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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner
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Commissioner
KRISTIN MAYES
Commissioner

LEVEL 3 COMMUNICATIONS, LLC, Complainant *vs.* QWEST CORPORATION, Respondent	DOCKET NOS. T-01051B-05-0415 T-03654A-05-0415 **QWEST CORPORATION'S NOTICE OF THIRD FILING OF SUPPLEMENTAL AUTHORITIES**

Qwest Corporation ("Qwest") hereby files the following documents as supplemental authorities: (1) Recommendation on Motion for Summary Disposition entered on January 30, 2006, *In The Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, Docket No. IC 12, Order No. 06-037, Public Utility Commission of Oregon (the "*Oregon Level 3 Order*"); and (2) Arbitrator's Decision entered on February 2, 2006, *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.*, ARB 671, Public Utility Commission of Oregon (the "*Oregon Universal Telecommunications Arbitrator's Decision*"). The *Oregon Level 3 Order* and the *Oregon Universal Telecommunications Arbitrator's Decision* are attached hereto.

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A. *Oregon Level 3 Order*

Qwest would like to call the following passages from the *Oregon Level 3 Order* to the Commission's attention, and urge the Commission to consider this authority in connection with its upcoming decision in this docket:

> We hold that the ALJ correctly concluded that the FCC's definition of ISP-bound traffic in the *ISP Remand Order* does not encompass VNXX-routed traffic. The ALJ's decision is consistent with the language of the ISP Remand Order and the appellate decisions interpreting that order. It is also in agreement with decisions in several other states. Order at page 3 (footnotes omitted).
>
> ****
>
> [B]oth the ISP Remand Order and current FCC rules exclude ISP-bound traffic from the realm of 'telecommunications' subject to §251(b)(5). (fn. 9)
>
> ****
>
> If VNXX is included in the definition of ISP-bound traffic (as Level 3 alleges) and therefore preempted from State regulation, there is no rational reason why the FCC would have made a contemporaneous statement recognizing that States may reject VNXX arrangements as misuse of numbering resources. The logical conclusion is that the FCC did not contemplate that VNXX traffic would be encompassed by its *ISP Remand Order*. (fn. 11).

B. *Oregon Universal Telecommunications Arbitrator's Decision*

Qwest would like to call certain passages from the *Oregon Universal Telecommunications Arbitrator's Decision* to the Commission's attention specifically, and urge the Commission to consider this authority in connection with its upcoming decision in this docket:

> As discussed in some detail above, the VNXX dilemma is a product of Universal's intentional design. Universal requests and obtains blocks of numbers from the NANPA for specific local calling areas and assigns them without interference, or even influence, from Qwest. If the telephone number that Universal assigned to the modem that terminated the ISP-bound traffic came from the same LCA as where the modem were actually located, then Qwest customers originating calls from one of the non-Portland or Eugene/Springfield LCAs,

would be required to pay toll charges to Qwest. Thanks to Universal's number assignment policies, Qwest is denied the access charge revenue to which it is entitled under its tariff. Universal then goes a step further and seeks compensation from Qwest for terminating this very traffic for which Universal has designed a means to avoid paying access charges. Universal's argument that by failing to pay terminating charges for VNXX ISP-bound traffic "Qwest is enjoying free use of Universal's switch" in violation of he Takings Clause of the Fifth Amendment in the Bill of Rights, strains both logic and credulity. I am not alone in that view. Decision at page 12.

*****

There are several problems with the [*SNET*] Court's analysis. First there is no indication in the *ISP Remand Order* that the FCC intended its interim intercarrier compensation scheme to "affect calls that are subject to the access charge regime." On the contrary, paragraphs 36-40 of the Order indicate that the FCC specifically declined to modify pre-Act requirements for access .traffic. Thus, I do not agree that there is "clear langrage" that the FCC intended to supplant its existing access charge policy with the compensation regime in the ISP Remand Order.

For the same reason, I am not persuaded by the [*SNET*] Court's suggestion that the FCC intended to modify its access charge regime as a "first step" in implementing a unified intercarrier compensation scheme. In support of its conclusion, the [*SNET*] Court cites paragraph 83 if the *ISP Remand Order*, wherein the FCC states that "[t]he interim compensation regime, as a whole, begins a transition toward what we have tentatively concluded, in the companion NPRM, to be a more rational cost recovery mechanism under which LECs recover more of their costs from their own customers." This is hardly a "clear" statement that the FCC intended to discard pre-existing access charge requirements. Moreover, allowing carriers to use NVNXX arrangements to avoid access charges and also receive intercarrier compensation does not advance the FCC's state goal of having carriers "recover more of their costs from their own customers." On the contrary, it perpetuates the same opportunities for arbitrage that the interim compensation scheme in the ISP Remand Order was designed to avoid.

Finally, I reject the Court's approach in *SNET* because I find it incomprehensible that the FCC would implement a decision with such significant financial consequences as those associate with modifying the existing access charge regime without providing a clear statement to that effect. There is simply no indication in the ISP Remand Order that the FCC intended to make that far-reaching change in policy. Decision at page 15 (footnotes omitted).

****

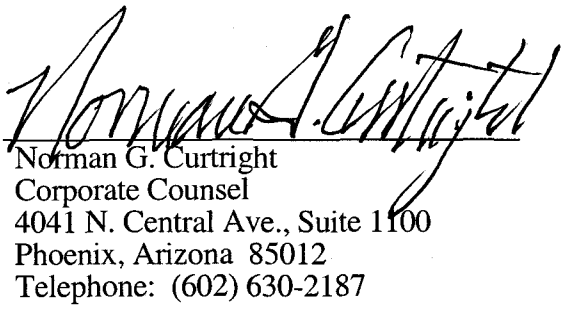
In light of the Commission's continuing jurisdiction over the proper use of NPA NXXs and the enforcement of NANPA guidelines for their use in Oregon, it is clear that VNXX is not a permissible means for transporting ISP-bound , or any

other, traffic. Furthermore, in light of the Commission's Order in UM 1058 and Conditions 7 and 8 of Universal's Certificate, continued use of VNXX arrangements for the transport of any traffic by Universal is clearly a violation of its certificate and the Commission's Order.

The Qwest-proffered language is adopted except insofar as we modify the language of Section 7.3.4.5 by deleting the sentence "Qwest's agreement to the terms in this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX traffic with CLEC" and inserting in its place "Qwest and CLEC shall not exchange VNXX traffic." Decision at pages 15-16 (footnotes omitted).

RESPECTFULLY SUBMITTED this 3rd day of February, 2006.

