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Carla M. Butler
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September 19, 2007

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: IC 13

Dear Ms. Nichols Anglin:

Enclosed for filing in the above entitled matter please find an original and two (2) copies of Qwest's Response to Universal's Brief in Support of its Proposed Order, along with a certificate of service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Carla". The signature is written in a cursive, flowing style.

Carla M. Butler

CMB:

Enclosure

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 13

UNIVERSAL TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

QWEST CORPORATION,

Defendant.

**QWEST'S RESPONSE TO UNIVERSAL'S
BRIEF IN SUPPORT OF ITS PROPOSED
ORDER**

Pursuant to Administrative Law Judge Allan Arlow's ruling at the September 11, 2007 prehearing conference, defendant Qwest Corporation ("Qwest") hereby responds to plaintiff Universal Telecommunications, Inc.'s ("Universal's") brief in support of its proposed order requesting that the Commission extend the current stay in Order No. 07-366.

ARGUMENT

Despite Universal's repeatedly resorting to numerous appeals to emotion about the relative sizes of Universal and Qwest, or its hiding behind its expressed concerns about its Internet Service Provider customers or rural dial-up Internet end-user customers, or its alleged (but unsubstantiated) financial troubles, or other attempts to cloud the issues, Universal *concedes* that the Commission has the *jurisdiction to grant equitable relief*, including allowing for disconnection of services and facilities for nonpayment. That is, it is undisputed that the Commission can allow disconnection *unless* Universal pays Qwest the current outstanding balance due in full. Further, just as there is no dispute that the Commission can permit Qwest to disconnect services and facilities for nonpayment by lifting the current stay, there can also be no

dispute that the Commission can alternatively *condition* such disconnection on Universal's performance of certain acts to prevent disconnection.

Accordingly, the Commission has the ability to consider *alternatives* to a straight-forward lifting of the stay and allowing disconnection by either (1) ordering Universal to pay a certain amount into escrow, or, (2) if Universal is truly financially unable to do so at the present time (as it claims, but does not prove), give Qwest a conditional security interest in the proceeds of the sale of Universal's assets, pending resolution of the complaint. Such a conditional order would accomplish a well-balanced approach to all parties by allowing Universal the ability to continue operations, and thus temporarily stay in business, and more importantly, not disrupt the pending sale of its business to GlobalPOPs. Further, such a conditional order would not disrupt any service to the 27 ISPs that Universal claims to have as customers (and who are all presumably paying Universal for the services it is providing them), or to the more than 24,000 Oregon dial-up end-user customers that Universal alleges rely on the services it provides to its Internet Service Provider customers. At the same time, however, such a conditional order would give Qwest at least some hope of addressing the core issue at hand (namely, the balances due for services that Qwest has provided to Universal under the ICA).

Indeed, the Commission's granting the alternative relief that Qwest seeks here is not only a "win/win" solution, but would be a "win/win/win/win" solution. That is, Universal would win by temporarily staying in business and realizing at least some of the proceeds of its sale to GlobalPOPs (assuming the sale proceeds exceed the amounts it owes to Qwest).¹ Likewise, Universal's Internet Service Provider customers and their dial-up end-user customers would win because no services would be disrupted. Meanwhile, GlobalPOPs would win because it would

¹ Moreover, even if the sale proceeds do not exceed the amounts that Universal owes to Qwest, Universal would win because it would be able to partially liquidate its huge debt to Qwest.

be able to consummate the purchase of Universal's managed modem business, as it clearly wishes (and plans) to do. Finally, Qwest would win because it would be assured of being paid for at least some of the services and facilities it has provided to Universal, and for which it is rightfully owed, for the past 13 months since the current ICA became effective. This is an equitable and balanced result, and both parties acknowledge that the Commission can grant equitable relief.

