Qwest ICA does not specify rates for UDIT, or even contemplate that Pac-West can order UDIT. Qwest Reply Br. at 6; Pac-West Reply Br. at 7, fn. 13.

<sup>28</sup> This is consistent with Sentences No. 1 and No. 6 of Revised Appendix A.

<sup>29</sup> Supplemental Advice No. 1661 is officially designated as Qwest tariff PUC Oregon No. 26. The recurring rates for the Transport Termination Dedicated building block are shown on Section 10.5, Sheet 7. The recurring rates for the Transport Facilities Dedicated building block are shown on Sheet 8 of the tariff.

Transport and ILEC to CLEC Dedicated Transport.<sup>30</sup> Even then, the Commission only specified recurring rates for the former UNE, using the Interoffice Transport building block rates approved in Order No. 97-239. The Commission specifically noted that it had not approved a default cost or price for the ILEC to CLEC Dedicated Transport UNE.<sup>31</sup>

Thus, even though Qwest and Pac-West agree that the ICA does not contemplate the provision of ILEC to ILEC Dedicated Transport, or UDIT, historical circumstance has resulted in a situation where the recurring rates for DTT facilities adopted in Revised Appendix A are identical to the recurring rates that were subsequently adopted by the Commission for UDIT.<sup>32</sup>

**6(b). Nonrecurring Dedicated Transport Rates.** As noted above, Pac-West alleges that Qwest is attempting to bill the wrong NRC rates. It maintains that the interim NRC rates set forth in Supplemental Advice No. 1661 and approved subject to refund in Order No. 97-153, as well as the final NRC rates filed in docket UT 138/139, Phase III, apply only to UDIT, not to DTT. Put another way, Pac-West claims that the DTT NRCs billed by Qwest are not the product of Order No. 96-283, as amended.<sup>33</sup>

The Commission's official files do not support the position taken by Pac-West.<sup>34</sup> Instead, they confirm that:

(1) Both Supplemental Advice No. 1661 and the UT 138/139 final compliance filing made by Qwest specify different NRCs for the transport facilities that are now referred to as DTT and UDIT.

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<sup>30</sup> Apparently, the FCC also failed to distinguish between ILEC- to-ILEC dedicated transport (UDIT) and ILEC- to-CLEC dedicated transport (DTT) until 2003, when it issued its Triennial Review Order. *In the Matter of the Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (released Aug. 21, 2003), reversed in part *United States Telecom Assoc. v. FCC* 359 F.3d 554 (D.C. Cir. 2004) (hereafter "TRO Order"), ¶365.

<sup>31</sup> See e.g., Order No. 01-1106, Appendix B at 8, fn. "#". Recurring rates specific to DTT are now listed in Qwest's SGAT. Qwest Reply Br., Exhibit T, *Qwest Oregon SGAT, Seventeenth Revision, Exhibit A*, Section 7.3, p. 1 (September 15, 2004).

<sup>32</sup> Not surprisingly, the "fixed" and "per-mile" recurring DS1 and DS3 DTT rates continue to mirror the corresponding "fixed" and "per-mile" UDIT rates. Qwest Reply Br., Exhibit T, *Qwest Oregon SGAT*, compare Section 7.3, p.1, with Section 9.6, p. 9.

<sup>33</sup> Again, Order No. 96-283 specified that nonrecurring costs incurred by Qwest and Verizon should be addressed in subsequent compliance filings. That order resulted in the NRCs filed by Qwest in Supplemental Advice No. 1661. In Order No. 97-153, the Commission approved Supplemental Advice No. 1661 subject to refund, and initiated the generic investigation in docket UT 138/139 that, after almost six years, culminated in Order No. 03-209.

<sup>34</sup> The Commission takes official notice of its orders and all documents and records in its files relating to the NRC dispute. See OAR 860-014-0050(1)(c) and (e).

(2) The final NRCs for DTT facilities approved by the Commission in docket UT 138/139 are derived from the interim NRCs applicable to the “Transport Facilities-Common and Dedicated” building block listed on Section 10.5, Sheet 9, of Supplemental Advice No. 1661.<sup>35</sup> Qwest was authorized to charge Pac-West those interim NRCs for DTT on a subject-to-refund basis pursuant to Order No. 97-153.

(3) The final UT 138/139 compliance filing replaced the interim NRCs for DTT with permanent NRCs as follows:

	<b>Interim DTT NRCs Supp. Advice No. 1661</b>	<b>Final DTT NRCs UT 138/139<sup>36</sup></b>
DS1-First Trunk	\$503.60	\$338.80
DS1-Each Additional Trunk	\$48.00	\$23.55
DS3-First Trunk	\$500.00	\$337.87
DS3-Each Additional Trunk	\$44.50	\$23.11

(4) Whereas the final NRCs for DTT facilities are derived from the interim NRCs applicable to the Transport Facilities-Common and Dedicated building block, the UT 138/139 compliance filing also discloses that the final NRCs for UDIT are derived from the interim NRCs applicable to Transport Termination Dedicated building blocks shown in Section 10.5, Sheet 7, of Supplemental Advice No. 1661.<sup>37</sup> Although the NRC column for the Transport Termination Dedicated building blocks in Supplemental Advice No. 1661 indicates that “NRC rates are under development in cost studies,”

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<sup>35</sup> Supplemental Advice No. 1661 did not list any Uniform Service Order Codes (USOC codes) for the Transport Facilities-Common and Dedicated building block NRCs. A USOC code is a unique five-character code used to identify facilities that Qwest and other carriers use for service orders. The NRCs listed in the UT 138/139 final compliance filing continue to be denominated “Transport Facilities-Common and Dedicated” (rather than DTT) and still do not have a USOC code. The following documents demonstrate that the Transport Facilities-Common and Dedicated NRCs are, in fact, the NRCs applicable to DTT facilities: Qwest Reply Br., Exhibit Q, *Executive Summary, Oregon Interconnection Cost Docket, Nonrecurring Elements Study ID #7654, 1996 Nonrecurring Cost Study Revised May 2003 in Compliance with Order No. 03-209* (hereafter, *Executive Summary*), Section B, *Description of Service*, p. 4, and Section F, *Summary of Results*, p. 10, lines 4-9; Exhibit R, *Qwest UT 138 USOC Old-New Price Comparison*, p. 2 of 5; Exhibit S, *Statement of Interconnection and Unbundled Elements*, Section 2.5, Sheet 8. The final DTT NRC rates prescribed in the UT 138/139 compliance filing also correspond with the DTT NRC rates set forth in Qwest’s Statement of Generally Available Terms (SGAT), Seventeenth Revision, Exhibit A, Direct Trunked Transport, Sections 7.3.2 and 7.3.3, p. 1 (September 15, 2004).

<sup>36</sup> Qwest affirms that Pac-West has been billed these rates for Qwest-provisioned DTT facilities. Qwest Reply Br. at 8.

<sup>37</sup> See e.g., Qwest Reply Br., Exhibit Q, *Executive Summary*, Section B, *Description of Service*, p. 4, and Section F, *Summary of Results*, p. 9, lines 9-12. See also Exhibit S, *Statement of Interconnection and Unbundled Elements*, Section 2.5, Sheet 6. The final UDIT NRC rates prescribed in the UT 138/139 compliance filing also correspond to the UDIT NRC rates set forth in Qwest’s SGAT. See Qwest Reply Br., Exhibit T, Qwest’s SGAT, Seventeenth Revision, Exhibit A, Unbundled Dedicated Interoffice Transport, Sections 9.6.2 and 9.6.3, pp. 9-10 (September 15, 2004).

the correlation is made by comparing the USOC codes for the Transport Termination Dedicated building blocks in Supplemental Advice No. 1661 with the USOC codes for UDIT NRCs in the UT 138/139 final compliance filing.<sup>38</sup>

In summary, there is no basis to Pac-West's claim that the DTT NRCs billed by Qwest are the "wrong" rates. Nor is there any justification for concluding that the DTT NRCs charged by Qwest did not result from "Order No. 96-283, as amended."<sup>39</sup>

7. In conjunction with its argument regarding UDIT, Pac-West asserts:

[U]nless a rate from Advice No. 1661 is expressly incorporated into the ICA, it cannot be imposed as though Advice 1661 were a tariff. It is not a tariff and cannot be interpreted to act as a tariff. In *MCI v. GTE*,<sup>40</sup> the United States District Court for the District of Oregon concluded that the Commission's UNE tariffs conflicted with the Act. While the Commission continues to have Qwest file statements listing recurring and nonrecurring prices for UNEs, these 'default' prices must be incorporated in interconnection agreements.<sup>41</sup> Accordingly, Qwest cannot impose a rate from Advice No. 1661 unless that rate has been incorporated into an interconnection agreement. As discussed above, the DTT NRCs Qwest seeks to impose upon Pac-West have not been incorporated in the ICA.<sup>42</sup>

The short answer to Pac-West's argument is that Revised Appendix A does in fact incorporate the DTT NRCs charged by Qwest. As discussed above, Revised Appendix A specifies that the prices set forth in Order No. 96-283, as amended, shall govern in the event of any pricing conflict.<sup>43</sup> In this instance, the conflict is between

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<sup>38</sup> Compare PUC No. 26, Section 10.5, Sheet 7, with Qwest Reply Br., Exhibit R, Old-New Price Comparison, p. 2, Exhibit Q, *Summary of Results*, p. 9. See also, Qwest Reply Br., Exhibit T, Qwest Oregon SGAT, Seventeenth Revision, Exhibit A, Unbundled Dedicated Interoffice Transport, Sections 9.6.2 and 9.6.3, pp. 9-10 (September 15, 2004).

<sup>39</sup> Pac-West also argues that the NRC rates charged by Qwest violate the FCC's Triennial Review Order, which redefined dedicated transport (UDIT) to include only those transmission facilities connecting ILEC switches and wire centers. Because the NRCs billed by Qwest apply to DTT, not UDIT, there is no merit to Pac-West's claim. See also, *TRO Order* at ¶¶365-368.

<sup>40</sup> *MCI Telecommunications Corp., and MCI Metro Access Transmission Services, Inc. v. GTE Northwest, Inc., and the Public Utility Commission of Oregon*, 41 F. Supp. 2d 1157 (D. Or. 1999).

<sup>41</sup> Order No. 00-316, docket UT 138/139, entered June 9, 2000, p. 8.

<sup>42</sup> Pac-West Op. Br. at 6-7.

<sup>43</sup> As noted, the NRCs set forth in Supplemental Advice 1661 were filed by Qwest in compliance with Order No. 96-238.

Pac-West's claim that there is no price for DTT NRCs and Qwest's assertion that the DTT NRC prices should be those derived from Order No. 96-283; that is, those NRCs approved in dockets UT 138/139, Phase III. Revised Appendix A clearly indicates that the parties intended to adopt the position advocated by Qwest.

Furthermore, since Revised Appendix A was added to the ICAs *after* both the *MCI v. GTE* decision and Commission Order No. 00-316, it is reasonable to conclude that the parties intended “default pricing” would apply.<sup>44</sup> Indeed, that is the only logical reason why the parties would have specified that “Order No. 96-283, as amended,” should prevail in the event of a pricing conflict. Thus, there is no basis for Pac-West's claim that a Commission decision approving the DTT NRCs billed by Qwest somehow equates to the imposition of a tariff upon the parties.