QWEST CORPORATION

By: 

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ORDER

ORDER NO. 06-037

ENTERED 01/30/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

IC 12

In the Matter of	)	
	)	
QWEST CORPORATION vs. LEVEL 3 COMMUNICATIONS, LLC	)	ORDER
	)	
Complaint for Enforcement of Interconnection Agreement.	)	

DISPOSITION: RULING AFFIRMED

Procedural History

On June 6, 2005, Qwest Corporation (Qwest) filed a complaint against Level 3 Communications, LLC (Level 3), asserting that Level 3 is violating federal law, state law, and terms of the Interconnection Agreement (ICA) executed by the parties. Qwest alleges that Level 3 is assigning local telephone numbers to Internet Service Provider (ISP) customers, even though the ISP's modem banks (or servers) are not located within the local calling area to which those numbers have been assigned. Qwest asserts that Level 3 improperly seeks payment of reciprocal compensation for such "Virtual NXX" (VNXX) ISP-bound traffic. Qwest further alleges that Level 3 is violating the ICA by obligating Qwest to send non-local ISP traffic over Local Interconnection Service (LIS) trunks.

Level 3 responded to Qwest's complaint on June 20, 2005. It denies the allegations in the complaint and counterclaims that Qwest is violating the ICA by refusing to compensate Level 3 for the transport and termination of Qwest-originated ISP-bound traffic. Level 3 also counterclaims that Qwest violated the ICA by failing to negotiate an amendment to the agreement reflecting the Federal Communications Commission's (FCC's) *Core Communications Order.*[1]

A prehearing conference was held in this matter on June 30, 2005. On July 5, 2005, the Administrative Law Judge (ALJ) issued a Memorandum requesting that the parties file briefs addressing whether the ICA requires compensation for the exchange

[1] *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Communications Order*").

of VNXX-routed ISP-bound traffic. Because Section 7.3.4.3 of the ICA provides that the parties shall exchange "ISP-bound traffic (as that term is used in the FCC ISP Order),"[2] a central issue in this complaint proceeding is whether the FCC's use of the term "ISP-bound traffic" in that order encompasses VNXX-routed ISP-bound traffic.[3] The parties filed briefs addressing that issue on July 18, 2005.

On August 16, 2005, the ALJ ruled that compensation for VNXX-routed ISP-bound traffic is not authorized under the ICA because the FCC's definition of ISP-bound traffic in the *ISP Remand Order* does not encompass VNXX-routed ISP-bound traffic. Because of the significance of the ruling on the outcome of this complaint proceeding, the ALJ certified the matter to the Commission for disposition pursuant to OAR 860-014-0091.

On August 30, 2005, Level 3 filed objections to the ALJ's ruling. On September 9, 2005, Qwest replied to Level 3's objections.

On September 29, 2005, Level 3 requested that proceedings in this docket be suspended to allow completion of settlement discussions designed to resolve all issues in this docket and a companion arbitration proceeding, docket ARB 665.

On November 4, 2005, Level 3 notified the Commission that the tentative settlement did not materialize as anticipated. Accordingly, it requested that the Commission resume the schedule in this docket and ARB 665.

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[2] The 'FCC ISP Order' is more commonly known as the "ISP Remand Order." The latter reference is used in this order. See, *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, para. 81, 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). ("*ISP Remand Order.*")

[3] For purposes of this case, "VNXX-routed ISP-Bound traffic" describes a situation wherein a CLEC, such as Level 3, obtains telephone numbers for various locations within a state. Those numbers are assigned by the CLEC to its ISP customers even though the ISP has no physical presence (*i.e.*, does not locate its modem banks or server) within the local calling area (LCA) associated with those telephone numbers. ISP-bound traffic directed to those telephone numbers is routed to the CLEC's Point of Interconnection (POI) and then delivered to the ISP's modem bank/server at a physical location in another LCA.[3]

Qwest takes the position that the FCC's definition of ISP-bound traffic in the *ISP Remand Order,* and therefore Section 7.3.4.3 of the ICA, encompasses only those circumstances where an ISP modem bank/server is physically located in the same LCA as the end-user customer initiating an Internet call.[3] Level 3, on the other hand, maintains that the *ISP Remand Order*, read in conjunction with the *Core Communications Order*, requires that reciprocal compensation must be paid on *all* ISP-bound traffic, including VNXX-routed ISP-bound traffic.

On November 14, 2005, the ALJ convened a telephone conference to discuss procedural and scheduling matters. At the conference, the parties agreed that the Commission should proceed with its review of the August 16, 2005, ruling certified by the ALJ.

The Commission has reviewed the ALJ's ruling, together with the arguments advanced by the parties and the case law cited in support of their respective positions.[4] We hold that the ALJ correctly concluded that the FCC's definition of ISP-bound traffic in the *ISP Remand Order* does not encompass VNXX-routed traffic. The ALJ's decision is consistent with the language of the *ISP Remand Order* and the appellate decisions interpreting that order.[5] It is also in agreement with decisions in several other states.[6] While we acknowledge that some jurisdictions have reached a contrary conclusion, we agree with Qwest that those decisions are unpersuasive.[7]

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[4] The ALJ did not have the opportunity to address the cases cited in Level 3's Objections, because Level 3 did not mention them in its initial brief.

[5] *Bell Atlantic Tel. Cos. v. FCC,* 206 F.3d 1, 5, 8 (D.C. Cir. 2000); *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).

[6] *See e.g., In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Indiana Bell Telephone Company, d/b/a SBC Indiana,* Cause No. 42663 INT-01, at 81 (Ind. Util. Reg. Comm'n, Dec. 22, 2004); Arbitrator's Order No. 10, *Re Level 3 Communications, LLC,* Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, ¶ 271 (Kan. SCC, Feb. 7, 2005); Order, *Petition of Global NAPS, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc., d/b/a Verizon Massachusetts, f/k/a New England Telephone & Telegraph Co., d/b/a Bell Atlantic-Massachusetts,* D.T.E. 02-45 at 24, 33 (Mass. Dep't of Tel and Energy, Dec. 12, 2002); Order, *Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont,* Docket No. 6742 at 16-17, 41-45 (Vt. PSB, Dec. 26, 2002); Order, *Re Adelphia Business Solutions, Inc.,* Docket No. 6566 at 38 (Vt. PSB, July 16, 2003); Opinion and Order, *Petition of Global NAPs South, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania Inc.,* Docket No. A-310771F7000 at 45, 48 (Pa. PUC, Apr. 21, 2003); *In the Matter of the Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C), Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Application 02-03-059, Decision 03-05-031, 2002 at 7-10 (Cal. PUC, May 8, 2003); *Re Verizon California, Inc.,* Application 02-06-024, Decision 03-12-021 at 7-9 (Cal. PUC, Dec. 4, 2003); Recommended Decision, *Re Complaint of Level 3 Communications, LLC, against Qwest Corporation Regarding Compensation for ISP-Bound Traffic,* Docket No. C-05-721, State of Minnesota Office of Administrative Hearings for the Public Utilities Commission (Jan. 18, 2006).

