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September 19, 2007

**VIA e-FILING and
FEDERAL EXPRESS**

Oregon Public Utility Commission
550 Capitol St., N.E., Suite 215
Salem, OR 97301

Re: **IC 13**

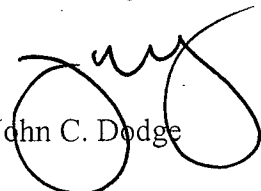
Dear Ms. Nichols Anglin:

Enclosed for filing in the above-referenced docket please find an original and five copies of "Reply Brief in Support of Proposed Order" of Universal Telecom, Inc. ("Universal").

Any questions regarding this matter may be directed to the undersigned.

Very truly yours,

Davis Wright Tremaine LLP


John C. Dodge

Enclosures

cc: Service List

**Before The
Oregon Public Utilities Commission**

IC 13

In the Matter of

UNIVERSAL TELECOMMUNICATIONS,
INC. vs. QWEST CORPORATION

Complaint for Enforcement of Interconnection
Agreement.

REPLY BRIEF IN SUPPORT OF PROPOSED ORDER

Universal Telecom, Inc. ("Universal") hereby provides its "Reply Brief in Support of Proposed Order" in the above-captioned matter, as required by Judge Arlow's bench ruling of September 11, 2007. Universal will respond, briefly, to certain allegations and arguments contained in Qwest Corporation's ("Qwest") "Comments Regarding the Lifting of the Temporary Stay" ("Comments") filed on September 17, 2007.

INTRODUCTION

Predictably and unfortunately, Qwest's Comments entirely ignore the larger interests at stake in this matter, namely, the interests of its own end users who would be adversely impacted if the stay were lifted. Nearly 25,000 Oregonians would lose access to the Internet immediately if Qwest were permitted to disconnect circuits interconnected with Universal. Similarly, Qwest ignores entirely its own complicity in the continuation of VNXX service after entry of the final order in ARB 671. By Qwest's own admission, it would not be possible for Universal to provide VNXX service without Qwest's express technical acquiescence. Instead, Qwest resorts to its usual litany of misstatements and ad

hominem attacks in an attempt to force the Commission to ignore the larger interests at issue here. Despite Qwest's heated rhetoric, Universal remains confident that it satisfies Oregon standards of law for maintaining the stay. Finally, Universal believes that the Commission may not impose Qwest's primary alternative request for relief as such request goes beyond the Commission's jurisdiction.

DISCUSSION

A. Qwest Ignores the Interests of Its Own End Users.

As Universal noted in its initial Brief dated September 17, 2007, the largest interest at stake is not that of Universal or Qwest. Rather, the largest interest at stake in determining whether to continue the stay for another 60 days is the local dial-up access to the Internet that Universal currently enables. These are the stakeholders that will suffer the greatest hardship from lifting the stay and allowing Qwest to disconnect circuits interconnected with Qwest. Similarly, 27 Oregon-based Internet Service Providers ("ISPs") are at risk if the Commission permits Qwest to disconnect the circuits immediately.

Qwest did not address these facts because it has no refutation of them. However, as Universal correctly argued in its Brief, the legal test that the Commission must employ in considering extending the stay involves a "competing interests" test. There are other interests aside from Qwest's financial claims. Balancing those other interests, including the public interest, against Qwest's interests clearly weighs in favor of extending the stay.

B. Qwest's Comments Contain Inaccuracies of Fact.

As the Commission considers the competing interests at stake here, it should be aware that certain of Qwest's assertions of fact are simply incorrect. Thus, the

Commission should be wary of overly relying on Qwest's statements. For example, at page 7 of its Comments Qwest states, "In the meantime, and in response to the growing concern that the continuing monthly amount billed by Qwest to Universal was in jeopardy, Qwest has allowed Universal to disconnect approximately 43 percent of the LIS trunks." This sentence implies that Qwest has disconnected LIS trunks in the past few weeks as part of Qwest's efforts to mitigate its financial losses. To the contrary, as the attachment demonstrates, although Qwest processed Universal's disconnection requests starting after the final order in ARB 671, more recently Qwest *suspended* disconnection requests in an effort to force Universal to pay disputed RUF charges, which suspension has been in effect for several weeks (and remains in effect today).¹ Thus, the Commission should not draw the inference that Qwest has managed circuit disconnection in a responsible manner; in fact Qwest has suspended disconnections that would mitigate its claimed losses.