Finally, Universal argues strenuously that it has satisfied the standards for a stay. However, in reality, and for the reasons set forth below, it is Qwest's request that the Commission order Universal to disclose the sale amount and to escrow the sales proceeds, or to give Qwest a security interest in the sale proceeds, which satisfies the standards for rescinding the current stay. Such a result will not impose a hardship on Universal or on the "public" (the more than 24,000 dial-up end-user customers in Oregon who allegedly purchase services from Universal's 27 Internet Service Provider customers) that Universal says it is so concerned about, because neither Universal nor the "public" would suffer any disruption in operation or service.

I. Requiring Universal to escrow the amounts at issue or provide a security interest to Qwest in the asset sale would not cause harm to the public

Universal once again continues to try to hide behind its Internet Service Provider customers and their dial-up end-user customers as a shield against Qwest's attempts to collect the money that Universal owes Qwest. Thus, Universal expresses concerns about "sudden and serious disruption" of services to "rural" "Qwest basic service customers" (including "schools and churches") who allegedly "have no alternative for Internet access other than dial-up.

(Universal Brief, p. 3.)² However, although Universal seems to profess concerns about these

² Universal makes many unsubstantiated allegations in its brief (none of which are even supported by affidavit evidence), which are clearly attempts to appeal to emotion or to scare the Commission from ruling in Qwest's favor. However, although it seemingly claims poverty, and its inability to continue operations, and

ISPs and their dial-up customers, the stark reality is that Universal is not truly concerned about them at all; it is solely concerned about being able to consummate the sale of its business to GlobalPOPs, and it fears that any disconnection action or other disruption will jeopardize that deal. Indeed, Universal admits it is “exiting” the managed modem business, and thus these customers will no longer be any concern to it anyway. Rather, Universal is simply hoping to not have any service disruptions so that it can execute the terms of its agreement with GlobalPOPs and retain the entire sale price for the transaction, thereby leaving Qwest out in the cold.

likelihood of bankruptcy, it provides absolutely no evidence of any such facts. Instead, it apparently assumes that by simply claiming it is on the verge of bankruptcy, or that it is unable to pay the disputed amounts, the Commission will take such claims at face value. Absent any inquiry or discovery regarding Universal’s true financial condition, however, Qwest believes the Commission should be very wary of Universal’s claims. Indeed, neither the Commission nor Qwest is in any reasonable position to believe these claims of financial hardship, especially since Universal adamantly refuses to disclose the sale price from GlobalPOPs. Instead, it simply expects the Commission, and Qwest, to take its word for it. Moreover, Qwest assumes that Universal is billing (and is being paid by) its 27 Internet Service Provider customers for which Universal provides services right up until the close date of the sale, and there is certainly no evidence to the contrary.

Universal also misleadingly implies that if disconnection occurs, the dial-up customers will be left without access to ANY ISP services. (See e.g., Universal Brief, p. 1 (“such action [Qwest demanding a portion of the disputed costs] will force Universal out of business overnight, leaving tens of thousands of Oregonians without access to local dial-up Internet access service”); p. 3 (“[d]isconnection would immediately deprive more than 24,000 Oregonians of their local dial-up Internet access. . . [t]he vast majority of [which] . . . have no alternative for Internet access other than dial-up”); see also p. 5 (“Universal believes it is highly likely that many of the ISPs that rely on Universal would not survive if their service was immediately terminated.”). However, Universal fails to provide *any evidence* for its claims, such as that there are “no alternatives” to the dial-up Internet services that its Internet Service Provider customers provide to end-users in Oregon. Indeed, the truth of the matter is that Universal is *not the only provider* that provides services to ISPs— there are many other providers in Oregon, including Level 3, which this Commission is very familiar with. See e.g., Order No. 07-098, and Arbitrator’s Decision, in docket ARB 665, and http://www.level3.com/wholesale/services/data/managed_modem.html (where Level 3 claims its services provide its customers “dial-up connections to more than 90 percent of the United States”). Other providers that provide services to Internet Service Providers throughout Oregon include AT&T (http://www.business.att.com/ver_overview.jsp?repopid=Vertical&repopitem=w_isp&segment=whole) and Pac-West (<http://www.pacwest.com/>). Thus, Universal’s citing to a “recent report” about the United States’ rank in broadband penetration, or the percentage of American Internet users still using dial-up access (Universal Brief, fn. 2), is merely an attempt to cloud the issues.