8. Qwest argues that it is entitled to recover DTT NRCs pursuant to the equitable doctrines of *quantum meruit* and unjust enrichment. It also asserts that failure to require Pac-West and Wantel to pay NRCs discriminates against other CLECs who are similarly situated and have already paid such charges. Since we have concluded that Revised Appendix A permits Qwest to assess the DTT NRCs authorized in docket UT 138/139, Phase III, it is unnecessary to address these claims.

## **Issue II – Does the Relative Use Factor Apply to DTT NRCs?**

**Party Positions.** Pac-West and Wantel argue that the “relative use factor” (RUF) set forth in Article V., Section D.2.d., of the ICAs applies to recurring *and* nonrecurring charges for DTT facilities. Qwest disagrees that the RUF applies to DTT NRCs. As noted above, Article V., Section D.2.d., provides:

If the Parties elect to establish two-way direct trunks, the compensation for such jointly used ‘shared’ facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider’s use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider’s relative use (i.e., originating minutes of use) of the facility in the busy hour.

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<sup>44</sup> The default pricing approach adopted in Order No. 00-316 provides that, in lieu of tariff filings, the Commission will (a) establish a list of UNEs that ILECs must provide under the Act, and (b) specify the recurring and nonrecurring charges requesting carriers must pay for those UNEs. In accordance with the decision in *MCI v. GTE*, those UNE prices function as default prices that shall be incorporated in ICAs arbitrated by the Commission unless: (a) the parties agree to different UNE prices, or (b) one of the parties to the arbitration demonstrates there are special costs warranting a price different from the default price established by the Commission. See, Order No. 00-316 at 7-9.

The CLECs argue that the Commission is obligated to enforce the ICAs “as written.”<sup>45</sup> They maintain that a straightforward interpretation of Article V., Section D.2.d., requires applying the RUF not only to monthly recurring fixed and per-mile DTT charges, but also to NRCs (to the extent they exist). They further emphasize that there is no provision in the ICAs for excluding certain types of traffic from the RUF calculation.

The CLECs assert that it makes sense to apply the RUF to DTT NRCs because:

[T]he two-way trunks that are involved here are shared facilities that are used for the mutual benefit of both Qwest and [the CLEC]. They carry traffic of both carriers and allow both to avoid the expense of providing one-way trunks. Also, they allow both carriers to discharge their interconnection obligations. Since the DTT facilities benefit both carriers, both should share in covering their costs, both the recurring costs and the non-recurring costs of installation.<sup>46</sup>

Consistent with this argument, both Wantel and Pac-West point out that Qwest's responses to data requests “demonstrate that Qwest effectively applies a RUF to DTT NRCs for other CLECs.”<sup>47</sup>

With respect to how the RUF would apply to DTT NRCs, Wantel opines:

[T]he fact that the ICA does not specify the mechanics of how NRCs should be shared when the facilities are first installed should be of no concern. Logic dictates that, in the absence of a specific agreement otherwise, the parties would assume that the busy hour traffic would be roughly equal and; therefore, initially split the NRCs 50/50. They would then review the actual busy hour traffic flows on a quarterly basis and make any adjustments to the NRC split that are deemed necessary through subsequent bill adjustments. That is a fair and practical way of handling the issue.<sup>48</sup>

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<sup>45</sup> Pac-West Op. Br. at 4.

<sup>46</sup> Wantel Reply Br. at 5; Pac-West Reply Br. at 2-3, ftn. 4.

<sup>47</sup> Wantel Op. Br. at 7, Reply Br. at 5; Pac-West Op. Br. at 8, Reply Br. at 4, 10.

<sup>48</sup> *Id.* Pac-West makes a similar proposal. See Pac-West Op. Br at 8-9.

Qwest disputes the CLECs' claim that the RUF applies to NRCs. It contends that it does not make sense to attempt to apply a "relative use" provision to nonrecurring charges:

Common sense also dictates that the relative use factor, which is based on 'usage,' necessarily applies to recurring charges (which are based on usage), and not to NRCs, which are based on one-time labor installation charges, regardless of future usage. Finally, the usage is to be *adjusted*, which clearly means that it applies to the continuing (recurring) monthly charges for the facilities based on the relative use of those facilities. NRCs, however, are one-time, labor-intensive charges at the initiation of service, and thus the parties simply cannot know what the 'relative use' of the facilities will be in the future, which can change over time.<sup>49</sup> (Emphasis in original.)

Qwest asserts that it is "well understood in the industry" that the RUF does not apply to NRCs, and notes that the CLECs have not cited any authority to support their theory. Moreover, despite Qwest having entered ICAs with more than 100 CLECs in Oregon, none have alleged that the RUF applies to NRCs. Indeed, Qwest asserts that Pac-West and Wantel are the first CLECs to make such a claim since passage of the 1996 Act.

Qwest also rejects the CLECs' claim that it makes sense for the parties to share NRCs because the parties share the use of the DTT facilities. According to Qwest, the CLECs ignore that they ordered the facilities for their own business purposes and that Qwest had no choice in the matter. The CLECs also ignore that Qwest has incurred a cost to install the facilities, which is the principal cost that NRCs are designed to recover.

**Issue II – Decision.** 1. Article V., Section D.2.d., of the ICA contemplates that compensation for DTT facilities shall be adjusted based on the usage of those facilities during the busy hour. This is a logical approach to take in the case of monthly recurring charges, which typically recover ongoing costs associated with a particular service or element. As the Commission has recognized, recurring costs tend to be usage-based.<sup>50</sup> NRCs, on the other hand, are designed to recoup the nonrecurring costs of installing – as opposed to using – telecommunications facilities. These costs tend to be predominately labor-related and are customarily assessed on a one-time, up-front basis.<sup>51</sup>

<sup>49</sup> Qwest Op. Br. at 18-19; Reply Br. at 22.

<sup>50</sup> Order No. 94-444 at 55.

<sup>51</sup> *Id.* It should be noted that the Commission has authorized certain NRCs to be recovered over time via recurring installment payments consistent with the 47 C.F.R. §507(b). Such payments, however, must be made over a reasonable period of time, not continually readjusted in the manner suggested by the CLECs.

The problem with the contract interpretation urged by the CLECs is that it is fundamentally incompatible with the recovery of nonrecurring costs. Under the RUF provision in the ICAs, the NRCs paid by each party would be periodically recalculated based on relative usage of each DTT trunk “during the busy hour.” While this type of adjustment mechanism makes sense for costs that are ongoing in nature, it is neither a logical nor practical method for recovering one-time costs incurred to install facilities. Nonrecurring costs must be paid by someone once and for all, not continually passed back and forth between the parties.

The CLECs attempt to overcome the mechanical difficulties associated with their approach by suggesting that the parties could initially split the NRCs 50/50 and make subsequent adjustments on a quarterly basis. The fact that the ICAs make no mention of this procedure “should be of no concern,” they insist, because it is a “fair and practical way of handling the issue.”<sup>52</sup> Not only does the CLECs’ proposed adjustment mechanism represent a departure from their claim that the ICAs must be applied “as written,”<sup>53</sup> it fails to remedy the inherent flaw in applying the RUF to NRCs; that is, there is simply no point at which the adjustments end and final payment occurs.<sup>54</sup>

The CLECs contend that, because the DTTs provided under the ICAs are shared facilities, it makes perfect sense for the parties to share the costs of installation. That argument would have more force if the language of the ICAs clearly specified how such costs should be apportioned *and paid for*. What the CLECs propose is something entirely different, however—a contorted reading of Article V., Section D.2.d., that envisions a scenario where the parties share nonrecurring costs, but never finalize payment of those costs.<sup>55</sup>

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See Order No. 00-316 at 16-18; Order No. 03-085 at 14-15, fn. 53. Note also that, at the time the ICAs were adopted, Qwest’s tariff defined “Nonrecurring Charge” as “[a] one-time charge made under certain conditions to recover all or a portion of the cost of installing telephone facilities.” See U.S. WEST Communications, Inc., P.U.C. Oregon No. 29, Exchange and Network Services, Section 2.1, Definitions, Original Sheet 12.

<sup>52</sup> Wantel Reply Br. at 5.

<sup>53</sup> Pac-West Reply Br. at 3, 4, 10.

<sup>54</sup> The illogic of attempting to apply the RUF to NRCs is underscored by the practical difficulties that would result. As Qwest points out, the transactional costs associated with continually adjusting the NRC for each DTT facility as long as the ICAs remain in effect would be unwieldy, inefficient, and uneconomical. Qwest Reply Br. at 20. Of course, the parties could have fashioned a mechanism to apportion and recover NRCs over a specific amount of time, but the ICAs simply do not contain such a provision.

<sup>55</sup> In response to the CLECs’ assertion that NRC costs should be shared because “both parties benefit from the availability and use” of DTT facilities, Qwest notes that “Wantel and Pac-West have ordered these facilities, for their own business purposes, and Qwest had no choice in the matter.” Qwest emphasizes that the Commission should not lose sight of the fact that NRCs are designed to recoup the costs Qwest incurred to install the facilities, rather than the cost to use them. As noted above, usage costs are recovered through the monthly recurring fixed and per-mile charges set forth in Revised Appendix A.

2. Pac-West and Wantel argue that Qwest's response to the following information request indicates "that Qwest can and does apply the equivalent of the RUF to DTT NRCs it assesses on other CLECs."<sup>56</sup>

Pac-West Request No. 013, Wantel Request No. 011: Does Qwest apply an RUF calculation to determine reductions to the nominal rate for assessing DTT NRCs for any other telecommunications carriers with whom Qwest exchanges traffic in Oregon?

Qwest Response: There may be specific interconnection agreements with specific language to not bill NRCs for DTT because of the equal exchange of traffic between Qwest and the CLEC (a situation not at issue here). However, Qwest is not aware of any such RUF calculations for any interconnection agreement that has language similar to that which Pac-West has.

Contrary to the CLECs' claims, Qwest's response does not disclose that Qwest applies "the equivalent of the RUF to DTT NRCs."<sup>57</sup> At most, it indicates that in certain agreements the parties may have agreed to waive the NRC where a 50/50 traffic balance exists. As Qwest points out, that is definitely not the situation presented here.<sup>58</sup> An agreement to waive NRCs differs substantially from an agreement to make periodic NRC adjustments based on the RUF.

Furthermore, it is inappropriate to rely upon terms and conditions from other ICAs to demonstrate what the parties intended when they entered into these agreements. Ironically, it is Pac-West that makes this point most emphatically.<sup>59</sup>

<sup>56</sup> Pac-West Reply Br. at 4.

<sup>57</sup> *Id.*

<sup>58</sup> At the November 18, 2004, prehearing conference, Pac-West conceded that nearly 100 percent of the traffic transported over the DTT facilities is delivered to Pac-West's ISP customers. Wantel, on the other hand, indicates that 80 percent of the traffic carried over its DTT facilities is incoming voice traffic to call center customers. Wantel Op. Br. at 9, fn. 4.

<sup>59</sup> Pac-West asserts: "Qwest has not shown that the rates, terms and conditions of the interconnection agreements it has with the CLECs that have paid Qwest DTT NRCs are identical to those contained in the ICA, or that the traffic flow between Qwest and these other CLECs is identical. Even if Qwest were to prove that a CLEC that has an interconnection agreement with Qwest containing provisions identical to those found in the ICA, and that the traffic volumes were identical, and it had erroneously paid Qwest DTT NRCs, it would still have no bearing whatsoever on the proper interpretation of Pac-West's rights and obligations under the ICA." Pac-West Reply Br. at 3. There is no indication from Qwest's data response that the contracts referred to in the data response are similar to the Pac-West/Qwest and Wantel/Qwest agreements.