[7] For discussion of these cases, see, *Qwest Corporation's Reply to Level 3's Objections to ALJ Ruling.* Similar issues were addressed recently in Order No. 05-1219 in docket IC 9.

In addition, shortly after the ALJ's ruling in this matter, the United States District Court for the District of Oregon entered its supplemental order in *Qwest v. Universal Telecom.*[8] In that decision, the Court clarified that telecommunications traffic subject to reciprocal compensation under §251(b)(5)[9] includes:

> . . . traffic that originates in one LCA or EAS area and "terminates" in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. *In other words, 'the termination point' is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision and the ISP Remand Order.*[10] (Emphasis added.)

Consistent with the ALJ ruling in this case, the Court recognized that the I*SP Remand Order* does not contemplate that ISP-bound traffic will be provisioned through VNXX arrangements, but rather requires that an ISP's modem must be located in the same local calling area as customers originating in the Internet-bound call in order for the traffic to be compensable.[11] Thus, the Court's holding contradicts Level 3's claim that the *ISP Remand Order* requires payment of reciprocal compensation for VNXX-routed ISP-bound traffic.

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[8] *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Sept. 22, 2005) (*Universal*).

[9] As noted, Level 3 asserts that the reciprocal compensation requirements of §251(b)(5) apply to VNXX-routed ISP-Bound traffic. See Level 3 Brief, dated July 18, 2005. As noted by the ALJ, however, both the ISP Remand Order and current FCC rules exclude ISP-bound traffic from the realm of "telecommunications" subject to §251(b)(5). See, ALJ Ruling at 5. Instead, the FCC held that the interim compensation regime established for ISP-bound traffic is governed by its §201 authority. See, ISP Remand Order at para 82. Notwithstanding the FCC's revised jurisdictional analysis, the fact remains that VNXX-routed ISP-bound traffic is not encompassed by the term "ISP-bound traffic" used by the FCC in the ISP Remand Order.

[10] Citing the Commission's decision *In the Matter of the Petition of Electric Lightwave, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Inc., Pursuant to the Telecommunications Act of 1996, ARB 91 (March 17, 1999), and ISP Remand Order.* In ARB 91, the Commission affirmed an arbitrator's determination that "to the extent calls to ISP providers are not directed to an ISP modem within the local calling area, they are not local calls and should not be eligible for reciprocal compensation. See Order No. 99-218 at 9.

[11] As we recognized in Order No. 05-1219 in docket IC 9, the *ISP Remand Order* specifically preempts States from regulating ISP-bound traffic. *ISP Remand Order* at para. 82. At the same time, the FCC's *Notice of Proposed Rulemaking* in its Intercarrier Compensation proceeding (released on the same date as the *ISP Remand Order*) acknowledges that States may reject VNXX arrangements as a misuse of numbering resources. *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket 01-92, FCC 01-132, rel. April 27, 2001, para. 115. If VNXX is included in the definition of ISP-bound traffic (as Level 3 alleges) and therefore preempted from State regulation, there is no rational reason why the FCC would have made a contemporaneous statement recognizing that States may reject VNXX arrangements as misuse of numbering resources. The logical conclusion is that the FCC did not contemplate that VNXX traffic would be encompassed by its *ISP Remand Order.*

ORDER

IT IS ORDERED that the ruling issued by the Administrative Law Judge on August 16, 2005, in this proceeding is affirmed.

Made, entered, and effective JAN 30 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

ARBITRATOR'S DECISION

ISSUED: February 2, 2006

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 671

In the Matter of QWEST CORPORATION'S Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with UNIVERSAL TELE-COMMUNICATIONS, INC.	)))))	ARBITRATOR'S DECISION

Procedural History

On July 14, 2005, Qwest Corporation (Qwest) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement (ICA) with Universal Telecommunications, Inc. (Universal), pursuant to the Telecommunications Act of 1996 (the Act). Qwest noted that their previous interconnection agreement has expired and is in "evergreen" status, and Qwest asserted that it sought negotiations with Universal who had not responded substantively to Qwest's request. A proposed interconnection agreement was affixed to the petition as Exhibit A.

Universal responded to the petition on August 8, 2005. Prehearing conferences were held on August 22 and September 16, 2005. A procedural schedule was adopted, Universal's counsel was admitted *pro hac vice* and a hearing was scheduled for November 15, 2005. Opening and Initial Briefs and Statements of Facts and associated testimony and exhibits were submitted on October 21, 2005, and Reply Briefs were submitted on November 4, 2005. A Motion to Compel was filed by Universal on November 9, 2005.

On November 14, 2005, the Administrative Law Judge (ALJ) granted a joint motion by the parties to waive the hearing, accept certain testimony and evidentiary material into the record, and adopt a schedule for the submission of final briefs on contested issues that would address arguments raised by the opposing parties in their earlier briefs. Final Briefs were filed on November 18, 2005. The Motion to Compel filed by Universal on November 9, 2005, was denied by Ruling of December 23, 2005.

Before moving into the formal discussion of the statutory requirements and issues involved in the instant arbitration proceeding, an open procedural matter must be addressed. On November 28, 2005, Qwest filed a Motion asking that official notice be taken of Order No. 05-1219 in Docket IC 9 and made comment thereon as to its relevance to the instant proceeding. Universal objected to additional argument posited by Qwest as violating

the agreement with respect to the number and lengths of briefs, and Qwest and Universal traded further responses with respect to Qwest's comments associated with the Motion for official notice.

Qwest's inclusion of argument with its Motion is improper. OAR 860-014-0050(1)(c) provides that the ALJ may take official notice of prior Commission orders. However, Qwest should have filed a motion for leave to file an additional brief thereon rather than include further argument when the parties had previously agreed to a limited number and length of briefs. The Motion is granted to the extent that I address the relevant precedents in Order No. 05-1219 in Docket IC 9 in this Decision, as I would have done in any event. However, all of the argument submitted by Qwest in conjunction with its Motion and all filings by both parties related thereto have been disregarded.

Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission (FCC) pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Legal and Regulatory Background

The interpretation of Sections 251 and 252 of the Act, which concern how parties negotiate an ICA, and their application via the Rules promulgated by the FCC have been the subject of virtually continuous litigation since the legislation was passed almost a decade ago. With each Appellate and Supreme Court decision, prior FCC rules and their interpretations have been struck down or modified in whole or in part and new rules adopted, in an attempt to satisfactorily comply with the later Court rulings. The most significant rulings affecting the current state of federal law and regulation, which the Commission is required to utilize in fulfilling its statutory obligations under the Act, are the *Triennial Review Order (*TRO*)*[1] and the *Triennial Review Remand Order (TRRO).*[2] As a former Bell Operating Company (BOC),

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd. 16978 (2003, *affirmed in part and reversed and vacated in part, United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"*).