Finally, Universal would have the Commission believe that all of these “rural” Oregon end-user customers are forced to have (“have no alternative to”) dial-up Internet access, and thus that none of them have access to broadband or other Internet access alternatives. However, there are many dial-up Internet providers and broadband providers throughout Oregon, including the “rural” areas that Universal alleges would be disrupted. See e.g., http://www.business.com/directory/internet_and_online/internet_service_providers_isp/isps_by_country/usa/oregon/. (Eagles Lair & Web Services, Inc., for example, at <http://www.eagleslair.net/>, provides ISP access numbers throughout the state.) Indeed, although Universal tries to use the “rural” card in its attempts to play the victim, the evidence in docket ARB 671 shows the vast majority of the traffic that Universal exchanges with Qwest is in non-rural exchanges, including Portland, Salem, Eugene, Corvallis, Albany, Ashland, Roseburg and Medford.

Universal also makes much ado that lifting the stay would threaten the “orderly transition” of Universal’s managed modem base to GlobalPOPs, and that it would harm the interests of Universal’s Internet Service Provider customers. However, Qwest too has an interest in an “orderly transition,” which is exactly what it seeks in offering the alternative of allowing Universal to continue operations, but simultaneously place amounts it owes into escrow, or, if it really does not have the funds (and Universal has never provided any evidence to that effect, only allegations), to provide Qwest a security interest in these amounts. Instead, Universal defiantly refuses to disclose to the Commission or Qwest, under confidentiality and the protective order in this case, the amounts that GlobalPOPs will be paying Universal.³

Accordingly, all of Universal’s arguments about an “orderly transition,” “service disruption” and “harm to the public” are nothing more than self-serving efforts to convince the Commission to give it two more months, and thus to allow it to reap the benefit of the sale, but

³ Universal also seems to take umbrage about Qwest’s assertions of the timing of these events. (See Universal Brief, p. 4, and fn. 3.) However, the facts are the facts, and it is undisputed that Universal was searching for a buyer long before it filed its complaint in July. Also undisputed is that Universal’s filing of its complaint, and the subsequent delays as a result, has clearly benefited it because, two months later, Qwest is still far from being able to obtain the amounts that Universal owes it. Meanwhile, however, Universal is two months closer to receiving the proceeds of the sale of its business, *without paying amounts to Qwest for 13 months*, and after running up a bill in *excess of \$380,000*. Yet it also now wants an *additional two months* to finish the deal, retain an additional two months of revenue from its Internet Service Provider customers, and pocket the full amount of the sale money.

In fact, Universal has now admitted that it had been looking for a buyer of its business since the ARB 671 order was issued (more than a year ago). Given that Universal chose to dispute the lion’s share of Qwest’s charges that were validly assessed consistent with the terms of the ICA, primarily on the basis of the pending results from the federal district court case, the only conclusion a reasonable person can reach is that Universal never had any intentions whatsoever of paying to Qwest the amounts for the services and facilities Qwest has provided to it. The only reasonable conclusion is that Universal was merely continuing a long history of stalling and delaying as long as it could to be able to find a buyer and sell its business. And now it seeks two more months (although it likely needs far less time to migrate the customers and assets and collect its money) to finally accomplish this goal.