3. Pac-West also relies on the following Qwest data response to support its claim that “the parties can, with relative ease, determine how to apply the RUF to an NRC.”<sup>60</sup>

Pac-West Request No. 3:

- A. How is the relative use factor (“RUF”) referred to in Article V, Section D.2.d. of the ICA calculated?
- B. How often is the RUF calculated (e.g., hourly, monthly, quarterly)?

Qwest Response:

- A. The denominator in the RUF calculation includes all MOU going across the trunk (in both directions). Qwest's responsibility (the numerator) includes all non-ISP local (non-VNXX) MOU + all Qwest originated switched access MOU + all transit MOU that Qwest receives compensation for.
- B. The provider of the LIS two-way Entrance Facility will initially share the cost of the LIS two-way EF by assuming an initial RUF, relative use factor of 50% for a minimum of one quarter. Future adjustments to the RUF can be initiated by either party when there is sufficient data to warrant a change.<sup>61</sup>

Qwest's answer does not support Pac-West’s claim that the RUF can be applied readily to NRCs. There is no indication that the calculation procedure identified by Qwest is designed to apply to anything other than the monthly recurring charges for DTT facilities, as Qwest alleges. Furthermore, even if the process were used to initially apportion NRCs, it does not address the fundamental problem identified above; *i.e.*, that there is nothing in these ICAs that indicates how the costs underlying the NRCs are to be paid once and for all. Absent such a provision in the agreements themselves, the CLEC proposal to apply the RUF to NRCs simply does not make any sense.

4. In *Universal*, the Court held that Qwest was entitled to collect NRCs for DTT facilities because Universal Telecom failed to meet its burden of proof. Although Pac-West argues that the Court’s ruling is not relevant to this proceeding, it claims that “the rationale the court utilized in ruling that ISP-bound traffic is included in

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<sup>60</sup> Pac-West Op. Br. at 8.

<sup>61</sup> *Id.*, Exhibit B at 1.

the RUF when calculating DTT MRCs is equally applicable to DTT NRCs.”<sup>62</sup>  
Specifically, Pac-West claims:

As the court noted, ‘a (sic) 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.’ It stands to reason that if charges designed to recover the 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. (Citations omitted.) (Emphasis in original.)<sup>63</sup>

As noted above, both the language of the RUF<sup>64</sup> and §51.709(b)<sup>65</sup> contemplate that the apportionment of the costs associated with DTT facilities will be based upon usage of those transport facilities. While it is a relatively simple matter to apportion DTT monthly recurring costs in this manner, the same is not true for nonrecurring costs for the reasons discussed above. Indeed, applying the RUF to NRCs results in a bizarre scenario whereby NRCs are continually reapportioned without ever being finalized. There is nothing in the ICAs that suggests that the parties contemplated such an illogical result.

Pac-West’s assertion that DTT NRCs are “facility charges” that are necessarily encompassed by the RUF is not supported by the FCC’s explanation of how §51.709(b) is intended to apply. In *TSR Wireless, LLC v. U.S. WEST Communications*,

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<sup>62</sup> Pac-West Supp. Br. at 5.

<sup>63</sup> *Id.* at 5-6. Wantel joins in this argument. Wantel Supp. Br. at 3.

<sup>64</sup> As noted, the RUF provision in the ICAs provides: “The actual rate paid to the provider of the direct trunk facility *shall be reduced to reflect the provider’s use of that facility*. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider’s relative use (i.e., originating minutes of use) of the facility in the busy hour.” Pac-West Exhibit/1, *Pac-West/Qwest ICA*, Section V.D.2.d. (Emphasis supplied.)

<sup>65</sup> Section 51.709(b) states: “The rate of a carrier providing transmission of traffic between two carrier’s networks shall *recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic* that will terminate on the providing carrier’s network. Such proportions may be measured during peak periods.” (Emphasis supplied.)

*Inc.*<sup>66</sup> the FCC rejected an ILEC claim that §51.703(b) governs only charges for “traffic,” as opposed to charges for the “facilities” used to transport that traffic.<sup>67</sup> In describing the relationship of §51.703(b) to §51.709(b) (*i.e.*, the RUF), the FCC held:

Nor are we persuaded by the LEC arguments that the reference to ‘transmission facilities’ in §51.709(b) compels the conclusion that §51.703(b) is limited to ‘traffic charges.’ Section 51.709(b) applies the general principle of §51.703(b) – that a LEC may not impose on a paging carrier *any costs the LEC incurs to deliver* LEC-originated, intraMTA traffic, regardless of how the LEC chooses to characterize those costs – to the specific case of dedicated facilities. (Emphasis supplied.)

Thus, while the main thrust of the FCC’s discussion dealt with the attempt to avoid traffic charges by redesignating them as facility charges, the FCC clearly recognized that §51.709(b) applies to *costs incurred to deliver traffic*. While such costs certainly include monthly recurring DTT charges, they do not encompass DTT NRCs, which recover only the costs of installing those transport facilities.

The decision in *Universal* is also instructive regarding this issue. In that case, “100 percent of the traffic exchanged between the parties originated on Qwest’s network and terminated on Universal’s.”<sup>68</sup> Although the Court concluded that §51.703(b) and §51.709(b) prevented Qwest from imposing charges on Universal for DTT and other interconnection facilities, it nevertheless permitted Qwest to assess NRCs for the installation of interconnection facilities.<sup>69</sup> While the decision was predicated on Universal Telecom’s failure to present evidence on the issue, it is extremely unlikely that the Court would have permitted Qwest to collect NRCs if the outcome was contrary to §51.709(b).

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<sup>66</sup> *TSR Wireless, LLC, et al. v. U. S. WEST Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, FCC 00-194, ¶26 (Rel. June 21, 2000) (hereafter, *TSR Wireless*).

<sup>67</sup> The FCC noted that “. . . the Commission’s rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic would be inconsistent with those rules. Moreover, the [Local Competition] Order requires a carrier to pay for dedicated facilities only to the extent it uses the facilities to deliver traffic that it originates. Indeed, the distinction urged by the Defendants is nonsensical, because LECs could continue to charge carriers for the delivery of originating traffic by merely re-designating the ‘traffic’ charges as ‘facilities’ charges. Such a result would be inconsistent with the language and intent of the Order and the Commission’s rules.” *Id.* at para. 25.

<sup>68</sup> *Universal*, mimeo at 12-13.

<sup>69</sup> *Id.* at 13.

Based on the foregoing, the Commission concludes that Article V., Section D.2.d., cannot reasonably be interpreted to apply the RUF to NRCs.

### **Issue III – Does the Relative Use Factor Apply to DTT MRCs?**

In its amended complaint, Pac-West states that it has paid Qwest approximately \$47,016.74 in monthly recurring fixed and per-mile charges for use of two-way DTT facilities. Pac-West contends that the monthly recurring charges (MRCs) “appear to have been assessed using the nominal rate set forth in Appendix A to the ICA.”<sup>70</sup> Pac-West seeks a determination by the Commission that the RUF applies to MRCs for DTT facilities.

Article V., Section D.2.d., of the ICAs provides that the nominal compensation paid to the provider of DTT facilities shall be the rates set forth in Revised Appendix A. Those rates, however, are reduced pursuant to the RUF to reflect the provider’s relative use of the facilities during the busy hour.

As we have explained, the RUF was clearly designed to apply to recurring charges for the use of the DTT facilities. The Commission therefore agrees that the RUF applies to MRCs assessed for those facilities. Whether or not Pac-West is entitled to a refund of the charges assessed by Qwest depends upon the type of traffic under consideration. See discussion of Issues IV and V below.

### **Issue IV – Should ISP-Bound Traffic Be Excluded From the RUF Calculation for Purposes of Determining DTT Compensation?**

**Background.** In the *ISP Remand Order*,<sup>71</sup> the FCC held that ISP-bound traffic fell within the scope of §251(g) of the Act and was therefore excluded from “telecommunications” traffic subject to reciprocal compensation under §251(b)(5). In making this determination, the FCC found that the availability of per-minute reciprocal compensation for ISP-bound traffic created market distortions and opportunities for

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<sup>70</sup> Pac-West Amended Complaint, dated August 24, 2004, at ¶¶15-19. Although paragraph 18 of the Amended Complaint indicates that Qwest originates 100 percent of the minutes of use on the DTT facilities, Pac-West subsequently removed that claim from its Second Amended Complaint. The letter filed by Pac-West with the Second Amended Complaint indicates that “Pac-West discovered during the discovery process that not all of the traffic flowing over the facilities in dispute in this proceeding is originated by Qwest.” See, Letter from Mark P. Trinchero to Frances Nichols, dated November 10, 2004.

<sup>71</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, 2000, *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). (hereafter, *ISP Remand Order*).

regulatory arbitrage that undermined the operation of competitive markets.<sup>72</sup> It concluded that bill-and-keep arrangements<sup>73</sup> might eliminate incentives for arbitrage by forcing carriers to look to their own customers for cost recovery. Pending completion of its *Intercarrier Compensation NPRM* proceeding, the FCC adopted an interim compensation regime that included a transition to bill and keep.<sup>74</sup>

In September, 2001, this Commission entered Order No. 01-809 in docket ARB 332, an arbitration proceeding involving Level 3 Communications and Qwest.<sup>75</sup> In that order, the Commission concluded that ISP-bound traffic should not be included in calculating the relative use of DTT facilities provided by Qwest. Significantly, the Commission concluded that its authority over ISP-bound traffic was preempted as a result of the FCC's finding in the *ISP Remand Order* that such traffic was not subject to reciprocal compensation because of the "carve-out" provision in §251(g).<sup>76</sup>

In May, 2002, the United States Court of Appeals for the District of Columbia entered its decision in *WorldCom, Inc. v. FCC, et al.*<sup>77</sup> The Court rejected the FCC's finding that §251(g) authorizes the exclusion of ISP-bound traffic from the reciprocal compensation requirements of §251(b)(5). The Court declined to make any further determinations, including the scope of "telecommunications" encompassed by §251(b)(5).<sup>78</sup> It also refused to vacate the *ISP Remand Order*, observing that "there is plainly a non-trivial likelihood that the [FCC] has authority to elect [bill and keep] (perhaps under §§251(b)(5) and 252(d)(B)(i))."<sup>79</sup>

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<sup>72</sup> *Id.* at para. 13, *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. §160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, at para. 5 (rel. October 18, 2004) (hereafter, *Core Communications*.)

<sup>73</sup> "Bill and keep" refers to an arrangement in which each carrier recovers its originating and terminating costs from its own end users. *ISP Remand Order* at para. 2, fn. 6.

<sup>74</sup> *Id.* at para. 7. *Core Communications* at para. 5.

<sup>75</sup> *Re Petition of Level 3 Communications for Arbitration with Qwest Corporation*, docket ARB 332, Order No. 01-809, entered September 13, 2001. (Emphasis added.)

<sup>76</sup> Order No. 01-809, Appendix A at 13-14.

<sup>77</sup> *WorldCom, Inc. v. Federal Communications Commission, et al.*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>78</sup> The Court noted ". . . 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)." *Id.* at 434.