[2] Order on Remand, *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251, Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, WC Docket No. 04-313 (FCC rel. February 4, 2005).

Qwest is also bound by the requirements of Section 271 of the Act, and the Arbitrator is obliged to be cognizant of federal rules and regulations and judicial opinions related thereto in the arbitration process.

Statement of Relevant Facts

Qwest is an incumbent local exchange carrier (ILEC) that provides local telephone services in Oregon, and Universal is a competitive local exchange carrier (CLEC) operating pursuant to a Certificate of Authority issued by the Commission. Qwest and Universal have been interconnected for the exchange of traffic in Oregon since early 2000. They are currently parties to an ICA approved by the Commission in docket ARB 157 in which Universal adopted the agreement Qwest had previously entered into with Metropolitan Fiber Systems (MFS Agreement). Pursuant to the MFS Agreement, Universal and Qwest have two points of interconnection (POI), one in each of the two Oregon LATAs.[3]

The service Universal provides to its customers, all of whom are Internet service providers (ISPs), is somewhat different from the typical arrangement. Under a typical arrangement, a customer's computer modem uses a normal telephone line to dial a normal telephone call to a local telephone number that has been assigned to the ISP by the CLEC. The ISPs' assigned numbers come from blocks of numbers obtained by the CLEC based on its local exchange carrier status in a particular LATA.

Universal provides a variation of this arrangement, which it calls "Managed Modem Service." The local numbers called are assigned to Universal in its role as a CLEC. Universal uses those numbers to serve its ISP customers' local needs. The ISPs' customers, who are also local exchange service customers of Qwest, use their modems to initiate local telephone calls that travel over Qwest's network to the POI with Universal. At the POI, universal picks up the call and assumes responsibility for transporting and delivering the call to the Internet. Universal converts the calls to Internet Protocol and delivers them to different Internet locations.[4]

The ISPs market themselves to end users and advise them of the local telephone numbers to use to access the Internet, but Universal offers ISPs an arrangement that lets them operate with less equipment, less bandwidth and lower maintenance costs, because Universal provides modems, routers, radius servers, DNS servers and caching servers, all of which are used by Universal, in both Portland and Eugene, to provide Internet functionalities for its ISP customers.[5]

Universal leases two circuits from Qwest: the first connects Universal's Portland and Eugene's Points of Presence (POPs), and the other connects its Eugene's POP to Universal's office in Corvallis, where it maintains monitoring equipment. At each POP, once the call passes through the POI from Qwest to Universal, Universal connects to an Internet backbone service that allows Universal, on behalf of its ISP customers, to route calls to the Internet as instructed by the ISP's end user customers. With this Managed Modem Service, the only equipment that

[3] Universal Statement of Material Facts, pp. 1-2.
[4] Pre-filed Testimony of Stephen C. Roderick on Behalf of Universal, October 21, 2005, p. 2.
[5] Qwest Corporation Statement of Facts, pp. 3-6.

the ISP customer must own is a radius server, which performs the customer authentication process. Universal offers nine separate plans for ISPs in Oregon, ranging from small geographic area coverage to most of the populated areas of the state. As of August 2004, Universal had obtained local telephone numbers in 17 separate local calling areas in Qwest territory from which traffic was being generated, including both the Portland EAS Region and Eugene-Springfield local calling area. Therefore, there are 15 local calling areas that are part of neither the Portland EAS Region or Eugene-Springfield local calling area. Approximately 70 percent of the traffic delivered to Universal originates in these 15 local calling areas.[6]

Issue 1: Should the Relative Use Factor (RUF) be applied to include ISP-Bound Traffic and Virtual NXX (VNXX) Traffic and Should the RUF Apply to Non-Recurring Charges? (Sections 7.1.1, 7.1.2, 7.3.1, 7.3.1.1.1, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.1, 7.3.2.2 and 7.3.2.2.1)

Section 7.1 of the ICA provides language regarding non-discrimination in interconnection and the availability of various forms of interconnection at the POI in each LATA. Section 7.3, which discusses interconnect facility options, states that it "shall apply to the exchange of Exchange Service (EAS/Local) traffic" between Qwest and Universal. Section 7.3.1.1.3 and Section 7.3.1.1.3.1 provide for the establishment of LIS entrance facilities and two-way trunks for reciprocal exchange of EAS/Local traffic and that the costs would be shared on the basis of relative use, initially on a 50/50 basis (the RUF), "until parties agree to a new factor based upon actual minutes of use data for non-ISP bound traffic." Section 7.3.1.1.3.1 further defines VNXX traffic in which the "CLEC's End User Customers are assigned NPA-NXX associated with a rate center different from the rate center where the End User Customers are physically located.... For purposes of determining the relative use factor, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic." Section 7.3.2.1 describes Direct Trunked Transport (DTT) and the means for measuring distance and calculating fixed and per-mile charges. Rates for recurring and non-recurring charges are set forth in Exhibit A. Sections 7.3.2.2 and 7.3.2.2.1 set forth the formula for sharing costs of LIS entrance facilities and two-way DTT Facilities. DTT is calculated in a similar manner as LIS entrance facilities, excluding ISP-bound and VNXX traffic from the RUF calculation. Both 7.3.1.1.3.1 and 7.3.2.2.1 specifically state that ISP-bound traffic is interstate in nature and that "Qwest has never agreed to exchange VNXX traffic with CLEC."

Universal's Position. Universal opposes these provisions and asserts that Qwest should be responsible for the delivery of this traffic as part of the RUF. Universal argues that the Court in *Qwest Corporation v. Universal Telecom, Inc.*,[7] properly found that ISP traffic is "telecommunications traffic" and that Qwest's interpretation of the applicability of the RUF and the imposition of charges was erroneous and unlawful as a matter of federal law.[8] Universal also asserts that "current controlling OPUC law (*Wantel*) and federal law (*Qwest v. Universal*) demolishes [Qwest's] position on ISP traffic."[9] While implicitly acknowledging that ISP traffic

[6] *Id.*, p. 7-10. Universal also has one frame relay circuit that may serve one customer, a fact not relevant to the issues in this case.
[7] Universal Final Brief, p.1., citing 2004 LEXIS 28348 (D. Or., Dec. 15, 2004).
[8] *Id.*, p. 2, citing 2004 LEXIS at *14-15.
[9] *Id.*, citing *Wantel/PacWest* Order No. 05-974, IC 8, IC 9 (July 26, 2005).