Similarly, at page 8 of its Comments Qwest states, "On September 11, 2007, pursuant to notice, a prehearing conference was held, at which time Universal's counsel disclosed that Universal could not pay the outstanding bills to Qwest". That is not what Universal's counsel stated. What counsel stated was that if the Commission conditioned continuation of the stay on full or "substantial" payment of the entire amount claimed by Qwest, Universal could not comply with such an order and would have to close its doors. Universal's counsel further stated that if Universal exited the managed modem business under such circumstances, there would be an unknown quantity of assets remaining in the corporation and that counsel did not know whether the assets would outstrip all legitimate

¹ To the best of Universal's information and belief, Qwest imposed the suspension on or about July 3, 2007. Universal has approximately 25 T-1's that the company would like to disconnect immediately.

liabilities. Put another way, if the Commission does not permit the orderly transition of Universal's customer base to GlobalPOPs, it is all but certain that Qwest will not realize any of its claimed losses. But if that process is allowed to conclude over the next 60 or so days, there is a possibility that Qwest may realize some or all of its claimed revenues (presuming they are judged to be valid by the U.S. District Court in Oregon).²

Next, at page 13 of its Comments Qwest claims, 'in open defiance of the ICA and the Commission's order, Universal has continued to engage in VNXX traffic, and to misuse Qwest's facilities to exchange such traffic.' Universal begs to differ. Qwest has facilitated the exchange of VNXX traffic – which the ICA purports to forbid – *more* than Universal, as Qwest admits earlier in its Comments: "Universal would not even have a business in the absence of the services that Qwest has been *required to provide*, and has provided, to Universal." Qwest Comments at 9 (emphasis in original).

Universal is unsure as to what services Qwest believes it has been "required to provide," but Qwest cannot have it both ways. Qwest has transported every minute of VNXX traffic over its own facilities to Universal since the final order in ARB 671, with full and complete knowledge of the originating and terminating points of such traffic. If any party has "misused" Qwest's facilities, it is Qwest. After all, Qwest exerts complete dominion and control over its own facilities, not Universal.

² Of course, at this time, Universal cannot represent that it can make full payment to Qwest or any other unsecured creditor. There are simply too many variables and unknowns for Universal to make any responsible representation about whether it will cease operations entirely, attempt other lines of business, secure winding up financing, liquidate assets, etc. And, it is far from certain that Qwest's RUF charges will be sustained on appeal to federal district court. Universal also rejects Qwest's claim that, as a result of the GlobalPOPs' transaction, "Universal's principals or shareholders would be able to improperly retain the proceeds of the sale for their sole benefit." Qwest Comments at 12. Qwest's assertion presumes (i) there will be proceeds from the sale that could run to Universal's principals or shareholders, and (ii) retention of such proceeds is improper. Qwest has proved neither assertion. Finally, Qwest's reliance on *Global NAPs v. Verizon New England*, 454 F.3d 91 is misplaced. That case had nothing to do with a CLEC in financial distress as a result of disputed RUF charges as is the case here.

Further, Qwest seems to have changed its tune since August 2, 2007:

[S]ignificant uncertainty as to the Commission's position on banning VNXX has resulted from the Commission's recent order in the Qwest/Level 3 arbitration order in Docket ARB 665, where the Commission adopted a limited exception that allows the continuation of VNXX between Qwest and Level 3. Qwest recognizes that the decision in the Qwest/Level 3 docket approved a different ICA than is effective in this matter. However, the different approach taken to VNXX in the Qwest/Level 3 docket has caused Qwest to pause in any effort to disconnect services that assist in the provision of VNXX service while the Universal federal court appeal was pending.

Qwest Corporation's Supplemental Response to Commission Question Propounded by Judge Allan Arlow at 2 (Aug. 2, 2007). Clearly Qwest thinks that the ARB 665 decision unsettled the VNXX question,³ and just as clearly Qwest was prepared to exchange VNXX traffic with Universal *through the pendency of Universal's appeal of ARB 671*. The Commission should not be fooled by Qwest's expedient change of heart or, at the least, give much weight to Qwest's current façade of pique over exchanging VNXX traffic for another few months (*i.e.*, until the federal appeal is resolved).

Further, Qwest misstates Universal's intention to pay Qwest legitimate charges. Qwest asserts at page 8 of its Comments that Universal "clearly and utterly refuses to provide Qwest any payment, or any other any form of security or assurance that Qwest will be made whole in the event that Universal does not prevail in its complaint." This is

³ That decision, dated February 13, 2007, recommended that the Commission permit VNXX for dial-up ISP access so long as the CLEC (there, Level 3) "assumes responsibility for paying all of the costs associated with transporting VNXX-routed ISP-bound traffic from its primary and secondary POIs in Oregon to its media gateway. This traffic is both interexchange and interstate in nature." *In the Matter of Level 3 Communications, LLC, Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act*, ARB 665 (Feb. 13, 2007). The Commission adopted the Arbitrator's Decision, with modifications not relevant to this discussion, in Order No. 07-098. Obviously this decision calls into question the Commission's broad assertion that VNXX is "unlawful" in Oregon, which suggests an absolute ban. Rather, it appears that VNXX is "lawful" so long as the CLEC agrees to pay for interexchange transport at the ILEC's retail or tariff rates. This is one observation Universal might have made in response to Order NO. 07-366 and its findings of "willful violations."

false and contradicted by the record in this matter. Universal currently pays Qwest \$18,000 per month toward RUF charges (withheld reciprocal compensation, including unrelated payments arising from Washington State). Universal has also made clear, through its counsel, that the company is unable to provide additional recurring payments or separate security at present. Finally, it would be irresponsible for Universal to make any representation regarding future assurances of additional payments, for the reasons discussed above.