<sup>79</sup> *Id.*

In November, 2002, the United States District Court for the District of Oregon entered its decision in *Level 3 Communications v. Public Utility Commission of Oregon, et al.* The Court affirmed the OPUC's decision in Order No. 01-809 excluding ISP-bound traffic from the RUF. In reaching its decision on that issue, the Court observed:

The parties have not pointed to any statute or regulation that, at least in the court's view, provides a clear answer to the dispute. The FCC has not directly addressed this issue either. In a modern-day exercise of reading the tea leaves, each party tries to coax nuances from various FCC pronouncements and regulations on other subjects. None of the arguments is particularly persuasive; some were not even preserved below. An extensive discussion of the many arguments would be pointless. In all probability, the FCC will soon moot this case by directly addressing the issue. Level 3, as the plaintiff, had the burden of persuading the court that the PUC's decision violates the 1996 Act, or is otherwise erroneous. Level 3 has not met that burden.<sup>80</sup>

In May, 2004, the OPUC entered Order No. 04-262, in docket ARB 527, an arbitration proceeding involving Qwest and AT&T Communications. In that order, the Commission affirmed its decision in Order No. 01-809, excluding ISP-bound traffic from the RUF for purposes of the proposed AT&T/Qwest ICA.<sup>81</sup>

In December, 2004, the United States District Court for the District of Oregon entered its decision in *Universal*. In that opinion, the Court addressed several issues relating to the Universal/Qwest ICA, which like the Pac-West/Qwest and Wantel/Qwest ICAs, also adopted the interconnection agreement between Qwest and MFS Intelenet. With respect to compensation for DTT facilities, the Court concluded that the *ISP Remand Order* did not have the effect of automatically excluding ISP-bound traffic from the RUF for purposes of the existing Universal/Qwest ICA.<sup>82</sup>

**Party Positions.** Nearly 100 percent of the traffic transported over DTT facilities under the Pac-West/Qwest ICA is ISP-bound traffic. Under the Wantel/Qwest ICA, approximately 20 percent of the traffic transported over DTT facilities is ISP-bound

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<sup>80</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).

<sup>81</sup> Although the Commission acknowledged that *Worldcom* rejected §251(g) as the legal basis for the FCC's rules, it observed that the D.C. Circuit had not vacated the rules. *Re Petition of Qwest Corporation for Arbitration with AT&T Communications*, Docket ARB 527, Order No. 04-262, entered May 17, 2004, at 2-3, Arbitrator's Decision at 10-13.

<sup>82</sup> *Id.*, mimeo at 8-13.

traffic. Wantel and Pac-West argue that the RUF should apply to ISP-bound traffic. Qwest disagrees.

In support of its position, Qwest emphasizes that the Commission has on two occasions interpreted the FCC's *ISP Remand Order* to exclude ISP-bound traffic when determining the relative use of DTT facilities. It reiterates that Order No. 01-809 was affirmed on appeal in *Level 3 Communications v. PUC*, and reaffirmed by the Commission last year in ARB 527.

Qwest argues that the *Universal* decision is not entirely on point because it deals with reciprocal compensation for ISP-bound traffic rather than the relative use of DTT facilities.<sup>83</sup> To the extent *Universal* does impact the ISP-bound traffic issue, it supports Qwest's position because the *ISP Remand Order* was integrated into the ICAs by virtue of contract amendments agreed to by the parties in 2003.<sup>84</sup>

The CLECs contend that there is no provision in ICAs for excluding any specific type of traffic from the RUF.<sup>85</sup> They emphasize that an ICA is a binding contract, subject to amendment only in accord with its terms, and not automatically amended each time the Commission renders a decision in a subsequent arbitration proceeding.<sup>86</sup> The CLECs further maintain that, "in order to apply the Commission's decisions regarding the exclusion of traffic from the RUF, Qwest would need to amend the agreement to expressly do so."<sup>87</sup> Since the parties have not executed such an amendment, the CLECs contend that the Commission's decisions in ARB 332 and ARB 527 do not apply.

The CLECs also claim that the Commission's decisions excluding the *transport* of ISP-bound traffic from the RUF are based upon a "misreading of the FCC's *ISP Remand Order*."<sup>88</sup> They contend that the FCC's recent order in *Core Communications* "makes clear" that the *ISP Remand Order* was designed to modify only

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<sup>83</sup> Qwest Supp. Br. at 2. The Court held that Qwest could not impose charges on Universal Telecom for certain facilities, including DTT facilities, used solely to exchange traffic originating on Qwest's network and terminating on Universal's network. *Universal*, mimeo at 13.

<sup>84</sup> As discussed below, both Pac-West and Wantel executed an "ISP-Bound Traffic Amendment" to their interconnection agreements with Qwest. The Wantel/Qwest amendment was executed by the parties in May, 2003, and approved by the Commission in Order No. 03-525, entered August 26, 2003. The Pac-West/Qwest Amendment was executed by Pac-West in August, 2002, by Qwest in February, 2003, and approved by the Commission in Order No. 03-204, entered April 4, 2003. Pac-West and Qwest also executed a new Change of Law Amendment at the same time as their ISP-Bound Traffic Amendment.

<sup>85</sup> Pac-West Op. Br. at 9; Wantel Reply Br. at 6.

<sup>86</sup> Pac-West Op. Br. at 10.

<sup>87</sup> *Id.* at 11.

<sup>88</sup> Wantel Reply Br. at 6; Pac-West Reply Br. at 12.

the reciprocal compensation rates applicable to the *termination* of ISP-bound traffic, and did not disturb existing obligations relating to the cost sharing of DTT facilities or other interconnection facilities.<sup>89</sup> Thus, both §51.709(b) and the RUF continue to apply to compensation arrangements for DTT facilities.<sup>90</sup>

The CLECs further maintain that the *Qwest v. Universal* decision substantiates their position regarding the applicability of the RUF to ISP-bound traffic. Although that decision focuses on monthly recurring charges for DTT, Pac-West and Wantel maintain that the Court's analysis applies equally in the instant case.<sup>91</sup>

**Issue IV – Decision.** Based upon a review of the interconnection agreements, the amendments executed by the parties, and the applicable case law, the Commission concludes that the RUF provision in Article V., Section D.2.d., of the ICAs applies to ISP-bound traffic transported over DTT facilities.

Like the interconnection agreement considered in *Universal*, both the Wantel/Qwest and Pac-West/Qwest ICAs were negotiated and agreed to prior to the FCC's *ISP Remand Order*. At the time those agreements were executed, the prevailing law in Oregon was that ISP-bound traffic was subject to reciprocal compensation.<sup>92</sup>

The RUF provisions in the Universal/Qwest ICA are also identical to those in the Pac-West/Qwest and Wantel/Qwest ICAs. As noted elsewhere in this order, the RUF provides for the same sharing of DTT costs specified in §51.709(b) of the FCC's reciprocal compensation rules.<sup>93</sup>

**ISP-Bound Traffic Amendments.** In contrast to the situation presented in *Universal*, both Wantel and Pac-West executed identical "ISP-bound traffic Amendments" [hereafter, ISP Amendments] with Qwest.<sup>94</sup> The ISP Amendments state that "the parties wish to reflect the [*ISP Remand Order*] under the terms and conditions contained herein."<sup>95</sup> Basically, the ISP Amendments provide that ISP-bound traffic will be exchanged in accordance with the interim intercarrier compensation regime

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<sup>89</sup> Wantel Reply Br. at 7. Pac-West Reply Br. at 12.

<sup>90</sup> *Id.*

<sup>91</sup> Pac-West Supp. Br. at 4; Wantel Supp. Br. at 2.

<sup>92</sup> *Universal* at 20. See also, OPUC Docket ARB 238, Order No. 00-722, entered November 9, 2000.

<sup>93</sup> See, e.g., Pac-West Supp. Br. at 4. The RUF falls under Article V of the ICAs, entitled "Reciprocal Traffic Exchange."

<sup>94</sup> Pac-West Exhibit/1.

<sup>95</sup> *Id.*

established in the *ISP Remand Order* for the termination of traffic.<sup>96</sup> The ISP Amendments do not mention the RUF or the transport of ISP-bound traffic.<sup>97</sup>

Qwest argues that the ISP Amendments represent an agreement by the parties to implement the terms of the *ISP Remand Order*, including the determination that ISP-bound traffic is not “local.” Since the RUF applies only to “local” traffic under Article V., Section D., of the ICAs,<sup>98</sup> Qwest argues that the ISP Amendments must be read to exclude ISP-bound traffic from the application of the RUF.

Qwest advanced a similar argument in *Universal* regarding the applicability of the RUF to ISP-bound traffic. The Court in that case found:

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 [the *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 telecommunications traffic for the purpose of determining the scope of reciprocal compensation requirements under 47 U.S.C. §251(b)(5).

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.’ The FCC further stated that the interim compensation regime established in ISP Remand Order ‘effects 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

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<sup>96</sup> The ISP Amendments also provide that local/EAS (§251(b)) will be exchanged at the state-ordered reciprocal compensation rate. The parties further agreed that while the Amendments would be effective on approval by the OPUC, the rate-affecting provisions for both ISP-bound traffic and §251(b)(5) traffic would be effective as of June 14, 2001, the effective date of the *ISP Remand Order*. *Id.* at 2-3.

<sup>97</sup> The only reference to the term “transport” in the ISP Amendments is included in the definition of “bill and keep” that is taken from para. 2, fn. of the *ISP Remand Order*.

<sup>98</sup> The FCC has construed the reciprocal compensation requirements of §251(b)(5) to apply only to local/EAS traffic. *See, e.g., Worldcom* at 288 F.3d. at 430-431; *Universal*, mimeo at 27.

existing intercarrier agreements, such as obligations to transport traffic to points of interconnection.’ Therefore, the restrictions of §51.703(b) and §51.709(b) remain in full effect. (Citations omitted).<sup>99</sup>

Qwest’s position here differs from that articulated in *Universal* to the extent that it now claims §51.709(b) and the RUF do not apply to ISP-bound traffic because it is “not local” (as opposed to “not telecommunications”). The distinction is unavailing, however. As the Court in *Universal* explained, the FCC held that the *ISP Remand Order* did “not alter carriers’ other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing carrier intercarrier agreements such as obligations to transport traffic to points of interconnection.”<sup>100</sup> In other words, the FCC never intended that the *ISP Remand Order* would affect the relative use requirements applicable to the transport of ISP-bound traffic set forth in §51.709(b). Likewise, the *ISP Remand Order* did not affect arrangements for the transport of traffic under Article V., Section D.2.d., of the ICAs, including the applicability of the RUF.

An examination of the ISP Amendments reinforces the Court’s conclusion in *Universal*. While the amendments mirror the interim compensation regime established in the *ISP Remand Order* for the termination of ISP-bound traffic, there is no mention of compensation for transport facilities or the RUF. Had the parties intended the ISP Amendments would encompass compensation for DTT facilities, it seems reasonable that they would have made reference to that fact.<sup>101</sup>

Qwest’s argument also fails for another reason. In *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9<sup>th</sup> Cir. 2003), the Ninth Circuit recognized that, in the *ISP Remand Order*, “the FCC itself 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.”<sup>102</sup> The Court further observed that “the FCC has yet to resolve whether ISP-bound traffic is ‘local’ within the scope of §251.”<sup>103</sup> Given that the *ISP Remand Order* “abandoned” the effort to construe the reciprocal compensation requirements of §251(b)(5) using the dichotomy

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<sup>99</sup> *Universal*, mimeo at 10-11.

<sup>100</sup> *Id.*

<sup>101</sup> In reaching its decision in *Universal*, the Court also distinguished this Commission’s decision in *Level 3 Communications*, as well as a similar ruling of the Colorado Public Utilities Commission. The Court reiterated that the *ISP Remand Order* “did not alter existing contractual obligations” or “alter other obligations to under [FCC] Part 51 rules. . . .” As the Court noted, those “other obligations” include the requirements of §51.709(b). *Id.*, mimeo at 11-12.

