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Carla M. Butler
Sr. Paralegal

November 30, 2004

Via Hand Delivery

Trudy Jaynes
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

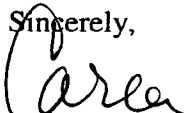
Re: UM-1168

Dear Ms. Jaynes:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Response to Time Warner Telecom of Oregon's Proposed Issues List and Universal Telecommunications, Inc.'s Initial Statement of Issues, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,


Carla M. Butler

CMB:

Enclosure

L:\Oregon\Executive\Duarte\UM 1168 (Unfiled Agreements)\PUC Transmittal Ltr.doc

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1168

In the Matter of PUBLIC UTILITY
COMMISSION OF OREGON STAFF
Investigation into Qwest Corporation's (and
possibly other parties') failure to file
interconnection agreements for Commission
approval under Section 252(a)(1) of the
Telecommunications Act

QWEST'S RESPONSE TO TIME
WARNER TELECOM OF OREGON'S
PROPOSED ISSUES LIST AND
UNIVERSAL TELECOMMUNICATIONS,
INC.'S INITIAL STATEMENT OF ISSUES

INTRODUCTION

Qwest Corporation ("Qwest") hereby responds to the proposed Issues List that intervenor Time Warner Telecom of Oregon ("Time Warner") filed on November 9, 2004, and the "Initial Statement of Issues" that intervenor Universal Telecommunications, Inc. ("Universal") (collectively "CLECs") filed that same day. Both Commission Staff and Qwest agree that this proceeding should be limited to whether Qwest should pay penalties for not filing certain agreements for approval by the Commission, consistent with the terms of a stipulation or Memorandum of Understanding ("MOU") that those parties have agreed to. The CLECs, on the other hand, request that the Commission consider awarding "damages" or "reparations" to CLECs based upon alleged "harm" as a result of these unfiled agreements. (See e.g., Time Warner's proposed Issues 3, 4 and 5; see also Universal's Statement of Issues generally.)¹ Both Staff and the Department of Justice, however, have advised the Commission not only that such issues are beyond the scope of this proceeding, but also that the Commission does not have authority to award CLECs damages. For the reasons set forth below, the Commission should

¹ As Qwest was finalizing this response, Qwest learned from a voicemail message and subsequent telephone conversation with Time Warner's counsel that Time Warner is withdrawing its proposed issues 3, 4 and 5. However, since Universal appears to also advocate for some type of damages or reparations for its alleged harm in this docket, Qwest will respond generally herein.

reject the CLECs' proposed Issues Lists and Statement of Issues, and thus that it should instead adopt the Issues Lists that Commission Staff and Qwest have proposed.

ARGUMENT

I. The scope of this docket is limited to consideration of ORS 759.990 penalties

The Commission opened this docket upon Staff's recommendation that the Commission initiate a formal docket following Staff's investigation of these issues. It is clear that Staff's recommendation, and the Commission's opening of this docket, were limited to the possible imposition of penalties under ORS 759.990, including consideration of a possible stipulation between Staff and Qwest to resolve such penalty issues. The issues that the CLECs propose, however, are well beyond the scope of this docket.

In its August 30, 2004 Staff Report for the September 7, 2004 Public Meeting ("Staff Report"), Staff discussed the background of this matter, including requirements under section 252(a)(1) of the Telecommunications Act of 1996 ("Act") that both incumbent local exchange carriers (ILECs) and their competitors (CLECs) file interconnection agreements with state commissions, and Qwest's FCC petition regarding filing requirements in 2002. The Staff Report also discussed the history of this matter, beginning with a February 2002 complaint that the Minnesota Department of Commerce filed with the Minnesota Public Utilities Commission, as well as Staff's own investigation of this matter beginning in March 2002, and commission investigations in other states.

The Staff Report recommended that the Commission open a docket to consider obtaining penalties pursuant to ORS 759.990. Notably, the Staff Report also concluded: "DOJ advises that the Commission does not have authority to order Qwest to pay money directly to CLECs on the basis of the CLECs having been damaged by Qwest's failure to file." Thus, Staff recommended

that “[t]hat the Commission should open a docket for [the investigation of Qwest’s and possibly other carriers’ failure to file agreements] even though Staff hopes to resolve this matter by stipulation.” Staff did not recommend that the Commission consider awarding “damages” or “reparations” to CLECs who allege they have been harmed by any lack of filing of agreements. Indeed, Qwest understands that Staff’s intent was to limit the scope of the docket to the issues of monetary penalties and to ensure compliance with section 252 filing requirements in the future.