Qwest's claim that it will "suffer immediate and irrevocable financial harm in the form of an ever-increasing amount owed by Universal" is similarly misleading, for multiple reasons. Qwest Comments at 8. Qwest's financial harm, as Universal noted in its initial Brief, is limited to purported *revenue* loss, not increased costs. That harm is not necessarily "irrevocable," as Universal may be able to pay Qwest RUF charges in the future – presuming those RUF charges survive Universal's federal appeal. And Qwest can mitigate the "ever-increasing amount owed by Universal" if Qwest honors pending and future disconnection requests.⁴

Given all these factual misstatements and misimplications, the Commission should discount Qwest's arguments. Qwest advances only parochial considerations in

⁴ Universal is unable to confirm Qwest's claimed "disconnection" rate of 43%. Certainly Qwest has not communicated this fact to date, or whether recent disconnection requests have been honored. If the 43% figure is accurate, it signals a welcome change in Qwest's position that Universal is fully responsible for disconnecting unutilized circuits, and hopefully signals a change in Qwest's refusal to honor Universal's future disconnect orders. Moreover, Qwest's statistic unwittingly proves that there is excess capacity on Qwest's network that has existed for some time and for which Qwest is trying to charge Universal. Qwest could have disconnected this excess capacity long ago (or identified the excess capacity in any of the required planning meetings). But even in light of Universal's dispute of RUF charges, Qwest preferred to leave these circuits in service in an attempt to increase the amount it could charge Universal. Put another way, Qwest's own statements suggest that possibly 43% of the charges that Qwest claims it is owed, \$163,000, constitutes overbilling from a capacity perspective.

this matter. Those considerations are legitimate at least in part, but should not be inflated by Qwest's overreaching factual assertions.

C. The Commission Lacks Jurisdiction to Grant Qwest's Primary Request for Relief.

Universal agrees with Qwest that the Commission has the authority to condition continuation of the stay on partial or full payment of the disputed RUF charges. Universal has already indicated, however, it is not in a position to contribute any additional payments and Qwest has not proved otherwise. Thus, Universal concentrates its arguments here on Qwest's primary request for relief, to wit, securitization of the purported amounts due by Commission fiat. Qwest is flatly wrong as a matter of law that the Commission has the authority to take such action. Oregon statutes are clear on this point.

The transaction executed by Universal and GlobalPOPs is *not* subject to Commission jurisdiction. ORS 759.375 addresses the only circumstance in which Commission approval is required for the sale or other disposal "operative utility property:"

(1) A *telecommunications utility* doing business in Oregon shall not, without first obtaining the Public Utility Commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such *telecommunications utility* necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$100,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such *telecommunications utility* or *telecommunications utility property*, or perform any service as a telecommunications utility".

According to ORS 759.005(C), "telecommunications utility" does *not* include:

"Any person acting only as a competitive telecommunications provider." Further, "[a]s

used in this chapter: (a) 'Competitive telecommunications provider' means a telecommunications services provider that has been classified as a competitive telecommunications provider by the Public Utility Commission pursuant to ORS 759.020." Universal is a competitive telecommunications provider under ORS 759.020.⁵ Consequently, its transaction with GlobalPOPs is not subject to Commission approval.

The Commission is a creature of state law.⁶ Its powers are limited to those expressed by the Legislature in statute, and such implied powers as are necessary to carry out the powers that are expressly granted.⁷ Nothing in ORS 759.375 expressly grants the Commission the authority to regulate a competitive telecommunications provider asset sale in any fashion, let alone securitizing the proceeds of such a sale. Nor can anyone reasonably infer from the statute that the Legislature intended to grant the Commission the authority to regulate CLEC asset sales. Instead, the statute strongly supports the contrary inference. Thus, as made clear by the Legislature, the Commission simply lacks authority to consider the sale of any property by Universal in this circumstance. This is why there is *no* decision on record in which the Commission has attempted to leverage its general statutory authority to regulate a competitive telecommunications provider sale, including disclosure of the sale terms or securitization of sale proceeds. Further, Universal could find no instance in which an agency, state or federal, in Oregon or across

⁵ *In the Matter of Universal Telecom, Inc. dba USPOPS, Application for a Certificate of Authority to Provide Telecommunications Service in Oregon and Classification as a Competitive Provider*, CP 1359, CP 578, Order No. 07-117 (Apr. 2, 2007).