<sup>102</sup> *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1128, 1131 (9<sup>th</sup> Cir. 2003) (hereafter, *Pacific Bell*). See also, *ISP Remand Order* at ¶¶46-47, 54, 56.

<sup>103</sup> *Id.* at 1131; *Universal*, mimeo at 20.

between local and interstate traffic,<sup>104</sup> there is no merit to Qwest's claim that the parties intended to rely upon that distinction when they amended the ICAs to "reflect" the *ISP Remand Order*.<sup>105</sup>

**Change of Law Amendments.** As noted above, the Court in *Universal* held that the *ISP Remand Order* "did not alter existing contractual obligations, except to the extent that the parties are entitled to invoke contractual change of law provisions."<sup>106</sup> The change of law provisions in the Pac-West/Qwest and Wantel/Qwest ICAs are examined below.

**Pac-West/Qwest ICA.** The Pac-West/Qwest ICA was amended by the parties in 2003 to include a new change of law provision.<sup>107</sup> The new provision states, in relevant part:

The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). Among the Existing Rules are the results of arbitrated decisions by the Commission which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in AT&T Corp., et al. v. Iowa Utilities Board, et al. on January 25, 1999. Many of the Existing Rules, including rules concerning which network elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion.

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Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the

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<sup>104</sup> *ISP Remand Order* at ¶54.

<sup>105</sup> This does not mean that the distinction between local and nonlocal traffic has no meaning for purposes of interpreting the ICAs. The point here is merely that the FCC did not rely upon the local/nonlocal dichotomy in the *ISP Remand Order*. Thus, there is no merit to Qwest's claim that the parties relied upon that distinction in the ISP Amendment. Put another way, neither the *ISP Remand Order* nor the ISP Amendment provide a basis for concluding that ISP-bound traffic is not "local" and therefore excluded from the RUF.

<sup>106</sup> *Universal*, mimeo at 11. (Emphasis supplied.)

<sup>107</sup> The Pac-West/Qwest ISP Amendment was approved by the OPUC in Order No. 03-204, entered April 4, 2003.

Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

At the time the 2003 Pac-West/Qwest Change of Law Amendment was executed, this Commission had entered Order No. 01-809 in *Level 3 Communications*, holding that the FCC's *ISP Remand Order* excluded ISP-bound traffic for purposes of calculating the relative use of transport facilities.<sup>108</sup> In addition, Order No. 01-809 had been sustained on appeal by the U.S. District Court in *Level 3 Communications v. PUC*.

Because Pac-West and Qwest amended the change of law provision in their interconnection agreement at a time when the *Level 3 Communications* decisions provided that ISP-bound traffic was excluded from the RUF, it is possible to argue that those decisions comprised the "Existing Rules" under which the ICA should now be interpreted. The problem with that argument, however, is that the Commission's decision to exclude ISP-bound traffic from the RUF was informed by the FCC's finding in the *ISP Remand Order* that ISP-bound traffic was not "telecommunications" subject to the reciprocal compensation requirements of §251(b)(5), but rather "information access" within the scope of §251(g) of the Act.<sup>109</sup> The FCC's legal determination, as we now know, was subsequently rejected by the D.C. Circuit in *Worldcom v. FCC*. Since an

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<sup>108</sup> As noted elsewhere, the OPUC decision was consistent with an initial decision entered by the Colorado Public Utility Commission. See, *In the Matter of the Petition of Level 3 Communications for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Dckt. No. 00B-601T (Colo. P.U.C. March 30, 2001) at 36.

<sup>109</sup> Order No. 01-809 concluded that the Commission's authority over ISP-bound traffic was preempted by the FCC's determination that Section 251(g) removed such traffic from the "universe of telecommunications." And, while the Commission recognized that the *ISP Remand Order* dealt only with the termination of ISP-bound traffic, it emphasized that the FCC's legal analysis did not distinguish "between termination and transport for purposes of excluding access to information services from reciprocal compensation." The Commission further emphasized that the FCC's overall concern with arbitrage opportunities and uneconomic subsidies applied with equal force to both the termination and transport of ISP-bound traffic. Order No. 01-809, Appendix A at 13-14.

important legal rationale underlying the decision in Order No. 01-809 to exclude ISP-bound traffic from the RUF has been found to be contrary to federal law, it cannot provide a basis for interpreting the Pac-West/Qwest ICA.<sup>110</sup>

Aside from the legal impediment, the circumstances surrounding implementation of the new change of law provision strongly suggest that the parties never contemplated that the *Level 3 Communications* decisions would become part of the Existing Rules under which the ISP Amendment should be interpreted. Had the *Level 3 Communications* decisions been relevant to the treatment of ISP-bound traffic under the ISP Amendment, it would have been logical, if not obligatory, for the parties to acknowledge those cases in the ISP Amendment, especially given the fact that the new change of law provision and the ISP Amendment were proffered at the same time. As discussed above, however, the ISP Amendment makes no reference to the RUF or to transport facilities whatsoever. The only rational explanation for these omissions is that the parties understood that the *ISP Remand Order*, upon which the ISP Amendment was based, “did not alter existing . . . agreements to transport traffic to points of interconnection,” including the operation of the RUF.<sup>111</sup> That understanding, of course, is consistent with the interpretation of the *ISP Remand Order* set forth in *Universal*.

**Wantel/Qwest ICA.** Unlike the Pac-West agreement, the change of law provision in the Wantel/Qwest ICA was never amended by the parties.<sup>112</sup> Since neither the *ISP Remand Order* nor the ISP Amendment affected a change in law regarding the

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<sup>110</sup> As noted above, the Commission subsequently entered Order No. 04-262 in docket ARB 527. In that order, we acknowledged that, whereas *Worldcom* rejected the FCC’s reliance upon §251(g), the rules adopted in the *ISP Remand Order* remained in effect. We therefore continued to adhere to our decision in Order No. 01-809, interpreting the FCC’s rules to exclude the transport of ISP-bound traffic from the RUF. The *Universal* decision clarifies, however, that the *ISP Remand Order* did not alter existing transport obligations, including the applicability of §51.709(b). See Order No. 04-262 at 3.

<sup>111</sup> *ISP Remand Order* at para. 78, fn. 149.

<sup>112</sup> The relevant provisions of the Wantel/Qwest ICA change of law provision are identical to those considered in *Universal*, wherein it was determined that the ICA could not be amended absent affirmative action by the parties. The change of law provision provides as follows:

‘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), conditions(s), or covenants. Where the parties fail to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of the Agreement. Wantel/Qwest ICA at 78, para. iv. See also, *Universal*, mimeo at 19.

application of the RUF, the parties are bound by the law in effect at the time the ICA was executed.<sup>113</sup> As noted by the court in *Universal*, the applicable Commission holding in 1999 was that ISP-bound traffic was local traffic subject to reciprocal compensation.<sup>114</sup> Since the ICA provides that the RUF applies to local traffic, it applies to ISP-bound traffic transported by the parties under the agreement.

**Issue V: Does the RUF apply to VNXX traffic transported over DTT facilities?**

**Party Positions.** Pac-West takes the position that VNXX traffic is subject to the RUF. Qwest disagrees. Wantel takes no position on the matter.<sup>115</sup>

**Discussion.** In Order Nos. 03-329 and 04-504, the Commission described VNXX traffic as follows:

‘NXX’ is a designation used throughout the telephone industry to indicate the second three digits in a party’s telephone number following the area code. NXX codes are assigned to particular central offices within the state. The NXX codes are associated with specific geographic areas, typically an exchange or ‘rate center.’ An exchange is a geographic area defined for the purpose of providing local exchange service. A rate center is a geographic point within an exchange, or group of contiguous exchanges. (The rate center’s geographic coordinates are used to measure distance for rating long distance toll calls). Competitive local exchange carriers wishing to provide local service in multiple exchanges from a single central office need to have a separate NXX code for each rate center. Customers with the same NXX have their calls rated the same way. Calls from a customer with a particular NXX to another customer with that same NXX would thus have a geographic distance of zero, so no long distance charges would apply.

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in

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<sup>113</sup> *Id.*, mimeo at 19-20.

<sup>114</sup> Citing the Ninth Circuit’s statement in *Pacific Bell* that “the FCC has yet to resolve whether ISP-bound traffic is ‘local’ within the scope of §251,” the Court concluded that “[b]ecause there was 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.” *Universal*, mimeo at 20.

<sup>115</sup> Wantel has indicated that it does not engage in VNXX traffic. Qwest Op. Br. at 24, fn. 32.

sequence, including entire NXXs. A ‘Virtual NXX’ (VNXX) occurs when a CLEC assigns a ‘local’ rate center code to a customer physically located in a ‘foreign’ rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer’s phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer’s physical location in Portland, is a distance of some fifty miles. Thus, under a CLEC’s VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC’s Portland customer. When those same customers call the ILEC’s Portland customers, served out of the same central office as the CLEC’s Portland customer, they are charged time and distance-sensitive intraLATA toll charges. (Footnotes in original omitted.)<sup>116</sup>

The Court in *Universal* also described VNXX traffic:

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.<sup>117</sup>

In its supplemental brief, Qwest emphasizes that the Court in *Universal* concluded that VNXX traffic is not “local” traffic. Because the ICAs provide that the

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<sup>116</sup> Order No. 03-329 at 2; Order No. 04-504 at 1-2.

<sup>117</sup> *Universal*, mimeo at 21.

RUF applies only to local traffic, VNXX traffic must be excluded from the RUF for purposes of allocating the cost of DTT facilities.

Pac-West responds that the *Universal* decision is inapposite because the court only addressed whether Qwest was required to pay reciprocal compensation under the Universal/Qwest ICA, and “did not address the issue of whether VNXX traffic should be included in the RUF for determining DTT MRCs and NRCs.”<sup>118</sup> Also, unlike the situation in *Universal*, the Pac-West/Qwest ICA was amended to incorporate the *ISP Remand Order*. Pac-West asserts that the ISP Amendment “governs all ISP-bound traffic compensation issues under the *ISP Remand Order*” with “no carve-out for alleged VNXX traffic,” thus making the *Universal* decision “inapplicable to the present dispute.”<sup>119</sup>

**Issue V – Decision.** Pac-West’s arguments are not persuasive. The ISP Amendment executed by Pac-West and Qwest was designed to reflect the terms of the *ISP Remand Order*. As discussed above, the *ISP Remand Order* “did not alter contractual obligations to transport traffic,” including the requirements in §51.709(b) and the RUF.<sup>120</sup> Thus, contrary to Pac-West’s claim, issues relating to compensation for DTT facilities – including the transport of VNXX traffic -- are not encompassed by the ISP Amendment.

Pac-West’s claim also fails for the reason cited by Qwest. The terms of the Pac-West/Qwest ICA clearly specify that the RUF applies only to the transport of “local” traffic. The agreement further specifies that local traffic must originate and terminate within the same local calling area or extended service area (EAS).<sup>121</sup> As recognized in *Universal*, “VNXX traffic does not meet the definition of local because it does not originate and terminate in the same LCA or EAS; instead, it crosses LCAs and EASs.”<sup>122</sup>

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<sup>118</sup> Pac-West Supp. Br at 6.

<sup>119</sup> *Id.*

<sup>120</sup> *Universal*, mimeo at 11. Furthermore, both Pac-West and Wantel concede that the *ISP Remand Order* addresses only the termination of ISP-bound traffic. See discussion, *supra* at 28. See also, Pac-West Reply Br. at 12; Wantel Reply Br. at 7.