was not an issue in either of those cases, Universal asserts that ISP traffic is includable because it was at issue in the Fourth Circuit *MCImetro* case and Judge Aiken ruled that ISP traffic "is delivered over Qwest's telecommunications network facilities via *telephone* numbers, over local *telephone* loops to end office and tandem *telecommunications* switches."[10] Qwest, Universal claims, does not provide "services" that Universal purchases; instead, there is an obligation to interconnect and exchange traffic pursuant to Section 251(c)(2) obligations.[11]

Qwest's Position. Qwest contends that Universal misinterprets the *Universal* case when it contends that it supports the proposition that it would be unlawful for Qwest to exclude ISP traffic from the RUF provision.[12] That decision interpreted the specific meaning of a specific agreement, rather than generally applicable federal law, and, Qwest observes, there was nothing in the agreement that even referred to ISP traffic.[13] Qwest further states that the decision distinguished other cases on the grounds that they related to arbitrations for proposed interconnection agreements established after the issuance of the *ISP Remand Order*, rather than the interpretation of a preexisting agreement.[14]

Qwest also takes issue with Universal's characterization of the Commission's rulings in the *Wantel* order. The Commission, in Qwest's view, was only examining the impact of the *WorldCom* case on a preexisting agreement when it found that "an 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..." and, therefore, "it cannot provide the basis for interpreting the Pac-West/Qwest ICA." Qwest therefore calls Universal's conclusion that ISP-bound traffic continues to fall under Section 251(b)(5) on a forward-going basis "false," and discusses two Colorado federal court decisions ignored by Universal to support its position.[15]

Discussion. This arbitration proceeding must set new agreement terms based on existing law and policy, both federal and state, rather than interpret the terms and parties' intentions with respect to a preexisting agreement.

Some general observations are in order. With non-ISP-bound traffic, in terms of minutes of use (MOU, the index by which traffic is measured), the local/EAS intercarrier traffic flows roughly equally in both directions, and intercarrier reciprocal compensation payments for terminating access are essentially a "true-up" of relatively small amounts. Similarly, when trunking facilities are placed into service and the costs allocated on the basis of comparative amounts of originating traffic, the costs are also borne on a relatively equal basis. No carrier bears a disproportionate burden for the facilities used to transport the traffic between the carriers, and carriers voluntarily enter into these arrangements for their mutual benefit and the benefit of their customers.

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[10] *Id.*, p. 3, citing *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.*, 352 F.3d 872 (4th Cir. 2003). Emphasis in text.
[11] *Id.*, p. 3.
[12] Qwest Final Brief, p. 2, and Qwest Reply Brief, pp. 16-18, cited therein.
[13] Qwest Reply Brief, p. 17.
[14] Qwest Final Brief, p. 2.
[15] *Id.*, pp. 3-7, citing *WorldCom v. FCC*, 288 F. 3d. 429 (D.C. Cir. 2002), the Wantel/Pac-West Order at pp. 32-33 and *Level 3 Communications v. Colorado PUC*, 300 F. Supp 2d. 1069 (D. Colo. 2003) and *AT&T Communications v. Qwest Corporation* (slip opinion, June 2005).

The FCC recognized that the presence of local dial-up Internet service providers changes this relationship profoundly because the carrier that has only ISPs for customers will have virtually 100 percent terminating traffic. The is the case because, unlike the ISP's residential customer who logs onto the Internet by instructing his or her computer modem to dial the ISP, the "caller" on the terminating end is not actuated by a human being who can originate calls at another time, but is, instead, a piece of electronic equipment that converts and processes the incoming call. Furthermore, the holding time for an ISP-bound call is typically far longer than for a voice call and the circuit is in use for a greater percentage of time than with a typical voice circuit. Traffic is thus unidirectional and far heavier than normal. Prior to the issuance of the FCC's *ISP Remand Order,* the burden of paying for both terminating access and the entire direct trunked transport facilities placed in service for ISP-bound traffic fell entirely upon the local exchange carrier whose usually flat-rate billed customer originates the call to the ISP served by the terminating carrier. Simply put, no sane businessperson providing residential local telephone service would voluntarily enter into such an arrangement.

This arrangement, which the FCC characterized as "regulatory arbitrage," sending out false pricing signals, changed with respect to payments for terminating traffic when, in the *ISP Remand Order,* the FCC asserted its interstate jurisdiction over Internet-bound traffic,[16] concluding that it was "information access traffic."[17] Such traffic was to be capped at a $0.007 MOU rate, limited to a ten percent growth cap and subject to a "New Markets Rule." A different compensation scheme—"bill-and-keep"—would apply for excess growth when a CLEC entered a new market[18] rather than be subject to the reciprocal compensation regime under §251(b)(5) of the Act and the FCC rules embodied in 47 C.F.R., Part 51, including §51.709(b).[19] The Commission also adopted a "Mirroring Rule," which required that ISP-bound traffic rate caps would apply only if an incumbent LEC offers to exchange all 251(b)(5) traffic at the same rate.[20] The FCC subsequently decided to eliminate the growth factor and the New Markets Rule, favoring a unified compensation regime.[21] The issue of payment for terminating access of local area ISP-bound traffic has thus been settled on an interim basis, pending the outcome of an NPRM now underway.

Application of the Relative Use Factor to Direct Trunked Transport of Local/EAS ISP-Bound Traffic. In this arbitration proceeding, Universal does not contest the reciprocal compensation caps for termination of ISP-bound traffic, but does take issue with the exclusion of ISP-bound traffic from the calculation of the RUF applied to LIS entrance and DTT facilities. In IC 9, the Oregon Commission held on two occasions that the *ISP Remand Order,* as

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[16] "Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue." *ISP Remand Order,* ¶82.

[17] *Id.,* ¶¶1, 30, 39, 42.

[18] *Id.,* ¶81.

[19] Section 51.701(b) defines "telecommunications traffic." Subsection (b)(1) makes specific reference to paragraphs 34, 36, 39 and 42-43 of the *ISP Remand Order.* Paragraphs 39 and 42 clearly articulate that ISP-bound traffic is information access rather than telecommunications traffic. The D.C. Circuit did not vacate the FCC rules, leaving the agency's determination intact.

[20] *ISP Remand Order,* ¶89.

[21] Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, FCC 04-241, WC Docket No. 03-171 (rel. October 18, 2004) (*Core Communications Order*). ¶¶19, 20, 21 and 24.

construed by the Oregon District Court in the *Universal* case, does not apply to transport obligations.[22] Thus, the Commission retains jurisdiction over the compensation regime for local direct trunked transport of ISP-bound traffic.

As noted above, the FCC determined that ISP-bound traffic is "information access traffic," and not "telecommunications traffic," local or otherwise. Section 51.709 provides as follows:

> (a) In state proceedings, a state commission shall establish rates for the *transport* and termination of *telecommunications traffic* that are structured consistently with the manner that carriers incur those costs and consistently with the principles in §§51.507 and 51.509. (Emphasis added.)
>
> (b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

In reading Subsections 51.709(a) and (b) together, it is evident that the "traffic" referred to in §51.709(b) is the "telecommunications traffic" referred to in §51.709(a), not information access traffic, as ISP-bound traffic was found by the FCC to be.