⁶ *Beaver Creek Coop. Tel. Co. v. PUC*, 162 Ore. App. 258, 262 (1999).

⁷ *Ochoco Const. v. DLCD*, 295 Or 422, 667 P2d 499 (1983); *Warren v. Marion County et al*, 222 Or 307, 353 P2d 257 (1960).

the United States, has ever securitized the proceeds of an unregulated sale for the benefit of a third party.⁸

Qwest's argument that the Commission may rely on its general statutory authority to order Universal to disclose the purchase price or securitize the sale proceeds is wrong as a matter of law. The axiomatic rule of statutory construction in Oregon is that "a specific statute controls over a general statute." *Kambury v. DaimlerChrysler Corp.*, 334 Ore. 367, 374 (2002) (citations omitted). Here the Oregon Legislature has determined that the Commission may not exert jurisdiction over CLEC asset sales. Thus, the Commission may not end run ORS 759.375 by relying on any statute of general authority.

Qwest is simply wrong, too, as a matter of fact and as a conclusion of law that Universal has, "[b]y filing this action, and pursuant to the fact that it is a certificated CLEC in Oregon, Universal has conceded it is subject to the Commission's jurisdiction in this matter." Qwest Comments at 10. Oregon statute governs this question and, as noted above, the Commission lacks jurisdiction to review or approve the sale of Universal's managed modem customer base to GlobalPOPs. Universal cannot waive Oregon statute. Moreover, Universal has not "conceded" anything by its actions or statements. Universal believes that the dispute arising under the ICA and concerning RUF charges is subject to Commission jurisdiction. Universal volunteered the fact of the sale of its customer base to GlobalPOPs, but specifically noted in its Compliance Filing in this matter that the

⁸ Universal also notes that such action could constitute a preferential, and thus avoidable, transaction were the company to seek bankruptcy protection.

transaction is not subject to Commission review or approval.⁹ Qwest points to no Oregon law supporting its argument and thus the Commission should disregard it.

D. The Federal Appeal Remains Active.

Yesterday, September 18, 2007, as the Commission is aware, the U.S. District Court for Oregon entertained oral arguments in Universal's appeal of ARB 671. At the close of arguments Chief Judge Michael R. Hogan indicated that he would propound written questions to the parties, whose answers will assist the court in its consideration of the issues on appeal. Universal anticipates that Judge Hogan's questions will issue within the next few business days. Obviously, if the stay is lifted and Universal is forced out of business immediately, it may not have the resources to respond to Judge Hogan's questions, thereby mooting the appeal and depriving Universal of the opportunity to have its federal claims heard. For this reason too (which Qwest studiously ignores), the Commission should continue the temporary stay through November 15, 2007.

CONCLUSION

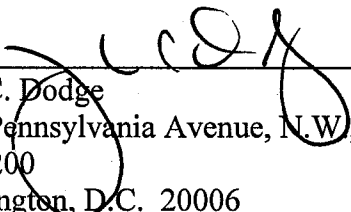
Based upon the foregoing, Universal respectfully requests that the Commission continue the stay established in paragraph 5 of Order No. 07-366 through November 15, 2007, and order Qwest to take no action to disconnect or otherwise impair service to the end-user customers of Internet Service Providers who utilize the services of Universal pending the transfer of all Universal managed modem customers to GlobalPOPs. Universal further respectfully requests that the Commission amend the current stay to require Qwest to process pending and future disconnection requests from Universal.

⁹ Universal Telecommunications, Inc.'s Compliance Filing in Response to Order No. 07-366 at n. 1 (Sept. 4, 2007).

DATED this 19th day of September, 2007.

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By



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ATTACHMENT A

Qwest® Online Request Application

Welcome
Matt H Freitag

Submitted Request: CCMA: UNU PON: 6565 Ver: 4 ASR No: 0718400831 Status: Sup Req

ASR Trunking ACI List C/NR

Clarification/Notification Request Form (C/NR)

Administrative C/NR Detail Error Detail

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BILLING HOLD IS STILL IN EFFECT, PLEASE SEE SERVICE MANAGER TO REMOVE IT

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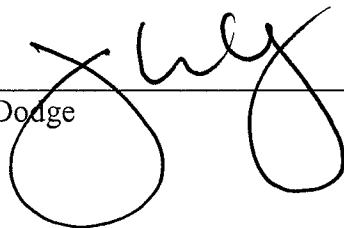
CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2007, Universal Telecommunications, Inc.'s Reply Brief in Support of Proposed Order was sent via UPS overnight mail to the Oregon Public Utility Commission.

A copy of the filing was sent via U.S. Mail and email to the service list below.

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