At its September 7th meeting, the Commission adopted the Staff Report’s recommendation that it initiate a docket to investigate whether Qwest and *possibly other parties* failed to file interconnection agreements for Commission approval under section 252(a)(1) of the Act, and if so, to determine appropriate remedies, including penalties. Thus, the Commission agreed with the Staff Report recommendation and opened this docket. The Commission’s action adopting the Staff Report should be understood as agreeing with the limitations on the scope of the proceeding that Staff recommended. Thus, the Commission intended to limit the scope of this docket to penalties for unfiled agreements, and not to consider awarding “damages” or “reparations” to CLECs, which the Commission was specifically advised it did not have the authority to do.

II. The Commission does not have authority to award damages to CLECs in this docket

While the Commission was considering opening this docket, Commission Chairperson Lee Beyer inquired of the Department of Justice (“DOJ”) as to the scope of the Commission’s authority in a penalty proceeding addressing unfiled agreements. Specifically, Chairperson Beyer inquired whether the Commission has authority to require Qwest, in settlement of a contemplated penalty proceeding under ORS 759.990(6), to pay money directly to CLECs on the basis of the CLECs having been damaged by Qwest’s failure to file interconnection agreements.

The DOJ addressed this inquiry in an August 19, 2004 memorandum, which Staff has previously filed with the Commission on November 10, 2004. The DOJ's answer is that the penalty provisions of ORS 759.990 control the Commission's actions in response to any failure to file agreements, and that "neither that statute nor any other provides the Commission with authority to direct payment of a penalty to one or more CLECs." The DOJ concluded that "[a]lthough the PUC has broad regulatory power under ORS 756.040, a court likely would conclude that the legislature, through enactment of ORS 759.990, has circumscribed that power with respect to responding to violations of OAR 860-016-0020(3)." The DOJ further concluded: "The PUC may seek penalties for such violations, but the penalties must be deposited in the General Fund, and an alternative remedy is not clearly authorized."

Thus, not only has the Commission limited the scope of this proceeding to consider possible penalties under ORS 759.990, but the Commission's own attorneys have advised the Commission that it does not have the authority to award damages to CLECs. Nevertheless, despite their awareness of this advice, the CLECs have requested that the Commission consider awarding them damages in this proceeding. For this additional reason, the Commission should limit the scope of the proceeding to the issues that Staff and Qwest have proposed.

III. CLECs will not be prejudiced if the issues are limited to ORS 759.990 penalties

Finally, CLECs will not be prejudiced if the issues are limited to ORS 759.990 penalties. For example, both Staff and Qwest have stated that nothing in the stipulation or MOU to which Staff and Qwest have agreed and which they intend to submit to the Commission for comment and approval would affect any rights that CLECs might otherwise have to bring a claim against Qwest for alleged individualized damages in an appropriate forum. Further, Qwest expects that the stipulation will specifically provide that the settlement will be *without prejudice* to CLECs'

filing any complaints they deem warranted against Qwest in an appropriate forum. Thus, limiting the issues in this proceeding to those that Staff and Qwest have contemplated will permit this docket to proceed more efficiently with a narrow scope, but at the same time preserve any claims that the CLECs might otherwise have, which they would be able to make in a more appropriate forum.

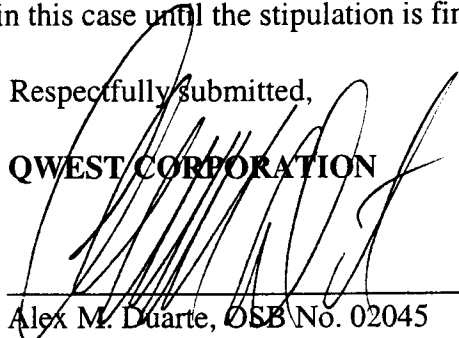
CONCLUSION

Accordingly, Qwest respectfully submits that the Commission should reject Time Warner's proposed Issues List and Universal's Statement of Issues, and further, that it should adopt Staff's and Qwest's Proposed Issues Lists limited to ORS 759.990 penalties and consideration of their stipulation. Qwest further concurs with Staff's suggestion that the Commission suspend scheduling future events in this case until the stipulation is finalized.

DATED: November 30, 2004

Respectfully submitted,

QWEST CORPORATION



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Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

UM-1168

I hereby certify that on the 30th day of November, 2004, I served the foregoing **QWEST CORPORATION'S RESPONSE TO TIME WARNER TELECOM OF OREGON'S PROPOSED ISSUES LIST AND UNIVERSAL TELECOMMUNICATIONS, INC.'S INITIAL STATEMENT OF ISSUES** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their office regular address as shown below.

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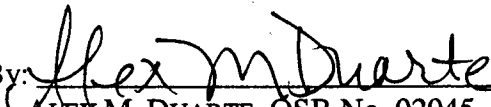
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DATED this 30th day of November, 2004.

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