Section 51.713 provides rules for the establishment of rates for transport and termination of telecommunications traffic. Subsection 51.713(c) provides as follows:

> Nothing in this section precludes a state commission from presuming that the amount of *telecommunications traffic* from one network to the other is roughly balanced with the amount of *telecommunications traffic* flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption. (Emphasis added.)

All of Universal's customers are ISPs and all of the numbers that Universal has placed into service are used for the provision of Internet services. Calls delivered to those numbers carry ISP-bound traffic exclusively. Since ISP-bound traffic is not telecommunications, it is not subject to the RUF. Thus, the amount of telecommunications traffic flowing from each network to the other is presumptively in exact balance at zero. Therefore, the RUF for LIS entrance and DTT facilities is 50-50. The Qwest-proposed language is adopted.

VNXX Traffic. While the developmental path of the law and regulations encompassing the issue of intercarrier compensation for ISP-bound traffic has been long and circuitous, the issue of ISP-bound VNXX traffic is a fairly recent development and, as discussed

[22] Order No. 05-1219, entered November 18, 2005, p. 7, citing Order No. 05-874, entered July 26, 2005.

below, not contemplated in earlier FCC orders. The dispute presented here involves how the RUF should be applied to VNXX traffic.

The Commission previously described VNXX traffic in Docket UM 1058 as follows:

> 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 50 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 intraLATA toll charges.

The FCC has delegated some of its authority to state public utility commissions so that they may order the North American Numbering Plan Administrator (NANPA) to reclaim NXX codes that are not used in accordance with the Central Office Code Assignment Guidelines. The FCC also sought comment on when use of VNXX codes might be appropriate.[23]

As noted above in the Statement of Relevant Facts, traffic from 15 local calling areas outside of the Portland EAS and Eugene/Springfield LCA is delivered to Universal modems in the Portland and Eugene/Springfield rate centers using telephone numbers from their respective calling areas. Those numbers have been reassigned by Universal to the Portland or Eugene rate centers where the modems are actually located. Universal acknowledges engaging in this practice.

The Commission has repeatedly and unequivocally determined that the ISP-bound traffic, which the *ISP Remand Order* specifically preempts states from regulating, does not encompass VNXX-routed ISP-bound traffic.[24]

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[23] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket 01-92, FCC 01-132, ¶115.

[24] *See Pac-West Telecomm, Inc. v. Qwest Corporation,* Docket No. IC 9, Order No. 05-1219, entered November 18, 2005, p. 8, and the Ruling of the Administrative Law Judge in Docket IC 12, dated August 16, 2005, cited therein, affirmed by Order 01-037, entered January 30, 2006.

Furthermore, the District Court in the *Universal* case, in a Supplemental Opinion of September 22, 2005, at page 2, stated as follows:

> The court intended compensable traffic to include traffic that originates in one LCA or EAS area and 'terminates' in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. In other words, the 'termination point' is the location of the Universal modems that handle the call on behalf of the ISP.

As the foregoing demonstrates, ISP-bound traffic, as defined by the FCC and the Court in *Universal*, must originate and terminate in the same LCA or EAS area.[25] The RUF only applies to local telecommunications traffic. *VNXX-routed ISP-bound traffic is not local,* and, furthermore, regardless of whether the traffic is ISP-bound information access or ordinary voice telecommunications, the RUF does not apply.

Although this decision generally approves the Qwest language proposed in Sections 7.3.1.1.3.1 and 7.3.2.2.1, excluding ISP-bound and VNXX traffic of whatever nature (to the extent that such traffic continues to exist) from the calculation for transport expenses of traffic with the CLEC, it does not imply that the practice of reassigning NXX codes from one rate center to another is a practice of which the Commission approves. Quite to the contrary, in the Commission's Order in Docket UM 1058 closing the investigation into the provision of VNXX services, the Commission stated:

> When applicant is assigned one or more NXX codes, applicant shall limit each of its NXX codes to a single local exchange or rate center, whichever is larger, and shall establish a toll rate center in each exchange or rate center proximate to that established by the telecommunications utility or cooperative corporation serving the exchange or rate center.[26]
>
> A plain reading of these conditions leads to the conclusion that any carrier engaging in the [assignment of one rate center's NXX codes to a different rate center] would clearly be in violation of its certificate. Therefore, rather than requesting a declaratory ruling or a generic investigation, the most appropriate means for dealing with allegations relating to such activity would be in the context of a complaint or a request for arbitration.[27]

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[25] *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Sept. 22, 2005) (*Universal*).
[26] See In the Matter of Petition from Oregon Exchange Carrier Association Requesting an Order to Implement Rate Center Consolidation, Docket UM 953, Order No. 00-478, entered August 29, 2000.
[27] Order Closing Investigation, Docket No. UM 1058, Order No. 94-504, entered September 7, 2004, p. 5.

> In our Order closing the investigation, we made clear our view that, if there were an aggrieved party (most likely a carrier) alleging that another carrier was improperly offering VNXX services, the filing of a complaint or a request for arbitration would be the appropriate means for addressing the allegations.[28]

Pursuant to OAR 860-014-0050 (c) and (d), the Arbitrator takes official notice of Universal's Certificate to operate as a CLEC in Oregon.[29] Among the conditions on the Certificate are the following:

> 7. For purposes of distinguishing between local and toll calling, applicant shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, applicant shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.
>
> 8. When applicant is assigned one or more NXX codes, applicant shall limit each of its NXX codes to a single local exchange and shall establish a toll rate center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange.[30]

By the above definition, Universal, in utilizing VNXX arrangements to provide dial-up access to the Internet to its ISPs' customers while in its current "evergreen" contract status, is in violation of Conditions 7 and 8 of its operating Certificate. Consequently, we modify the language of these sections by deleting the sentence "Qwest has never agreed to exchange VNXX traffic with CLEC" and inserting in its place "Qwest and CLEC shall not exchange VNXX traffic."

Non-Recurring Charges. Universal wishes to modify the Qwest-proposed language regarding the application of the RUF in Sections 7.3.1.1.3.1 (entrance facilities) and 7.3.2.2.1 (direct trunked transport) to include language that requires that the RUF apply to both recurring and non-recurring charges.

The Commission directly discussed the issue of applying the RUF to non-recurring charges in Dockets IC 8 and IC 9, Order No. 05-874: "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."[31] (p. 22.) The Commission went on to discuss the *Universal* decision that

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[28] Order Granting Clarification, Docket No. UM 1058, Order No. 04-704, entered December 8, 2004, p. 3.