While Universal certainly has the right to sell its business if it is no longer profitable, or is no longer a viable business model, it does not have the right to stiff Qwest for more than a year, for more than \$380,000, in order to buy time and allow it the opportunity to sell the business and not pay its debts to Qwest. And while Universal now claims that it has a “heartfelt disagreement regarding the propriety of certain costs, and the responsibility for those costs,” surely even Universal cannot argue that it is somehow entitled to 13 months of services and facilities without paying for them. Of course, if Universal truly had a “heartfelt disagreement regarding the propriety” of Qwest’s charges (other than that it believed the Commission’s orders in docket ARB 671 were wrong, and are on appeal), it had a duty to raise the specific charges it disagreed with. The record shows, however, that it never did so until disconnection became an imminent possibility. Instead, it simply rested on its legal position, a tactic which this Commission has found to constitute “serious misconduct.” Order No 07-366, p. 6.

without paying its obligations to Qwest. However, by the time that Qwest would be able to take any action or remedy (Universal claims an “aggressive schedule” to transition the customers to GlobalPOPs), the sale proceeds would have been collected and disbursed, and Qwest would be left holding the bag with a worthless \$380,000+ accounts payable bill against a “shell company.”

Accordingly, the Commission is well within its rights, and *discretion* (as Universal notes), to grant equitable relief that will protect the public, as well as third parties like ISPs and GlobalPOPs, and the parties to this complaint. The Commission should therefore grant Qwest’s requested relief that (1) orders Universal to immediately disclose the sale price, (2) lifts the current stay, and thus that (3) allows Qwest to disconnect services, UNLESS Universal immediately escrows at least \$384,006.58 with the Commission (or a third-party escrow agent), or alternatively, immediately gives to Qwest a security interest in the sale of its assets, pending resolution of the complaint.

Finally, although Qwest prefers not to disconnect services and facilities at the present time, so as to allow such an escrow or security interest arrangement, Qwest respectfully submits that the Commission should include the option of disconnection in its order. No one, including Universal, disputes that disconnection is a remedy under the interconnection agreement. Thus, the disconnection option is necessary to give Universal an *incentive* to immediately escrow the appropriate funds, or to give an appropriate security interest to Qwest. Otherwise, Universal will most certainly disobey the Commission’s order (as it did with the ARB 671 orders), and will seek further delay with additional frivolous regulatory and legal maneuvers, including appeal.

II. Requiring Universal to escrow the amounts at issue or provide a security interest to Qwest in the asset sale would not cause harm to Universal

Universal also claims that it would be harmed if Qwest immediately disconnects services, and thus that it would not be able to complete an “orderly transition of its customers” (and would

not be able to complete the sale or retain the sale proceeds, no doubt). Universal also claims it would be “forced to shut its doors, lay off employees, breach contracts and liquidate its remaining assets,” as well as “lose all goodwill,” and that it “may be plunged into sudden bankruptcy.” (Universal Brief, p. 5.) However, despite these unsubstantiated “sky is falling” claims, and appeals to emotion about “furloughing employees” and “reducing or eliminating salaries,” Universal fails to mention that this “harm” or “hardship” can be largely avoided if the Commission requires Universal to disclose the sale price and escrow the amounts owed, or to give Qwest a security interest in the sale proceeds, pending resolution of this complaint.

Moreover, Universal itself admitted that after the sale of its managed modem business, there will be no business, but only a “shell corporation.” Thus, no matter what, and by its own admission, Universal will be “exiting” the market, shutting its doors, laying off employees and liquidating its remaining assets. And since Universal claims that it is concerned about an “orderly transition,” the Commission can accomplish this through the relief that Qwest seeks.

Again, there is no reason why the Commission should not grant Qwest its requested relief under the circumstances. Neither Universal nor GlobalPOPs (nor their customers or dial-up users) will not be harmed by the Commission granting such relief.

III. Continuing the stay would cause Qwest significant harm and result in an ill-gotten windfall to Universal

Finally, Universal claims that the potential harm to Qwest from continuing the stay is very limited. Universal, however, evades the simple fact that it rightfully owes Qwest for the very services it ordered, and has not indicated how Qwest will be paid for such services.