<sup>121</sup> Like the Universal/Qwest ICA, the Pac-West/Qwest ICA adopts the definition of “local” included in Qwest’s tariff at the time the agreement became effective. At that time, the Qwest tariff defined “Local Service” as “[t]elephone service furnished between customer’s premises located with the same local service area.” “Local Service Area” is defined in the tariff 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.” See, Pac-West Exhibit/1, Pac-West/Qwest ICA, Section III, Subsection PP. See also, U. S. WEST Communications, Inc., P.U.C Oregon Tariff No. 29, Exchange and Network Services, Section 2, Original Sheet 10. In *Universal*, the Court acknowledged that a “local service area” is the equivalent of a “local calling area.” *Universal*, mimeo at 23.

<sup>122</sup> *Id.*, mimeo at 24.

Pac-West contends that if the Commission finds that the *Universal* holding “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 to non-ISP traffic,” because it has previously concluded in Order No. 03-329 that state regulation over ISP-traffic has been preempted by the FCC.<sup>123</sup> This argument misses the point.<sup>124</sup> First, the Commission is merely interpreting the terms of the interconnection agreement, not seeking to exercise authority over ISP-bound traffic. Second, for purposes of interpreting the interconnection agreement, the critical issue is not whether VNXX traffic is ISP-bound traffic, but whether it is local traffic subject to the RUF. Since VNXX traffic is not local by definition,<sup>125</sup> the RUF simply does not apply.<sup>126</sup>

**Issue VI – Does Section XXIV of the Wantel/Qwest ICA preclude Qwest from backbilling for NRCs?**

**Party Positions.** Wantel argues that Section XXIV of its ICA with Qwest precludes the parties from back-billing beyond a 24-month period. Section XXIV is entitled “Audit Process” and specifies the conditions under which an “audit” shall take place. Subsection G. of Section XXIV provides that “All transactions under this Agreement which are over 24 months old will be considered accepted and no longer subject to Audit.” Wantel contends that Section XXIV(G) must be interpreted to mean that all transactions over 24 months old must be “considered final and no longer subject to adjustment.”<sup>127</sup> Accordingly, it maintains that Qwest should not be permitted to collect for DTT NRCs over 24 months old.

Qwest advances several arguments in opposition to Wantel’s claim. First, it points out that Section XXIV is inapplicable because no “audit” ever took place. Section XXIV provides:

Audit shall mean the comprehensive review of:

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<sup>123</sup> Pac-West Supp. Br. at 6-7.

<sup>124</sup> We do not interpret Order 03-329 as expansively as Pac-West, but it is unnecessary to address that issue for the reasons set forth herein. See, e.g., Order No. 04-504 at 3.

<sup>125</sup> In fact, the Court in *Universal* concluded that VNXX traffic was not local “whether it was ISP-bound or not.” *Universal*, mimeo at 24.

<sup>126</sup> At another point in its supplemental brief, Pac-West suggests that it may not transport any traffic falling within the definition of VNXX traffic used by the Court in *Universal*. It states, “According to this definition [in *Universal*], 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*.” Obviously, if no VNXX traffic is transported under the Pac-West/Qwest ICA then the discussion in this section would not apply. Pac-West Supp. Br. at 7.

<sup>127</sup> Wantel Op. Br. at 4.

A. data used in the billing process for services performed and facilities provided under this Agreement; and

B. data relevant to provisioning and maintenance for services performed or facilities provided under this agreement for interconnection or access to unbundled elements.

The data referred to in subsection (B), above, shall be relevant to any performance standards that are adopted in connection with this Agreement, through negotiation, arbitration, or otherwise.

Qwest emphasizes that the DTT NRC billing adjustment is not the result of a “comprehensive review of data” as contemplated by Section XXIV. Rather, it is the result of calculations made during the course of a Commission-ordered refund process, “in which Qwest discovered it had inadvertently not billed DTT NRCs it was entitled to bill.”<sup>128</sup>

Qwest also points out that the ICA imposes a number of other requirements, including:

[A]n ‘audit’ must take place under no less than *11 separate conditions*, including a *request* by either party for an audit, *30 business days written notice* by the requesting party to the non-requesting party, requirements about the *time* and *location* of the audit, requirements about the *costs* of the audit, opportunities to review the other’s books and records, etc. In other words, it is very clear that there must be a *mutual understanding* that one party wants to conduct an audit of the other.<sup>129</sup>

**Issue VI – Decision.** The Commission concurs with Qwest that the Section XXIV audit process is inapplicable to the billing adjustment Qwest has made to recover DTT NRCs from Wantel. Section XXIV contemplates a “comprehensive review of data used in the billing process for services performed and facilities provided.” That process is more inclusive than the NRC refund process ordered by the Commission in docket UM 351, and completed in dockets UT 138/139.

More importantly, Section XXIV mandates that an audit “shall take place” under certain conditions designed to clearly convey the knowledge that one party wants

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<sup>128</sup> Qwest Op. Br. at 17.

<sup>129</sup> *Id.*

to conduct an audit of the other. Wantel has not alleged that the conditions necessary to conduct an audit ever took place.<sup>130</sup>

**Issue VII: Is Oregon Administrative Rule 860-021-0135(1) Applicable to the Billing Adjustments made by Qwest in this Case?**

In the absence of a provision in the ICAs dealing with billing adjustments, Qwest states that OAR 860-021-0135(1) limits the adjustment for NRCs in these cases to no more than three years.<sup>131</sup> The CLECs do not discuss the applicability of OAR 860-021-0135(1) to the instant dispute.<sup>132</sup>

OAR 860-021-0135(1) provides:

(1) When an underbilling or overbilling occurs, the energy or large telecommunications utility shall provide written notice to the customer detailing the circumstances, period of time, and amount of adjustment. If it can be shown that the error was due to some cause and the date can be fixed, the overcharge or undercharge shall be computed back to such date. If no date can be fixed, the energy or large telecommunications utility shall refund the overcharge or rebill the undercharge for no more than six months' usage. In no event shall an overbilling or underbilling be for more than three years usage.

The Pac-West/Qwest and Wantel/Qwest ICAs include the following provisions:

**Article XXXIV, Section W. Controlling Law**

This Agreement was negotiated by the Parties in accordance with the terms of the Act and the laws of the state where service is provided hereunder. It 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. (Emphasis added.)

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<sup>130</sup> For example, Wantel has not alleged or submitted any evidence that there was a request for an audit by Qwest or written notice of the requested audit.

<sup>131</sup> Qwest Op. Br. at 2.

<sup>132</sup> The CLECs do not appear to object to the concept of overbilling/underbilling adjustments, however, since they have sought a refund of monthly recurring charges related to Qwest's decision not to apply the RUF to ISP-bound traffic.

Article XXXIV, Section Z. Compliance

Each party shall comply with all *applicable federal, state, and local laws, rules and regulations* applicable to its performance under this Agreement. (Emphasis added.)

While these contract provisions reflect a clear intent by the parties to be bound by all applicable state laws and regulations, Division 21 of the Commission's administrative rules, including OAR 860-021-0135, establishes requirements relating to the provision of regulated (*i.e.*, tariffed and price-listed) utility services.<sup>133</sup> The rule does not apply to interconnection agreements executed by telecommunications carriers under the 1996 Act.

Although there is no reason why the contracting parties could not have agreed to adopt OAR 860-021-0135(1) to govern billing adjustments, there is no indication in the ICAs that the parties intended to incorporate that rule into their agreements.

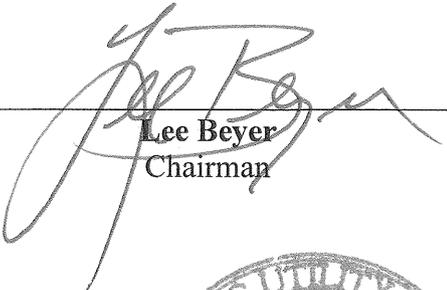
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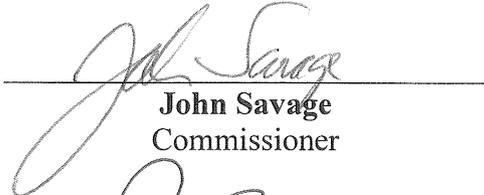
<sup>133</sup> These include rules relating to dispute resolution, annual fees, installation of service, meter reading, late payment charges, adjustment of bills, credit establishment, deposits, time payment arrangements, disconnection/reconnection procedures, etc.

**ORDER**

IT IS ORDERED that the Pac-West/Qwest and Wantel/Qwest interconnection agreements shall be interpreted and enforced consistent with the findings set forth herein.

Made, entered, and effective JUL 26 2005.

  
\_\_\_\_\_  
**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**John Savage**  
Commissioner

  
\_\_\_\_\_  
**Ray Baum**  
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

## V. RECIPROCAL TRAFFIC EXCHANGE

### A. Scope

Reciprocal traffic exchange addresses the exchange of traffic between Pac-West end users and USWC end users. If such traffic is local, the provisions of this Agreement shall apply. Where either party acts as an intraLATA toll provider or interLATA Interexchange Carrier (IXC) or 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 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.

### B. Types of Traffic

The types of traffic to be exchanged under this Agreement include:

1. EAS/local traffic as defined above.
2. IntraLATA toll traffic as defined above.
3. Switched access traffic, or interLATA toll traffic, as specifically defined in USWC's state and interstate switched access tariffs, and generally identified as that traffic that originates at one of the Party's end users and terminates at an IXC point of presence, or originates at an IXC point of presence and terminates at one of the Party's end users, whether or not the traffic transits the other Party's network.
4. 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.

Transit service provides the ability for a Telecommunications Carrier to use its connection to a local or access tandem for delivery of calls that originate with a Telecommunications Carrier and terminate to a company other than the tandem company, such as another Competitive Local Exchange Carrier, an existing Exchange Carrier, or a wireless carrier. In these cases, neither the originating nor terminating end user is a customer of the tandem Telecommunications Carrier. The tandem Telecommunications Carrier will accept traffic originated by a Party and will terminate it at a point of interconnection with another local, intraLATA or interLATA network Telecommunications Carrier. This service is provided through local and access tandem switches.

5. Ancillary traffic includes all traffic destined for ancillary services, or that may have special billing requirements, including, but not limited to the following:
  - a. Directory Assistance
  - b. 911/E911
  - c. Operator call termination (busy line interrupt and verify)
  - d. 800/888 database dip
  - e. LIDB
  - f. Information services requiring special billing.
6. Unless otherwise stated in this Agreement, ancillary traffic will be exchanged in accordance with whether the traffic is Local/EAS, intraLATA toll, or Switched Access.

**C. Types of Exchanged Traffic**

1. Termination of Local Traffic.

Local traffic will be terminated as Local Interconnection Service (LIS).

2. Transport of Local Traffic

As negotiated between the Parties, the exchange of local traffic between the Parties may occur in several ways:

- a. While the parties anticipate the use of two way trunks for the delivery of local traffic, either Party may elect to provision its own one-way trunks for delivery of local traffic to be terminated on the other Party's network at the "initial" point of interconnection.
- b. The Parties may elect to purchase transport services from each other or from a third party. Such transport delivers the originating Party's local traffic to the terminating Party's end office or tandem for call termination. Transport may be purchased as either tandem switched transport (which is included in the tandem call termination rate) or direct trunk transport.
- c. Based on forecasted traffic at Pac-West's busy hour in CCS, where there is a DS1's worth of traffic (512 CCS) between the Pac-West switch and a USWC end office, the Parties agree to provision a dedicated (i.e., direct) two-way trunk group from the Pac-West switch directly to the USWC end office. To the extent that Pac-West has established a collocation arrangement at a USWC end office location, and has available capacity, the Parties agree that Pac-West shall provide two-way direct trunk facilities, when required, from that end office to the Pac-West switch. In all other cases, the direct facility may be provisioned by USWC or Pac-West or a third party. If both Pac-West and USWC desire to

provision the facility and cannot otherwise agree, the parties may agree to resolve the dispute through the submission of competitive bids.