[29] *In the Matter of the Application of Universal Telecommunications, Inc., for a Certificate of Authority to Provide Telecommunications Service in Oregon and Classification as a Competitive Provider.* Docket CP 578, Order No. 99-252, entered April 9, 1999.

[30] *Id.*, pp. 6-7.

[31] P. 22. *See also id at* pp. 18-19 for discussion of non-recurring charge methodology.

allowed Qwest to assess NRCs on Universal for the installation of interconnection facilities. "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)." *(Id.)* The Commission is again presented with this issue and, for the above reasons just recently enunciated by the Commission, I reject the proposal to allocate the RUF to NRCs. The Qwest language is adopted.

Issue 2: Should the Interim Compensation Regime Ordered by the FCC in the ISP Remand Order Be Applied Only to ISP Traffic that Originates and Terminates at ISP Modems Located in the Same Local Calling Area? (Section 7.3.4.4.1 and 7.3.4.5)

The Section 7.3.4.5 language of the Qwest-proposed ICA is as follows:

> The Parties will not pay reciprocal compensation for traffic, including ISP-bound traffic, when the traffic does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the calling and called NPA-NXXs and specifically, regardless whether an End User Customer is assigned an NPA-NXX associated with a rate center that is different from the rate center where the End User Customer is physically located (also known as "VNXX traffic"). Qwest's agreement to the terms in this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX traffic with CLEC.

Universal's proposed language would require Qwest to pay compensation on all ISP-bound traffic regardless of where it originates and terminates.

Positions of the Parties. Qwest asserts that the *ISP Remand Order* applies only to ISP traffic that originates and terminates in the same local calling area and that, given the history of the Act's interpretation by the FCC and the Courts, Universal's interpretation of that order is incorrect: only local (non-VNXX) ISP-bound traffic was to be included.[32]

Universal asserts that the *ISP Remand Order* applies to all ISP-bound traffic, including VNXX traffic, citing the *SNET* and *Illinois Bell* decisions as examples of federal district courts in other states that reached such a conclusion.[33] Judge Aiken's exclusion of VNXX traffic from reciprocal compensation in the Universal case was due to her interpretation of the existing contract, not, as here, where, "we are arbitrating the terms of a brand new interconnection agreement and Universal wants the new contract to reflect the current state of ederal law."[34]

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[32] Qwest Reply Brief, pp. 23-31, numerous citations concluding with the *Universal* Supplemental Opinion of September 22, 2005, cited *supra*.
[33] *Southern New England Telephone Co. v. MCI WorldCom Communs.*, 353 F. Supp. 2d 287, 289 (D. Conn. 2005). *AT&T Communs. Co. v. Illinois Bell Telephone Co.*, 2005 WL 820412, No. 04 C 1768 (ND Ill. Mar. 25, 2005).
[34] Universal Reply Brief, p. 31.

Universal further argues that "[b]ecause federal law establishes a duty on Qwest to pay reciprocal compensation for the transport and termination of telecommunications, and because the traffic here is comprised of telecommunications, should the Commission fail to enforce Universal's federal law rights to compensation, this would be an impermissible regulatory taking under the Fifth Amendment of the United States Constitution."[35] This regulatory taking arises from the requirement placed on Universal to terminate the ISP-bound traffic that might be "excised" by the Commission from the compensation scheme—VNXX traffic—because Universal has a duty to interconnect, and "there is no dispute that the traffic from Qwest actually physically 'invades' Universal's privately-owned switch," and, without VNXX compensation, "Qwest would enjoy significant free use of Universal's switch....[36]

Discussion. As discussed in some detail above, the VNXX dilemma is a product of Universal's intentional design. Universal requests and obtains blocks of numbers from the NANPA for specific local calling areas and assigns them without interference, or even influence, from Qwest. If the telephone number that Universal assigned to the modem that terminated the ISP-bound traffic came from the same LCA as where the modem were actually located, then Qwest customers originating calls from one of the non-Portland or Eugene/Springfield LCAs, would be required to pay toll charges to Qwest. Thanks to Universal's number assignment policies, Qwest is denied the access charge revenue to which it is entitled under its tariff. Universal then goes a step further and seeks compensation from Qwest for terminating this very traffic for which Universal has designed a means to avoid paying access charges. Universal's argument that by failing to pay terminating charges for VNXX ISP-bound traffic "Qwest is enjoying free use of Universal's switch" in violation of the Takings Clause of the Fifth Amendment in the Bill of Rights, strains both logic and credulity. I am not alone in this view. The Arbitrator in *Global NAPs, Inc,* makes a similar observation:

> VNXX does not in any way represent an innovation of the sort that competition is intended to encourage. Rather, VNXX is an artificial service that takes advantage of the manner in which NXX codes are assigned as a means to avoid toll charges and is essentially a form of price arbitrage. In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service and instead relying upon [the ILEC] to transport the traffic without charge simply because the VNXX says the call is 'local.'[37]

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[35] Universal Final Brief, p. 6.
[36] *Id.*, p. 8.
[37] *Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Docket No. 6742, 2002 Vt. PUC LEXIS 272 (Vt. PSB, Dec. 26, 2002), p. 21.

In Massachusetts, the Arbitrator stated that the CLEC's

> ability to serve ISPs is the result of merely shifting transport costs to other LECs and of billing reciprocal compensation for completing calls that are properly rated as toll...[the CLEC's] VNXX would artificially shield [the CLEC] from the true cost of offering the service and will give [the CLEC] an economic incentive to deploy as few new facilities as possible. By artificially reducing the cost of offering the service, [the CLEC] will be able to offer an artificially low price to ISPs and other customers who experience heavy inbound calling.[38]

Universal provides the *SNET* case[39] in support of its position on the propriety of including VNXX ISP-bound traffic in the interim compensation regime. Although the *SNET* case is on point, it is also flawed in several critical respects, which bear thorough discussion. In *SNET,* the Court dismisses the statements made by the FCC and D.C. Circuit describing how ISP-bound traffic is provisioned. The Court held that such statements merely disclose how the FCC "began" its analysis, explaining why ISP-bound traffic was "local" in nature. The Court says:

> . . . [T]hese statements indicate the FCC began by addressing the question whether ISP-bound traffic that would typically be subject to reciprocal compensation – which at the time would have consisted of 'local' ISP-bound traffic – was nevertheless exempt. In other words, because at the time only 'local' traffic was subject to reciprocal compensation, the question before the FCC was whether 'local' ISP-bound traffic was exempt from reciprocal compensation. Other forms of ISP-bound traffic were already exempt because they were not 'local.'
>
> What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*. In answering the question, the FCC (a) disclaimed the use of the term 'local,' (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is 'information access,' (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether 'local' ISP-bound traffic was subject to

[38] *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc., d/b/a Verizon Massachusetts, f/k/a New England Telephone & Telegraph Co., d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45, 2002 Mass. PUC LEXIS 65 at *50 (Mass. Dep't of Tel and Energy, Dec. 12, 2002), p. 36.