First, what Universal conveniently fails to mention in its brief is anything regarding Qwest ever being paid the amounts that Universal owes to Qwest. Instead, it completely ignores the \$380,000+ that it owes Qwest, and engages in some fuzzy math about why “ironically” and

“counterintuitive[ly],” Qwest would be more harmed by the Commission lifting the stay than by not lifting the stay.⁴ Of course, there would be no need for disconnection if the Commission grants the relief that Qwest requests, especially because it would be in Universal’s best interests (as well as GlobalPOPs’) for Universal (or GlobalPOPs, if it agreed to do so or was contractually required to do so) to escrow the amounts in dispute, or to give Qwest a security interest in the sale proceeds. The Commission’s lifting the stay, and thus allowing Qwest to disconnect services will necessarily give Universal the incentive to save its deal with GlobalPOPs, and therefore give Qwest the assurance that if Universal does not prevail on its complaint, Qwest would be entitled to at least some of the sale proceeds to pay off Universal’s debt to Qwest.

Finally, in desperate Hail Mary pass fashion, Universal trots out an irrelevant David and Goliath argument about how large of a company Qwest is in comparison to Universal. (See Universal Brief, p. 7, and fn. 8 (“negligible impact,” “insignificant when compared to Qwest’s annual operating revenues,” and “this amount is de minimis to a company the size and scope of Qwest”).) Apart from the utter lack of relevance of this argument, Universal ignores the fact that much of this revenue is earned from the approximately 14 million access lines that Qwest serves and the millions of Qwest end-user customers who faithfully pay their bill monthly (each month, every month) for services that are provided to them. These customers include the proverbial “little old ladies in tennis shoes,” those on fixed incomes, young families just starting out, etc. These people, unlike Universal, pay for the services they use. Thus, Universal apparently argues

⁴ Universal’s argument is premised on the assumption that Qwest would be unable to immediately “repurpose” the facilities associated with Universal’s disconnected circuits and, therefore, that Universal should be permitted to use those dedicated facilities, essentially for free, for another two months. From Qwest’s perspective, absent a Commission order granting Qwest’s alternative proposal of either an escrow or security interest, it would be much more prudent and responsible to disconnect those circuits and make them available for use by paying users of the network. As long as those facilities are dedicated to Universal, Qwest has no opportunity to receive *any* revenue. Of course, even if Universal’s math were logical (which it is not), it is ultimately irrelevant because the issue here is Qwest’s right to be paid for the services and facilities that it provided to Universal for more than a year.

that Qwest (and this Commission) should not have to worry about an “insignificant” amount of \$320,000, and that it is somehow acceptable to have different rules based on the size of the party.⁵ Universal’s claim, which mocks the concept that all parties (even big companies) are entitled to equal justice and that valid contracts should be enforced, is of course not supported by any legal authority.

Universal’s argument cannot be taken seriously, and it is simply another example of its long history of arguing anything it can to cloud the real issues: to wit, that it owes Qwest a sizeable sum, that it has not paid a dime for the use of Oregon Local Interconnection Services (“LIS”) facilities since its initial dispute of Qwest’s November 5, 2006 charges, that it has stalled on paying any amounts by knowingly violating the Commission’s orders and engaging in serious misconduct based on a pending appeal, and that it now wants two more months to bill and collect revenue from its Internet Service Provider customers, consummate its sale, and pocket the proceeds. The Commission should not be an accomplice to such unfair and inappropriate tactics.

CONCLUSION

Accordingly, for the reasons set forth below, Qwest respectfully submits that the Commission should lift the stay and grant the equitable relief that Qwest seeks. In so doing, Qwest respectfully requests the Commission include the following ordering clauses in its order:⁶

⁵ This is like a homeowner telling Citimortgage that he will not pay his sizeable mortgage because ultimately, the size of the mortgage is but an insignificant and *de minimis* amount for a lender of that size. Examples of such irrelevant arguments abound.

⁶ Because Qwest is willing to modify its initial request (that the Commission order unconditional immediate disconnection) by giving Universal an opportunity to escrow the money or to grant Qwest a security interest in the GlobalPOPs/Universal sale, Qwest herein has modified its proposed ordering clauses from those that it submitted on September 17, 2007. Qwest’s willingness to do so is conditioned *on one important caveat*: If, once the sales price of the assets is disclosed, the amount is so small that it would not even cover the ongoing \$15,000 per month in additional potential bad debt that Qwest incurs based on current traffic levels, then the Commission should lift the temporary stay and allow immediate disconnection.