3. Transit Traffic.

- a. USWC will accept traffic originated by Pac-West and will terminate it at a point of interconnection with another CLEC, Exchange Carrier, Interexchange Carrier or Wireless Carrier. USWC will provide this transit service through local and access tandem switches. Pac-West may also provide USWC with transit service.
- b. The Parties expect that all networks involved in transporting transit traffic will deliver calls to each involved network with CCS/SS7 protocol and the appropriate ISUP/TCAP message to facilitate full interoperability and billing functions. In all cases, the originating company is responsible to follow the EMR standard and to exchange records with both the transiting company and the terminating company, to facilitate the billing process to the originating network.
- c. The Parties will use industry standards developed to handle the provision and billing of Switched Access by multiple providers (MECAB, MECOD and the Parties' FCC tariffs), including the one-time provision of notification to Pac-West of the billing name, billing address and carrier identification codes of all interexchange carriers originating or terminating at each USWC access tandem.

4. Toll Traffic.

- a. Toll traffic routed to an access tandem, or directly routed to an end office, will be terminated as Switched Access Service. Traffic terminated at the access tandem will be routed to the end offices within the LATA that subtend the USWC access tandem switch. Switched Access Service also allows for termination at an end office or tandem via direct trunked circuits provisioned either by USWC or Pac-West.

**D. Rate Structure -- Local Traffic**

1. Call Termination

- a. 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.
- b. For traffic terminated at an USWC or Pac-West end office, the end office call termination rate in Appendix A shall apply.

- c. For traffic terminated at a USWC or Pac-West tandem switch, the tandem call termination rate in Appendix A shall apply. The tandem call termination rate provides for end office call termination, tandem switched transport and tandem switching.

The Parties acknowledge that Pac-West will initially serve all of its customers within a given LATA through a single Pac-West switch. The Parties also acknowledge that Pac-West may, in the future, deploy additional switches in each LATA..

- d. For purposes of call termination, the initial Pac-West switch shall be treated as an end office switch.<sup>2</sup>
- e. Pursuant to OPUC Decision 96-324, USWC's proposed paragraph e. has been deleted.

2. Transport

- a. If the Parties elect to each provision their own one-way trunks to the other Party's end office for the termination of local traffic, each Party will be responsible for its own expenses associated with the trunks and no transport charges will apply. Call termination charges shall apply as described above.
- b. If one Party desires to purchase direct trunk transport from the other Party, the following rate elements will apply. Transport rate elements include the direct trunk transport facilities between the POI and the terminating party's tandem or end office switches.. The applicable rates are described in Appendix A.
- c. Direct-trunked transport facilities are provided as dedicated DS3 or DS1 facilities without the tandem switching functions, for the use of either Party between the point of interconnection and the terminating end office or tandem switch.
- d. If the Parties elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's relative use (i.e., originating minutes of use) of the facility in the busy hour.

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<sup>2</sup>. This sentence has been included pursuant to OPUC Decision 96-324.

**OREGON – [CO-PROVIDER] - REVISED APPENDIX A Rates and Charges  
U S WEST Interconnection Price List**

Except as footnoted, rate revision pursuant to Commission Order No. 97-239 entered June 25, 1997.

The Parties recognize that all of the building block elements ordered by the Commission in Orders No. 96-188 and 96-283, as amended, are not contained in this Appendix, but they are available pursuant to Appendix C.

The Parties agree that this Appendix A represents the most likely elements to be used during the term of this Agreement.

In the event of a conflict in pricing between this Appendix A and Order No. 96-283, as amended, Order No. 96-283, as amended, shall prevail.

NOTE: In some instances, unbundled element names are changed from the building block vernacular of UM351 to reflect the language of the Agreement. Also, except as footnoted, all rate revisions are the result of the Oregon Public Utility Commission's Order in Docket UM 844, issued June 25, 1997.

In the event that the text of this Agreement references a rate (or rate element) that is not contained in this Appendix A and [Co-Provider] wishes to obtain such element from USWC, USWC will provide the applicable rate upon request by [Co-Provider].

**INTERCONNECTION - LOCAL EXCHANGE**

<i>Entrance Facility (EF2)</i>	Nonrecurring		
	Recurring	1 <sup>st</sup> Loop	Add'l Loop
DS1, Electrical	\$87.37	\$579.75	\$476.04
DS3, Electrical	\$363.42	\$579.75	\$476.04

<i>Call Termination</i>	Price
Per Minute of Use	\$0.001330

<i>Call Transport</i>			
<i>Direct Trunked Transport</i>	Fixed	Per Mile	Nonrecurring Charge
DS1 - 0 Miles	None	None	
DS1 - Over 0 to 8	\$37.94	\$0.49	Note 1
DS1 - Over 8 to 25	\$37.94	\$0.85	Note 1
DS1 - Over 25 to 50	\$37.94	\$1.16	Note 1
DS1 - Over 50	\$37.94	\$1.17	Note 1
DS3 - 0 Miles	None	None	
DS3 - Over 0 to 8	\$253.13	\$9.95	Note 1
DS3 - Over 8 to 25	\$253.13	\$10.19	Note 1
DS3 - Over 25 to 50	\$253.13	\$14.27	Note 1
DS3 - Over 50	\$253.13	\$21.11	Note 1

<i>Tandem Switched Transport</i>	Price
Tandem Switching, Per Minute of Use)	\$0.001596

<i>Tandem Transmission</i>	Fixed	Per Mile	Nonrecurring Charge
0 Mile	None	None	
Over 0 - 8 Miles	\$0.000372	\$0.000005	Note 1
Over 8 - 25 Miles	\$0.000372	\$0.000007	Note 1
Over 25 - 50 Miles	\$0.000372	\$0.000008	Note 1
Over 50 Miles	\$0.000372	\$0.000012	Note 1

Multiplexing, per arrangement

DS3 to DS1

Recurring	Nonrecurring
\$203.54	\$317.81

**INTERCONNECTION - EXCHANGE ACCESS**

Call Termination	Per Switched Access Tariff
Call Transport	Per Switched Access Tariff
Call Transit	Per Switched Access Tariff

**COMMON CHANNEL SIGNALLING ACCESS SERVICE**

Entrance Facility (EF2)

	Recurring	Nonrecurring
DS1, Electrical	\$87.37	<del>\$555.28</del> \$579.75
DS3, Electrical	\$363.42	<del>\$658.69</del> \$579.75

Direct Link Transport

	Fixed	Per Mile	Nonrecurring
DS0 - 0 Miles	None	None	
DS0 - Over 0 to 8	\$19.74	\$0.09	Note 1
DS0 - Over 8 to 25	\$19.74	\$0.08	Note 1
DS0 - Over 25 to 50	\$19.74	\$0.11	Note 1
DS0 - Over 50	\$19.74	\$0.08	Note 1
DS1 - 0 Miles	None	None	
DS1 - Over 0 to 8	\$37.94	\$0.49	Note 1
DS1 - Over 8 to 25	\$37.94	\$0.85	Note 1
DS1 - Over 25 to 50	\$37.94	\$1.16	Note 1
DS1 - Over 50	\$37.94	\$1.17	Note 1
DS3 - 0 Miles	None	None	Note 1
DS3 - Over 0 to 8	\$253.13	\$9.95	Note 1
DS3 - Over 8 to 25	\$253.13	\$10.19	Note 1
DS3 - Over 25 to 50	\$253.13	\$14.27	Note 1
DS3 - Over 50	\$253.13	\$21.11	Note 1

CCS Link -- First Link

CCS Link -- Each additional Link

Recurring <sup>1</sup>	Nonrecurring <sup>2</sup>
None	\$300.05
None	\$32.65

STP Port -- Per Port

\$183.99	None
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Multiplexing

DS1 to DS0	\$212.76	\$310.43
DS3 to DS1	\$203.54	\$317.81

<sup>1</sup> UM773 interim rates

<sup>2</sup> UM773 interim rates

**PHYSICAL, VIRTUAL, CAGELESS, AND SPOT COLLOCATION**

Common Elements	Recurring	Nonrecurring
Quote Preparation Fee	None	\$2,181.44
Entrance Facility (EF1) - per 2 Fibers	\$2.38	\$1,835.82
<b>Space Construction</b>		
• HVAC	ICB	ICB
• AC Power	ICB	ICB
• Cage	ICB	ICB
<b>[Co-Provider] Typical Cageless Collocation</b>		
2 Bay Configuration	\$700.00	\$18,000.00
4 Bay Configuration	\$770.00	\$27,656.00
6 Bay Configuration	\$1,390.00	\$45,656.00
<b>Jumper NAC<sup>3</sup></b>		
<b>Physical Collocation</b>		
• Jumper NAC DS0 (2-wire)	\$0.12	\$75.00
• Jumper NAC DS1 (4-wire)	\$1.01	\$205.00
• Jumper NAC DS3 Electrical	\$5.21	\$207.00
• Jumper NAC DS3 Optical (Fiber)	\$7.54	\$207.00
<b>Virtual Collocation</b>		
• Jumper NAC DS0 (2-wire)	\$0.12	\$75.00
• Jumper NAC DS1 (4-wire)	\$1.01	\$205.00
• Jumper NAC DS3 Electrical	\$5.21	\$207.00
• Jumper NAC DS 3 Optical (Fiber)	\$7.54	\$207.00
<b>Distributing Frame Termination<sup>4</sup></b>		
<b>DS0</b>		
• 2-wire	\$0.40	\$9.60
• 4-wire	\$0.81	\$19.20
<b>DS1</b>		
• 4-wire	\$0.81	ICB <sup>5</sup>
<b>DS3</b>		
• 4-wire	\$0.81	ICB <sup>6</sup>

<sup>3</sup> Nonrecurring charge does not apply when ordered at the same time and on the same service order as a NAC, NACC or Transport Facilities.

<sup>4</sup> Nonrecurring charge does not apply when ordered at the same time and on the same service order as a NAC, NACC or Transport Facilities.

<sup>5</sup> Nonrecurring charge will be developed on an individual case basis until permanent nonrecurring charges are developed.

<sup>6</sup> Nonrecurring charge will be developed on an individual case basis until permanent nonrecurring charges are developed.