[39] Universal Reply Brief, pp. 23-24, citing *Southern New England Telephone Co. v. MCI WorldCom Communs., Inc.*, 359 F. Supp. 2d 229 (D. Conn 2005).

> reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.[40]

Put another way, the Court is saying that even though the FCC and D.C. Circuit only discussed one method of provisioning ISP-bound traffic, all potential methods of provisioning ISP-bound traffic, including VNXX-facilitated ISP-bound traffic, were encompassed by the ISP Remand Order and became subject to the intercarrier compensation scheme that was established in that order. However, the *ISP Remand Order* is utterly silent on the subject of VNXX, and it is broad and unreasonable overreaching on the part of the Court in the *SNET* case, to assume that the *ISP Remand Order*, or other FCC or D.C. Circuit decisions discussing ISP-bound traffic contemplated the inclusion of VNXX into the compensation scheme adopted in the ISP Remand Order. Indeed, there is no description of ISP-bound traffic being provisioned in any manner other than where the ISP server is located in the same calling area as the end user customer initiating the Internet call.[41]

Nevertheless, the Court in *SNET* rejected a similar argument and concluded that the *ISP Remand Order* indicated that the FCC was

> interested in changing all intercarrier compensation regimes, including the access charge regime. On the same day that the *ISP Remand Order* was issued, the FCC also issued a Notice of Proposed Rulemaking in which it sought to move all forms of intercarrier compensation away from so-called 'Calling Party Network Pays' compensation, of which both reciprocal compensation and access charges are examples, toward some method of recovering costs directly from endusers. *Accordingly, it is at least arguable that the FCC intended to use the ISP Remand Order as a first step in its general plan to unify all intercarrier compensation, including access charges.* (Citations omitted.) (Emphasis supplied.)

There are several problems with the Court's analysis. First, there is no indication in the *ISP Remand Order* that the FCC intended its interim intercarrier compensation scheme to "affect calls that are subject to the access charge regime." On the contrary, paragraphs 36-40 of the Order indicate that the FCC specifically declined to modify pre-Act requirements for access

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[40] *Id.*, pp. 230-231.

[41] In at least one point in the *ISP Remand Order*, the FCC mentions that ISP-bound traffic is "typically" provided by having the ISP server located in the same local calling area as the customer initiating the Internet call. Although the order does not address "atypical" situations, it used to be common for end users to incur toll charges to complete dial-up Internet calls where an ISP's modem is located in a different local calling area. The fact that the *ISP Remand Order* does not address such "atypical" situations suggests that the FCC understood that such calls were not at issue, and therefore not encompassed by the compensation regime established in the *ISP Remand Order*. Again, had the FCC intended that such "atypical" arrangements were encompassed by its Order, it certainly would have made reference to that fact. Instead, the FCC repeatedly refers to only one method of provisioning ISP-bound traffic; *i.e.*, where the ISP modem is located in the same local calling area as the caller initiating the Internet call.

traffic. Thus, I do not agree that there is "clear language" that the FCC intended to supplant its existing access charge policy with the compensation regime in the *ISP Remand Order*.

For the same reason, I am not persuaded by the Court's suggestion that the FCC intended to modify its access charge regime as a "first step" in implementing a unified intercarrier compensation scheme. In support of its conclusion, the Court cites paragraph 83 of the *ISP Remand Order*, wherein the FCC states that "[t]he interim compensation regime, as a whole, begins a transition toward what we have tentatively concluded, in the companion *NPRM*, to be a more rational cost recovery mechanism under which LECs recover more of their costs from their own customers." This is hardly a "clear" statement that the FCC intended to discard pre-existing access charge requirements. Moreover, allowing carriers to use VNXX arrangements to avoid access charges and also receive intercarrier compensation does not advance the FCC's stated goal of having carriers "recover more of their costs from their own customers." On the contrary, it perpetuates the same opportunities for arbitrage that the interim compensation scheme in the ISP Remand Order was designed to avoid.

Finally, I reject the Court's approach in *SNET* because I find it incomprehensible that the FCC would implement a decision with such significant financial consequences as those associated with modifying the existing access charge regime without providing a clear statement to that effect. There is simply no indication in the *ISP Remand Order* that the FCC intended to make that far-reaching change in policy.[42]

Furthermore, it is appropriate to repeat at this juncture the statement of the District Court in the *Universal* case, in its Supplemental Opinion of September 22, 2005, at page 2:

> The court intended *compensable* traffic to include traffic that originates in one LCA or EAS area and "terminates" in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates." (Emphasis added.)

Thus, the Court clearly intended that Universal should receive no compensation whatsoever for the termination of VNXX traffic.

In light of the Commission's continuing jurisdiction over the proper use of NPA NXXs and the enforcement of NANPA guidelines for their use in Oregon, it is clear that VNXX is not a permissible means for transporting ISP-bound, or any other, traffic. Furthermore, in light of the Commission's Order in UM 1058 and Conditions 7 and 8 of Universal's Certificate, continued use of VNXX arrangements for the transport of any traffic by Universal is clearly a violation of its certificate and the Commission's Order.

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[42] A similar reaction was recently expressed by the ALJ presiding in a case before the Minnesota PUC facing this same question: "The ALJ has difficulty accepting the proposition, advanced by Level 3, that the FCC would have endorsed such a fundamental change in approach without mentioning it at all. *In the Matter of the Complaint of Level 3 Communications LLC against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, Recommendation on Motions for Summary Disposition, 3-2500-16646-2, P-412/C-05-721, p. 10, January 18, 2006.

The Qwest-proffered language is adopted except insofar as we modify the language of Section 7.3.4.5 by deleting the sentence "Qwest's agreement to the terms in this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX traffic with CLEC" and inserting in its place "Qwest and CLEC shall not exchange VNXX traffic."

ARBITRATOR'S DECISION

1. The interconnection agreement between Universal and Qwest shall utilize the language proposed by Qwest with respect to Sections 7.1.1, 7.1.2, 7.3.1, 7.3.1.1.1, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.1, 7.3.2.2 and 7.3.2.2.1, except as modified herein. Universal-proposed sections are rejected.

2. The interconnection agreement between Universal and Qwest shall utilize the language proposed by Qwest with respect to Sections 7.3.4.4.1 and 7.3.4.5, except as modified herein.

3. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Universal shall submit an interconnection agreement consistent with the terms of this decision.

4. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 2nd day of February, 2006.

Allan J. Arlow, Arbitrator