Qwest will provide the Commission with a Word copy of this brief for the Commission’s convenience.

[Proposed] ORDER

IT IS ORDERED that:

1. The Commission's stay of Qwest's right to disconnect the services and facilities that Qwest provides to Universal, as set forth in Commission Order No. 07-366 on August 22, 2007, page 8, Ordering Clause 5, is hereby RESCINDED, and thus Qwest retains the right to disconnect such services and facilities, consistent with the parties' current interconnection agreement, effective three (3) days after the issuance of this Order.
2. However, the rescission of the stay as set forth in the ordering clause above *shall not apply* under the following conditions:
 - a. Universal immediately provides, within one (1) business day of this Order, an unredacted version of paragraph 12 of the Asset Purchase Agreement, dated September 7, 2007, to the Commission and to Qwest, pursuant to the protective order in this case.
 - b. Universal deposits, within two (2) business days of this Order, a sum of \$384,006.58, payable to the "Oregon Public Utility Commission," care of Judge Allan Arlow. The Commission will hold such funds in an account or third-party escrow arrangement, pending resolution of the claims in this complaint, at which time the Commission shall disburse the funds to Universal and/or Qwest pursuant to the order of the Commission after the complaint has been resolved. Because this amount will likely continue to grow, subsequent monthly installments shall be placed into the account, through November 30, 2007.
 - c. If Universal proves to the Commission's satisfaction, within two (2) business days of this Order, that it is financially unable to deposit a sum of \$384,006.58 into an escrow arrangement, and if the sale price of its sale to GlobalPOPs is greater than \$384,006.58, Universal shall provide written assurance, secured by the Asset Purchase Agreement dated September 7, 2007, that the buyer, GlobalPOPs, Inc., is required to send all such payments, up to the initial amount of \$384,006.58, payable to the "Oregon Public Utility Commission," care of Judge Allan Arlow. The Commission will hold such funds in an account or third-party escrow arrangement, pending resolution of the claims in this complaint, at which time the Commission shall disburse the funds to Universal and/or Qwest pursuant to the order of the Commission after the complaint has been resolved.
 - d. If Universal proves to the Commission's satisfaction, within two (2) business days of this Order, that it is financially unable to deposit a sum of \$384,006.58 into an escrow arrangement, and if the sale price of its sale to GlobalPOPs is less than \$384,006.58, but greater than \$30,000, Universal shall provide written assurance, secured by the Asset Purchase Agreement dated September 7, 2007, that the buyer, GlobalPOPs, Inc., is required to send all such payments, payable to the "Oregon Public Utility Commission," care of Judge Allan Arlow. The Commission will hold such funds in an account pending resolution of the claims

in this complaint, at which time the Commission shall disburse them to Universal and/or Qwest pursuant to the order of the Commission after the complaint has been resolved.

3. In the event the sale between Universal and GlobalPOPs does not close by November 30, 2007, or the sale price of Universal's sale to GlobalPOPs is less than \$30,000, Qwest shall have the right to immediately disconnect services to Universal consistent with the parties' current interconnection agreement.
4. The Commission shall resolve the claims in this complaint on an expedited basis, and shall immediately set an expedited schedule to do so.

DATED: September 19, 2007

Respectfully submitted,



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Pro Hac Vice Application In Process

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

IC 13

I hereby certify that on the 19th day of September, 2007, I served the foregoing **QWEST'S RESPONSE TO UNIVERSAL'S BRIEF IN SUPPORT OF ITS PROPOSED ORDER** in the above-entitled docket on the following persons via U.S. Mail and electronic mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon, as well as submitting to the counsel listed below a courtesy electronic copy of same:

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DATED this 19th day of September, 2007.

QWEST CORPORATION



By: _____

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