	Recurring	Nonrecurring
<b>Fiber Splicing</b>		
• Per setup		\$468.57
• Per fiber spliced		\$51.08
<b>SPOT Frame Per Termination</b>		
• DS0	\$0.01	\$5.27
• DS1	\$0.03	\$12.47
• DS3	\$0.40	\$189.08
<b>Cable Racking, Per Termination Pair, Per Foot</b>		
DS0		\$1.23
DS1		\$1.10
DS3		\$0.68
<b>SPOT Frame Block Termination</b>		
• DS0, per 100 pairs	\$1.14	\$646.34
• DS1, per 28 circuits	\$0.99	\$472.79
• DS3, per termination	\$0.54	\$256.04
<b>Backup AC Power Feed, per foot</b>		
• 20 Ampere, Single Phase	\$0.01	\$9.62
• 20 Ampere, Three Phase	\$0.03	\$11.88
• 30 Ampere, Single Phase	\$0.03	\$10.35
• 30 Ampere, Three Phase	\$0.03	\$14.14
• 40 Ampere, Single Phase	\$0.03	\$12.14
• 40 Ampere, Three Phase	\$0.04	\$16.62
• 50 Ampere, Single Phase	\$0.03	\$14.36
• 50 Ampere, Three Phase	\$0.04	\$19.94
• 60 Ampere, Single Phase	\$0.04	\$16.20
• 60 Ampere, Three Phase	\$0.05	\$22.92
• 100 Ampere, Single Phase	\$0.04	\$20.00
• 100 Ampere, Three Phase	\$0.07	\$31.10
<b>Regeneration<sup>7</sup></b>		
DS1 Regeneration	ICB	ICB
DS3 Regeneration	ICB	ICB
<b>Backup AC Power, per ampere</b>		
• 120 Volt	\$15.12	
• 208 Volt, Single Phase	\$26.22	
• 208 Volt, Three Phase	\$45.36	
• 240 Volt, Single Phase	\$30.25	
• 240 Volt, Three Phase	\$52.33	
• 480 Volt, Three Phase	\$104.67	

<sup>7</sup> If required, no NRC applies to regeneration ordered concurrently with an associated Jumper NAC and/or Distribution Frame Termination.

	Recurring	Nonrecurring
48 Volt DC Power, per ampere	\$14.18	
<b>48 Volt DC Power Cable, per foot</b>		
• 20 Ampere Capacity	\$0.15	\$67.97
• 40 Ampere Capacity	\$0.19	\$88.62
• 60 Ampere Capacity	\$0.22	\$105.07
• 100 Ampere Capacity	\$0.22	\$104.64
• 200 Ampere Capacity	\$0.35	\$168.40
• 300 Ampere Capacity	\$0.49	\$230.47
• 400 Ampere Capacity	\$0.56	\$261.31
<b>Grounding Per Foot</b>		
• 2 AWG	\$0.01	\$3.27
• 1/0 AWG	\$0.01	\$9.19
• 4/0 AWG	\$0.03	\$11.54
• 350 kcmil	\$0.03	\$14.87
• 500 kcmil	\$0.04	\$17.68
• 750 kcmil	\$0.05	\$23.84
CO Synchronization, per port	\$8.04	
<b>Security</b>		
• Access, per person, per central office	\$6.29	
• Identification Cards, per person	\$0.77	
<b>Inspector per 1/2 Hour</b>		
• Normal business hours		\$28.28
• Outside normal business hours		\$37.08
<b>Virtual Collocation</b>		
<b>Engineering, per 1/2 Hour</b>		
• Normal business hours		\$23.02
• Outside normal business hours		\$32.49
<b>Installation, per 1/2 Hour</b>		
• Normal business hours		\$28.28
• Outside normal business hours		\$37.08
<b>Maintenance per, 1/2 Hour</b>		
• Normal business hours		\$25.29
• Outside normal business hours		\$33.88
Equipment Bay, per shelf	\$3.04	
Training, per 1/2 hour		\$25.29
<b>Physical and Cageless Physical Collocation</b>		
Rent (w/Maintenance), per square foot	\$3.10	

VIRTUAL COLLOCATION (UT 119 ORDER NO. 96-079)

Entrance Enclosure

	<u>Recurring</u>	<u>Nonrecurring</u>
<u>Manhole (Shared)</u>	\$27.61	
<u>Handhole (Non-shared)</u>	\$15.22	
<u>Conduit/Innerduct from Entrance Enclosures to the Company cable vault, per foot</u>	\$0.42	
<u>Core Drill</u>		\$363.13
<u>Riser, per foot from cable vault to the Customer-designated equipment</u>	\$0.47	

Cabling, Splicing and Placement

	<u>Recurring</u>	<u>Nonrecurring</u>
<u>Fiber Optic Cable, per foot per 24 fiber increments</u>	\$0.05	
<u>Fiber Cable Splicing</u>		
<u>Per setup</u>		\$417.43
<u>Per fiber spliced</u>		\$17.40
<u>Fiber Cable Placement, per foot in conduit and riser</u>		\$1.66
<u>Copper Cable, per foot per 25 pair</u>	\$0.012	
<u>Copper Cable Splicing</u>		\$91.27
<u>Copper Cable Placement, per foot in conduit and riser</u>		\$1.66
<u>Coax Cable RG59, per foot</u>	\$0.20	
<u>Copper Cable Splicing</u>		\$91.27
<u>Copper Cable Placement, per foot in conduit and riser</u>		\$1.66

Power and Humidification

	<u>Recurring</u>	<u>Nonrecurring</u>
<u>--48 Volt DC Power, per ampere/per month</u>	\$7.52	
<u>--48 Volt DC Power Cable, Installation per foot per A and B feeder pair from power source to the leased physical space</u>		
<u>20 amp feed</u>	\$0.28	\$50.00
<u>40 amp feed</u>	\$0.38	\$68.81
<u>60 amp feed</u>	\$0.48	\$86.42
<u>AC power per watt</u>	\$0.06	
<u>Humidification, per leased physical space</u>	\$56.45	

Expanded Interconnection (EI)

	<u>Recurring</u>	<u>Nonrecurring</u>
<u>EI per termination</u>		
<u>Analog</u>	\$4.02	\$467.44
<u>DDS</u>	\$4.02	\$467.44
<u>1.544 Mbps</u>	\$17.22	\$313.25
<u>44.636 Mbps</u>	\$52.50	\$329.00
<u>OC-3</u>	\$33.37	\$378.26
<u>OC-12<sup>2</sup></u>	\$33.37	\$378.26
<u>OC-48<sup>2</sup></u>	\$33.37	\$378.26
<u>EI Equipment Bay - Rack space, per shelf</u>	\$5.61	

Labor Charges

	<u>Normal Business Hours</u>	<u>Out of Normal Business Hours</u>
<u>Virtual Equipment Maintenance, per 1/2 hour/ per technician</u>	\$20.48	\$31.33
<u>Virtual Training, per 1/2 hour or fraction thereof</u>	\$23.98	
<u>EI Equipment Installation, Change, Removal Labor per 1/2 hour/per technician</u>	\$20.48	\$31.33
<u>EI Engineering Installation, Change, Removal Labor per 1/2 hour/per technician</u>	\$25.79	\$39.30
<u>Inspector Labor</u>	\$22.00	\$37.41
<u>Labor per 1/2 hour/per technician</u>		

**ANCILLARY SERVICES**

**Directory Assistance**

Price per Call -- Facilities-Based Providers \$0.33

**Directory Listings**

Primary Listings, Directory Assistance, White & Yellow Pages \$0.11

**E911**

LEC and CLECs recover costs from PSAP No Charge

**Interim Number Portability**

**Recurring**

Remote Call Forwarding Without Transport Refer to the *Interim Number Portability* Section of the Agreement.

Per Number Ported - First Path

Per Number Ported - Additional Path

Remote Call Forwarding With Transport Refer to the *Interim Number Portability* Section of the Agreement.

Per Number Ported - First Path

Per Number Ported - Additional Path

**Additional Charges**

**Nonrecurring**

Service Establishment, per switch, per route - nonrecurring Refer to the *Interim Number Portability* Section of the Agreement.

Service Establishment - additional number ported or changes to existing numbers, per number ported -- nonrecurring Refer to the *Interim Number Portability* Section of the Agreement.

Additional and Consecutive Numbers -- additional number ported on same account name and consecutive numbers, per number ported -- nonrecurring Refer to the *Interim Number Portability* Section of the Agreement.

**Assignment of Numbers**

**Price**

Assignments per industry guidelines No Charge

**Busy Line Verification**

Per Call \$0.67

**Busy Line Interrupt**

Per Call \$0.82

**UNBUNDLED ELEMENTS**

	Recurring	Nonrecurring	
<b>Unbundled Loops</b>			
2-Wire Loop, Statewide	\$15.00		
ISDN Loop	\$15.00		
4-Wire Loop, Statewide	\$30.00		
ISDN Extension Increment (Note 5)	\$23.54		
		<b>Nonrecurring</b>	
Basic Installation, First Loop		\$117.49	
Basic Installation, Each Additional Loop		\$64.63	
Installation with Conformance Testing, First Loop		\$188.83	
Installation with Conformance Testing, Each Additional Loop		\$95.74	
Coordinated Installation with Testing, First Loop		\$241.02	
Coordinated Installation with Testing, Each Add'l Loop		\$147.94	
		<b>Nonrecurring</b>	
	<b>Recurring</b>	<b>1<sup>st</sup> Loop</b>	<b>Add'l Loop</b>
DS1 per Loop	\$87.37	\$579.75	\$476.04
DS3 per Loop	\$363.42	\$579.75	\$476.04
	<b>Recurring</b>	<b>Nonrecurring<sup>8</sup></b>	
Network Interface Device (Note 6)		\$61.33	
Cable Unloading and Bridge Tap Removal (Pursuant to Commission Order UM 138 and 139)		\$ 0	

**UNBUNDLED ELEMENTS**

**Unbundled Ports**

For the first three months of this Agreement, [Co-Provider] does not anticipate requiring the Unbundled Port elements contained in UM351, Order No. 96-283. Following the first three months of this Agreement, [Co-Provider] anticipates ordering Unbundled Port elements from the USWC tariff. In the event that the USWC tariff for Unbundled Port elements is not in effect at the conclusion of the first three months of this Agreement, at [Co-Provider]'s request, the Parties will negotiate the applicable rates for the Unbundled Port elements.

	Recurring	Nonrecurring
<b>Multiplexing</b>		
DS1 to DS0	\$212.76	\$310.43
DS3 to DS1	\$203.54	\$317.81

<sup>8</sup> UM773 interim rates

**APPENDIX A- OREGON LOCAL EXCHANGE SERVICES  
RESALE OF SERVICES**

The Parties agree the following charges apply to the Resale of Local Services:

1. Nonrecurring Charges.
  - a. Customer Transfer Charge (CTC): The following nonrecurring charges apply when converting a USWC account to a [Co-Provider] account or when changing an end user from one reseller to another.
 

CTC	
Business, per end user	\$56.60
Residence, per end user	\$54.13
ISDN, end user per	\$57.15
  - b. Product Specific Nonrecurring Charge: As set forth in USWC tariffs, the product specific nonrecurring charges, with discount, will apply when additional lines or trunks are added or when the end user adds features or services to existing lines or trunks.
2. Except as qualified below, all USWC telecommunications services, including deregulated services, that it offers at retail shall be available for resale at an 18.8% discount, without any unreasonable or discriminatory limitations.
  - a. Residence service is offered at a 0% discount
  - b. Discount for services already subject to volume or term discounts shall be 9.4%
  - c. Private Line services purchased at wholesale shall not be used to provide special access service.
  - d. The following services are not available for resale:
    - Customer Premises Equipment (separately or in a package)
    - Enhanced Services
    - Switched Access Service
    - Special Access Tariff
  - e. The following services are available only to the same class of customer eligible to purchase that service from USWC:
    - Grandfathered
    - Residence
    - Lifeline/Link-up
  - f. Telecommunications services offered by USWC as part of a short term promotions are available for resale at the ordinary rate for the retail service less the wholesale discount. The special promotion rate is not available.
3. IntraLATA toll is available for resale at the contract toll rates listed below without application of a further wholesale discount:

<u>State:</u>	<u>Rate Per Minute of Use</u>
Oregon	\$0.09